MEMBERS' HANDBOOK

2009

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THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

MEMBERS' HANDBOOK 2009

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a Wolters Kluwer business

FOREWORD

We are pleased to publish your Institute's *Members' Handbook* in hard copy.

The *Members' Handbook* contains information relevant to members, firms and affiliates. However, since it is not economical to include all material in this volume, firms may also need to refer to the *Audit Regulations and Guidance* or the *Designated Professional Body Handbook*. Regulations relevant to insolvency practitioners licensed by the ICAEW are set out in the *Insolvency Licensing Regulations and Guidance Notes*. These documents are published separately and are available at www.icaew.com/membershandbook.

We hope that you will continue to find the handbook to be a valuable reference work. The text in this edition was, unless otherwise indicated, current at 1 September 2008. Where, at the date of publication, we were revising individual sections within this edition, an advisory note appears at the start of the section. However, please remember that you should always refer to the website www.icaew.com/membershandbook for the most up-to-date version of any section.

The list below outlines the main changes since the last hard copy edition.

Section 2.3	These regulations were made on 4 December 2007 and came into force on that date. Regulations 20 and 27 were amended and came into force on 10 March 2008.
Section 2.5	Please visit www.frc.org.uk/aadb/
Section 2.6	Please visit www.frc.org.uk/aadb/
Section 3.5	New insolvency ethical code.
Section 5	This section is under revision. Please refer to the online version at www.icaew.com/membershandbook.
Section 6.3	These regulations were amended on 28 August 2008; changes take effect from 1 September 2008.
Section 7.2 deleted	Anti-money laundering (proceeds of crime and terrorism); second interim guidance for accountants. This section has been replaced by section 9.5.
Section 8.1	This statement was issued in October 2008.
New Section 9.5	This guidance was issued by the Consultative Committee of Accountancy Bodies in August 2008. It replaces the previous handbook section 7.2 and technical releases issued in October 2007 (Tech 05/07) and December 2007 (Tech 07/07).

GROUP CONSUMER CREDIT LICENCE

A group licence (No. G900009) valid until 1 August 2009 has been issued to the Institute under the Consumer Credit Act 1974. The licence is in respect of all Members and Affiliates of the Institute of Chartered Accountants in England and Wales and other persons, who, under regulations made by the Institute, are subject to the obligations and liabilities of a Member of the Institute, to carry on the business of:

A consumer credit;

C credit brokerage;

D debt-adjusting and debt-counselling;

G debt administration;

H1 provision of credit information services (including credit repair);

limited to activities arising in the course of the practice of accountancy or acting as an insolvency practitioner carried on within the United Kingdom by such Member, Affiliate or other person:

(a) as a sole practitioner;

(b) in partnership or a corporate practice with others who:

  (i) hold the like qualification, or

  (ii) hold a qualification authorising such activities under any other group licence issued by the Director, or

  (iii) together comprise a practice which, under regulations made by the Institute, is registered to carry on audit work, licensed for a range of investment business activities or permitted to describe itself as 'Chartered Accountants'.

Group licences in corresponding terms have been issued to the Institute of Chartered Accountants of Scotland, the Institute of Chartered Accountants in Ireland and the Chartered Association of Certified Accountants.

Keeping you up to date

The Institute aims to help members succeed in their chosen field. We promote trust in the 'chartered accountant' brand in order to build on a collective reputation at home and abroad as the world's leading body of business advisers and finance professionals.

Offering world class qualifications, thought leadership and clear insight into professional and technical issues, we continually develop our portfolio of products and services to ensure members have access to the most useful and relevant support available.

The Institute uses a variety of media to provide information and help keep you up to date. You can also stay informed by joining our faculties or subscribing to any of our special interest groups.

Members are presumed to be familiar with any essential and official material that is published in *Accountancy*, which is supplied to all members free of charge.

The Institute's Library & Information Service (LIS) offers all members the facilities of a world-class business library. It includes a dedicated enquiry service, extensive web resources, key online databases and more than 40,000 books and journals on the huge range of issues relevant to the profession and business.

What's available from the Institute's website, www.icaew.com?

With over 30,000 pages, the Institute's website is an invaluable source of information. Links to some of the most popular pages are given below.

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Section 1

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Explanatory notes

1 The Institute of Chartered Accountants in England and Wales was incorporated by Royal Charter granted by Her Majesty Queen Victoria on 11th May 1880. The Royal Charter remained unaltered for sixty-eight years until 21st December 1948 when the Institute was granted a Supplemental Charter by His Majesty King George VI, following the presentation of a petition in terms approved by a special meeting of members on 21st April 1948. A new set of bye-laws (as appended to the draft charter annexed to the petition) came into operation with the grant of the 1948 Supplemental Charter, the bye-laws previously in force then ceasing to operate.

2 Prior to the special meeting on 21st April 1948 a draft of the petition, Supplemental Charter and bye-laws was sent to every member together with an explanatory memorandum containing brief observations on those changes to which it was considered that the attention of members should be drawn. Copies of the drafts and the explanatory memorandum in their original form and as amended at the special meeting are on record in the Institute library.

3 No fundamental change, either in the nature and objects of the Institute or in the method of attaining membership, was involved in the 1948 petition. The general purpose was to redraft the clauses of the Original Charter and the bye-laws in such a way as to give the members greater control of the affairs of the Institute and so facilitate administration and management, whilst furthering the objects of the Institute and preserving its historic continuity. It was decided that this could best be achieved by transferring to the bye-laws many of the administrative provisions of the Original Charter, so giving the Institute greater powers of regulating its affairs by bye-law. At the same time, it was considered necessary to amend other clauses of the Original Charter, to redraft the bye-laws as a whole so as to bring them up-to-date, to remove difficulties and obscurities present in the existing clauses and bye-laws and to put them in a form, which experience had indicated would best suit the needs of the Institute and its members.

4 The foregoing aims were achieved in 1948 by the granting of the Supplemental Charter and the allowance of the new bye-laws. All the operative clauses of the Original Charter were repealed and replaced by the clauses of the Supplemental Charter, but the historical preamble of the Original Charter and the all-important incorporation clause, with its date 11th May 1880, were preserved. Moreover, the Supplemental Charter (clause 19) provides that it shall be read as one with the Original Charter and shall operate as though it had been granted with the Original Charter. There has thus been no break in the continuity of the Institute's history. It remains a body incorporated by Royal Charter on 11th May 1880.

5 In this booklet, the sections of the Royal Charter of 1880 which remain unaltered appear in 1.2. The Supplemental Charter of 1948 then follows in 1.3.

6 Clause 17 of the Supplemental Charter gives the Institute power to alter, amend or add to the Supplemental Charter, subject to allowance by Her Majesty in Council. In 1957, this power was used to implement a Scheme of Integration to integrate The Society of Incorporated Accountants with the Institute. Copies of that Scheme are on record in the Institute library.

7 Substantial amendments to the Supplemental Charter have been made since 1957, with a major revision in 1972 and 1973 to give the Council power to deal with largely administrative matters by regulation. The Supplemental Charter has since been amended as and when required.

8 For the furtherance of the objects of the Institute and the better execution of the Royal Charters the Institute has power under clause 15 of the Supplemental Charter to make new bye-laws and to rescind or vary existing bye-laws but the bye-laws for the time being must not be inconsistent with the express provisions of the Supplemental Charter. This power is exercised by members in special meetings but new bye-laws do not have effect until allowed by the Privy Council.

9 As stated in paragraph 1 above a new set of bye-laws was appended to the Supplemental Charter of 1948. A complete revision of the bye-laws was approved at a Special Meeting of the Institute on 8 June 1993 and received Privy Council allowance on 8 February 1994. Subsequent amendments agreed at Special Meetings and receiving Privy Council Allowance have been incorporated into Section 1.4.

Royal Charter of the 11th May 1880

Victoria by the Grace of God

of the United Kingdom of Great Britain and Ireland Queen
Defender of the Faith

TO ALL TO WHOM THESE PRESENTS SHALL COME GREETING!

Whereas an Humble Petition has been presented to Us by the following Public Accountants namely William Turquand of Coleman Street in the City of London John Unwin Wing of Prideaux Chambers Sheffield Anthony Wigham Chalmers of 5 Fenwick Street Liverpool Henry Grosvenor Nicholson of 100 King Street Manchester Jarvis William Barber of Alliance Chambers George Street Sheffield and Charles Henry Wade and Edwin Guthrie both of Marsden Street Manchester setting forth (among other things) to the effect following:

That the Petitioner William Turquand is the President of a Society established in 1870 in London called the Institute of Accountants that the Petitioner John Unwin Wing is the President of a Society established in 1872 in London called the Society of Accountants in England that the Petitioner Anthony Wigham Chalmers is the President of a Society of Accountants established in 1870 at Liverpool that the Petitioner Henry Grosvenor Nicholson is the President of a Society of Accountants established in 1871 at Manchester that the Petitioner Jarvis William Barber is the President of a Society of Accountants established in 1877 at Sheffield and that the Petitioners Charles Henry Wade and Edwin Guthrie are Public Accountants at Manchester.

That the Profession of Public Accountants in England and Wales is a numerous one and their functions are of great and increasing importance in respect of their employment in the capacities of Liquidators acting in the winding-up of companies and of Receivers under decrees and of Trustees in bankruptcies or arrangements with creditors and in various positions of trust under Courts of Justice as also in the auditing of the accounts of public companies and of partnerships and otherwise.

That the aggregate number of members of the said societies exceeds 500 and in that number are comprised nearly all the leading Public Accountants of England and Wales.

That the said societies were not established for the purposes of gain nor do the members thereof derive or seek any pecuniary profit from their membership but the societies aim at the elevation of the profession of public accountants as a whole and the promotion of their efficiency and usefulness by compelling the observance of strict rules of conduct as a condition of membership and by

setting up a high standard of professional and general education and knowledge and otherwise.

That in the judgement of the Petitioners it would greatly promote the objects for which the said societies have been instituted and would also be for the public benefit if the members thereof were incorporated as one body as besides other advantages such incorporation would be a public recognition of the importance of the profession and would tend to gradually raise its character and thus to secure for the community the existence of a class of persons well qualified to be employed in the responsible and difficult duties often devolving on Public Accountants.

That the Petitioners desire and propose that if incorporation by Charter is granted to them such conditions should be laid down as would require for the admission to membership of persons now already following the profession either long actual experience in the profession or service for a long time in the capacity of a Public Accountant's Clerk or else the passing of appropriate examinations under the supervision of the Corporation.

That with respect to the admission to membership of persons hereafter desirous of entering into the profession the Petitioners contemplate that subject to future determination by the Council or Governing Body of the Corporation a strict system of examination should be established including a preliminary examination to be held before the candidate for membership enters on service under articles an intermediate examination to be held in the course of his service and a final examination and that no person be allowed to present himself for the final examination unless he has served for five years at least or if he has graduated in any of the Universities of the United Kingdom then for three years at least under articles as a Public Accountant's Clerk.

That the examinations would (subject to future determination by the Governing Body of the Corporation) be of such a character as to test the knowledge of the candidates not only in bookkeeping and accounts but also in the principles of mercantile law and in the law and practice of bankruptcy and the winding-up of companies.

That the Petitioners believe that such a system would have an educational effect of a highly beneficial kind.

That the Petitioners further desire and propose that the Corporation should lay down such rules respecting admission to membership and exclusion therefrom as would prevent Public Accountants from mixing the pursuit of any other business with the discharge of the higher duties devolving on them as Public Accountants and as would put an end to the practice which has been much objected to of the division of profits with persons in other professions or callings in the form of commission or the like.

That the Petitioners further desire that the members of the Corporation

should be authorised to annex to their names distinctive letters indicative of their membership.

And whereas by the said Petition, the Petitioners on behalf of themselves and the other members of the said societies and of the profession generally most humbly prayed that We would be graciously pleased to grant our Royal Charter for incorporating under the title of the Incorporated Institute of Accountants in England and Wales or under such other title as to Us might seem fit and with all such powers and privileges as are mentioned in the Petition or such others as to Us might seem fit the Petitioners and the several persons who were then members of the said societies or of any of them and other Public Accountants who might thereafter become members of the Corporation in pursuance of the regulations thereof.

Now therefore we having taken the said Petition into Our Royal consideration and being satisfied that the intentions of the Petitioners are laudable and deserving of encouragement have constituted erected and incorporated and We by Our Prerogative Royal and of Our especial Grace certain knowledge and mere motion by these Presents for Us and Our Royal Successors do constitute erect and incorporate into one body politic and corporate by the name of THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES the said William Turquand John Unwin Wing Anthony Wigham Chalmers Henry Grosvenor Nicholson Jarvis William Barber Charles Henry Wade and Edwin Guthrie and such other persons as are by this Our Charter made or declared to be members or as shall hereafter be admitted as members of the said body corporate with perpetual succession and a Common Seal and with power to alter and renew the same at discretion Willing and ordaining that the said body corporate (hereinafter referred to as the Institute) shall be capable in law to take and hold any personal property and also to take purchase and hold lands buildings and hereditaments for the purposes of the Institute with power to dispose thereof but so that the Institute shall apply its profits (if any) or other income in promoting its objects and shall not at any time pay any dividend to its Members.

And we do also will ordain and declare as follows (that is to say): (*Clauses* 1 *to* 28 *inclusive were revoked by clause* 32 (*now clause* 18) *of the Supplemental Charter of* 21*st December* 1948.)

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at our Palace of Westminster, the Eleventh day of May in the Forty third Year of Our Reign.

By Her Majesty's Command,

CARDEW.

Supplemental Charter of the 21st December 1948

George the Sixth

by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith

TO ALL TO WHOM THESE PRESENTS SHALL COME GREETING!

Whereas Our Royal Predecessor Queen Victoria in the year of Our Lord 1880 by Royal Charter dated 11th day of May in the forty-third year of Her Reign constituted the seven persons named therein a Body Politic and Corporate by the name of The Institute of Chartered Accountants in England and Wales with perpetual succession and a Common Seal.

And Whereas the said Institute of Chartered Accountants in England and Wales (hereafter referred to as 'the Institute') has presented a Humble Petition to Us setting forth to the effect following:

That the Institute since the grant of the said Royal Charter (hereinafter referred to as 'the Original Charter') has pursued the objects of the Original Charter and has aimed at the elevation of the accountancy profession as a whole and the promotion of its efficiency and usefulness by compelling the observance of strict rules of conduct as a condition of membership and by setting up a high standard of professional and general education and knowledge and has thereby secured for the community the existence of a class of persons well qualified to be employed in the responsible and difficult duties devolving on professional accountants.

That since the grant of the Original Charter the number of members of the Institute has greatly increased and is now about 14,000.

That since the grant of the Original Charter the duties and responsibilities of members of the Institute have been extended and widened as a result of the growth and development of industry and commerce and the increasing diversity and complexity of all forms of social and economic activity.

That it is the belief of the Institute that by reason of the foregoing the furtherance of the objects for which the Institute was originally constituted and incorporated has become increasingly desirable in the public interest and the responsibilities of the Institute have become of greater importance than at the date of the grant of the Original Charter.

That it is the belief of the Institute that the furtherance of the aforesaid objects would be facilitated and the public interest served if certain limits

upon the operations of the Institute were extended and further powers and privileges granted to the Institute and if certain other variations were made in the Original Charter and if certain ordinances of the Original Charter with the aforesaid further powers and privileges and variations were restated in terms which would facilitate the management of the affairs of the Institute.

That the Institute being desirous of furthering the aforesaid objects and of serving the public interest desires that We should be graciously pleased to command that as from a date to be fixed by Us a new Royal Charter should be granted to the Institute supplemental to the Original Charter granting to the Institute certain additional powers and privileges and restating certain of the ordinances of the Original Charter with certain variations in the form and manner expressed in a document appended to the Petition but subject to any amendments and alterations which to Us may seem desirable.

That the Institute desires that it should be empowered to frame new bye-laws subject to confirmation by the Lords of Our Most Honourable Privy Council to give effect to the powers to be granted by such new Royal Charter but in the hope and humble expectation that We will be pleased to grant a new Royal Charter as aforesaid the members of the Institute at meetings held on the 21st April 1948 and the 5th May 1948 have approved the bye-laws appended to this Our Charter and signed by the President of the Institute and the Institute desires that We may be pleased to ordain that the said bye-laws shall become and be valid as the bye-laws of the Institute from the date fixed by Us as the date of the aforesaid new Royal Charter.

The Institute has by the said Petition most humbly prayed that We may be graciously pleased to grant to the Institute as from a date to be fixed by Us a new Royal Charter supplemental to the Original Charter granting to the Institute certain additional powers and privileges and restating with certain variations certain of the ordinances of the Original Charter in the manner hereinbefore expressed and empowering the Institute to frame new bye-laws subject to confirmation by the Lords of Our Most Honourable Privy Council to give effect to the powers to be granted by the said new Royal Charter and ordaining that the bye-laws appended to the Petition become and be valid from the said date as the bye-laws of the Institute.

Now therefore we having taken the said Petition into Our Royal consideration by virtue of Our Prerogative Royal and moved thereto by Our desire to further the objects of the Institute for Ourselves Our Heirs and Successors in addition to and notwithstanding anything to the contrary contained in the said Original Charter granted by Our Royal Predecessor Queen Victoria are graciously pleased to grant ordain and declare as follows namely:

Objects and powers

1 (a) The principal objects of the Institute are:

(i) to advance the theory and practice of accountancy, finance, business

and commerce in all their aspects, including in particular auditing, financial management and taxation;

(ii) to recruit, educate and train a body of members skilled in these arts;

(iii) to preserve at all times the professional independence of accountants in whatever capacities they may be serving;

(iv) to maintain high standards of practice and professional conduct by all its members; and

(v) to do all such things as may advance the profession of accountancy in relation to public practice, industry, commerce and the public service.

(b) In furtherance of its principal objects the Institute shall have the following ancillary objects and powers, namely:

(i) to borrow with or without security, to purchase, take on lease of hire or in any other way acquire any real or personal property and to sell, lease, mortgage or otherwise deal in any way with any such real or personal property;

(ii) to construct, alter and maintain any buildings considered necessary for the use of members and others or for any purposes of the Institute and to provide the same and any buildings and rooms in the occupation of the Institute with all proper and necessary fixtures, fittings, furniture and other equipment;

(iii) to maintain a library or libraries for the use of members and others;

(iv) to publish or distribute books pamphlets and journals relating to the affairs of the Institute or promoting and furthering the interests, usefulness and efficiency of members and others or of the accountancy profession generally;

(v) to make gifts or contributions for national, public, educational or charitable purposes;

(vi) to make grants to universities or other educational establishments, to provide finance and make grants for courses, lectures, classes or other tuition or for research and to establish scholarships or exhibitions and give prizes with a view to promoting or furthering the interests of members and prospective members of the Institute;

(vii) to organise, finance and maintain schemes for the granting of diplomas, certificates and other awards (with or without prior examination) with a view to promoting the principal objects of the Institute and to provide, if it thinks fit (whether in such scheme or otherwise) and subject to payment of such fee, subscription or other sums as may be prescribed by or pursuant to the bye-laws of the Institute, for the use of designatory letters by persons granted such diplomas, certificates and awards; provided always that no such scheme shall become operative unless and until it shall have been approved by the Council of the Institute (in this Our Supplemental Charter referred to as 'the Council') and so that no designatory letters shall be used in connection with any such scheme unless such use shall have been expressly approved by the Lords of Our Most Honourable Privy Council; and provided also that no member shall in any circumstances be obliged to participate in any such scheme;

(viiA) to organise and establish finance (directly or indirectly), maintain and participate in, and agree to be subject to, alone or in conjunction with

one or more other bodies, a body or bodies, independent of the Institute, having responsibility for providing independent oversight of the accountancy profession and any related matter, including (but without limitation): considering and reviewing the standard setting activities of the Institute and its systems of discipline, professional conduct and regulation; adopting and publishing professional and ethical standards relevant to the profession; and adopting a scheme or schemes providing for the investigation and discipline of persons and bodies subject to it which shall, if the Institute so agrees, include persons and bodies subject to discipline by the Institute;

(viii) to make grants or other contributions to local or other societies having as their object the furtherance of the objects of the Institute;

(viiiA) without prejudice to the generality of sub-clause (a)(iv) and sub-clause (b)(viiA) of this clause, the Institute shall have power to organise, finance and maintain alone or in conjunction with one or more other professional accountancy bodies (together in this sub-clause called 'the participants') a scheme for investigating and making findings as to the professional or business conduct, efficiency and competence of any member of any of the participants or of any firm which is or at any time has been composed in whole or in part of members of any of the participants who are in public practice in Our United Kingdom, where (in any such case) in the opinion of the participants (or as laid down in the scheme) the circumstances to be investigated give rise to or include questions of public concern; and if any such finding be adverse to any member or firm as aforesaid the scheme may provide for the making of an appropriate order or orders against such member or firm. Any such scheme shall be binding upon the Institute, its members and firms as aforesaid. If any such scheme contains any provision which enables the Council (alone or in conjunction with others) to alter or amend the scheme, the Council shall not permit any alteration or amendment to be made which in the opinion of the Council would fundamentally alter the scheme as then in force, except with the further approval of the Institute in general meeting and of the Lords of Our Most Honourable Privy Council;

(viiiB) to organise, establish, finance and maintain a scheme, system or arrangements for Practice Assurance, consisting of the inspection, monitoring and review of the professional and business efficiency and competence of:

(a) any body corporate or partnership including a limited liability partnership which is wholly or partly composed of member engaged in public practice; or

(b) any member who holds a current practising certificate; or

(c) by agreement, any body corporate or partnership including a limited liability partnership or sole practitioner engaged in public practice as accountants;

and to levy such fee as is prescribed by or pursuant to the bye-laws from such body corporate, partnership, sole practitioner or member;

(viiiC) to perform any function which by virtue of, or for the purposes of,

any statute or agreement may be performed by the Institute in relation to members, non-members or persons comprised wholly or partly of members or non-members;

(ix) to pay remuneration to and the reasonable expenses of officers and servants of the Institute and to pay pensions and gratuities to, or to make other provision for, former officers and servants of the Institute and their dependants;

(x) to pay such sums for the reasonable expenses of members of the Council as may be permitted by the bye-laws and to pay remuneration to and the reasonable expenses of any other persons (whether members of the Institute or not) who render services to the Institute;

(xi) to organise, finance and maintain alone or in conjunction with one or more other professional accountancy bodies (and to delegate to any other person or body the operation and performance of) any schemes or arrangements for the compensation of loss, the monitoring of compliance, the investigation of complaints and discipline;

(xii) to do, alone or in conjunction with others, the foregoing and all such other lawful things, in any manner whatsoever consistent with the provisions of this Our Supplemental Charter and the bye-laws of the Institute as from time-to-time in force (in this Our Supplemental Charter referred to as 'the bye-laws'), as may be incidental or conducive to promoting, furthering or protecting the interests, usefulness and efficiency of the Institute and its members and of the accountancy profession.

The Council

2 (a) There shall be a Council of the Institute and subject to the provisions of this Our Supplemental Charter and of the bye-laws, the management of the affairs and business of the Institute shall be vested in the Council which, in addition to the powers and authorities by this Our Supplemental Charter or otherwise expressly conferred on it, may exercise all such powers and do all such acts and things as may be exercised or done by the Institute as are not hereby or by the bye-laws required to be exercised or done by the Institute in general meeting but so that no addition to or rescission or variation of the bye-laws shall invalidate any prior act of the Council which would have been valid if the same had not been made.

(b) Subject to the provisions of this our Supplemental Charter the Council may delegate any of its powers, authorities or discretions in accordance with the bye-laws.

(c) The Council shall consist of such members and provisional members, with such qualifications and appointed or elected in such manner and holding office for such periods or on such terms as to re-appointment or re-election and otherwise, as may be prescribed by or pursuant to the bye-laws. The President, Deputy-President and Vice-President of the Institute shall also be the President, Deputy-President and Vice-President of the Council.

Classes of members

3 The members of the Institute shall be divided into two classes to be styled respectively fellows and associates of the Institute with such practising rights as may be prescribed by the bye-laws. There shall in addition be a class to be styled honorary members of the Institute for whom the bye-laws and regulations shall make express provision, and who may use after their name the designation 'FCA (Honorary)' (or such other letters as may be approved by the Privy Council). Save as so provided, the provisions of this Our Supplemental Charter and the bye-laws and regulations shall not apply to an honorary member of the Institute (but they shall apply to an honorary member who is or has been a member or an affiliate of the Institute to the same extent as to any other person who is or has been a member or an affiliate of the Institute). Provided always that honorary members shall not be members of the Institute and (save as aforesaid) may not use the designatory letters applicable to members for which clause 9 of this Our Supplemental Charter provides.

Continuance of existing members

4 The persons who at the date of the grant of this Our Supplemental Charter are fellows or associates of the Institute shall continue to be fellows or associates of the Institute subject to the provisions of this Our Supplemental Charter and of the bye-laws of the Institute.

Admission as associate

5 Any person who has satisfied such requirements as may from time-to-time be prescribed by or pursuant to the bye-laws in respect of training, examinations, fitness for membership or otherwise shall be entitled to be admitted an associate of the Institute.

Associate becoming a fellow

6 On and after the first day of January 1960 an associate of the Institute shall become a fellow of the Institute on the first day of January next following the completion by him of ten years of membership of the Institute: save that an associate may become a fellow before that date on establishing to the satisfaction of the Council and in such manner as the Council may require that he has been continuously for at least five years a member of the Institute in practice as a public accountant as his main occupation on which the decision of the Council shall be final. For the purposes of this Clause membership of the Society of Incorporated Accountants prior to becoming a member of the Institute shall be counted as membership of the Institute.

Associate becoming a fellow revised provisions

7 (a) The provisions of clause 6 of this Our Supplemental Charter shall cease to apply on the first day of January 1979. But until that date an associate shall become a fellow prior to the expiration of the qualifying period laid down in the said Clause 6 if he satisfies the Council in the prescribed manner as to his fitness to become a fellow.

(b) As from and including the first day of January 1979:

(i) an associate admitted to membership of the Institute prior to the first day of July 1978 shall automatically become a fellow on the first day of January next following the completion by him of five years of membership or on such earlier date on which he satisfies the Council in the prescribed manner as to his fitness to become a fellow;

(ii) an associate admitted to membership of the Institute on or after the first day of July 1978 shall become a fellow if but only if he satisfies the Council in the prescribed manner as to his fitness to become a fellow.

(c) A person shall satisfy the Council in the prescribed manner as aforesaid if he complies with such requirements (which may include but need not be limited to the passing of oral or written tests or both and evidence of practical accountancy experience) as shall be prescribed in regulations made from time-to-time by the Council in its absolute discretion.

Fees and subscriptions

8 Every person on his admission to be a member of the Institute shall pay such fee and every member shall pay such subscription or other sums as may be prescribed by or pursuant to the bye-laws of the Institute.

Description of members and distinctive letters

9 A member of the Institute may describe himself as a Chartered Accountant and may use after his name in the case of a fellow the initials F.C.A. (representing the words 'Fellow of the Institute of Chartered Accountants in England and Wales') and in the case of an associate the initials A.C.A. (representing the words 'Associate of the Institute of Chartered Accountants in England and Wales').

Power to organise, finance and maintain a scheme for 'Accounting Technicians'

10 Without prejudice to the generality of the powers conferred upon the Institute by this Our Supplemental Charter, the Institute shall have power to organise, finance and maintain a scheme for the training and qualification of a body of persons to be known as 'accounting technicians'. The powers conferred upon the Institute by this clause shall be exercisable by the Council and any such scheme shall be in such form as the Council may from time-to-time consider appropriate and in particular may include provision for adding to, rescinding or varying the scheme and any regulations made thereunder for the purpose of implementing the same.

Provided always that accounting technicians shall not be members of the Institute and that the Institute shall not be entitled to authorise the use of any designatory letters in connection with any such scheme.

Power to admit members of Scottish and Irish Institutes of Chartered Accountants

11 Notwithstanding anything in this Our Supplemental Charter or the bye-laws contained, the Council shall have power in its absolute discretion to

admit to membership of the Institute any qualified member of The Institute of Chartered Accountants of Scotland or of The Institute of Chartered Accountants in Ireland upon such terms and conditions as the Council from time-to-time considers appropriate provided that such terms and conditions are also approved by the Council of the other Institute in question.

Power to admit members of overseas accountancy bodies

12 (a) Notwithstanding anything in this our Supplemental Charter or the bye-laws contained, the Council shall have power in its absolute discretion to admit to membership of the Institute any qualified member of any accountancy body or any individual authorised as an accountant by an appropriate authority outside the United Kingdom and the Republic of Ireland upon such terms and conditions as the Council from time-to-time considers appropriate provided that such accountancy body or, in the case of an authorising authority, the criteria upon which such individuals may be admitted to membership of the Institute, shall first have been approved by the Lords of Our Most Honourable Privy Council, but subject to paragraph (b) below.

(b) Notwithstanding anything in this Our Supplemental Charter, the Council shall treat an application for membership of the Institute from a national of a member state of the European Union, or of a state in which the European Economic Area Agreement is in force, who holds a diploma in accountancy to which any Directive in force in the European Union (as adapted by the said Agreement) applies, in accordance with the said Directive, regulations made in pursuance thereof and, where appropriate, the said Agreement and the European Economic Area Act 1993.

Affiliate status

12A (a) The Council shall have the power in its absolute discretion to grant affiliate status to persons not being members of the Institute upon such terms and conditions as the Council from time-to-time considers appropriate.

(b) Every person on being granted affiliate status shall pay such fee and every affiliate shall pay such subscription or other sums as may be prescribed by or pursuant to the bye-laws of the Institute.

(c) An affiliate shall be subject to the provisions as to discipline set out in this Our Supplemental Charter and of the bye-laws of the Institute, including any scheme maintained under sub-paragraphs (viiA) or (viiiA) of Clause 1(b) hereof, and references to members in such provisions shall be taken to include references to affiliates.

(d) Provided always that affiliates shall not be members of the Institute and shall not be entitled to any of the rights of members (other than the rights of a member in disciplinary proceedings) and that the Institute shall not be entitled to authorise their use of any designatory letters.

Examinations

13 The Council shall from time-to-time cause examinations to be held of all persons seeking to become members of the Institute (or assessment to take

place of such persons on such terms and conditions as the Council from time to time considers appropriate).

Persons ceasing to be members to have no claim on funds or property

14 If any person ceases for any cause whatever to be a member of the Institute he shall not nor shall his representatives have any interest in or claim against the funds or property of the Institute.

Power to make bye-laws

15 (a) The Institute may from time-to-time, by resolution passed by a majority of not less than two-thirds of the members present and voting (in person or by proxy) at a meeting specially convened for the purpose with at least twenty-one days' notice in writing (which expression shall be taken to mean written or produced by any substitute for writing or partly one and partly another, including in electronic form), make such bye-laws for regulating the affairs of the Institute as to the Institute seem fit and from time-to-time rescind or vary any of the bye-laws and make others in their stead, but so that the bye-laws shall not be in any respect inconsistent with the express provisions of this Our Supplemental Charter.

(b) No new bye-law and no rescission or variation of any bye-law shall have effect unless and until the same has been submitted to and allowed by the Lords of Our Most Honourable Privy Council, of which allowance a Certificate under the hand of the Clerk of Our said Council shall be conclusive.

(c) Unless and until added to rescinded or varied, the bye-laws in force immediately upon the allowance of this clause by Us in Council shall constitute the bye-laws.

Power to make regulations

16 The Council may from time-to-time make such regulations as it thinks fit for any of the following purposes:

(a) carrying into effect any provision of this Our Supplemental Charter or of the bye-laws or otherwise for regulating the affairs of the Institute; or

(b) the Institute carrying out the functions of a designated professional body or a recognised professional body or a recognised supervisory body or a recognised qualifying body, under applicable legislation whether within the United Kingdom, the Isle of Man, the Channel Islands or the Republic of Ireland, or under equivalent legislation in other jurisdictions, or for the purpose of carrying out any other functions thereunder; or

(c) without prejudice to the generality of the foregoing, the Institute carrying out any function which by virtue of, or for the purposes of, any statute or agreement may be performed by the Institute;

and may rescind, vary or add to any such regulations provided always that no such regulations shall be in any way inconsistent with the express provisions of this Our Supplemental Charter or of the bye-laws.

Power to amend Supplemental Charter

17 The Institute may from time-to-time by resolution passed by a majority

of not less than two-thirds of the members present and voting (in person or by proxy) at a meeting specially convened for the purpose with at least twenty-one days' notice in writing (which expression shall be taken to mean written or produced by any substitute for writing or partly one and partly another, including in electronic form) alter amend or add to this Our Supplemental Charter and such alteration amendment or addition shall when allowed by Us in Council become effectual so that the said Original Charter and this Our Supplemental Charter shall thenceforth continue to operate as if they had originally been granted and made accordingly.

Revocation of Clauses 1–28 of the Original Charter
18 Clauses numbered 1–28 inclusive of the said Original Charter shall be revoked and be of no effect but all admissions elections appointments acts and things lawfully effected made or done under and in accordance with powers granted under any of the aforesaid clauses of the said Original Charter shall be deemed to have been effected made or done under powers granted by this Our Supplemental Charter and shall operate and take effect from the date of such admission election appointment or act.

Supplemental Charter and Original Charter to be read as one
19 As far as is consistent with the terms hereof this Our Supplemental Charter shall be read as one with the said Original Charter and henceforward shall operate as though it had been granted with the said Original Charter.

Scheme of Integration
20 Notwithstanding anything hereinbefore in this Our Supplemental Charter contained, the Institute shall have power to carry into effect the Scheme of Integration dated the 5th day of December 1956 for the integration of the Society of Incorporated Accountants with the Institute (a copy of which Scheme is appended to this Our Supplemental Charter) and the provisions of such Scheme shall be binding upon the Institute and its members. Subject to clause 15 of this Our Supplemental Charter the Institute may make such bye-laws for the purpose of carrying the said Scheme into effect as to the Institute seem fit and may from time-to-time rescind or vary any such bye-laws and make others in their stead; and any such bye-law may empower the Council to issue regulations for the purpose aforesaid. The above mentioned Scheme of Integration shall be alterable in like manner and upon the like conditions as the bye-laws of the Institute and references in this Our Supplemental Charter and the bye-laws to the said Scheme shall be construed as references to such Scheme as from time-to-time in force.

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourselves at Westminster this twenty-first day of December in the thirteenth year of Our Reign.

By Warrant under the King's Sign Manual.

NAPIER.

Principal Bye-Laws

Made under article 15 of the Supplemental Charter dated 21st December 1948

CONTENTS

Principal Bye-Laws made under clause 15 of the Supplemental Charter dated 21st December 1948

Chapter I. Interpretation of Terms and Citation

Interpretation of terms

1 (a) In *these bye-laws*, unless inconsistent with the subject or context:

(i) the following expressions shall have the following meanings:

Appeal Committee means the Appeal Committee appointed by the *Council* under the Schedule to the Disciplinary Bye-laws (appointment of Investigation, Disciplinary and Appeal Committees);

approved training means practical training and experience approved by the *Council* and obtained at or from a *training office*;

Committee means a committee appointed by the *Council* pursuant to bye-law 49(a) (concerning delegation of powers to committees) and any of the *Appeal Committee*, the *Disciplinary Committee* and the *Investigation Committee*;

Council means the Council of the Institute;

Disciplinary Bye-laws means the Disciplinary Bye-laws of the Institute;

Disciplinary Committee means the Disciplinary Committee appointed by the *Council* under the Schedule to the Disciplinary Bye-laws (appointment of Investigation, Disciplinary and Appeal Committees);

electronic mail includes electronic transmission in any form through any medium (including, without limitation, telephonic, facsimile and email transmission, and publication on the Internet);

European Community includes the European Economic Area where any provision relates to a matter to which the European Economic Area Agreement relates;

head of staff means the person appointed by the *Council* pursuant to bye-law 50 (power to appoint head of staff);

Investigation and Discipline Scheme means the Scheme made and adopted on behalf of the Accountancy Investigation and Discipline Board Limited by its managing body, the Accountancy Investigation and Discipline Board, in which the Institute participates pursuant to sub-clause 1(b)(viiA) of the Supplemental Charter, and in these bye-laws any reference to the *Investigation and Discipline Scheme* shall be deemed also to include the *Joint Disciplinary Scheme*;

Investigation Committee means the Investigation Committee appointed by the *Council* under the Schedule to the Disciplinary Bye-laws (appointment of Investigation, Disciplinary and Appeal Committees);

in writing means written or produced by any substitute for writing or partly one and partly another, including in electronic form;

Joint Disciplinary Scheme means the Scheme established with other accountancy bodies pursuant to sub-clause 1(b)(viiiA) of the *Supplemental Charter* (power to establish a disciplinary scheme);

member means a member of the Institute and *membership* shall be construed accordingly;

member firm means

(a) a *member* engaged in *public practice* as a sole practitioner; or
(b) a partnership engaged in *public practice* of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by *members*; or
(c) a limited liability partnership engaged in *public practice* of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by *members*; or
(d) any body corporate (other than a limited liability partnership) engaged in *public practice* of which:
    (i) 50 per cent or more of the directors are *members*; and
    (ii) more than 50 per cent of the nominal value of the voting shares is held by *members*; and
    (iii) more than 50 per cent of the of the aggregate in nominal value of the voting and non-voting shares is held by members;

order includes any finding, term or condition in consequence of or upon which the *order* is made;

practice and *public practice* mean practice as a public accountant in any part of the world otherwise (subject to bye-law 51(b) (concerning directors of a body corporate and members of limited liability partnerships)) than as an employee;

practising certificate means a certificate issued to a *member* by the Institute authorising him to engage in *public practice*;

provisional member (formerly known as *student*) means a person:
(a) who is training under a *training contract*; or
(b) who has trained under such contract and is eligible either to sit for the professional examinations of the Institute or, having successfully sat those examinations, to apply for *membership*,
and for the purposes only of this definition an order under bye-law 22(7)(d) of the Disciplinary Bye-laws (concerning eligibility to sit examinations) shall be disregarded;

registered address means:
(a) in the case of a *member* in *practice*, the place of business registered by him with the Institute or, where more than one such place of business is registered by him, such place of business indicated by him as being his principal place of business; and
(b) in the case of a *member* not in *practice*, the address registered by him with the Institute;

regulations or *regulation* means regulations made by the *Council* or any *Committee* or *Sub-committee* pursuant to clause 16 of the *Supplemental Charter* (power to make regulations) and for the time being in force;

Royal Charters means the Royal Charter dated 11th May 1880 and the *Supplemental Charter* dated 21st December 1948;

Sub-committee means a sub-committee appointed by a *Committee* pursuant to bye-law 49(b) (power to delegate to sub-committees);

Supplemental Charter means the Supplemental Royal Charter dated 21st December 1948;

training contract means a contract of *approved training* registered with the Institute and in such form and containing such provisions as may be prescribed in *regulations*, made between a candidate for *membership* and the person or firm at or from whose office the *approved training* is to be given;

training office means an office which for the time being is authorised pursuant to *regulations* to train *provisional members*; and

United Kingdom includes the Channel Islands and the Isle of Man;

(ii) the expression '*these bye-laws*' includes the Schedules which shall have the same status and effect as if they were set out herein as part hereof; and

(iii) references to Schedules are to the Schedules to *these bye-laws*.

(b) The Interpretation Act 1978 applies to *these bye-laws* in the same way as it applies to an enactment.
(c) The headings are inserted for convenience only and shall not affect the construction of *these bye-laws*.
(d) *These bye-laws* may be cited as the Principal Bye-laws of the Institute of Chartered Accountants in England and Wales.

Chapter II. Admission to membership

Admission to and refusal of membership
2 (a) All admissions to and refusals of *membership* shall be by the *Council* or as it may by *regulation* prescribe.
(b) An applicant for admission to *membership* must satisfy such requirements as to education, *approved training*, examinations, fitness for *membership* or otherwise as shall be prescribed in *regulations*.

Admission notwithstanding informality in training
3 The *Council* may, in any particular case in which it considers it desirable to do so, admit a person to *membership* notwithstanding any deficiency in his *training contract* or his *approved training* thereunder.

Applications for admission to membership
4 (a) An application for admission to *membership* shall be in writing and shall be signed by the applicant who shall thereby undertake, if admitted, to be bound by the *Royal Charters*, bye-laws of the Institute and *regulations* for the time being in force.
(b) Every such application shall comply with such other requirements (not being inconsistent with *these bye-laws*) as shall be prescribed in regulations.

Honorary members
4A (a) The Council may, by a resolution passed by a majority of not less than three-fourths of the members present and voting at a meeting, admit a person to be an honorary member of the Institute.
(b) An honorary member (in his capacity as an honorary member):
(i) shall not be bound by the Supplemental Charter and the bye-laws and regulations except where these make express provision relating to honorary members;
(ii) shall not be liable to pay any fee or subscription to the Institute;
(iii) is not entitled to receive notice of or attend or vote at any meetings of the Institute; and
(iv) for the avoidance of doubt, shall not be subject to the provisions as to discipline set out in the Supplemental Charter and in the bye-laws.
(c) The Council may by a resolution passed by a majority of not less than three-fourths of the members present and voting at a meeting, remove a person from honorary membership for good cause.

Chapter III. Members

Certificate of membership
5 A *member* shall be entitled on being admitted to *membership* to a certificate and on changing his class of *membership* to a certificate stating his new class of *membership*.

Resignation of membership
6 A *member* may tender his resignation by notice to the Institute and on its acceptance by the *Council*, but not until then, he shall cease to be a *member*. Provided that any *member* whose notice of resignation has not been received before 1st February in any year shall remain liable for any fees or subscriptions in respect of that year.

Cessation of membership
7 A *member* shall thereupon cease to be a *member*:

(a) if he has a bankruptcy order made against him;
(b) if he fails to pay his annual subscription by 31st March in the year in which it becomes due or any increase in such subscription before the expiration of three months after the increase becomes due unless the *Council* otherwise decides; or
(c) if he fails to comply with any *order* as to fines and/or costs made by the *Investigation Committee*, the *Disciplinary Committee* or the *Appeal Committee* or any Tribunal appointed under the *Investigation and Discipline Scheme* by the date or dates upon which the same are due. Provided that in respect of a *member* whose *registered address* is outside the *United Kingdom*, the *Council* may, if it is satisfied that for legal reasons beyond the *member's* control he is unable to remit the amount due, extend the period within which the amount must be paid.

Return of certificates
8 (a) If a person ceases for any reason to be a *member* he shall thereupon forthwith return to the Institute all certificates issued to him by the Institute, including his certificate of *membership, practising certificate* and examination certificates (if any), unless the *Council* otherwise decides.
(b) On the coming into force of any order made against a person, or body under *the Disciplinary Bye-laws*, that person or body shall forthwith return to the Institute all certificates issued to him or it by the Institute which are affected by the order.

Re-admission of former members
9 Any person who has ceased for any reason to be a *member* may be re-admitted to *membership* on such terms and conditions as the *Council* may consider appropriate.

Chapter IV. Meetings of the Institute

Annual meeting

10 (a) The annual meeting shall be held in London on the first Tuesday in June in every year or at such other place in England or Wales or on such other day (being not earlier than the first Tuesday in May and not later than the second Tuesday in June) as the *Council* may decide.

(b) The ordinary annual business of the Institute shall be the appointment or re-appointment of auditors and the reception and consideration of the annual report of the *Council* and the accounts of the Institute with the auditors' report thereon.

Special meeting

11 (a) The *Council* may whenever it thinks fit convene a special meeting and shall do so:

(i) on receipt by the Institute of a requisition in writing, signed by not less than two hundred and fifty *members* and stating the object of the proposed meeting, provided both that the said requisition requires the special meeting to be held on the same day as the annual meeting of the Institute and that the Institute has received the said requisition not later than 21st February in the relevant year; or

(ii) within 56 days from the receipt by the Institute of a requisition in writing signed by not less than one per cent of the *members* as at the end of the calendar year prior to the date of the said requisition and stating the object of the proposed meeting.

(b) A requisition may consist of several documents in like form each signed by one or more *members*.

Meeting at more than one place

11A (a) The *Council* may resolve to enable *members* to attend an annual or special meeting by simultaneous attendance and participation at more than one place. The *members* present in person or by proxy at each meeting place shall be counted in the quorum for, and entitled to vote at, the meeting in question. That meeting shall be duly constituted and its proceedings valid if the chairman of the meeting is satisfied that *members* attending at all the meeting places are able to:

(i) participate in the business for which the meeting has been convened;

(ii) hear and see all persons who speak (whether by the use of microphones, loudspeakers, audio-visual communications equipment or otherwise) in the principal meeting place (as defined in paragraph (b) of this bye-law) and any other meeting place; and

(iii) be heard and seen by all other persons so present in the same way.

(b) The meeting shall be deemed to take place at the place at which the chairman of the meeting is present (the 'principal meeting place').

Notice of meetings

12 (a) An annual or special meeting shall be called by at least twenty-one

days' notice, exclusive of the day on which it is served or deemed to be served and of the day on which the meeting is to be held. The notice shall specify the date, time and place of the meeting and, in the case of a meeting at which business other than the ordinary annual business of the Institute is to be transacted, the general nature of that business and shall be given in manner hereinafter mentioned to all *members* other than any as are not entitled to receive notices from the Institute. In the case of an annual meeting, the notice shall also specify the meeting as such and shall be accompanied by a copy of the annual report of the *Council*, subject to paragraph (c) of this bye-law a summary financial statement which complies with paragraph (d) of this bye-law, a list of the persons nominated or deemed to be nominated as auditors and particulars of any motions to be brought before the meeting under bye-law 13 (notice of motions).

(b) Every notice calling a meeting of the Institute shall be accompanied by a form of proxy complying with the provisions of bye-law 23 (form of proxy). Except that the Institute shall not be obliged to send out forms of proxy to the members for use at any adjourned meeting.

(c) The Institute shall send a copy of its accounts with the auditors' report thereon, instead of a summary financial statement, to any *member* who has given written notification to that effect to the Institute in such form as the *Council* may determine or accept and who has not revoked it.

(d) Every summary financial statement shall be derived from the accounts of the Institute, shall include the auditors' statement thereon and shall have been approved by the *Council*.

Notice of motions

13 A *member* wishing to bring before the annual meeting any motion not relating to the ordinary annual business of the Institute may do so provided that:

(a) the Institute has received notice of the proposed motion not later than 21st February in the relevant year;

(b) the Institute has received notice from not less than ten *members* entitled to vote at the annual meeting not later than 21st February in the relevant year expressing their desire that the proposed motion should be brought before the annual meeting; and

(c) the proposed motion relates to matters affecting the Institute or the accountancy profession.

13A The Institute shall circulate with the notice calling the annual meeting before which any such motion as is referred to in bye-law 13 (notice of motions) is to be brought a statement not exceeding 1,000 words explaining the grounds on which the said motion is to be proposed. Provided that:

(a) the Institute shall have received notice to that effect and a copy of the said statement not later than 21st February in the relevant year; and

(b) the Institute shall not be bound to circulate a statement if it is reasonably satisfied that the rights conferred by this bye-law are being abused to secure needless publicity for a defamatory matter.

Transmission of accompanying documents
13B The documents required by bye-laws 12 and 13A to accompany or be circulated with the notice of meeting may be sent by electronic mail.

Chairman of meeting
14 At all meetings of the Institute the President or in his absence the Deputy-President or in his absence the Vice-President shall be chairman. If at any meeting the President, Deputy-President and Vice-President are not present within fifteen minutes after the time appointed for the meeting and willing to act, the members of the *Council* present shall choose one of their number to be chairman of the meeting. If no member of the *Council* is present or if all the members of the *Council* present decline to take the chair, the *members* present shall choose one of their number to be chairman of the meeting.

Quorum at meetings
15 Subject as hereinafter provided with regard to adjourned meetings, the quorum at any annual meeting shall be twenty *members* present in person and the quorum at any special meeting shall be thirty *members* present in person. No business other than the appointment of a chairman shall be transacted at any annual or special meeting unless the requisite quorum is present at the time when the meeting proceeds to business.

Lack of quorum
16 (a) If within fifteen minutes after the time appointed for an annual meeting (or such longer interval as the chairman of the meeting may determine) a quorum is not present, or if during the meeting a quorum ceases to be present, the meeting shall stand adjourned to such other date (being not less than fourteen nor more than twenty-eight days thereafter) and such time and place as the chairman of the meeting may determine. At such adjourned meeting any *members* present in person shall be a quorum and shall have power to pass any resolution and to transact all business which could lawfully have been transacted at the meeting from which the adjournment took place. At least seven days' notice of any meeting adjourned through want of a quorum shall be given in the same manner as for the original meeting.

(b) If within fifteen minutes after the time appointed for a special meeting (or such longer interval as the chairman of the meeting may determine) a quorum is not present, or if during the meeting a quorum ceases to be present, the meeting shall be dissolved.

Adjournment of meetings
17 Subject to *these bye-laws*, the chairman of any meeting at which a quorum is present may, with the consent of the meeting, adjourn the meeting from time-to-time (or sine die) and from place-to-place. No business shall be transacted at any adjourned meeting except business which might lawfully have been transacted at the meeting from which the adjournment took place. Where a meeting is adjourned sine die, the date, time and place for the

adjourned meeting shall be fixed by the Council and not less than seven days' notice of the adjourned meeting shall be given in the same manner as for the original meeting. Subject thereto and as provided in bye-law 16 (lack of quorum), no notice need be given of an adjourned meeting unless it be so directed in the resolution for adjournment.

Amendment to resolutions

18 (a) No amendment shall be permitted to any resolution to alter, amend or add to the *Supplemental Charter* or *these bye-laws* or *the Disciplinary Bye-laws* except with the consent of the chairman of the meeting and then only if in the opinion of the chairman (whose decision shall be final) the amendment is one of form and not of substance.

(b) If an amendment is proposed to any resolution under consideration but is in good faith ruled out of order by the chairman of the meeting the proceedings on the substantive resolution shall not be invalidated by any error in such ruling.

Polls

19 (a) At any annual or special meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless:

(i) before or on the declaration of the result of the show of hands a poll is demanded by the chairman of the meeting or by at least twenty-five *members* present in person or by proxy; or

(ii) the resolution is to alter, amend or add to the *Supplemental Charter* or *these bye-laws* or *the Disciplinary Bye-laws*, in which event a poll shall be taken without any show of hands or demand as aforesaid.

(b) A demand for a poll may, before the poll is taken, be withdrawn. A demand so withdrawn shall not be taken to have invalidated the result of a show of hands declared before the demand was made.

(c) If a poll is duly demanded or is required to be taken, it shall be taken in such manner as the chairman of the meeting may direct. The result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded or required to be taken. The chairman of the meeting may appoint scrutineers (who need not be *members*) and may adjourn the meeting to a date, time and place fixed by him for the purpose of declaring the result of the poll.

(d) A poll demanded on the choice of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded or required to be taken on any other question shall be taken either immediately or at such subsequent date (being not more than twenty-eight days after the date of the meeting), time and place as the chairman of the meeting may direct. Any business other than that upon which a poll has been demanded or is required may be proceeded with pending the taking of the poll. No notice need be given of a poll not taken immediately.

(e) On a poll, votes may be given personally or by proxy.

Each member to have one vote

20 On a show of hands every *member* present in person shall have one vote and on a poll every *member* present in person or by proxy shall have one vote.

Chairman's casting vote

21 In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded or is required to be taken shall be entitled to a second or casting vote.

Validity and result of vote

22 (a) No objection shall be raised as to the admissibility of any vote except at the meeting or adjourned meeting at which the vote objected to is or may be given or tendered. Every vote not disallowed at such meeting shall be valid for all purposes. Any such objection shall be referred to the chairman of the meeting whose decision shall be final.

(b) Unless a poll is taken a declaration by the chairman of the meeting that a resolution has been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the minute book, shall be conclusive evidence of that fact without proof of the number or proportion of the votes recorded for or against the resolution.

Form of proxy

23 (a) The instrument appointing a proxy shall be in writing in such form as the *Council* may determine or accept and shall be signed by the appointor or his attorney duly authorised in writing. The signature on such instrument need not be witnessed.

(b) An instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

Proxy must be a member

24 A proxy must be a *member*.

Deposit of proxy

25 The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, must be deposited at such place or one of such places (if any) as may be specified for that purpose in or by way of note to or in any document accompanying the notice convening the meeting or, if no place is so specified, with the *head of staff* at such place within the *United Kingdom* as the *Council* may from time-to-time prescribe not less than 48 hours before the time for holding the meeting or adjourned meeting or (in the case of a poll taken otherwise than at or on the same day as the meeting or adjourned meeting) for the taking of the poll at which it is to be used. In default it shall not be treated as valid. The instrument shall, unless the contrary is stated thereon, be valid as well for any adjournment of the meeting as for the meeting to which it relates.

25A (a) The *Council* may allow a proxy to be appointed, and the instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, to be sent, by electronic mail, on such terms and conditions as it

thinks fit. Provided that such instrument and other documents must be deposited by the time specified in bye-law 25.

(b) If and to the extent that the *Council* allows appointments to be made and documents to be sent in this way, any provisions of these bye-laws which are inconsistent therewith shall be of no effect in relation thereto. The *Council* may require such evidence it thinks fit to satisfy itself that any such appointment or document is genuine.

Validity of vote by proxy

26 A vote given or demand for a poll made in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the appointor or the revocation of the appointment of the proxy or of the authority under which the appointment was made: Provided that no notice of such death, insanity or revocation was received at the address for the time being applicable for the purposes of bye-law 25 (deposit of proxy) before the commencement of the meeting or adjourned meeting or (in the case of a poll taken otherwise than at or on the same day as the meeting or adjourned meeting) the time appointed for the taking of the poll at which the proxy is used.

Minutes of meetings of the Institute

27 Proper minutes shall be recorded of all resolutions and proceedings of meetings of the Institute. Every minute signed by the chairman of the meeting to which it relates or by the chairman of a subsequent meeting shall be sufficient evidence of the facts therein stated.

Chapter V. Fees and Subscriptions

Fees and subscriptions

28 The fees and subscriptions payable by *members* shall be those in force immediately before this bye-law came into effect or as from time-to-time approved by *members* at a meeting in accordance with bye-law 31.

Annual subscriptions: when payable

29 All annual subscriptions payable under *these bye-laws* shall be due and payable on 1st January in each year or, in the case of *members* admitted after that date, as shall be prescribed in *regulations*.

Power to waive, reduce, remit or refund fees and subscriptions

30 Notwithstanding anything contained in *these bye-laws*, the whole or any part of any fees or subscriptions payable by a *member* may be waived, reduced, remitted or refunded and the period within which payment must be made may be extended in such manner as may be prescribed in *regulations*.

Power to vary fees and subscriptions

31 The Institute may from time-to-time by resolution passed by a majority of the *members* present and voting (in person or by proxy) on a poll at a

meeting change the then prevailing rates or types of fees and subscriptions payable by any or all *members*.

Practice assurance fees
31A For the purposes of bye-laws 28, 30 and 31 the term 'fees' does not include the fees payable under bye-law 54.

NOTE
This note does not form part of the bye-laws.

Rates at 1 January 2009 are:

Annual subscriptions

Subscription Category	Rate
Members residing and/or practising in the *United Kingdom* or other member-state of the European Community)	£283
Members not residing and not practising in the *United Kingdom* or other member-state of the European Community	£172
The annual subscription for retired members is	£27

Life Membership is available in certain circumstances at the same rate as a UK/EU member, ie, £520.

Practising certificate fee
Members in practice in the *United Kingdom* or other member-state of the European Community: ..... £133.00 (not including the practice assurance fee)

Members in practice elsewhere than in the *United Kingdom* or other member-state of the European Community:.....£62.00

Admission fee
Members residing in the United Kingdom or other member-state of the European Community.....£520.00

Members not residing in the United Kingdom or other member-state of the European Community.....£260.00

Chapter VI. The Council

Composition of Council

32 The *Council* shall consist of not more than 85 elected members, not more than 20 co-opted members appointed under bye-law 36 (co-opted members of Council), not more than five ex officio members appointed under bye-law 36A and not more than 10 ex officio members appointed under bye-law 36B (ex officio members of Council) and may act notwithstanding any vacancy in its body.

Election by constituencies

33 Election to the *Council* shall be on the basis of constituencies. The number and areas and/or type of such constituencies and the number of *members* which each constituency is to be entitled to elect to the *Council* shall be such as may be prescribed in *regulations*: and such *regulations* shall also, subject to any express provisions of *these bye-laws*, prescribe:

(i) the manner and conduct of *Council* elections including but not limited to the timing of such elections, the notices to be issued, the procedure for nominating candidates, the procedure for holding, voting at, determining and announcing the results of elections and the procedure for filling any casual vacancies among the elected members of the *Council*; and

(ii) eligibility to stand for election, to join in nominating a *member* for election, and to vote on any election to the Council in respect of any particular constituency.

[34 – Deleted]

Term of office of elected members

35 (a) An elected member's term of office is in *these bye-laws* referred to as his '*elected term of office*'.

(b) An elected member of the *Council* shall assume office at the conclusion of the annual meeting of the Institute next following his election. Provided that, if a vacancy occurs among the elected members of the *Council* otherwise than because an elected member of the *Council* has come to the end of his *elected term of office* and otherwise than at the conclusion of an annual meeting, the person who is elected to fill such vacancy shall assume office fourteen clear days after election.

(c) An elected member of the *Council* shall, subject to *these bye-laws* and *the Disciplinary Bye-laws*, be entitled to hold office until the conclusion of the fourth annual meeting after that at which he assumed office.

(d) An elected member of Council shall be eligible for re-election at the election immediately preceding the Annual Meeting at which he would otherwise retire from office.

(e) If a vacancy occurs among the elected members of the *Council* otherwise than because an elected member of the *Council* has come to the end of his *elected term of office*, the person who is elected to fill such vacancy shall hold office only for the remainder of the *elected term of office* of the elected member of the *Council* whose vacancy he fills; and in

relation to any such person the expression '*elected term of office*' shall be construed accordingly.

Co-opted members of Council

36 (a) The *Council* may appoint any *member* or *provisional member* to be a co-opted member of the *Council* provided that there shall not be more than twenty co-opted *members* in office at any one time.

(b) A co-opted member of the *Council* shall not be appointed for a term exceeding four years at any one time. Subject as aforesaid, a co-opted member of the *Council* whose term of appointment has expired shall be eligible for further co-option.

(c) Every appointment of a co-opted member of the *Council* shall be reported to the next succeeding annual meeting.

Ex officio members of Council

36A A member of the *Council* chosen as President, Deputy-President or Vice-President in accordance with bye-law 43 (election of President, Deputy-President and Vice-President) shall thereupon become an ex officio member of the *Council* (in substitution for any other membership of the *Council* which shall be deemed to have been vacated) and shall remain an ex officio member of the *Council* until he ceases to hold the office of President, Deputy-President or Vice-President as the case may be. Provided that, except where he is, as President, removed from office pursuant to bye-law 43A, a Past-President shall retain ex officio membership of the *Council* until the conclusion of the second annual meeting after the annual meeting held in the year in which he ceases to hold the office of President.

36B Such other holders of offices within the Institute who are not already members of the *Council* as the *Council* may determine shall become ex officio members of the *Council* until they cease to hold the office concerned provided that there shall not be more than 10 members in office at any one time by virtue of this bye-law.

Vacation of office of Council members

37 The office of a member of the *Council* shall be vacated:

(a) if he ceases to be a *member* or *provisional member* of the Institute;

(b) if an adverse finding, other than a finding of a prima facie case with an *order* that no further action be taken, is made against him under the *Investigation and Discipline Scheme* or the Disciplinary Bye-laws; or

(c) if he has been absent from six or more consecutive meetings of the *Council* without the consent of the *Council*.

Election to Council – disciplinary orders against candidates

37A A *member* or *provisional member* shall not be eligible for election or appointment to *Council* if within the period of 10 years prior to such proposed election or appointment an adverse finding other than a finding of a

prima facie case with an order that no further action be taken has been made against him under the *Investigation and Discipline Scheme* or the Disciplinary Bye-laws or any equivalent provision previously in force.

Resignation of Council members

38 A member of the *Council* may tender his resignation of office by notice to the *Council*. On its acceptance by the *Council*, but not until then, he shall cease to be a member of the *Council*.

Removal of Council members

39 The Institute may by resolution passed by a majority of the *members* present and voting (in person or by proxy) at a special meeting convened for the purpose remove any member of the *Council* from his office before the expiration of his period of office. No resolution to remove a member of the *Council* under this bye-law shall be effective unless notice of the intention to propose it has been given to the Institute not less than twenty-eight days before the meeting at which it is to be proposed. The Institute shall give *members* notice of any such resolution at the same time and in the same manner as it gives notice of the meeting. A copy of any such notice to propose such a resolution shall be sent to the member of the *Council* concerned forthwith upon receipt by the Institute.

Chapter VII. Proceedings of the Council

Meetings of Council

40 (a) Subject to *these bye-laws*, the *Council* shall meet for the despatch of business, adjourn and otherwise regulate its proceedings as it may think fit. The *Council* shall be deemed to meet if, notwithstanding that the members of *Council* are in separate locations, they are nonetheless linked by conference telephone, conference video link or other communication equipment which allows those participating to hear and speak to each other. A quorum in that event shall be the number of persons required for a quorum in accordance with bye-law 42 who are so linked. Such a meeting shall be deemed to take place where the largest group of those participating is assembled or, if there is no such group, where the chairman of the meeting then is.

(b) A meeting of the *Council* may at any time be called by order of the President, Deputy-President or Vice-President, or at the request in writing, addressed to the *head of staff*, of five members of the *Council*.

(c) At least three days' notice of a meeting of the *Council* shall be delivered or sent to each member of the *Council*: Provided that if the President, Deputy-President or Vice-President when ordering a meeting certifies in writing that an emergency exists, only one day's notice as aforesaid need be delivered or sent. The period of notice shall in each case be exclusive of the day on which the notice is delivered or sent and of the day on which the meeting is to be held. Any such notice shall contain as far as is practicable a statement of the business to be transacted at such

meeting. Any such notice shall be taken as duly delivered or sent unless the contrary be shown. The accidental failure to send or the non-receipt by any member of the *Council* of any notice or the non-existence in fact of the certified emergency shall not invalidate the relevant meeting.

Adjournment of meetings
41 Subject to *these bye-laws* the chairman of any meeting of the *Council* may, with the consent of the meeting, adjourn the meeting from time-to-time and from place-to-place. No business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. No notice need be given of an adjourned meeting unless it be so directed in the resolution for adjournment.

Quorum of Council
42 Twelve members of the *Council* shall form a quorum at all meetings of the *Council*.

Election of President, Deputy-President and Vice-President
43 At the first meeting of the *Council* after every annual meeting the members of the *Council* present shall choose one of the members of the *Council* as President, another as Deputy-President and another as Vice-President. Subject to bye-law 43A (removal of President, Deputy-President and Vice-President), the members so chosen shall hold the office of President, Deputy-President and Vice-President respectively until the first meeting of the *Council* held after the next succeeding annual meeting. A member of Council who has previously been chosen as President, Deputy-President or Vice-President shall be eligible to be chosen as President, Deputy-President or Vice-President for a second or subsequent period of office. Any vacancy in any of the offices of President, Deputy-President and Vice-President shall be filled at one or the other of the two meetings of the *Council* next following the occurrence of such vacancy or as the *Council* may otherwise determine.

Removal of President, Deputy-President and/or Vice-President
43A The Council may, by a resolution passed by a majority of not less than three-fourths of the members present and voting at a meeting, remove from office the President, Deputy-President and/or Vice-President before the expiration of his period of office.

Ex officio membership of Committees
44 The President, the Deputy-President and the Vice-President shall by virtue of their offices be members of all *Committees* other than the *Investigation Committee*, the *Disciplinary Committee* and the *Appeal Committee* and any Committee carrying out the Institute's functions as a regulator under statute.

Chairman of Council
45 At the first meeting of the *Council* after every annual meeting the members of the *Council* present shall appoint one of the members of the

Council as the chairman of *Council*. The person so appointed shall preside as chairman at all meetings of the *Council*, provided that in his absence at any meeting of the *Council* the members of the *Council* present shall choose one of their number to be chairman of that meeting.

Voting at meetings of Council
46 Subject to Bye-law 4A, at all meetings of the *Council* the vote of a majority of those present and voting shall prevail. In the case of an equality of votes the chairman of the meeting shall have a second or casting vote in addition to his original vote.

Minutes of meetings of Council and Committees
47 Proper minutes shall be recorded of all resolutions and proceedings of meetings of the *Council* and of *Committees* and *Sub-committees*. Every minute signed by the chairman of the meeting to which it relates or by the chairman of a subsequent meeting shall be sufficient evidence of the facts therein stated.

Validity of proceedings
48 All acts done by any meeting of the *Council*, or of any *Committee* or *Sub-committee*, or by any person acting as a member of the *Council* or as a member of the *Committee* or *Sub-committee*, shall as regards all persons dealing in good faith with the Institute, notwithstanding that there was some defect in the appointment of any of the persons acting as aforesaid, or that any such persons had vacated office, or were not entitled to vote, be as valid as if every such person had been duly appointed and had continued to be a member of the *Council* or a member of the *Committee* or *Sub-committee* and had been entitled to vote.

Chapter VIII. Delegation

Committees, Sub-committees or other person or persons
49 (a) Subject to the *Supplemental Charter* and *these bye-laws*, the *Council* may delegate any of its powers, authorities or discretions to committees consisting of such person or persons (whether members of the *Council* or not) or to such person or persons (whether members of the *Council* or not) and on such terms and conditions as it thinks fit and may from time-to-time revoke or alter any of such powers, authorities or discretions so delegated.

(b) Any *Committee* may, subject to any such terms and conditions as aforesaid, delegate any of its powers, authorities or discretions to a sub-committee consisting of such person or persons (whether members of the *Council* or of such *Committee* or not) or to such person or persons (whether members of the *Council* or of such *Committee* or not) and on such terms and conditions as it thinks fit and may from time-to-time revoke or alter any such powers, authorities or discretions so delegated.

(c) Subject to *these bye-laws* and to any terms and conditions imposed by

the *Council* or, in the case of a *Sub-committee*, the *Committee* by which it was formed, any *Committee* or *Sub-committee* may meet for the despatch of business, adjourn and otherwise regulate its proceedings as it thinks fit. A *Committee* or *Sub-committee* shall be deemed to meet if, notwithstanding that the members of the *Committee* or *Sub-committee* are in separate locations, they are nonetheless linked by conference telephone, conference video link or other communication equipment which allows those participating to hear and speak to each other. Such a meeting shall be deemed to take place where the largest group of those participating is assembled or, if there is no such group, where the Chairman of the meeting then is.

(d) Insofar as any power, authority or discretion is delegated to a *Committee*, *Sub-committee* or any other person pursuant to *these bye-laws*, any reference in *these bye-laws* to the exercise by the *Council* or *Committee* of the power, authority or discretion so delegated shall be construed as if it were a reference to the exercise thereof by such *Committee*, *Sub-committee* or person, as the case may be.

(e) Bye-law 36 of the Disciplinary Bye-laws (publicity for the disciplinary process) shall apply to chairmen of any *Committees* appointed for the purposes of paragraph (b) of Article 16 of the *Supplemental Charter* in the same way (after making any necessary changes) as it applies to the Chairman of the *Investigation Committee*.

Head of staff

50 (a) The *head of staff* of the Institute, being the most senior member of the paid staff of the Institute, shall be appointed by the *Council* on such terms and for such period as it thinks fit. The formal title of the *head of staff* shall be as *Council* may from time-to-time determine.

(b) The *head of staff* may, subject to any such terms and conditions as the *Council* thinks fit, delegate any of his powers, authorities and discretions (including, without limitation, any powers, authorities and discretions delegated to him pursuant to bye-law 49 (concerning delegation to person or persons)) to such person or persons and on such terms and conditions as he thinks fit and may from time-to-time revoke or alter any of such powers, authorities or discretions so delegated.

(c) Insofar as any power, authority or discretion is delegated by the *head of staff* to any other person pursuant to this bye-law, any reference in *these bye-laws* or *the Disciplinary Bye-laws* to the exercise by the *head of staff* of the power, authority or discretion so delegated shall be construed as if it were a reference to the exercise thereof by such person.

[Note (this note does not form part of the Principal bye-laws):

The Council has determined that the head of staff shall be called the Chief Executive.]

Chapter IX. Public Practice

Conditions for engaging in public practice

51 (a) A *member* shall be entitled to engage in *public practice* in the *United Kingdom* or any other member-state of the European Community only if he holds a current *practising certificate*.

(b) The circumstances in which a *member* is, by virtue of being a director of a body corporate or a member of a limited liability partnership, to be regarded as engaging in *public practice* and any other requirements governing such *practice* shall be those prescribed in *regulations*. A *member* shall not engage in *public practice* otherwise than in accordance with such *regulations* or as a sole practitioner or as a partner in a firm.

Eligibility to hold practising certificate

52 (a) Subject to paragraph (b) of this bye-law and to bye-laws 22 (powers of tribunal) and 30 (intervention orders) of the *Disciplinary Bye-laws*, a *member* shall be eligible to hold a *practising certificate* if he satisfies such requirements as shall be prescribed in *regulations*.

(b) A *member* who fails to pay his *practising certificate* fee by 31st March in the year in which it becomes due or before the expiration of three months after it has become due shall thereupon cease to be eligible for such a certificate unless the Council otherwise decides.

Issue of practising certificates

53 (a) *Practising certificates* shall normally be issued for a period not exceeding twelve months and ending on 31st December and shall, subject to bye-law 52(b) (failure to pay practising certificate fee), be renewed automatically for a period of twelve months on 1st January next following when the appropriate renewal fee shall become due and payable.

(b) *Practising certificates* shall be in such form or forms as may be prescribed in *regulations*.

(c) A *member* who ceases to be eligible for a *practising certificate* shall forthwith return his certificate to the Institute but shall be granted a further certificate if and when he again becomes so eligible.

54 (a) *Members* and *member firms* shall co-operate with any scheme, system, or arrangements for inspection, monitoring and review of their professional and business efficiency and competence established by the Institute and shall comply with any regulations made in respect thereof.

(b) A *member* holding a practising certificate shall pay such fee or fees in respect of such scheme, system or arrangement as may from time-to-time be determined by the Council in its absolute discretion.

(c) If a *member* fails to pay any fee or fees due under paragraph (b) he shall cease to be eligible for a practising certificate.

(d) For the purposes of this bye-law a firm which describes itself as 'Chartered Accountants' shall be presumed to be a *member firm* unless it proves it is not.

Use of designations

55 (a) Save as permitted by *regulation* a *member practising* under the title of a firm in partnership with any person not a *member* nor a member of one or other of such institutes, societies or bodies of accountants as may be approved by the *Council* shall not use after or in conjunction with the title of the firm the initials FCA or ACA or describe the firm in any way whatever as chartered accountants.

(b) Save as permitted by *regulation* a *member practising* as a director of a body corporate or as a member of a limited liability partnership shall not use after or in conjunction with the title of that body the initials F.C.A. or A.C.A. or describe the body in any way whatever as chartered accountants.

Chapter X. Continuing Professional Development

Continuing Professional Development

56 Except as may be provided in regulations a member shall:

(a) keep under review his needs for training and development having regard to the professional and other work he undertakes;

(b) where such a review identifies a specific need for training or development act promptly to meet such need; and

(c) certify annually to the Institute compliance with these provisions and, if requested by the Institute, provide such evidence of compliance as may be required.

Chapter XI, comprising bye-law 57, deleted

Chapter XII. Appeals

Appeals

58 (a) Except as provided in *these bye-laws* or in *regulations*, an applicant for *membership*, a *provisional member*, a former *provisional member* and a *member* shall each have the right to appeal against any decision made concerning him under or pursuant to *these bye-laws* or *regulations* (including decisions concerning admission to *membership*, eligibility for *practising certificates* and entitlement to fellowship).

(b) The provisions governing the hearing of any such appeal shall be prescribed in *regulations*.

Chapter XIII. Common Seal

Custody of Common Seal

59 The Common Seal shall be kept in such custody as the *Council* may determine.

Use of Common Seal

60 The Common Seal shall not be affixed to any instrument except by order of the *Council* or of a *Committee* or *Sub-committee* or of any person authorised by the *Council* in that behalf and in the presence of two members of the *Council*. Every such instrument shall be signed by the two members of the *Council* in whose presence the Seal is affixed and by the *head of staff*. Provided that it shall not be necessary for any member of the *Council* to be present when the Seal is affixed to any such certificate as is referred to in bye-law 5 (certificate of membership). It shall be sufficient for the signatures of the two members of the *Council* and the *head of staff* upon any such certificate to be facsimile signatures.

Chapter XIV. Authentication of Documents

Authentication of documents

61 Any member of the *Council* or the *head of staff* or any person appointed by the *Council* for the purpose shall have power to authenticate any document affecting the constitution of the Institute and any resolution passed at an annual meeting or a special meeting or at a meeting of the *Council* or of any *Committee* or *Sub-committee*, and any book, record, document or account relating to the business of the Institute, and to certify copies thereof or extracts therefrom as true copies or extracts. A document purporting to be a copy of any such resolution, or an extract from the minutes of any such meeting, which is certified as aforesaid shall be conclusive evidence in favour of all persons dealing with the Institute upon the faith thereof that such resolution has been duly passed or, as the case may be, that any minute so extracted is a true and accurate record of proceedings at a duly constituted meeting.

Chapter XV. Audit

Appointment of auditors

62 (a) The *members* shall at each annual meeting appoint at least one but not more than two *members* in *practice* or at least one but not more than two *firms* to be the auditor or auditors of the Institute.

(b) No member of the *Council* shall be eligible for appointment as auditor in a personal capacity. No *firm* in which a member of the *Council* is a director, partner, member (if the firm is a limited liability partnership), or employee shall be eligible for appointment as auditor.

(c) In the event of any vacancy occurring in the office of auditor between annual meetings or in the event of a vacancy not being filled at an annual meeting, the said vacancy may be filled by the *Council* at a meeting summoned with notice of the object provided that during such vacancy a continuing auditor may act alone.

(d) The remuneration, if any, of the auditor or auditors so appointed shall be determined either by the meeting or in such manner as the meeting may resolve.

(e) In this bye-law, the expression 'firm' means a partnership or body corporate (including a limited liability partnership) engaged in *public practice*.

Retirement of auditors
63 The auditor or auditors shall retire at the next annual meeting after his or their appointment, but shall be eligible for re-appointment.

Nomination of auditors
64 Each retiring auditor shall, unless he has notified the *Council* not later than 24th March preceding the date of the annual meeting that he does not wish to offer himself for re-appointment, be deemed to be nominated for re-appointment at such meeting. Every other candidate for appointment as an auditor shall be nominated in writing by the *Council*. Notice of the names of all candidates nominated for appointment or deemed to be nominated for re-appointment shall be sent to all *members* with the notice calling the annual meeting.

Removal of auditors
65 The Institute may, by a resolution passed by a majority of not less than three-fourths of the *members* present and voting (in person or by proxy) at a special meeting convened for the purpose, remove any auditor from his office before the expiration of his period of office. The Institute may also by a resolution passed by a majority of the *members* present and voting (in person or by proxy), at such a meeting appoint in place of any auditor so removed another *member* in *practice*. In default of such an appointment, the *Council* may at a meeting summoned with notice of the object appoint an auditor in the place of the auditor so removed.

Auditor's right to attend meetings
66 An auditor shall be entitled to attend any annual meeting or special meeting and to receive all notices of and other communications relating to any such meeting which any *member* is entitled to receive and to be heard at any such meeting on any part of the business of the meeting which concerns him as auditor.

Chapter XVI. Notices

Notices
67 (a) Any notice required to be given for the purposes of *these bye-laws* shall be in writing.
(b) Any notice or other document required to be given, delivered or sent to *members* under or in connection with *these bye-laws* may be given or sent by pre-paid post addressed to them at their *registered address*.
(c) Any notice, requisition, certificate or other document (other than a form of proxy) required to be given, delivered or sent to the Institute under or in connection with *these bye-laws* shall, subject to paragraph (e) of this

bye-law, be given or sent by pre-paid post addressed to the Institute at its principal London address for the time being and marked for the attention of the *head of staff*.

(d) Where any such notice or other document is given, delivered or sent by post, service shall be deemed to have been effected at the expiration of 48 hours after the time when such notice or other document is posted and in proving such service it shall be sufficient to prove that the cover containing such notice or other document was properly addressed, stamped and posted.

(e) (i) Any member may notify the Institute in writing of a number or address (in this bye-law 67(e) referred to as an 'address') for the purpose of his receiving electronic mail from the Institute and having done so shall be deemed to have agreed to receive any notice, requisition, certificate or other document required to be given, delivered or sent to him under or in connection with *these bye-laws* (in this bye-law 67(e) referred to as a 'notice or other document') by electronic mail. If a member so notifies the Institute of his address the Institute may satisfy its obligation to give, deliver or send to him any notice or other document by:

(1) sending it to him at that address by such form of electronic mail as the Council may from time-to-time determine; or

(2) (a) publishing such notice or other document on a web site; and

(b) notifying him by email to that address that such notice or other document has been so published, specifying the address on the website on which it has been published, the place on the website where the notice or other document may be accessed, how it may be accessed and (if any such notice relates to a meeting of the Institute) stating (i) that the notice concerns a notice of a meeting of the Institute, (ii) the date, time and place of the meeting and (iii) whether the meeting is an annual or special meeting.

(ii) The Institute may notify members in writing of an address for the purpose of its receiving from members such form of electronic mail as the Council may determine and may specify what notice or other document may be sent to it by electronic mail and having done so shall be deemed to have agreed to receive any such notice or other document from members by such form of electronic mail.

(iii) Subject to paragraph (e)(v) of this bye-law, any notice or other document sent in accordance with this bye-law 67(e) shall be deemed to be received at 9.00am on the day following that on which it was transmitted. Proof (in accordance with the formal recommendations of best practice contained in the guidance issued by the Institute of Chartered Secretaries and Administrators for the time being in force) that a notice or other document was sent by electronic mail shall be conclusive evidence of such sending.

(iv) Any amendment or revocation of a notice given to the Institute or a member under this bye-law 67(e) shall only take effect in writing, signed by the member or the Institute as the case may be,

and on actual receipt by the Institute or the member, as the case may be, thereof.

(v) Electronic mail shall not be treated as received by the Institute or member, as the case may be, if it is rejected by computer virus protection arrangements.

(f) The accidental failure to send, or the non-receipt by any person entitled to, any notice of or other document relating to any meeting, poll, ballot or other proceeding under *these bye-laws* shall not invalidate the relevant meeting, poll, ballot or other proceeding.

Suspension of postal services

68 If at any time by reason of the suspension or curtailment of postal services within the *United Kingdom* the Institute is unable effectively to convene a meeting of *members* by notices sent through the post, such meeting may be convened by a notice advertised on the same date in at least four national daily newspapers with appropriate circulation and such notice shall be deemed to have been duly served on all *members* entitled thereto on the day when the advertisement appears. In any such case the Institute may still, where applicable, serve notice by electronic mail and shall send confirmatory copies of the notice by post to members to whom it was not sent by electronic mail if at least seven days prior to the meeting the posting of notices to addresses throughout the *United Kingdom* again becomes practicable.

Chapter XVII. Indemnity and Expenses

Indemnification of Council members and others

69 Every member of the *Council*, the *head of staff* and every auditor of the Institute shall be indemnified by the Institute against all losses and expenses incurred by him in or about the discharge of his duties, except such as happen from his own respective wilful default or, in the case of an auditor, his own negligence or wilful default or that of any partner or employee of such auditor.

Council members and others not to be liable for losses

70 Neither any member of the *Council* nor the *head of staff* nor any auditor of the Institute shall be liable for any other member of the *Council* or the *head of staff* or any auditor of the Institute, or for joining in any receipt or document, or for any act of conformity, or for any loss or expense happening to the Institute, unless the same happen from his own wilful default, or in the case of an auditor from his own negligence or wilful default or that of any partner or employee of such auditor.

Expenses of members of Council

71 The *Council* may pay to any *member* who is required to attend a meeting of the *Council* or of any *Committee* or *Sub-committee* and to any member of the *Council* who is required to attend a meeting of the *Council* or of any *Committee* or *Sub-committee* or of the Institute and to any *member* or

member of the *Council* who is required to attend any other meeting for the purposes of the Institute a reasonable subsistence allowance on each occasion of attending such a meeting and reasonable travel costs to and from the place of the meeting. The *Council* may also pay the expenses reasonably and properly incurred by the President, Deputy-President, Vice-President or any member of the *Council* when acting in an official capacity on behalf of the Institute.

Section 2

Bye-laws, regulations and guidance relating to discipline

DISCIPLINARY BYE-LAWS

of the

Institute of Chartered Accountants

in England and Wales

Arrangement of Bye-Laws

Bye-law

Bye-law

DISCIPLINARY BYE-LAWS

of the Institute of Chartered Accountants

in England and Wales

Preliminary

Citation, interpretation and service of documents

1(1) These bye-laws may be cited as the Disciplinary Bye-laws of the Institute of Chartered Accountants in England and Wales.

(2) In these bye-laws, unless the context otherwise requires –

"AADB" means the Accountancy and Actuarial Discipline Board, being the body which has the responsibility for operating the AADB Scheme and references to the AADB shall, unless inconsistent with the subject or context, be deemed to include references to the managing body of the Accountancy and Actuarial Discipline Board;

"AADB Scheme" means the Scheme made and adopted by the managing board of The Accountancy Investigation and Discipline Board Limited (now the AADB), in which the Institute participates pursuant to Article 1(b)(viiA) of the Supplemental Charter;

"the Appeal Committee" means the Appeal Committee appointed under the Schedule to these bye-laws;

"approved training" means practical training and experience approved by the Council and obtained at or from an office which is for the time being authorised under regulations to train provisional members;

"authorised firm" means a firm regulated by the Institute in its capacity as –

(a) a recognised professional body under the Financial Services Act 1986, or
(b) as a designated professional body under the Financial Services and Markets Act 2000, or
(c) in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations;

"the bye-laws" means all the bye-laws of the Institute for the time being in force;

"complainant", except in bye-laws 24A and 34B, in relation to a complaint or formal complaint, means any of the following persons –

(a) the person who under bye-law 9(1) brought to the attention of, or reported to, the head of staff any of the facts and matters which constitute the complaint;
(b) any person, who, before the Investigation Committee has under bye-law 15 decided whether in its opinion the complaint discloses a prima facie case, has made written representations to the head of staff on any of those facts and matters; and
(c) if the person mentioned in paragraph (a) of this definition, being an individual, dies before the complaint has been finally disposed of under these bye-laws, his personal representative.

"complaint", except in bye-law 11 or where the reference is to a previously mentioned formal complaint, has the meaning given by bye-law 9(3);

"Council" means the Council of the Institute;

"defendant" means a member, firm or provisional member against whom a formal complaint has been preferred to the Disciplinary Committee;

"director" (save in paragraph (a) of the definition of "member firm" below) includes a member of a limited liability partnership;

"Disciplinary Committee" means the Disciplinary Committee appointed under the Schedule to these bye-laws;

"disciplinary record", in relation to any person or body, comprises all orders, findings, fines and penalties to which he has at any time been subject, being orders, findings, fines or penalties of any description prescribed for the purposes of this definition by regulations;

"Executive Committee" means the Executive Committee appointed under the JDS;

"firm" means –

(a) a body corporate or partnership including a limited liability partnership which is wholly or partly composed of members engaged in public practice or was so composed at, or at any time since, the relevant time;
(b) a member who is engaged in public practice as a sole practitioner or was so engaged at, or at any time since, the relevant time; or
(c) a person or body who was a regulated firm at the relevant time;

and in this definition, "the relevant time" means the time relevant to any facts or matters which under bye-law 9 have been reported to the head of staff, or have been brought or come to his attention, as indicating a possible liability to disciplinary action;

"formal complaint" means a complaint preferred by the Investigation Committee to the Disciplinary Committee under bye-law 15, and in relation to a tribunal means the formal complaint which the tribunal was appointed to hear;

"head of staff" means the person appointed under Principal Bye-law 50;

"hearing", in relation to a formal complaint or an appeal, includes the making of any finding or order on or in connection with the complaint or appeal, and also includes a re-hearing;

"Insolvency Licence" means an authorisation issued by the Institute to a member pursuant to the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989 (as from time to time amended) as a precondition to the member acting as an insolvency practitioner;

"Investigation Committee" means the Investigation Committee appointed under the Schedule to these bye-laws;

"JDS" means the Scheme established with other accountancy bodies pursuant to sub-clause 1(b)(viiiA) of the Supplemental Charter (power to establish a disciplinary scheme);

"member" means a member of the Institute, and "membership" shall be construed accordingly;

"member firm" means –

(a) a member engaged in public practice as a sole practitioner; or
(b) a partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or
(c) a limited liability partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or
(d) any body corporate (other than a limited liability partnership) engaged in public practice of which:
    (i) 50 per cent or more of the directors are members; and
    (ii) more than 50 per cent of the nominal value of the voting shares is held by members; and
    (iii) more than 50 per cent of the aggregate in nominal value of the voting and non-voting shares is held by members;

"notice" means notice in writing;

"order" includes a finding;

"panel" (except in bye-law 26) means a panel appointed under bye-law 27(1) to hear an appeal;

"practice" and "public practice" mean practice as a public accountant in any part of the world otherwise than as an employee, subject however to any regulations made pursuant to bye-law 51(b) of the Principal Bye-laws and to any other guidance issued by the Council;

"practising certificate" means a certificate issued to a member authorising him to engage in public practice;

"prima facie case" means a prima facie case for disciplinary action under these bye-laws;

"the Principal Bye-laws" means the Principal Bye-laws of the Institute;

"principal" means a sole practitioner, a partner in a partnership or a director of a body corporate;

"provisional member" means a person –

(a) who is serving under a training contract; or
(b) who has trained under such contract and is eligible either to sit for the professional examinations of the Institute or, having successfully sat those examinations, to apply for membership,

and for the purposes only of this definition an order under bye-law 22(7)(d) shall be disregarded;

"registered address" means –

(a) in the case of a member in practice or a firm, the place of business registered by the member or firm with the Institute or, if more than one place of business is so registered, the one registered as the principal place of business;
(b) in the case of a member not in practice or a provisional member, the address registered by him with the Institute;
(c) in the case of a former member, former member firm, former regulated firm or former firm the latest address registered with or notified to the Institute by the person or body in question.

"registered auditor" means a firm registered as a registered auditor at the instance of the Institute (in its capacity as a recognised supervisory body under the Companies Act 1989 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations);

"regulated firm" means an authorised firm or a registered auditor;

"regulations" means regulations made by the Council or any committee or sub-committee under clause 16 of the Supplemental Charter (power to make regulations) and for the time being in force;

"representative", in relation to the defendant in any proceedings under these bye-laws, means –

(a) a barrister, solicitor or member appointed by him to represent him in those proceedings; or
(b) any person permitted under regulations to represent him in those proceedings,

and "represented" shall be construed accordingly;

"Reviewer of Complaints" means a person appointed as a Reviewer of Complaints under paragraph 5 of the Schedule to these bye-laws;

"training contract" means a contract of approved training registered with the Institute and in such form and containing such provisions as may be prescribed in regulations, made between a candidate for membership and the person or firm at or from whose office the approved training is to be given;

"tribunal" means a tribunal appointed under bye-law 19(1) to hear a formal complaint;

"United Kingdom" includes the Channel Islands and the Isle of Man.

(3) The Interpretation Act 1978 applies to these bye-laws in the same way as it applies to an enactment.

(4) In these bye-laws, unless the context otherwise requires –

(a) words importing the masculine gender include the neuter (as well as, by virtue of the Interpretation Act 1978 as applied by paragraph (3), the feminine);
(b) words importing the neuter gender include both the masculine and the feminine;
(c) any reference to a numbered bye-law is a reference to the bye-law so numbered among these bye-laws;
(d) any reference within any of these bye-laws to a numbered paragraph is a reference to the paragraph so numbered of that bye-law.

(5) In these bye-laws –

(a) references to the date of an order made by the Investigation Committee under bye-law 16 (consent orders) or bye-law 16A (cautions) refer to the date on which the order was signed on behalf of the Committee;
(b) references to the date of an order made by a tribunal or panel refer to the date on which the order was announced at the hearing of the formal complaint or appeal in question;
(c) references to the date of an order made by the Investigation Committee under bye-law 30 (intervention orders) refer to the date on which the Committee decided to make the order.

(6) Any notice or other document required to be served for the purposes of these bye-laws on a member, a firm, a provisional member or a defendant may be sent by pre-paid post addressed to him at his registered address or, if none, at his last known or usual place of residence or business.

(7) Any notice or other document required to be served on the head of staff for the purposes of these bye-laws may be sent by pre-paid post addressed to the head of staff at the Institute's principal London address for the time being or such other address of the Institute as may be prescribed by regulations.

(8) Service of a document sent as mentioned in paragraphs (6) or (7) shall be deemed to have been effected at the end of 48 hours from the time of posting; and in proving that a document was so sent it shall be sufficient to prove that the cover containing it was properly addressed, stamped and posted.

Constitution of Investigation, Disciplinary and Appeal Committees, and appointment of Reviewers of Complaints

2 The Schedule to these bye-laws shall have effect with respect to the constitution of the Investigation, Disciplinary and Appeal Committees and the appointment of Reviewers of Complaints.

Liability to disciplinary action

Application of AADB Scheme and the JDS

3 The AADB Scheme and the JDS shall apply to all members and firms.

Liability of members and provisional members to disciplinary action

4(1) A member or provisional member shall be liable to disciplinary action under these bye-laws in any of the following cases, whether or not he was a member or provisional member at the time of the occurrence giving rise to that liability –

(a) if in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy;
(b) if he has performed his professional work or the duties of his employment, or conducted his practice, inefficiently or incompetently to such an extent, or on such a number of occasions, as to bring discredit on himself, the Institute or the profession of accountancy;
(c) if he has committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them;

(d) if he has failed to comply with any order of the Investigation, Disciplinary or Appeal Committee, or of any tribunal or panel, otherwise than by failing to pay any fine or costs;
(e) if any of the circumstances set out in paragraph (2) exist with respect to him.

(2) Those circumstances are –

(a) that he has failed to satisfy a judgement debt;
(b) that he has, individually or as a partner, made an assignment by reason of insolvency of some or all of his assets for the benefit of his creditors;
(c) that he has made any arrangement or entered into a composition with his creditors to satisfy his debts, whether by resolution of his creditors or court order or under any deed or other document by reason of insolvency;
(d) that an interim order has been made in respect of him under section 252 of the Insolvency Act 1986, or that he has entered into an individual voluntary arrangement under that Act;
(e) that he is a partner in a firm which –
(i) has had a winding-up order made against it on grounds of insolvency; or
(ii) has made a proposal to enter into a voluntary arrangement on grounds of insolvency, or has entered into such a voluntary arrangement; or
(iii) has had an administration order made against it on grounds of insolvency; or
(iv) has had a receiver appointed by a creditor or by a court on the application of a creditor;
(f) that he is a director of a body corporate engaged in public practice which –
(i) has been the subject of an effective resolution passed by the shareholders (or in the case of a limited liability partnership, by its members) for it to be wound up or has had a winding-up order made against it on grounds of insolvency; or
(ii) has made a proposal to enter into a voluntary arrangement on grounds of insolvency, or has entered into such a voluntary arrangement; or
(iii) has had an administration order made against it on grounds of insolvency; or
(iv) has had a receiver appointed by a creditor or by a court on the application of a creditor.

Liability of member firms to disciplinary action

5(1) A member firm shall be liable to disciplinary action under these bye-laws in any of the following cases –

(a) if in the course of carrying out professional work or otherwise it has committed any act or default likely to bring discredit on itself, the Institute or the profession of accountancy;
(b) if it has performed its professional work, or conducted its practice, inefficiently or incompetently to such an extent, or on such a number of occasions, as to bring discredit on itself, the Institute or the profession of accountancy;
(c) if it has committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them;
(d) if it has failed to comply with any order of the Investigation, Disciplinary or Appeal Committee, or of any tribunal or panel, otherwise than by failing to pay any fine or costs;
(e) if it is a partnership to which any of heads (i) to (iv) of bye-law 4(2)(e) applies;
(f) if it is a body corporate to which any of heads (i) to (iv) of bye-law 4(2)(f) applies.

In this paragraph "regulations" does not include any such regulations as are mentioned in bye-law 6(1)(a) or 6(2)(a).

(2) It shall be a defence to a complaint arising by virtue of this bye-law for a member firm to prove that it had taken all such steps as it could reasonably have been expected to take (including the making of appropriate rules and arrangements) to prevent acts or defaults of the kind which are the subject of the complaint.

(3) The fact that one or more partners have joined or left a member firm since the time of the acts or defaults which are the subject of disciplinary action shall not affect the firm's liability to such action unless the Investigation Committee is satisfied that, as currently constituted, the firm has substantially lost its identity with the firm as constituted at that time; but if the member firm continues to have the same or substantially the same name, that fact shall be evidence that such identity has not been lost.

(4) For the purposes of this bye-law a firm which describes itself as "Chartered Accountants" shall be presumed to be a member firm unless it proves that it is not.

Liability of regulated firms to disciplinary action

6(1) An authorised firm shall be liable to disciplinary action under these bye-laws in any of the following cases –

(a) if it has committed a breach of any regulations issued by the Institute in its capacity as a recognised professional body under the Financial Services Act 1986 or in its capacity as a designated professional body under the Financial Services and Markets Act

2000 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations;

(b) if it has failed to comply with a statement of principle issued by the Financial Services Authority under section 47A of the Financial Services Act 1986;

(c) if it has failed to comply with a notice served by the Investigation Committee under bye-law 13 within the time allowed by or under that bye-law;

(d) if it has failed to comply with any order of the Investigation, Disciplinary or Appeal Committee, or of any tribunal or panel, otherwise than by failing to pay any fine or costs.

(2) A registered auditor shall be liable to disciplinary action under these bye-laws in any of the following cases –

(a) if it has committed a breach of any regulations issued by the Institute in its capacity as a recognised supervisory body under the Companies Act 1989 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations;

(b) if it has failed to comply with a notice served by the Investigation Committee under bye-law 13 within the time allowed by or under that bye-law;

(c) if it has failed to comply with any order of the Investigation, Disciplinary or Appeal Committee, or of any tribunal or panel, otherwise than by failing to pay any fine or costs.

Liability of former members, member firms, regulated firms and firms to disciplinary action

6A(1) A person or body who, while he was a member, member firm, regulated firm or firm, became liable to disciplinary action under these bye-laws, the AADB Scheme or the JDS shall continue to be subject to these bye-laws after he has ceased to be a member, member firm, regulated firm or firm, as the case may be, as if he had not so ceased; and references in these bye-laws to members, member firms, regulated firms and firms shall be construed accordingly so far as may be necessary to give effect to this paragraph.

(2) Without prejudice to the generality of paragraph (1) above, the reference in paragraph (1) of bye-law 9 (complaints) to facts or matters indicating that a member or a firm may have become liable to disciplinary action under these bye-laws, the AADB Scheme or the JDS includes facts or matters indicating that a former member or former firm may have become so liable.

(3) Bye-law 13 (power of Investigation Committee to call for information etc) shall extend to any former member, former member firm or former regulated firm, and a breach of bye-law 13 shall render the former

member, former member firm or former regulated firm liable to disciplinary action by virtue of this bye-law.

(4) Liability to disciplinary action or other action by virtue of this bye-law –

(a) subject to paragraph (3), extends only to facts and matters which occurred while the person or body concerned was actually a member, member firm, regulated firm or firm, as the case may be; and

(b) does not extend to any facts or matters which occurred before 7 October 1999 unless (for the avoidance of doubt) such facts or matters, at the time when they occurred, rendered the person or body concerned liable to disciplinary action under bye-law 6(1)(a), or bye-law 6(2)(a) (or earlier regulations covering the same subject matter as those bye-laws, in conjunction with any bye-laws) or under any regulations issued by the Institute in its capacity as a recognised professional body under the Insolvency Act 1986.

Proof of certain matters

7(1) The fact that a member, member firm or provisional member has, before a court of competent jurisdiction, pleaded guilty to or been found guilty of an indictable offence (or has, before such a court, outside England and Wales, pleaded guilty to or been found guilty of an offence corresponding to one which is indictable in England and Wales) shall for the purposes of these bye-laws be conclusive evidence of the commission by him of such an act or default as is mentioned in bye-law 4(1)(a) or 5(1)(a), as the case may be.

(2) The fact that a member, member firm or provisional member –

(a) has been the subject of an adverse finding (not set aside on appeal or otherwise) in respect of his conduct, being a finding in proceedings before a body which is for the time being listed in paragraph (5) or before a regulatory body performing its functions under the Financial Services Act 1986, the Financial Services and Markets Act 2000, the Insolvency Act 1986 or the Companies Act 1989; or

(b) has had a disqualification order made against him or has given a disqualification undertaking which has been accepted by the Secretary of State under the Company Directors Disqualification Act 1986,

shall, for the purposes of these bye-laws, be conclusive evidence of the commission by him of such an act or default as is mentioned in bye-law 4(1)(a) or 5(1)(a), as the case may be.

(3) A finding of fact –

(a) in any report of an inspector appointed under the Companies Act 1985;

(b) in any civil or criminal proceedings before a court of competent jurisdiction in the United Kingdom or elsewhere;
(c) in any proceedings before, or report by, any of the bodies mentioned in paragraph (4); or
(d) in any proceedings as a result of which an accountant was notified by or on behalf of the Council of the Law Society that he was not qualified to give an accountant's report within the meaning of section 34 (accountants' reports), of the Solicitors Act 1974,

shall for the purposes of these bye-laws be prima facie evidence of the facts found.

(4) The bodies referred to in paragraph (3)(c) are –

(a) The Financial Services Authority;
(b) The Financial Services Tribunal or the Financial Services and Markets Tribunal;
(c) any recognised self-regulating organisation or recognised professional body within the meaning of the Financial Services Act 1986 or any designated professional body within the meaning of the Financial Services and Markets Act 2000;
(d) The Insolvency Practitioners Board;
(e) any recognised professional body or competent authority within the meaning of the Insolvency Act 1986;
(f) any recognised supervisory body within the meaning of the Companies Act 1989;
(g) any body which is for the time being listed in paragraph (5).

(5) The bodies referred to in paragraph (2)(a) and (4)(g) are –

(a) The Institute of Chartered Accountants of Scotland;
(b) The Institute of Chartered Accountants in Ireland;
(c) The Association of Chartered Certified Accountants;
(d) The Chartered Institute of Management Accountants;
(e) The Chartered Institute of Public Finance and Accountancy.

(6) The Council may at any time by regulations add any accountancy body (other than the Institute) to, or remove any body from, the list in paragraph (5).

(7) Nothing in paragraphs (3) to (6) shall affect the evidential status of any report or other document not falling within paragraph (3).

Relevance of codes of practice, regulations etc.

8(1) In discharging his or its functions under these bye-laws a person or body mentioned in paragraph (2) may have regard to all relevant matters, including any code of practice (whether relating to the ethical, the technical or any other aspect of practice), and any regulations or

guidance, affecting (as the case may be) the firm, member or provisional member concerned.

(2) Those persons and bodies are –

(a) the head of staff;
(b) a Reviewer of Complaints;
(c) the Investigation Committee;
(d) a tribunal;
(e) a panel.

Complaints

Complaints

9(1) Any person may bring to the attention of the head of staff any facts or matters indicating that a member, a firm or a provisional member may have become liable to disciplinary action under these bye-laws or the AADB Scheme or the JDS; and it is the duty of every member, where it is in the public interest for him to do so, to report to the head of staff any such facts or matters of which he is aware.

(2) In determining whether it is in the public interest for a member to report any such facts or matters under paragraph (1) regard shall be had to such guidance as may from time to time be issued by the Council.

(3) In these bye-laws any facts or matters which –

(a) have come to the attention of the head of staff under paragraph (1) or otherwise; and
(b) indicate that a member, a firm or a provisional member may have become liable to disciplinary action under these bye-laws or the AADB Scheme or the JDS,

are referred to as a "complaint".

(4) Any dispute relating to –

(a) a decision of the head of staff as to whether any facts or matters fall within paragraph (3)(b); or
(b) an opinion formed by him as mentioned in paragraph (1), (2), (3)(a) or 3(b) of bye-law 10,

shall be referred to and determined by the Investigation Committee.

Processing of complaints by head of staff

10(1) If, as regards any complaint, the head of staff is of the opinion that it is to be dealt with by the AADB, he shall lay it before the Investigation Committee.

(2) If, in the case of any complaint not laid before the Investigation Committee under paragraph (1), the head of staff is of the opinion that it is appropriate to do so, he shall attempt to resolve the complaint by conciliation or in some other way not involving disciplinary action under these bye-laws; and if the attempt is successful, he shall take no further action with respect to the complaint.

(3) Where an attempt under paragraph (2) is made but fails, the head of staff shall review the complaint in the light of any further relevant facts or matters which have come to his attention since he initiated the attempt; and –

(a) if as a result of that review he remains of the opinion that the member, the firm, or the provisional member concerned may have become liable to disciplinary action under these bye-laws, he shall proceed to investigate the complaint;
(b) if as a result of that review he is no longer of that opinion, he shall take no further action with respect to the complaint.

(4) If, as regards any complaint not laid before the Investigation Committee under paragraph (1), the head of staff does not think it appropriate to make an attempt under paragraph (2), he shall proceed to investigate the complaint.

(5) If, having investigated a complaint under paragraph (3) or (4), the head of staff is no longer of the opinion that the member, the firm or the provisional member concerned may have become liable to disciplinary action under these bye-laws, he shall take no further action with respect to the complaint unless the complainant insists on its being laid before the Investigation Committee; but if the head of staff remains of that opinion or the complainant so insists, the head of staff shall lay the complaint before the Investigation Committee.

Investigation of complaints by firms themselves

11(1) Every firm shall ensure that all new clients are informed in writing of the name of the principal to be contacted in the event of their wishing to complain about the firm's services, and of their right to complain to the Institute.

(2) If a firm receives a complaint concerning any services it has provided or failed to provide to a client or former client, it shall forthwith cause the complaint to be investigated by a principal.

(3) If, as a result of an investigation under paragraph (2), the firm is of the opinion that the complaint is wholly or partly justified, it shall take whatever steps are appropriate to resolve the complaint, whether by way of remedial work, apology, the provision of information, the return of books or documents, the reduction or repayment of fees, or otherwise.

(4) If the head of staff receives a complaint against a firm, not being a complaint to which paragraph (1) of bye-law 10 applies, he may, if it appears to him appropriate to do so, refer it to the firm for investigation under paragraph (2) of this bye-law instead of dealing with it as provided in paragraphs (2) to (5) of bye-law 10.

(5) The fact that a complaint is being investigated under this bye-law shall not affect the duty of members under bye-law 9(1) to report to the head of staff, where it is in the public interest for them to do so, any facts or matters indicating that a member, a firm or a provisional member may have become liable to disciplinary action.

(6) The definition of "complaint" in bye-law 9(3) does not apply for the purposes of this bye-law.

Complaints laid before Investigation Committee

Initial consideration of complaints so laid

12(1) This bye-law applies where a complaint is laid before the Investigation Committee under bye-law 10.

(2) The Investigation Committee shall first of all decide whether it considers that, having regard to all the circumstances of the matter, it is appropriate that the complaint is referred to the AADB to be dealt with under the AADB Scheme.

(3) If the Investigation Committee does not refer a complaint to the AADB under bye-law 12A(1), it shall either –

(a) refer the complaint back to the head of staff to be processed by him under paragraphs (2) to (5) of bye-law 10 as if he had not laid it before the Investigation Committee under paragraph (1) of that bye-law; or
(b) proceed to deal with it under bye-law 15.

Referral of complaints to or from the AADB

12A(1) If the Investigation Committee decides, in accordance with bye-law 12(2), that it is appropriate for a complaint to be referred to the AADB, it shall make a written referral of the complaint to the AADB.

(2) If the AADB declines a referral of a fact or matter to it under the AADB Scheme, the Investigation Committee shall either –

(a) refer the fact or matter back to the head of staff to be processed by him under paragraphs (2) to (5) of bye-law 10; or
(b) proceed to deal with the fact or matter under bye-law 15.

(3) If following an enquiry under the AADB Scheme, the AADB refers the fact or matter back to the Institute, the Investigation Committee shall either –

(a) refer the fact or matter back to the head of staff to be processed by him under paragraphs (2) to (5) of bye-law 10; or
(b) proceed to deal with the fact or matter under bye-law 15.

Assumption of matters by the AADB

12B If the head of staff receives notice in writing from the AADB requiring that a fact or matter be dealt with under the AADB Scheme, then with immediate effect –

(a) the AADB shall become responsible for the investigation of the fact or matter as if it had been referred under bye-law 12A(1); and
(b) the head of staff and the Investigation Committee (or if, at the relevant time, a formal complaint has been preferred under bye-law 15(2)(a), the Disciplinary Committee) shall cease to have any responsibility for it.

Power of Investigation Committee to call for information, etc.

13(1) The Investigation Committee shall have power by notice served on any member, member firm, regulated firm or provisional member to call for such information, such explanations and such books, records and documents as the Committee considers necessary to enable it or the head of staff to perform its or his functions under these bye-laws.

(2) It shall be the duty of any person or body on whom a notice is served under paragraph (1) to comply with it within the period of fourteen days beginning with the date of service or such longer period as the Investigation Committee may allow.

Power of Investigation Committee to require advice to be obtained and followed

14(1) If the Investigation Committee is of the opinion that a complaint laid before it indicates that the practice of any firm may have been conducted inefficiently, it may require any member or member firm concerned (at his own expense) to obtain advice from such source as the Committee may specify and to implement the advice obtained.

(2) In any disciplinary proceedings for an alleged failure to comply with a requirement imposed under paragraph (1), it shall be a defence for the member or member firm concerned to prove that he had good and sufficient reasons for not complying with the requirement.

(3) The power conferred on the Investigation Committee by this bye-law is without prejudice to any power exercisable by it apart from this bye-law.

Complaints not referred to or referred back from AADB Scheme

15(1) Where a complaint laid before the Investigation Committee is –

(a) not referred to the AADB under bye-law 12(A)(1) and not referred back to the head of staff under bye-law 12(3)(a); or
(b) declined by the AADB under bye-law 12A(2) and not referred back to the head of staff under bye-law 12A(2)(a); or
(c) referred back by the AADB to the Institute under bye-law 12A(3) and not referred back to the head of staff under bye-law 12A(3)(a),

the Investigation Committee shall consider whether or not the complaint discloses a prima facie case and, if it finds that it does not, shall dismiss the complaint.

(2) If the Investigation Committee finds that the complaint discloses a prima facie case it may –

(a) prefer the whole or part of the complaint to the Disciplinary Committee as a formal complaint; or
(b) deal with the whole or part of it under bye-law 16 (consent orders); or
(bb) deal with the whole or part of it under bye-law 16A (cautions); or
(c) order that further consideration of the whole or part of the complaint be deferred, on such terms and conditions as it considers appropriate, for either or both of the following purposes, namely –
(i) to enable the Investigation Committee to obtain such information, such explanations and such books, records and documents as it considers necessary to perform its functions under this bye-law; or
(ii) if the subject of the complaint is the existence of any of the circumstances set out in sub-paragraphs (b) to (f) of bye-law 4(2), to enable the Committee to monitor developments arising out of those circumstances; or
(d) order that no further action be taken on the complaint or on any specified part of it.

(3) The conditions on which an order under paragraph (2)(c) may be made include the giving of written undertakings for the protection of client interests.

(4) Before taking any decision under the preceding provisions of this bye-law the Investigation Committee –

(a) unless satisfied that the member, member firm, regulated firm or provisional member concerned has been given an opportunity to make written representations to the Committee, shall give him such an opportunity; and

(b) may, if it thinks fit, give him or his representative an opportunity of being heard before the Committee (but shall not be under a duty to do so).

(5) In deciding whether to prefer a complaint ("the current complaint") to the Disciplinary Committee, the Investigation Committee may take into account any facts or matters –

(a) which were the subject matter of any complaint considered by the Investigation Committee on any previous occasion in relation to the member, member firm, regulated firm or provisional member concerned;
(b) in respect of which the Committee on that occasion found that a prima facie case was disclosed; but
(c) in respect of which no formal complaint was preferred to the Disciplinary Committee and no order was made under bye-law 16(2) (consent orders) or bye-law 16A (cautions);

and if the Investigation Committee decides to prefer the whole or part of the current complaint to the Disciplinary Committee as a formal complaint, it may also prefer to that Committee any formal complaint which it could have preferred to it on that previous occasion against the member, member firm, regulated firm or provisional member in question and, if there were two or more such previous occasions, may prefer a separate formal complaint against him in respect of each of some or all of them.

(6) If the Investigation Committee prefers a formal complaint to the Disciplinary Committee, it shall send to the Disciplinary Committee and to the defendant a summary of the material facts and matters which were considered by the Investigation Committee together with –

(a) a summary or copy of any written representations made to it by the defendant, and
(b) if the defendant has appeared before it in person or by a representative, a summary of any oral representations made to it.

(7) If the Investigation Committee finds that a complaint discloses a prima facie case but orders that no further action be taken on it, it shall serve a notice to that effect on the member, member firm, regulated firm or provisional member concerned; and if within the period of 28 days beginning with the date of service of that notice the member, member firm, regulated firm or provisional member concerned serves notice on the head of staff that he is unwilling to accept the finding that a prima facie case exists, then, unless on reconsideration the Committee finds that no prima facie case exists, it shall prefer the whole or part of the complaint to the Disciplinary Committee under paragraph (2)(a).

Consent orders

16(1) If –

(a) under bye-law 15 the Investigation Committee is of the opinion that a complaint discloses a prima facie case; and
(b) after considering all the relevant circumstances (including the past disciplinary record, if any, of the member, member firm, regulated firm or provisional member concerned) the Committee is of the opinion that the complaint is one which it is appropriate to deal with under this bye-law, the following provisions of this bye-law shall apply.

(2) The Investigation Committee may with the agreement of the member, member firm, regulated firm or provisional member concerned make –

(a) any one or more of the orders which, on finding a formal complaint proved, the Disciplinary Committee would have power to make against the defendant by virtue of –
(i) bye-law 22(3) (f), (g) or (h); or
(ii) bye-law 22(4) (b), (c) or (d); or
(iii) bye-law 22(5)(b), (c) or (d); or
(iv) bye-law 22(6)(b), (c) or (d); or
(v) bye-law 22(7)(f) or (g),
according to whether the person concerned is a member, a member firm, an authorised firm, a registered auditor or a provisional member;
(b) if the person concerned is a member, member firm or regulated firm, any order which, on finding a formal complaint proved, the Disciplinary Committee would have power to make against the defendant under bye-law 23, 24 or 24A;
(c) an order that the member, member firm, regulated firm or provisional member concerned shall pay to the Institute a sum by way of costs.

(3) Before making any order under paragraph (2) the Investigation Committee shall serve on the member, member firm, regulated firm or provisional member concerned a notice describing the action which it proposes to take if the member, member firm, regulated firm or provisional member agrees, and specifying the order which it would make in that event.

(4) A notice under paragraph (3) must –

(a) be in, or substantially in, such form as may be prescribed by regulations made by the Investigation Committee;
(b) explain the extent to which the finding of the Investigation Committee would be communicated to others;
(c) state that, if the member, member firm, regulated firm or provisional member concerned does not agree in writing to the

proposed action within a stated period, a formal complaint may be preferred to the Disciplinary Committee which, in the event of its finding that complaint proved in whole or in part, would have available to it the complete range of orders mentioned in bye-laws 22, 23, 24 and 24A.

(5) If within the period stated in the notice the member, member firm, regulated firm or provisional member agrees in writing to the Investigation Committee proceeding as proposed in the notice, the Committee shall make the order specified in the notice unless, having regard to any further information which it has received, it is of the opinion –

(a) that a lesser or no penalty is appropriate, in which case it shall impose a lesser or no penalty, as the case may be;
(b) that a smaller or no sum is appropriate by way of costs, in which case it shall order a smaller sum to be paid by way of costs or make no order as to costs, as the case may be; or
(c) that no prima facie case exists, in which case it shall so find.

(6) If the member, member firm, regulated firm or provisional member does not within the period stated in the notice agree in writing to the Investigation Committee proceeding as proposed in the notice, the Committee shall prefer the complaint to the Disciplinary Committee under bye-law 15(2)(a) unless, having regard to any further information which it has received, it is of the opinion that no prima facie case exists, in which case it shall so find.

(7) Paragraphs (1), (4) and (5) of bye-law 32 (time limits for payment of fines) shall apply in relation to any fine imposed by an order made under paragraph (2)(a) or (b) of this bye-law as they apply in relation to a fine imposed by an order made by a tribunal; and paragraphs (2), (8) and (9) of bye-law 33 (time limits for payment of costs) shall apply in relation to any costs payable by virtue of an order made under paragraph (2)(c) of this bye-law as they apply in relation to costs payable by virtue of an order made under bye-law 33(1).

(8) Where any provision of bye-law 32 or 33 applies by virtue of paragraph (7) of this bye-law, it shall do so with the modification that any reference to the date of the order is to be taken to refer to the date of the relevant order under this bye-law.

(9) Where the Investigation Committee makes an order under this bye-law, it shall cause to be published, as soon as practicable and in such a manner as it thinks fit, such a report as it thinks fit of its proceedings under this bye-law with respect to the complaint.

(10) Except in so far as the Investigation Committee in its absolute discretion otherwise directs, a report published under paragraph (9) shall –

(a) state the name of the person or body against whom the order was made; and
(b) describe the order or orders made against him and state that they were made with his agreement,

but need not include the name of any other person or body concerned in the complaint.

Cautions

16A(1) If –

(a) under bye-law 15 the Investigation Committee finds that a complaint discloses a prima facie case; and
(b) after considering all the relevant circumstances (including the past disciplinary record, if any, of the member, member firm, regulated firm or provisional member concerned) the Committee is of the opinion that the complaint is one which it is appropriate to deal with by way of a caution under this bye-law (with or without an order to pay costs),

the following provisions of this bye-law shall apply.

(2) The Investigation Committee shall serve on the member, member firm, regulated firm or provisional member concerned ("the subject of the complaint") a notice –

(a) stating that the Committee finds that the complaint discloses a prima facie case; and
(b) informing the subject of the complaint that the Committee proposes to make an order under this bye-law –
(i) that he be cautioned; or
(ii) that he be cautioned and pay to the Institute a fixed sum by way of costs,
as the case may be.

(3) A notice under paragraph (2) must be in, or substantially in, such form as may be prescribed by regulations made by the Investigation Committee and must explain the extent to which, in accordance with regulations, the proposed order, if made, would be communicated to others; and in that paragraph "a fixed sum" means the fixed sum for the time being so prescribed for such costs.

(4) If within the period of 28 days beginning with the date of service of a notice under paragraph (2) above the subject of the complaint serves notice on the head of staff that he is unwilling to accept the finding that a prima facie case exists, then, unless on reconsideration the Committee finds that no prima facie case exists, it shall prefer the whole or part of the complaint to the Disciplinary Committee under bye-law 15(2)(a).

(5) If no notice under paragraph (4) is served on the head of staff within that period, the Investigation Committee shall make the order proposed in the notice served under paragraph (2).

(6) Any costs ordered under this bye-law shall be paid within the period of 30 days beginning with the date of the order; and bye-law 33(8) (latest time for payment of costs) shall apply to costs payable to the Institute under this bye-law as it applies to costs payable under bye-law 33, but with the omission of the words "or instalments of costs" and "or under".

(7) Except with the consent of the subject of the complaint in question, this bye-law shall not apply to a complaint involving facts or matters which occurred before 7 October 1999.

Complainant's right to review

Review of finding of no prima facie case

17(1) This bye-law applies where, under bye-law 15, 16 or 16A, the Investigation Committee finds that a complaint laid before it does not disclose a prima facie case against the member, member firm, regulated firm or provisional member concerned.

(2) A complainant may apply in writing to the head of staff for a review of the finding, and the head of staff shall refer every such application to a Reviewer of Complaints ("the Reviewer") who, subject to paragraph (3), shall consider the application.

(3) The Reviewer shall not consider the application if it was received by the head of staff after the end of the period of six months beginning with the date of the finding unless –

(a) the Reviewer is satisfied that the complainant could not reasonably have been expected to make the application within that period; or

(b) there is, in the opinion of the Reviewer, fresh evidence justifying consideration of the application.

(4) If, after considering the application, the Reviewer is of the opinion that one or more of the circumstances mentioned in paragraph (5) apply, he shall remit the application to the Investigation Committee with a recommendation that the whole or part of the complaint be reconsidered.

(5) Those circumstances are that –

(a) fresh evidence of a material nature has been received since the date of the finding;

(b) there has been a failure on the part of the head of staff or the Investigation Committee to follow the procedure for processing

or consideration of complaints laid down in these bye-laws or any regulations, and the Committee's consideration of the complaint has been prejudiced by that failure;

(c) there is reason to suspect a lack of independence on the part of any member of the Investigation Committee who took part in the consideration of the complaint, and the Committee's consideration of the complaint has been prejudiced by that lack;

(d) the finding was not one which could reasonably have been arrived at by the Investigation Committee upon due consideration of the facts and matters before it.

(6) If, after considering the application, the Reviewer is of the opinion that none of the circumstances mentioned in paragraph (5) applies, he shall so inform the complainant and the Investigation Committee and give them in writing his reasons for being of that opinion.

(7) The Reviewer may request the head of staff to provide him with such technical assistance as the Reviewer considers necessary to enable him to perform his functions under this bye-law; and the head of staff shall comply with any reasonable request made under this paragraph.

(8) The Reviewer may require the Investigation Committee to exercise its powers under bye-law 13 in order to obtain such information, such explanations and such books, records and documents as he considers necessary to enable him to perform his functions under this bye-law; and for this purpose the reference in that bye-law to the Committee's functions shall be taken to include those of the Reviewer.

Further investigation of complaint after review

18(1) If under bye-law 17(4) the Reviewer remits the application to the Investigation Committee with a recommendation that the whole or part of the complaint be reconsidered, the complaint or that part of it shall be treated by the Committee as if it had then been newly laid before it by the head of staff, except that –

(a) the Committee may have regard both to the information and any representations previously available to it in relation to the complaint and to any information or representations (whether written or oral) received by it since the date of the finding mentioned in bye-law 17(1); and

(b) the Committee shall not take any decision on the complaint under paragraphs (1) to (3) of bye-law 15 until the member, member firm, regulated firm or provisional member concerned has been given a further opportunity to make written representations to it.

(2) If it appears to the Investigation Committee, after reconsidering the complaint as required by paragraph (1), that there is still no prima facie case against the member, member firm, regulated firm or provisional

member concerned, it shall inform the Reviewer of its reasons for proposing so to find; and the Reviewer may, within the period of 28 days beginning with the date on which he is so informed, or such longer period as the Committee may allow, send the Committee such comments, if any, on the proposed finding as he thinks fit.

(3) On receipt of any such comments within the period mentioned in paragraph (2) the Investigation Committee shall consider its proposed finding in the light of them, and shall then decide whether or not it is of the opinion that the complaint discloses a prima facie case.

(4) If –

(a) within the period allowed by or under paragraph (2) the Reviewer informs the Investigation Committee that he has no comments on the proposed finding; or
(b) when that period ends no comments by the Reviewer have been received by the Committee,

the Committee shall proceed to decide whether or not it is of the opinion that the complaint discloses a prima facie case.

(5) If under paragraph (3) or (4), the Investigation Committee finds that the complaint does not disclose a prima facie case, it shall inform the complainant and the Reviewer in writing of its reasons for so finding.

Disciplinary proceedings

Tribunals

19(1) On receipt by the Disciplinary Committee of a formal complaint, the Chairman of that Committee or, failing him, any Vice-Chairman of that Committee –

(a) shall appoint three of its members, two of them being members of the Institute and the third not being an accountant, as a tribunal to hear that complaint; and
(b) shall appoint one of the three as chairman of the tribunal.

(2) If, in the case of a tribunal so appointed, any member of the tribunal –

(a) is for any reason unable to attend the hearing or any adjourned hearing of the formal complaint; or
(b) is in the course of the hearing unable to continue so to attend,

the remaining members, if not less than two in number, may at their discretion proceed or continue with the hearing; but if the defendant is present or represented at the hearing, they shall do so only if he or his representative consents.

(3) If, in a case falling within paragraph (2), the remaining members of the tribunal –

(a) do not proceed or continue with the hearing; or
(b) complete the hearing but are unable to agree on a finding,

the complaint shall be heard or re-heard by a new tribunal appointed under paragraph (1).

(4) If at any time during the hearing of a formal complaint the chairman of the tribunal appointed under paragraph (1) is for any reason of the opinion that it is impracticable or would be contrary to the interests of justice for the hearing to be completed by that tribunal, he shall so inform the Chairman or, failing him, any Vice-Chairman of the Disciplinary Committee, who shall thereupon direct that the complaint be re-heard by a new tribunal so appointed.

(5) The Disciplinary Committee may appoint a barrister or a solicitor to act as legal assessor at the hearing of a formal complaint.

(6) Where a new tribunal is appointed pursuant to paragraph (3) or (4), or to an order made on appeal under bye-law 29(2)(e), no member of the previous tribunal may be appointed as a member of the new one; but a person appointed as a legal assessor may continue to act at any re-hearing of the complaint.

Hearing of formal complaints

20(1) As soon as practicable after the appointment of a tribunal to hear a formal complaint, the head of staff shall serve on the defendant a notice stating the terms of the complaint and the time and place fixed for the hearing.

(2) The defendant may appear before the tribunal in person or by a representative.

(3) The tribunal shall give the defendant or his representative a reasonable opportunity of being heard before it.

(4) If the defendant does not attend and is not represented at the hearing, then, provided that the tribunal is satisfied that the notice required by paragraph (1) was served on him, the tribunal may hear the formal complaint in his absence.

(5) The Investigation Committee may appoint the head of staff or any member of the Institute, or may instruct a barrister or solicitor, to present the formal complaint before the tribunal.

Temporary suspension of activities of authorised firm

21(1) If, at any time while a tribunal is considering a formal complaint against an authorised firm, the tribunal is of the opinion, as regards all or any of the firm's investment business activities under the Financial Services Act 1986 or the firm's exempt regulated activities under the Financial Services and Markets Act 2000, that their continuation may materially prejudice the interests of any client of the firm, it may serve on the firm a notice specifying the activities as to which it is of that opinion and ordering the firm to suspend them for a specified period (not exceeding 30 days) beginning at the time of service of the notice.

(2) A notice under paragraph (3) of bye-law 16 (consent orders) served on an authorised firm shall mention the power available under this bye-law (as well as the orders referred to in paragraph (4)(c) of that bye-law).

Powers of tribunal

22(1) If the tribunal appointed to hear a formal complaint is of the opinion that the complaint has been proved in whole or in part, it shall make a finding to that effect; but if it is not of that opinion, it shall dismiss the complaint.

(2) If the tribunal finds that the formal complaint has been proved in whole or in part, it may (unless it is of the opinion that in all the circumstances it is inappropriate to do so) make against the defendant such one or more of the orders available against him under the following provisions of these bye-laws, namely –

(a) paragraph (3), (4), (5), (6) or (7) of this bye-law, as the case may be; and
(b) bye-laws 23 (waiver etc. of fees), 24 (remedial action) and 24A (expenses),

as it considers appropriate, having regard to the past disciplinary record, if any, of the defendant, the tribunal's views as to the nature and seriousness of the formal complaint (so far as proved), and any other circumstances which the tribunal considers relevant.

(3) If the defendant is a member, the orders available against him are –

(a) that he be excluded from membership;
(b) that his practising certificate be withdrawn either permanently or for a specified period;
(c) that any Insolvency Licence held by him be withdrawn;
(d) that he be ineligible for an Insolvency Licence;
(e) that he be ineligible for a practising certificate, either permanently or for a specified period;
(f) that he be severely reprimanded;

(g) that he be reprimanded;
(h) that he be fined a specified sum.

(4) If the defendant is a member firm, the orders available against it are –

(a) that it be prohibited from using the description "Chartered Accountants" for a specified period;
(b) that it be severely reprimanded;
(c) that it be reprimanded;
(d) that it be fined a specified sum.

(5) If the defendant is an authorised firm, the orders available against it are –

(a)(i) that its authorisation to conduct investment business granted by the Institute pursuant to the Financial Services Act 1986 be withdrawn or
(ii) that it shall cease to be authorised by the Institute to carry on exempt regulated services under the Financial Services and Markets Act 2000;
(b) that it be severely reprimanded;
(c) that it be reprimanded;
(d) that it be fined a specified sum.

(6) If the defendant is a registered auditor, the orders available against it are –

(a) that its registration granted at the instance of the Institute under the Companies Act 1989 be withdrawn;
(b) that it be severely reprimanded;
(c) that it be reprimanded;
(d) that it be fined a specified sum.

(7) If the defendant is a provisional member, the orders available against him are –

(a) that he be declared unfit to become a member;
(b) that he cease to be a provisional member and be ineligible for re-registration as a provisional member for a specified period not exceeding two years;
(c) that the registration of his training contract be suspended for a period not exceeding two years;
(d) that for a specified period not exceeding two years he be ineligible to sit for such one or more of the Institute's examinations as may be specified or for any specified part of any of those examinations;
(e) that he be disqualified from such one or more of the Institute's examinations as may be specified or from any specified part of any of those examinations, not being an examination or part the result of which was duly notified to him by the Institute before the date of the order;

(f) that he be severely reprimanded;
(g) that he be reprimanded.

(8) An order under this bye-law may include such terms and conditions (if any) as the tribunal considers appropriate including, in the case of an order for exclusion from membership made against a member, a recommendation that no application for his readmission be entertained before the end of a specified period.

(9) An order under this bye-law against a member, member firm or regulated firm may include a direction requiring him (at his own expense) to obtain advice from a specified source and to implement the advice obtained.

(10) In this bye-law "specified", in relation to any order or direction under this bye-law, means specified in the order or direction.

Orders for waiver or repayment of fees or commission

23(1) If the tribunal appointed to hear a formal complaint against a member or member firm engaged in public practice or against a regulated firm finds the complaint proved in whole or in part, it may make one or more of the following orders against the defendant namely –

(a) that he shall waive the whole or part of any fee which has been agreed by or invoiced to a client;
(b) that he shall pay to the Institute the whole or part of any fee which the client has paid;
(c) that he shall pay to the Institute the whole or part of any sum of money which has been retained by the defendant in or towards payment of a fee by a client;
(d) that he shall pay to the Institute a sum assessed by the tribunal as the value (in whole or in part) of any commission to which he has become entitled (whether or not it has been received by him) in connection with the facts and matters which are the subject of the complaint.

(2) Before making an order under paragraph (1) the tribunal –

(a) if the defendant is present or represented before it, shall give him or his representative an opportunity to make representations to the tribunal with regard to the proposed order;
(b) if the defendant is neither present nor represented before it, shall –
(i) adjourn the hearing for a reasonable period;
(ii) serve on him a notice describing the order it proposes to make under paragraph (1); and
(iii) at the resumed hearing give him or his representative an opportunity to make representations to the tribunal, either orally or in writing, with regard to the proposed order.

(3) Where an order is made under paragraph (1), the total of –

(a) any fees ordered to be waived under paragraph (1)(a);
(b) any sum ordered to be paid under paragraph (1)(b);
(c) any sum ordered to be paid under paragraph (1)(c); and
(d) any sum ordered to be paid under paragraph (1)(d)

shall not exceed £10,000 or such other sum as may from time to time be fixed for the purposes of this paragraph by direction of the Council.

(4) The tribunal making an order under paragraph (1) may include in it such terms or conditions as it thinks fit.

(5) In this bye-law "client" includes a former client.

Remedial orders

24(1) If the tribunal appointed to hear a formal complaint against a member or member firm engaged in public practice or against a regulated firm finds the complaint proved in whole or in part, it may make one or more of the following orders against the defendant namely –

(a) that he shall return to any client any books or documents belonging to the client which are not the subject of a lien;
(b) that, as regards any specified fee, he shall provide the client with such particulars as may be specified;
(c) that he shall take such steps as may be specified, being steps (other than payment of compensation) which the tribunal considers appropriate for the purpose of resolving the issues which gave rise to the formal complaint.

(2) If the tribunal finds the complaint proved in whole or in part, then, whether it makes any order under paragraph (1) or not, the tribunal –

(a) may appoint a member, member firm or regulated firm other than the defendant to undertake or complete any work which the defendant had been engaged to perform for a client; and
(b) if it does so, shall order the defendant to pay the reasonable fees of that member, member firm or regulated firm for work done as a result of the appointment.

(3) Bye-law 23(2) shall apply in relation to the making of any order or appointment under paragraph (1) or (2) as it applies in relation to the making of an order under bye-law 23(1).

(4) In the event of a dispute between the defendant and a member, member firm or regulated firm appointed under paragraph (2) as to the fees payable by virtue of an order under paragraph (2)(b), the Investigation Committee may either –

(a) determine the fees payable; or

(b) order the parties to the dispute to submit the fees to arbitration in accordance with the directions of the Investigation Committee.

(5) The tribunal making an order under paragraph (1) may include in it such terms or conditions (if any) as it thinks fit.

(6) A defendant against whom an order has been made under paragraph (1) of bye-law 23 requiring him to do all or any of the things mentioned in that paragraph shall be treated for the purposes of paragraph (1)(a) of this bye-law as having no lien in respect of the fees to which the order relates, if those requirements –

(a) cover the whole of those fees; or
(b) cover only part of them, and the balance has been paid by the client.

(7) In this bye-law –
"client" includes a former client;
"specified", in relation to any order under this bye-law, means specified in the order.

Expenses

24A(1) If the tribunal appointed to hear a formal complaint against a member or member firm or against a regulated firm finds the complaint proved in whole or in part, it may make an order that the defendant shall pay a sum to the Institute which will be sufficient to reimburse the complainant for such expense as, in the opinion of the tribunal, was reasonably and necessarily incurred by the complainant in –

(a) bringing to the attention of or reporting to the head of staff any of the facts and matters which constitute the complaint; or
(b) making written representations to the head of staff on any of those facts and matters before the Investigation Committee has under bye-law 15 decided whether in its opinion the complaint discloses a prima facie case.

(2) Bye-law 23(2) shall apply in relation to the making of any order under paragraph (1) as it applies in relation to the making of an order under bye-law 23(1).

(3) Where an order is made under paragraph (1), the sum which is ordered to be paid shall not exceed £1,000 or such other sum as may from time to time be fixed for the purposes of this paragraph by the direction of Council.

(4) The tribunal making an order under paragraph (1) may include in it such terms and conditions as it thinks fit.

(5) In this bye-law and bye-law 34B, "complainant" means the person who under bye-law 9(1) brought to the attention of, or reported to, the head of staff any of the facts and matters which constitute the complaint.

Time when tribunal's order takes effect

25(1) Subject to the following provisions of this bye-law, an order made by the tribunal appointed to hear a formal complaint shall, unless the tribunal otherwise directs, take effect at the end of the period of 28 days beginning with the date of the order.

(2) If within that period the defendant serves notice of appeal –

(a) against the order; or
(b) where applicable, against the tribunal's omission to direct that the record of its decision required to be published under bye-law 35 shall not include the name of the defendant,

then, subject to paragraph (3), the order shall take effect, if at all, only after the appeal has been determined under the following provisions of these bye-laws.

(3) If, before the appeal has been so determined, the defendant by notice withdraws the notice of appeal –

(a) the tribunal's order shall take effect at the end of the period of 14 days beginning with the date on which the notice of withdrawal is served on the head of staff; and
(b) any fines which would have been due for payment before the end of that period if there had been no appeal shall become due at the end of that period.

(4) This bye-law does not apply to an order for the payment of costs made by the tribunal under bye-law 33(1).

Appeals

Right of appeal

26(1) Subject to bye-law 33(5) in the case of an order for exclusion from membership, if a tribunal makes an order against the defendant, he may within the period of 28 days beginning with the date of the order serve on the head of staff notice of appeal –

(a) against the order; or
(b) where applicable, against the tribunal's omission to direct that the record of its decision required to be published under bye-law 35 shall not include the name of the defendant.

(2) The grounds on which the defendant may appeal against an order include the ground that the amount of any costs ordered by the tribunal to be paid by him is excessive (but not the ground that the amount of any costs ordered by it to be paid to him by the Institute is too small).

(3) A notice of appeal under paragraph (1) shall be of no effect unless, before the end of the period of 28 days beginning with the date on which the written record of the tribunal's decision was served on him, or such longer period as the Chairman of the Appeal Committee or, failing him, its Vice-Chairman may within that period allow, the defendant serves on the head of staff a notice stating the grounds of appeal.

(4) A notice under paragraph (3) stating the grounds of appeal may be combined with the notice of appeal; but the grounds stated in a notice under paragraph (3) as served on the head of staff shall not be amended thereafter except with the leave of the panel appointed under bye-law 27 to hear the appeal.

(5) A defendant may withdraw a notice of appeal by serving on the head of staff notice to that effect.

(6) If the defendant serves a notice of appeal under paragraph (1) but fails to serve a notice stating the grounds of appeal before the end of the period allowed by or under paragraph (3), the tribunal's order shall take effect under bye-law 25(3) as if the defendant had served a notice of withdrawal of the appeal on the head of staff on the last day of that period.

(7) If, after the period of 28 days allowed by paragraph (1) has expired, the defendant serves on the head of staff a written application (in the prescribed form) for leave to serve notice of appeal under that paragraph notwithstanding the expiration of that period, then –

(a) the Chairman of the Appeal Committee or, failing him, its Vice-Chairman shall as soon as practicable appoint a panel (constituted as prescribed) to consider the application in accordance with the procedure prescribed for such panels, and

(b) the panel may give the defendant leave to serve notice of appeal under paragraph (1) within the period of 28 days beginning with the date on which notice of the panel's decision is served on him at an address specified by him in his application.

(8) Leave shall not be given under paragraph (7)(b) unless the panel is satisfied that the defendant could not reasonably have been expected to serve notice of appeal within the period of 28 days originally allowed by paragraph (1).

(9) Where, in the case of an order made by a tribunal against a defendant, leave to serve notice of appeal out of time is given under paragraph (7)(b) –

(a) the order shall be treated for the purposes of the bye-laws as if its date were the date of service on the defendant of notice of the panel's decision as mentioned in paragraph (7)(b), and references to the date of that order shall be construed accordingly;

(b) the provisions of the bye-laws shall have effect in relation to that order subject to such directions as may be given by the panel giving that leave, being directions which the panel consider necessary for the purpose of adapting or supplementing those provisions so as to fit the circumstances resulting from the giving of that leave.

(10) In this bye-law "prescribed" means prescribed by regulations.

Panels

27(1) As soon as practicable after the receipt by the head of staff of an effective notice of appeal under bye-law 26 the Chairman of the Appeal Committee or, failing him, its Vice-Chairman shall appoint a panel to hear the appeal.

(2) A panel so appointed shall consist of –

(a) a chairman, being either the Chairman or the Vice-Chairman of the Appeal Committee or, if neither of them is available to sit, another person (whether a member of the Appeal Committee or not) who is either a barrister or a solicitor;
(b) three members of the Appeal Committee who are members of the Institute; and
(c) one member of the Appeal Committee who is not an accountant.

(3) If any member of the panel, other than its chairman –

(a) is for any reason unable to attend the hearing or any adjourned hearing of the appeal; or
(b) is in the course of the hearing unable to continue so to attend,

the remaining members, if not less than four in number, may at their discretion proceed or continue with the hearing; but if the defendant is present or represented at the hearing, they shall do so only if he or his representative consents.

(4) If, in a case falling within paragraph (3), the remaining members of the panel –

(a) do not proceed or continue with the hearing; or
(b) complete the hearing but are unable to agree on how to determine the appeal,

the appeal shall be heard or re-heard by a new panel appointed under paragraph (1).

(5) If at any time during the hearing of an appeal the chairman of the panel appointed under paragraph (1) is for any reason of the opinion

that it is impracticable or would be contrary to the interests of justice for the hearing to be completed by that panel, he shall so inform the Chairman or, failing him, the Vice-Chairman of the Appeal Committee who shall thereupon direct that the appeal be re-heard by a new panel so appointed.

(6) The Appeal Committee may appoint a barrister or solicitor to act as legal assessor at the hearing.

(7) Where a new panel is appointed pursuant to paragraph (4) or (5), no member of the original panel may be appointed as a member of the new one; but a person appointed as a legal assessor may continue to act at any re-hearing of the appeal.

Hearing of appeals

28(1) As soon as practicable after the appointment under bye-law 27(1) of a panel to hear an appeal, the head of staff shall serve on the defendant a notice stating the time and place fixed for the hearing.

(2) The defendant may appear before the panel in person or by a representative.

(3) The panel shall give the defendant or his representative a reasonable opportunity of being heard before it.

(4) If the defendant does not attend and is not represented at the hearing then, provided that the panel is satisfied that the notice required by paragraph (1) was served on him, the tribunal may hear the appeal in his absence.

(5) If the defendant or his representative so requests, the hearing of the appeal shall be held in public; but notwithstanding such a request, the panel may exclude the press and public from all or part of the hearing in circumstances in which Article 6 of the European Convention on Human Rights permits this.

(6) The Investigation Committee may appoint the head of staff or any member of the Institute, or may instruct a barrister or solicitor, to appear on behalf of the Committee at the hearing of the appeal.

Powers of panel on appeal

29(1) On an appeal under bye-law 26(1) against an order made on a formal complaint, the panel appointed to hear the appeal –

(a) shall take into consideration the record of the evidence given before, and the documents produced to, the tribunal at the hearing of the complaint;

(b) may, if it thinks fit, re-hear any witness who gave oral evidence before the tribunal; and
(c) may on special grounds (as to which the panel shall be the sole judge) receive fresh evidence.

(2) On such an appeal, the panel may by order –

(a) affirm, vary or rescind any order of the tribunal;
(b) substitute for any such order or orders such other order or orders as it thinks appropriate, being in every case an order which the tribunal might have made on the formal complaint;
(c) include in any substituted order such terms and conditions, if any, as the panel thinks appropriate including, in the case of an order for the exclusion of a member from membership, a recommendation that no application for his readmission be entertained before the end of a period specified in the order;
(d) direct that the record of the tribunal's decision to be published under bye-law 35 shall not include the name of the defendant;
(e) direct that the complaint shall be re-heard by a new tribunal appointed under bye-law 19(1).

(3) An order made by a panel on an appeal under bye-law 26(1) shall take effect on the date of the order unless the panel directs that it shall take effect as from some later date specified in the order.

Intervention orders

Intervention orders

30(1) Where, whether in the course of considering a complaint or not, the Investigation Committee is of the opinion that a member engaged in public practice –

(a) has appeared before a court of competent jurisdiction charged with an indictable offence and has either –
(i) been remanded in custody on that charge; or
(ii) pleaded guilty to or been found guilty of such an offence;
(b) has been excluded from membership of any body (other than the Institute) mentioned or referred to in bye-law 7(2)(a);
(c) is a person whose professional competence or efficiency is seriously impaired as a result of ill health or mental incapacity;
(d) is a sole practitioner who has abandoned his practice; or
(e) is a member of a partnership or director of a body corporate which was engaged in public practice, but whose principals have all abandoned the practice,

the Committee may (subject to paragraph (3) and, where it applies, paragraph (8)) make against him one or more of the orders available against him under paragraph (2).

(2) The orders available against a member are –

(a) that his practising certificate be suspended for such period (not exceeding two years) as the Investigation Committee considers appropriate in all the circumstances;
(b) that he shall not take on any new clients;
(c) that in respect of his professional activities he shall execute, in such terms as the Investigation Committee may specify in the order, a power of attorney or an enduring power of attorney in favour of another member designated by the Investigation Committee (in this paragraph referred to as "the substitute");
(d) that he shall instruct his bank that cheques drawn on his client bank account are not to be honoured unless signed or counter-signed by the substitute;
(e) that he shall provide the substitute with an account of all client account money;
(f) that he shall hand over to the substitute all books and documents concerning any of his clients and divert his professional mail to the substitute's registered address.

(3) Where a member is engaged in public practice –

(a) as a partner in a partnership in which one or more of the other partners are members so engaged; or
(b) as a director of a body corporate one or more of whose other directors are members so engaged,

an order under this bye-law (other than one confined to suspending his practising certificate) shall not be made against him unless it is also made against each other partner or director so engaged who is a member.

(4) In determining under this bye-law whether or not a member's professional competence or efficiency is seriously impaired as a result of ill-health or mental incapacity, the Investigation Committee may rely on a report by a registered medical practitioner; but the absence of such a report shall not prevent the Committee from so determining on the basis of the member's conduct.

(5) For the purposes of this bye-law a member shall, unless the contrary is proved, be presumed to have abandoned the practice of which he is a principal if –

(a) it appears to the Investigation Committee that he has, without reasonable explanation, been continuously absent from all offices of the practice for at least 30 days; or
(b) he has persistently failed to respond to efforts to contact him at his registered address.

(6) An order under this bye-law –

(a) may be framed so as to be in force indefinitely or for a specified period or until the occurrence of a specified event; and
(b) may include such terms and conditions (if any) as the Investigation Committee thinks fit.

(7) Where the Investigation Committee has made an order against a member under this bye-law, it may on a written application made by him or on its own initiative –

(a) by order discharge the order or vary it (whether so as to prolong its operation or in any other way); or
(b) if the order has ceased to have effect, make a fresh order under this bye-law.

(8) Before making an order against a member under this bye-law or taking any action under paragraph (7) the Investigation Committee shall –

(a) serve on the member concerned a notice describing (with reasons) the action it proposes to take; and
(b) give him a reasonable opportunity to make written representations to it and, if he so requests, give him or his representative a reasonable opportunity to make oral representations to it.

(9) Paragraph (8) shall not apply if, in the opinion of the Investigation Committee, delay in taking action under paragraphs (1) to (6) or paragraph (7) would seriously prejudice the interests of any person, whether a client of the member concerned or not; but where the Committee acts by virtue of this paragraph without having done as provided in paragraph (8), it shall promptly –

(a) serve on the member concerned a notice describing (with reasons) the action it has taken;
(b) give him a reasonable opportunity to make written representations to it and, if he so requests, give him or his representative a reasonable opportunity to make oral representations to it; and
(c) reconsider the action taken by it in the light of any representations so made.

(10) As soon as practicable after making any order under this bye-law the Investigation Committee shall serve a copy of the order on the member concerned.

(11) Where the Investigation Committee makes any order under this bye-law, it shall cause a statement to that effect to be published, as soon as practicable, in such manner as it thinks fit.

(12) Except insofar as the Investigation Committee in its absolute discretion otherwise directs, a statement published under paragraph (11) shall –

(a) state the name of the member against whom the order was made; and
(b) describe the order or orders made against him,

but need not include the name of any other person or body concerned.

Appeals against intervention orders

31(1) If the Investigation Committee makes an order against a member under bye-law 30 (intervention orders), he may within the period of 28 days beginning with the date of the order serve on the head of staff notice of appeal –

(a) against the order; or
(b) where applicable, against the Committee's omission to direct that the statement required to be published under bye-law 35 (as applied by the following provisions of this bye-law) shall not include the name of the member.

(2) The provisions of these bye-laws mentioned in column 1 of the table set out in paragraph (6) (which relate to appeals against orders made by tribunals) shall apply in relation to appeals under paragraph (1) of this bye-law as if references in those provisions to a tribunal, to an order made by a tribunal (or on a formal complaint) and to the defendant were respectively references to the Investigation Committee, to an order made by it under bye-law 30, and to the member against whom that order was made.

(3) In their application by virtue of paragraph (2) the provisions mentioned in column 1 of that table shall have effect subject to any further modifications specified in column 2 of the table.

(4) On an appeal under paragraph (1) the panel appointed to hear the appeal may, whether the appeal is successful or not, order the member concerned to pay the Institute by way of costs of the appeal such sum as the panel may in its absolute discretion determine.

(5) Any costs ordered under paragraph (4) shall, unless a longer period for payment (whether by instalments or not) is allowed by order of the panel, be paid within the period of 28 days beginning with the date of the order; and paragraphs (8) and (9) of bye-law 33 (time for payment of costs) shall apply in relation to any costs or instalment of costs payable under this bye-law as if references to that bye-law and to paragraph (8) of it were references to this bye-law and this paragraph respectively.

(6) The following is the table referred to above –

TABLE

(1)	(2)
the definition of "representative" in bye-law 1(2)	–
bye-law 26(3) to (10)	–
bye-law 27	–
bye-law 28	–
bye-law 29	(a) in paragraph (2)(b), for "on the formal complaint" substitute "under bye-law 30"; (b) in paragraph (2)(d), for "record of the tribunal's decision" substitute "statement"; and (c) for paragraph (2)(e) substitute— "(e) direct that the matter shall be referred back to the Investigation Committee for reconsideration."
bye-law 35	(a) for any reference to a record of a tribunal's decision substitute a reference to a statement; (b) in paragraph (2), for the words from "Where" to "in part" substitute "Where, on an appeal, a panel rescinds an order made under bye-law 30"; (c) in paragraph (3), omit "the tribunal or, as the case may be,"; (d) in paragraph (4), for "26(1)" substitute "31(1)"; (e) in paragraphs (5) and (6) omit "tribunal or" (3 times).

Fines and costs

Time limits for payment of fines

32(1) Subject to paragraph (2), a fine imposed by an order of a tribunal appointed to hear a formal complaint shall, unless a longer period for payment (whether by instalments or not) is allowed by the order, be paid within the period of 30 days beginning with the date of the order.

(2) If the defendant gives notice of appeal against the order of the tribunal within the period allowed by bye-law 26(1), the fine shall not become payable until the appeal has been determined under these bye-laws, and shall then be payable, if at all, in accordance with the following provisions of this bye-law.

(3) A fine –

(a) which is imposed by an order of a panel under these bye-laws; or
(b) which, having been imposed by a tribunal under these bye-laws, is on appeal affirmed or varied in amount by an order of a panel under these bye-laws,

shall be paid within the period of 28 days beginning with the date of the order unless a longer period for payment (whether by instalments or not) is allowed by the order of the panel.

(4) Any fine or instalment of a fine imposed under these bye-laws must be received by the Institute before the close of business on the last day of the period allowed by or under these bye-laws for its payment (or, if that day is not a business day, before the close of business on the next business day).

(5) Where –

(a) a fine imposed by these bye-laws is payable by instalments; and
(b) any instalment is not duly received by the Institute as required by paragraph (4),

the whole of that fine or, as the case may be, so much of it as then remains unpaid shall become due for payment in accordance with paragraph (4) as if the last day of the period allowed for the payment of that instalment were the last day of the period allowed for the payment of the whole fine.

Powers of tribunals and panels as to costs

33(1) If the tribunal appointed to hear a formal complaint finds that the complaint has been proved in whole or in part, it may order the defendant to pay to the Institute by way of costs such sum as the tribunal may determine.

(1A) If the tribunal appointed to hear a formal complaint dismisses the complaint as wholly unproved or finds that the complaint has been proved in part only, it may order the Institute to pay to the defendant by way of costs such sum as the tribunal may (subject to and in accordance with regulations) in its absolute discretion determine.

(2) Any costs ordered under paragraph (1) shall, unless a longer period for payment (whether by instalments or not) is allowed by the order, be paid within the period of 30 days beginning with the date of the order.

(3) If within the period allowed by bye-law 26(1) the defendant serves notice of appeal against an order for payment of costs made under paragraph (1) of this bye-law, then, subject to paragraphs (4) and (5)

of this bye-law (and to bye-law 26(3)), those costs shall not become payable until the appeal has been determined under these bye-laws, and shall then be payable, if at all, in accordance with the following provisions of this bye-law.

(4) If, before the appeal has been so determined, the defendant by notice withdraws the notice of appeal –

(a) the tribunal's order for payment of costs shall take effect at the end of the period of 14 days beginning with the date on which the notice of withdrawal is served on the head of staff; and
(b) any costs which would have been due for payment before the end of that period if there had been no appeal shall become due at the end of that period.

(5) A notice of appeal under bye-law 26(1) against an order that the defendant be excluded from membership shall be of no effect unless any costs ordered by the tribunal under paragraph (1) (or such part of those costs as may be determined by the Chairman of the Appeal Committee or, failing him, by its Vice Chairman, on the written application of the defendant) are paid on or before the giving of the notice; but any costs so paid shall be repaid if and so far as their amount is reduced or cancelled by the panel on the appeal.

(6) On an appeal against an order made by a tribunal, the panel appointed to hear the appeal –

(a) may by order reduce or cancel the amount of any costs ordered by the tribunal to be paid by the defendant;
(b) may, whether the appeal is successful or not, order the defendant to pay to the Institute by way of costs of the appeal such sum as the panel may in its absolute discretion determine;
(c) may, if it finds the complaint wholly unproved or finds that it has been proved in part only, order the Institute to pay to the defendant by way of costs such sum as the panel may, subject to and in accordance with regulations, in its absolute discretion determine.

(7) Any costs ordered by the panel under paragraph (6)(b), together with –

(a) any unpaid costs ordered by the tribunal under paragraph (1); or
(b) so much (if any) of those unpaid costs as remains payable after any reduction or cancellation under paragraph (6)(a),

shall, unless a longer period for payment (whether by instalments or not) is allowed by order of the panel, be paid within the period of 28 days beginning with the date of the order of the panel.

(8) Any costs or instalment of costs payable to the Institute under this bye-law must be received by the Institute before the close of business on

the last day of the period allowed by or under this bye-law for payment (or, if that day is not a business day, before the close of business on the next business day).

(9) Where –

(a) any costs ordered by these bye-laws are payable by instalments; and
(b) any instalment is not duly received by the Institute as required by paragraph (8),

the whole of those costs or, as the case may be, so much of them as then remains unpaid, shall become due for payment in accordance with paragraph (8) as if the last day of the period allowed for the payment of that instalment were the last day of the period allowed for the payment of the whole of those costs.

Liability for fines and costs payable by member firms

34(1) Where a member firm has been ordered to pay any fine or costs under these bye-laws, the following provisions of this bye-law apply.

(2) Any member or former member who at, or at any time since, the relevant time –

(a) was a director of or a partner in the firm; or
(b) as a sole practitioner, himself constituted the firm,

shall be liable for the full amount of the fine or costs in question; and where two or more persons are so liable under this paragraph, they shall be jointly and severally liable.

(3) If any member or former member fails to pay on demand any amount which he is liable to pay under paragraph (2), the failure shall have the same consequences under the bye-laws as it would if the fine or costs had been imposed on him individually.

(4) In this bye-law "the relevant time" has the same meaning as in the definition of "firm" contained in bye-law 1(2).

Refund of fees, commission and expenses

Time limit for payment of fees, commission and expenses

34A Bye-law 32 (time limits for payment of fines) shall apply in relation to an order for the payment of a sum under bye-law 23(1) or bye-law 24A(1) as it applies in relation to orders for the payment of fines.

Refund of sums to complainants

34B When any sum of which payment is ordered under bye-law 23(1) or bye-law 24A(1) is paid to the Institute, the Institute shall pay the same sum

to the client (if ordered under bye-law 23(1)) or to the complainant (if ordered under bye-law 24A(1)) within 21 days.

Publicity

Publication of findings and other orders

35(1) Subject to paragraphs (2) and (4), where a tribunal or panel makes any finding or other order under these bye-laws, it shall cause a record of its decision to be published, as soon as practicable, in such a manner as it thinks fit.

(2) Where a tribunal dismisses a formal complaint, or, on an appeal, a panel decides that a formal complaint has been proved neither in whole nor in part, it shall cause a record of its decision to be so published if, but only if, the defendant so requests.

(3) Unless the tribunal or, as the case may be, the panel otherwise directs, a record of its decision published under this bye-law shall state the name of the defendant and describe the finding and the other order or orders (if any) made against him, but need not include the name of any other person or body concerned in the formal complaint or appeal.

(4) A tribunal shall not cause a record of its decision to be published under paragraph (1) until the period allowed by bye-law 26(1) for giving notice of appeal against the order has expired; and if an effective notice of appeal is given under bye-law 26, then, unless the appeal is abandoned –

(a) no record of the tribunal's decision shall be published under paragraph (1) but
(b) subject to paragraph (2) a record of the panel's decision on the appeal shall be so published.

(5) Notwithstanding paragraphs (2) and (4), a tribunal or panel may cause a record of its decision to be published at any time if in its opinion publication is desirable in view of any statement or comment made in the public domain.

(6) The restrictions imposed by the preceding provisions of this bye-law on publication of a record of the decision of a tribunal or panel shall not apply if the hearing by the tribunal or panel (as the case may be) was held wholly or partly in public.

Publicity for the disciplinary process

36(1) Notwithstanding anything in these bye-laws, the Chairman of the Investigation Committee may at any time make such public statements as he thinks fit concerning –

(a) any matter relating to or connected with the performance by the Institute of any of its statutory functions;
(b) any complaint; or
(c) any matter relating to or connected with the performance by the Investigation Committee of its functions under bye-law 30 (intervention orders),

being a matter or complaint which in his opinion is or involves a matter of public concern.

(2) The power to make statements under paragraph (1) –

(a) shall be exercised in accordance with such guidelines as the Council may issue from time to time; and
(b) may, if the Chairman of the Investigation Committee is for any reason unavailable, be exercised by any Vice-Chairman of that Committee (in which case the reference in that paragraph to the Chairman's opinion shall be read as a reference to the opinion of that Vice-Chairman).

(3) The Chairman of the Investigation Committee may authorise the disclosure to a complainant of information concerning any proceedings brought or to be brought before the Investigation Committee or a tribunal or panel.

(4) An authorisation under paragraph (3) may be given subject to any restrictions which the Chairman of the Investigation Committee thinks appropriate.

(5) A hearing of a formal complaint or appeal may be held in public if the Council has authorised it to be so held; and an authorisation under this paragraph may –

(a) relate to a particular case, to cases of one or more classes, or to cases generally; and
(b) may be given subject to any restrictions which the Council thinks appropriate.

(6) Paragraph (5) does not affect a panel's duty under bye-law 28(5) to hear an appeal in public if so requested by the defendant or his representative, or its power under bye-law 28(5) to exclude the press and public in the circumstances there mentioned.

(7) Where any hearing is held in public by virtue of an authorisation under paragraph (5), the chairman of the tribunal or panel may exclude the press and public from all or part of the proceedings if it appears to him desirable to do so in the interests of justice or for any other special reason.

(8) In this bye-law "statutory functions" means powers and duties conferred or imposed by or under any Act of Parliament or by or under

any legislation (wherever in force) for the time being designated in regulations.

Commencement and transitional provisions

Commencement and transitional provisions

37(1) These bye-laws, as originally allowed, came into force on 1 September 1998; and references to these bye-laws in paragraphs (2) to (7) of this bye-law refer to them as originally allowed.

(2) Subject to the following paragraphs of this bye-law, these bye-laws apply in relation to –

(a) facts or matters which come to the attention of the head of staff (under bye-law 9(1) or otherwise) after the commencement of these bye-laws, including facts or matters which occurred at any time before, but come to his attention after, that commencement;
(b) facts or matters which came to the attention of the head of staff before the commencement of these bye-laws but were not laid by him before the Investigation Committee before that commencement; and
(c) facts or matters which immediately before the commencement of these bye-laws were the subject of proceedings under Schedule 2 (Professional Conduct) to the former bye-laws.

(3) In bye-law 7 (proof of certain matters) –

(a) paragraph (1) shall have effect in relation to any facts or matters falling within paragraph (2)(c) of this bye-law as if the references to a member firm were omitted;
(b) paragraphs (2) to (7) shall not apply in relation to facts or matters which came to the attention of the head of staff before the commencement of these bye-laws.

(4) An application for the review of a decision of the Investigation Committee made before the commencement of these bye-laws shall be proceeded with under Schedule 2 to the former bye-laws; but if under that Schedule the Reviewer of Complaints remits the application to the Investigation Committee with a recommendation that it should be reconsidered, the application shall from then on be proceeded with under bye-law 18 of these bye-laws.

(5) Where before the commencement of these bye-laws a tribunal or panel made a finding against a defendant under Schedule 2 to the former bye-laws, but did not make any other order against him, no record of its decision shall be published under bye-law 35 of these bye-laws unless the defendant so requests.

(6) Without prejudice to section 16(1) (general savings) of the Interpretation

Act 1978 as applied by bye-law 1(3), if Schedule 2 to the former bye-laws is rescinded, its rescission shall not affect the Institute's right to enforce any order, direction or requirement which was in force immediately before that rescission.

(7) In this bye-law "the former bye-laws" means the bye-laws of the Institute as in force immediately before the commencement of these bye-laws.

(8) It is hereby declared that –

(a) the liability of a person or body to disciplinary action under these bye-laws on a complaint is to be determined in accordance with the bye-laws and regulations in force at the time when the facts or matters complained of occurred; but

(b) all disciplinary proceedings under these bye-laws are to be conducted in accordance with the bye-laws and regulations in force at the time of the proceedings.

(9) Paragraph (8) does not affect the operation of paragraphs (2) to (7) of this bye-law or any other provision of these bye-laws which expressly restricts or extends the application of these bye-laws or any of them.

SCHEDULE Bye-law 2

CONSTITUTION OF INVESTIGATION, DISCIPLINARY AND APPEAL COMMITTEES AND APPOINTMENT OF REVIEWERS OF COMPLAINTS

The Investigation, Disciplinary and Appeal Committees

1(1) The Council shall appoint an Investigation Committee, a Disciplinary Committee and an Appeal Committee, and in this paragraph "the Committees" means those Committees and "a Committee" means any of them.

(2) Initial appointment as a member of a Committee shall be for a period of not less than three years (such period may be extended at the discretion of Council); but a member or former member of a Committee may be re-appointed.

(3) The Council may terminate a person's membership of a Committee on grounds of serious misconduct or incapacity in such manner as shall be prescribed in regulations made by Council. Such regulations may include a provision to suspend any person's membership of a Committee pending final determination.

(4) No person shall be a member of more than one of the Committees at the same time.

(5) The Council may pay remuneration to, and the reasonable expenses of, the non-accountant members of a Committee.

(6) A Committee may make such regulations (not inconsistent with the provisions of these bye-laws) as it considers necessary for the performance of its functions.

The Investigation Committee

2(1) The Investigation Committee shall consist of not fewer than 14 persons, of whom at least the required number must not be accountants.

(2) The required number for this purpose is one quarter or, if the total number of members of the Committee is not divisible by four, one quarter of the first higher number that is so divisible.

(3) The Committee may co-opt other persons, being either members of the Institute or persons who are not accountants, provided that the required number of non-accountants is maintained.

(4) At a meeting of the Committee three members of the Committee, of whom two must be members of the Institute and one must not be an accountant, constitute a quorum.

The Disciplinary Committee

3(1) The Disciplinary Committee shall consist of not fewer than 14 persons, of whom at least the required number must not be accountants.

(2) Paragraph 2(2) of this Schedule (meaning of "required number") applies for this purpose.

(3) No member of the Disciplinary Committee shall take part in a decision concerning a case if, while a member of the Investigation Committee, he took part in a decision on that case.

The Appeal Committee

4(1) The Appeal Committee shall consist of not fewer than 14 persons, of whom at least the required number must not be accountants.

(2) Paragraph 2(2) of this Schedule (meaning of "required number") applies for this purpose.

(3) The Chairman and Vice-Chairman of the Committee must each be either a barrister or a solicitor; and neither of them shall be an accountant.

(4) No serving member of the Council shall be appointed to the Appeal Committee. If a member of the Appeal Committee becomes a member

of Council he shall with immediate effect cease to be a member of the Appeal Committee.

(5) A person who, as a member of the Investigation Committee or the Disciplinary Committee, has been concerned with a formal complaint or with the making of an order under bye-law 30 (intervention orders) shall not be appointed to a panel which is to hear an appeal arising out of that complaint or order.

Reviewers of Complaints

5(1) The Council shall appoint one or more Reviewers of Complaints, none of whom shall be an accountant.

(2) Appointment as a Reviewer of Complaints shall be for a period of not less than three years, and any such appointment may be renewed.

(3) The Council shall pay remuneration to, and the reasonable expenses of, every Reviewer of Complaints, and shall indemnify him against any civil liability incurred by him in that capacity.

(4) The Reviewer of Complaints or, if two or more such Reviewers are appointed, those Reviewers acting jointly, shall make a report to the Council annually.

Investigation Committee Regulations

1 These regulations were made by the Investigation Committee ('the committee') on 6 October 1998[1].

2 In these regulations unless the context otherwise requires or express reference is made in these regulations, words and phrases used in these regulations have the same meaning as in the Disciplinary Bye-laws. Furthermore:

'Director' means the person for the time being holding the office of the Director of the Professional Conduct Directorate of the Institute or any member of his department authorised by him to act in his name;

'Institute' means the Institute of Chartered Accountants in England and Wales.

3 The committee may in its absolute discretion appoint one or more of its members or co-opt other persons to assist it to perform its functions. Such appointments may include the appointment of a monitor or team to assist the Director to investigate complaints.

4 If the Chairman considers that the appointment of one or more of its number is required on an urgent basis then he may make such appointment or appointments as he considers necessary and report back to the committee at the next available meeting.

5 Where a member who has been the subject of a complaint dealt with in accordance with the Disciplinary Bye-laws makes a complaint about the handling of the case by the staff and remains dissatisfied notwithstanding an explanation, the committee shall appoint one or more of its members (Investigation Committee Reviewer(s)) to review the member's complaint. The Reviewer shall consider written representations from the member and the staff and all documents he or she considers relevant. The Reviewer may, if he thinks fit, give the member and/or the staff an opportunity to make oral representations. The Reviewer(s) shall report back to the committee and the committee will notify both parties to the complaint of its conclusions in writing.

6 No objections shall be upheld to any technical fault in the procedure of the committee nor in any decision by the committee nor the terms of any order issued by it provided that the proceedings are fair and the relevant bye-laws and regulations have been observed.

[1]Last amended on 7 February 2006 by the Investigation Committee

7 The rules of judicial evidence will not apply. The committee may at its discretion treat as evidence any testimony whether in written, oral or other forms.

8 If a dispute is referred to the committee in accordance with Disciplinary Bye-law 9(4), the Secretary shall lay before the committee a summary of the material facts and matters to which any relevant documentation may be appended.

9 The committee shall consider the submission received under Regulation 8 and decide whether or not any of the facts and matters could make the subject of the complaint liable to disciplinary action.

10 If the committee is of the opinion that a submission under Regulation 8 discloses that a member, firm or provisional member may have become liable to disciplinary action it shall instruct the staff to proceed in accordance with the Disciplinary Bye-laws.

11 If the committee is of the opinion that the submission under Regulation 8 does not disclose that a member, firm or provisional member may have become liable to disciplinary action it shall instruct the staff to dismiss the matter.

12 The Director or any member of the staff authorised by him, may exercise the committee's power under Disciplinary Bye-law 13 in the following circumstances:

(i) if the member, member firm, regulated firm or provisional member has failed to satisfy a previous written request made by the staff when carrying out its function under the Disciplinary Bye-laws or
(ii) if in the opinion of the Director to make a written request prior to serving notice under Disciplinary Bye-law 14 would cause unreasonable delay.

13 'Representative' for the purpose of Disciplinary Bye-law 15(4)(b) or Disciplinary Bye-law 30(8)(b) (intervention orders) means a barrister or solicitor or any other member of the Institute or, with the agreement of the committee, any person. Provided that the firm, provisional member or member being considered by the committee shall supply to it the name and occupation and on request any other details of any proposed representative.

14 If the committee prefers a formal complaint to the Disciplinary Committee under Disciplinary Bye-law 15(2)(a), the summary that is referred to in Disciplinary Bye-law15(6) shall be prepared by the Director and the Director shall appoint a member, solicitor, barrister or member of the Institute's staff to represent the committee at any tribunal of the Disciplinary Committee.

15 If the committee considers that a complaint should be deferred to monitor developments in accordance with Disciplinary Bye-law 15(2)(c)(ii) it shall instruct the Director to report at prescribed intervals the progress of those circumstances. Such monitoring may include enquiries of third parties as well as the subject of the complaint.

16 For the purpose of Disciplinary Bye-law 16(1)(b) and 16A(1)(b) 'disciplinary record' means any previous (adverse) disciplinary findings or orders whether made by the Investigation Committee, the Disciplinary Committee, the Appeal Committee, or by a Joint Disciplinary Tribunal or Appeal Committee of the Joint Disciplinary Scheme or the Accountancy Investigation and Discipline Scheme or any regulatory penalty as defined in the Audit Regulations, Designated Professional Body Handbook or the Insolvency Licensing Regulations but shall not include a finding of prima facie case coupled with an order of the Investigation Committee under Disciplinary Bye-law 15(2)(d) that no further action be taken on the complaint or on any specified part of it.

17 The notice to be served under Disciplinary Bye-law 16(3) shall be in the form as set out in Schedule I to these regulations.

18 If the person or body served notice under Disciplinary Bye-law 16(3) has agreed to the terms of the order under Disciplinary Bye-law 16(2), the Investigation Committee Secretary may make the order on behalf of the committee.

19 The notice to be served under Disciplinary Bye-law 16A(2) shall be in the form set out in Schedule II to these regulations.

20 Unless the subject of the complaint, served notice under Disciplinary Bye-law 16A(2), serves written notice on the Secretary of the Investigation Committee, within 28 days of service of such notice, that he is unwilling to accept the finding of a prima facie case exists, the Secretary of the Investigation Committee shall make the order on behalf of the Investigation Committee.

21 The fixed sum referred to in Disciplinary Bye-law 16A(3) shall be determined by the committee from time to time and shall be, in each case, the fixed sum or where less, the actual costs incurred.

22 Any notice or document required to be served by the committee in accordance with the Disciplinary Bye-laws and these regulations may be served personally or by first class post to the member, provisional member or firm at the last known place of business appearing in the Institute's register or his last known home address. Where documents are served by post, service is deemed to have been effected 48 hours after posting for the purposes of this regulation and regulation 19.

23 If the committee is asked for directions in the event of a dispute as to the fees under Disciplinary Bye-law 24(4) the committee may:

(a) determine the amount payable; or
(b) order the issue to be referred to the Institute's Fee Arbitration Scheme.

24 If a member's conduct is, at any time, subject to consideration by the head of staff, Investigation Committee, Disciplinary Committee, Appeal Committee, Joint Disciplinary Scheme or Accountancy Investigation and Discipline Scheme, the Director may request the Members Registrar to defer demand for due payment of annual subscription until the conclusion of such consideration or disciplinary process whichever is the later.

SCHEDULE I

Notice served under Disciplinary Bye-law 16(3)

Dear Mr/Mrs/Ms [.....]

[INSERT BRIEF REFERENCE TO COMPLAINT QUOTING FILE REFERENCE]

On [INSERT DATE OF MEETING], the Investigation Committee considered this complaint including your representations. It concluded that there was a prima facie case in relation to heads [NUMBERS] and no prima facie case in relation to heads [NUMBERS]

Heads [NUMBERS]

Having considered all the relevant options, the committee decided to deal with heads [NUMBERS] under Disciplinary Bye-law 16 and offer you the opportunity to accept a Consent Order. It is therefore proposing, subject to your agreement, to order that:

[INSERT ORDER LISTED IN DISCIPLINARY BYE-LAWS16(2) AND DETAILED HEADS OF COMPLAINT]

The reasons for this decision are:

.....

Heads [NUMBERS]

The committee concluded that there was no prima facie case in relation to heads [NUMBERS]

[INSERT DETAILED HEADS OF COMPLAINT]

The reasons for this decision are:

Your option in relation to heads [numbers] prima facie case

You are required to respond to this offer of a Consent Order within 21 days letting me know which of the following four options you wish to adopt:

1 If [you] [your firm] wish(es) to accept the proposed order, please sign the enclosed copy order and return it to me.
This will be appropriate in circumstances where you [your firm] do(es) not wish to dispute the complaint. The advantage of taking this option is that with your [your firm's] agreement the matter is concluded. However, it is important that you are aware that the order will be recorded as a disciplinary record against you [your firm]. A copy of the order will be sent to the national and financial press and will be made available to any enquirers on request.
2 If [you] [your firm] do(es) not accept that there is a prima facie case to answer and you consider that there is further information that the committee should consider, please write to me detailing this information and I will put the complaint back to the committee for reconsideration under Disciplinary Bye-law 16(5).
3 If [you] [your firm] accept(s) that there is a prima facie case but you wish to make representations as to the penalty the committee proposes to impose, please let me have your [your firm's] representations in writing and I will put them to the committee. If you wish to make representations on the amount of the financial penalty, you will need to complete a financial circumstances form. Please ring the committee administrator on [NUMBER] for a form. Alternatively email [NAME]@icaew.co.uk.
4 If [you] [your firm] do(es) not wish to accept the proposed order, please let me know. The Investigation Committee will be informed and may then prefer a Formal Complaint to the Disciplinary Committee. The wording of the Formal Complaint may not necessarily be in identical terms to the complaint above.
5 If [you] [your firm] decide(s) not to accept the proposed order and a Formal Complaint is preferred, you will have the opportunity to attend a hearing before a disciplinary tribunal when you can deal with the matter yourself or be represented.

However, it is important that you are aware that the Disciplinary Committee has wider powers than those available to the Investigation Committee. (See Disciplinary Bye-laws 21, 22, 23 and 24). You should also be aware that this process will incur further costs by the Institute and if the Disciplinary Committee makes a finding against [you][your firm], [you][your firm] may be ordered to pay the Institute's costs.

If you do not respond within 21 days we will assume that you do not wish to accept the proposed order and the Investigation Committee may prefer the matter to the Disciplinary Committee as a Formal Complaint.

Heads [NUMBERS] – no prima facie case

In relation to these no prima facie case decisions, the complainant has the right to apply in writing to have the case reviewed by an independent Reviewer of Complaints and the Reviewer has the power to refer the matter back to the Investigation Committee for further consideration. The complainant must make his application within six months of the date of the committee decision unless, in the opinion of the Reviewer, there is fresh evidence to justify consideration of the application for a review. I will let you know if such an application is made.

Please ring me on my direct line below if you have any queries on the process set out above.

COMPLAINT AGAINST MEMBER

I **[INSERT NAME OF MEMBER]** agree to the Investigation Committee proceeding with the proposed order stated in Notice dated **[INSERT DATE OF NOTICE].**

SIGNED .....

DATE .....

COMPLAINT AGAINST FIRM

I **[LEAVE BLANK FOR SIGNATORY TO COMPLETE]** on behalf of **[INSERT NAME OF FIRM]** agree to the Investigation Committee proceeding with the proposed order stated in Notice dated **[INSERT DATE OF NOTICE]**

SIGNED .....

ON BEHALF OF **[INSERT NAME OF FIRM]**

STATUS IN FIRM .....

DATE .....

SCHEDULE II

Notice served under Disciplinary Bye-law 16A

Dear Mr [.....]

INSERT DETAILS OF THE COMPLAINT AND THE DISCIPLINARY BYE-LAW UNDER WHICH LIABILITY TO DISCIPLINARY ACTION OCCURS

The Investigation Committee has considered the above complaint under reference [.....] and the representations made. The committee has decided that the complaint discloses a prima facie case under the Disciplinary Bye-laws.

The committee, after considering all the relevant circumstances, is of the opinion that it is appropriate to deal with the complaint under Disciplinary Bye-law 16A (Caution). The committee is therefore proposing to order that:

[YOU] [YOUR FIRM] BE CAUTIONED

[OR]

[YOU] [YOUR FIRM] BE CAUTIONED AND PAY THE INSTITUTE THE SUM OF [£] BY WAY OF COSTS

The committee will make this order unless, **within 30 days of the date of this letter**, [you] [your firm] serve notice on the Secretary of the Investigation Committee that [you] [your firm] does not accept that a prima facie case exists.

If such notice is served on the Secretary then, unless on reconsideration the committee finds that no prima facie case exists, a formal complaint will be preferred to the Disciplinary Committee. In the event of finding the formal complaint proved, the Disciplinary Committee will have available to it the orders set out in Disciplinary Bye-laws 21, 22, 23 and 24 as appropriate.

An order made under Disciplinary Bye-law 16A will form a disciplinary record against [you] [your firm] and will be referred to should [you] [your firm] be subject to disciplinary action in the future.

A copy of the order will not be sent to the national or financial press but the Institute will notify the complainant, other regulators and any person making specific enquiry of the fact that a caution has been made against you.

N.B.

1 Failure to serve notice in writing, on the Secretary of the Investigation Committee that you do not accept that a prima facie case exists will result in the Investigation Committee making the proposed order.

2 If [you] [your firm] serves notice, within the period specified, that [you] [your firm] do[es] not accept that a prima facie case exists, then a formal complaint may be preferred to the Disciplinary Committee. However, the wording of that referral may not necessarily be in identical terms of the complaint above. [You] [your firm] should also be aware that the Disciplinary Committee has a wider range of penalties available to it than the Investigation Committee.

3 The above proposal does not affect any actions that may be taken of a regulatory nature by the Institute's Insolvency Licensing Committee, the Investment Business Committee or the Audit Registration Committee.

Disciplinary Committee Regulations

1 These Regulations were made by resolution of the Disciplinary Committee on 4 December 2007 and came into force on that date. Regulations 20 and 27 were amended and came into force on 10 March 2008.

2 Except where express reference is made in these Regulations, words and phrases used in these Regulations have the same meaning as in the Disciplinary Bye-laws;

(a) 'ICAEW' means the Institute of Chartered Accountants in England and Wales;
(b) 'the Director' means the person holding the office which is responsible for the operation of the Institute's disciplinary arrangements in the Professional Standards Department.
(c) 'the Investigation Committee representative' means the person appointed by the Investigation Committee to represent that committee before the disciplinary tribunal and to present the formal complaint;
(d) 'Legal Assessor' means the solicitor or barrister appointed to act as Legal Assessor under Disciplinary Bye-law 19(5);
(e) 'Tribunal' means any tribunal of the Disciplinary Committee appointed to hear the formal complaint or a pre-hearing review;
(f) 'Tribunal Chairman' means a member of the Disciplinary Committee appointed to be a Chairman of a tribunal under Disciplinary Bye-law 19(1)(b);
(g) 'Disciplinary record' means any previous (adverse) disciplinary findings or orders whether made by the Investigation Committee, the Disciplinary Committee, the Appeal Committee or by a Joint Disciplinary Tribunal or Appeal Committee of the Joint Disciplinary Scheme or by a Disciplinary or Appeal Tribunal of the Accountancy and Actuarial Discipline Board or any regulatory penalty as defined in the Audit Regulations, the DPB Handbook, Investment Business Regulations or the Insolvency Licensing Regulations but shall not include a finding of prima facie case coupled with an order of the Investigation Committee under Disciplinary Bye-law 15(2)(d) that no further action be taken on the complaint or on any specified part of it.
(h) 'Hearing' means the substantive hearing when the tribunal appointed in accordance with Disciplinary-Bye-law 19(1) meets to consider the merits of a formal complaint and does not include a pre-hearing review;
(i) 'Parties' means the defendant or his representative and the Investigation Committee or its representative;
(j) 'written record of decision' means the document prepared by the Legal Assessor and approved by the Chairman of the tribunal which records in writing a summary of the reasons for the finding and the order of the tribunal, including any term or condition on which the order was made.

3 Subject to Regulation 4, the defendant shall, unless he agrees to waive or vary any requirement for notice, as soon as practicable after the referral of

a formal complaint to the Disciplinary Committee be given not less than 42 days written notice of the date, time and place of the hearing and of the terms of the formal complaint preferred against him.

4 Where the formal complaint comprises an allegation of breach of Disciplinary Bye-law 13(2) the defendant shall, unless he agrees to waive or vary any requirement for notice, be given not less than 21 days written notice of the date, time and place of the hearing and of the terms of the formal complaint preferred against him.

5 Notice of the hearing as required by Regulations 3 and 4 shall unless previously provided be accompanied by a copy of the formal complaint together with a summary of the complaint and the Investigation Committee submission and copies of any documents and/or any other material which the Investigation Committee intends to adduce in evidence.

6 Subject to Regulation 7, the hearing shall be in public.

7 The Tribunal (including a tribunal at a pre-hearing review) or, where regulation 8 below applies, the Tribunal Chairman, may decide that the press and public shall be excluded from the whole or any part of the hearing where it appears desirable to do so in the interests of justice or for any other special reason provided always:

(a) the particular circumstances of the case outweigh the public interest in holding a public hearing; and
(b) the chairman or tribunal making the decision is satisfied that the parties have had an opportunity to make representations.

8 Except in a case proceeding under Regulation 4, if a party wishes to apply before the start of the hearing for the whole or part of any hearing to be held in private, that application must be made in writing to the Tribunal Chairman and must be received by the Institute within 14 days of the date when notice of the hearing is given in accordance with regulation 3. A copy of any written application made under this regulation will be sent to the other party or parties to the proceedings, who will be invited to make written representations to be received by the Institute within 7 days of the date on which the copy of the application was sent. A written application may thereafter be determined by a Tribunal Chairman sitting alone subject always to the requirements of regulation 7. The Tribunal Chairman shall give in writing to the parties the principal reason or reasons for allowing or dismissing any application made under this regulation. Notwithstanding any decision of the Tribunal Chairman made under this Regulation or Regulation 9 below, a Tribunal (including a Tribunal at a pre-hearing review) may at any stage of a hearing consider an oral application relating to the proper exercise of its discretion under Regulation 7.

9 On written application to the Tribunal Chairman, the 14 day limit in regulation 8 above may be extended by a maximum of a further 14 days to permit an application to be made for a hearing or part of a hearing to be held

in private. An extension shall not be given unless the Tribunal Chairman is satisfied that the defendant could not reasonably be expected to have made an application within the period of 14 days originally allowed. If an extension is refused, the Tribunal Chairman shall give in writing to the party his principal reason or reasons for the refusal. If an extension is granted, the application shall proceed as if it had been made in accordance with regulation 8.

10 The name of a defendant and the terms of the formal complaint will be published 7 days in advance of the hearing, but if an application has been made under regulation 8 or regulation 9 by either of the parties, the name of a defendant and the terms of the formal complaint will not be made public unless or until the Tribunal chairman has dismissed any written application.

11 Where an oral application is made to a tribunal to hold the hearing or part of the hearing in private, that application will be heard in private. Where the application is successful, or where the tribunal otherwise decides of its own motion to exercise its power under regulation 7, the principal reason or reasons for holding the hearing or part of the hearing in private will be given by the tribunal in public on the day that the decision is made provided always that such reasons as are given shall not in the opinion of the tribunal unreasonably undermine the purpose of proceeding in private. In the event of an adverse finding being made following the hearing of the complaint, the tribunal's reasons for having proceeded in private will be published, provided always that such reasons as are given shall not in the opinion of the tribunal unreasonably undermine the purpose of having proceeded in private. If the complaint is not proved such reasons will only be published if the defendant so requests.

12 The Director shall decide, in his absolute discretion whether an application for a postponement of a hearing which has not commenced should be granted.

13 Not less than 28 days before the date fixed for the hearing the Director may require the defendant to state in writing within 14 days of service of notice of such a requirement:

(a) whether he accepts the complaint and if not on what grounds he denies the complaint;
(b) whether he accepts the facts as stated in the summary and if not the grounds for challenge;
(c) if he accepts the complaint whether he has any explanation in mitigation;
(d) whether or not he intends to attend and/or be represented at the hearing.

14 At least 21 days before the day fixed for the hearing the defendant shall serve on the Director 8 copies of paginated and indexed bundles of all documents on which he intends to rely unless the documents have been included amongst the documents served in accordance with Regulation 5 above.

15 Regulations 13 and 14 above and 17 below shall not apply to any formal complaint which has been served in accordance with Regulation 4 above.

16 After the Investigation Committee has resolved to prefer a formal complaint but before any hearing the Director may require a defendant to provide such further information and documents relating to the complaint as the Director thinks necessary for the just, expeditious and economic disposal of the case and may require the defendant to supply such further copies of any document as he considers necessary.

17 Not less than 21 days before the hearing each party shall serve on the other a written Statement of any oral evidence which will be given by or on behalf of that party. Any such Statement shall be signed, dated and include the name and address of the maker. Within the same period each party shall serve on the other a copy of any document which will be relied upon at the hearing and provide sufficient copies for use at the hearing (8 copies). Nothing in this regulation shall prevent either party waiving wholly or in part the time period specified in this regulation or the tribunal by order directing such alternative time period as it may specify.

18 Prior to the commencement of the hearing of the formal complaint, any preliminary issues on procedure or any application for directions which are necessary or desirable for securing the just, expeditious and economical disposal of a formal complaint may be determined by a Pre-hearing Review Tribunal (which may or may not be the Tribunal appointed in accordance with Disciplinary Bye-law 19(1)). Any matters falling within this Regulation, except matters which fall to be determined under regulation 7 (hearing or part of the hearing proceeding in private) may be decided by agreement between the parties without a hearing.

19 The Director, Chairman or Vice Chairman of the Disciplinary Committee or the Chairman of any tribunal or any tribunal may direct that there be a Pre-hearing Review on the application of either party or act on their or its own volition.

20 Any notice or document may be served by the defendant by sending the notice or document addressed to the Director at Metropolitan House, 321 Avebury Boulevard, Milton Keynes, MK9 2FZ by first class post. Any notice or document required to be served on the defendant may be served personally or by first class post to the defendant at his last known place of business appearing in the register or his last known home address. Where documents are served by post, service is deemed to have been effected 48 hours after posting.

21 Subject to Regulations 8, 14 and 17 above, the defendant is entitled to make written representations to or to appear in person before a tribunal or be represented by a barrister or solicitor or any other member of the Institute or with the agreement of a tribunal, any person.

22 A tribunal may proceed in the defendant's absence where it is satisfied that Regulations 3 or 4, and 5 have been observed. A defendant is deemed present when he appears by his representative.

23 The Investigation Committee may be represented by a member of the secretariat or may instruct a barrister or solicitor.

24 At the commencement of the hearing the legal assessor shall read out the formal complaint, or with the defendant's consent the complaint can be taken as read, and invite the defendant to state whether he accepts or denies the complaint.

25 The representative of the Investigation Committee shall outline the case against the defendant and subject to Regulations 14 and 17 produce any document or call any witness.

26 The defendant shall be entitled to address a tribunal and subject to Regulations 14 and 17 to give evidence and to produce any document or call any witness.

27 A witness for one party (including the defendant) may be questioned by or on behalf of the other party. A witness so questioned may be re-examined by or on behalf of the party calling him. Members of a tribunal may ask questions of a witness. The Investigation Committee representative and the defendant or his representative may make a closing address. The defendant or his representative will have the final opportunity to address the tribunal. The tribunal may on the application of a party agree that the identity of a witness should not be revealed to the public.

28 The hearing shall be informal and the strict rules of evidence shall not apply. Subject to these regulations the tribunal may adopt any method of procedure which it may consider fair and which gives each party an opportunity to have his case presented. The tribunal may at its discretion consider evidence which has not been provided in accordance with regulations 14 and 17 above. Subject to regulation 7, the hearing will be in public. Evidence will not be taken on oath.

29 The Tribunal may deliberate in camera, in the absence of the parties and of their representatives, at any time.

30 Without prejudice to any other powers it may have, a tribunal may exclude from the hearing or part of it any person or persons whose conduct has disrupted or, in the opinion of the tribunal, is likely to disrupt the hearing.

31 A tribunal may in its discretion hear two or more formal complaints against a defendant at the same hearing.

32 A tribunal may in its discretion hear complaints against two or more defendants in the same hearing.

33 A tribunal may adjourn its proceedings from time to time as it thinks fit of its own volition or upon application by either party.

34 An application for further adjournment made before a hearing is resumed may be determined by the Chairman of the Tribunal or in his absence the Chairman or Vice Chairman of the Disciplinary Committee.

35 Where a formal complaint or part of a complaint is found proved, a tribunal may adjourn the proceedings before making an order.

36 If the Tribunal decides to exercise its powers under Disciplinary Bye-law 21, (temporary suspension of activities of regulated firm) it shall serve a notice on the defendant firm in a form approved by the Disciplinary Committee.

37 The Legal Assessor will prepare the notice referred to in regulation 36 for approval by the Chairman of the Tribunal and a copy of the notice will be sent to the Chairman of the Investment Business Committee.

38 On a finding that a formal complaint has been proved in whole or in part, the representative of the Investigation Committee shall inform the tribunal of any disciplinary record of the defendant.

39 The defendant or his representative shall be allowed to address the tribunal before any order is made.

40 A tribunal on finding a complaint not proved or proved in part only may, on the defendant's application, order that the Institute pay a specified sum in respect of the defendant's costs. In deciding whether such an order should be made, the Tribunal shall have regard to all the facts and matters it considers relevant including the conduct of the defendant and the conduct of the Institute. The sum payable by the Institute shall be in the amount determined by the Tribunal in its absolute discretion. The Tribunal shall give opportunity to the representative of the Investigation Committee to be heard.

41 For the purposes of Regulation 40, the defendant's costs shall be limited to costs reasonably incurred by the defendant since the date of the referral of the Formal Complaint by the Investigation Committee to the Disciplinary Committee.

42 If the Tribunal cannot deal fairly with the issue of costs against the Institute at the hearing, it will make such decisions of principle and detail as it can and the final order will be made by the Chairman of the Tribunal on considering any other material considered relevant.

43 If for any reason the Tribunal considers that it would be inappropriate for it to make a final order, the order will be made by the Chairman or failing him the Vice Chairman of the Disciplinary Committee.

44 Unless a Tribunal orders an extended period, any costs to be paid by the Institute will be paid within 28 days of the Institute authorising payment of the sum ordered.

45 A shorthand or stenograph note of the proceedings may be taken or a tape recording of them made on behalf of the tribunal.

46 No objection shall be upheld to any technical fault in the complaint or in the procedure adopted by a tribunal provided that the proceedings are fair and the relevant Bye-laws and Regulations have been complied with.

47 Where a formal complaint (or part of the complaint) has been found proved, the Director shall send to the defendant, as soon as reasonably practicable, notice of the decision of the tribunal and any order made.

48 A written record of the decision of the tribunal shall be prepared by the Legal Assessor for approval by the tribunal.

49 The Director shall send to the defendant a copy of the written record of decision where a formal complaint (or part of the complaint) has been found proved as soon as reasonably practicable after it has been approved by the tribunal.

50 All written material and information provided by either the ICAEW or the defendant in connection with any disciplinary proceedings, shall at all times remain confidential and no such material or information shall be disclosed (directly or indirectly) except:

(i) any advance notice of the name of the defendant and the terms of the formal complaint;
(ii) to legal advisers for the purposes of the disciplinary proceedings;
(iii) where the defendant is a partner in or employed by a member firm to a partner in that firm;
(iv) to any other person to whom disclosure is necessary for the purposes of obtaining evidence, information or assistance in connection with the disciplinary proceedings; and
(v) to an insurer where disclosure is required under the terms of any policy or in connection with any application for insurance cover.
(vi) where information is disclosed indirectly to members of the public in the course of a public hearing.

This Regulation does not apply to the written record of decision published in accordance with Disciplinary Bye-law 35(1) and 35(5).

Appeal Committee Regulations

1 These Regulations were made by the Appeal Committee under paragraph 1(6) of the Schedule to the Disciplinary Bye-laws and came into force on 31 March 2008.

Interpretation

2 Except where express reference is made in this Regulation, words and phrases used in these Regulations have the same meaning as in the Disciplinary Bye-laws;

(a) 'Answer' means a written response to the notice and grounds of appeal served on the appellant by the respondent;
(b) 'Appellant' means a member (Intervention Orders Disciplinary Bye-law 30), or a defendant or defendant firm (as defined in Disciplinary Bye-law 1), or an applicant (Review Committee and Re-admissions Sub-committee) who has given effective notice of appeal to the Director;
(c) 'Bye-laws' means all the Bye-laws of the Institute for the time being in force as amended from time to time;
(d) 'Chairman' means a member of the Appeal Committee appointed to be Chairman of the Panel in accordance with Disciplinary Bye-law 27(2)(a);
(e) 'Director' means the person holding the office which is responsible for the operation of the Institute's disciplinary arrangements in the Professional Conduct Directorate.
(f) 'ICAEW' means the Institute of Chartered Accountants in England and Wales;
(g) Membership Regulations means the Membership Regulations 2002 (as amended) made under Clause 16 of the Supplemental Charter and Principal Bye-law 49(a).
(h) 'Notice of Appeal' means –
    1) in the case of appeals from the Investigation Committee, the notice served on the Director under Disciplinary Bye-law 31(1) (Intervention Orders); or
    2) in the case of appeals from the Disciplinary Committee, the notice served on the Director under Disciplinary Bye-law 26(1); or
    3) in the case of appeals from the Review Committee, the notice served on the Secretary of the Review Committee under the appropriate provision in the Audit Regulations 2008, DPB Handbook or the Insolvency Licensing Regulations 2004;
    4) in the case of appeals from the Re-admissions Sub-committee, the notice of appeal served under Membership Regulation 11 and the term includes 'effective notice of appeal' under Disciplinary Bye-law 26(3) or 31(2).
(i) 'Panel' means a panel of the Appeal Committee appointed under Disciplinary Bye-law 27(1) and in accordance with Disciplinary Bye-law 27(2) or a panel of the Review Committee appointed under the relevant

provisions of the Review Committee Regulations; or a panel of the Appeal Committee appointed under Membership Regulation 12.

(j) 'Respondent' means in the case of an appeal against a decision of the Investigation Committee or the Disciplinary Committee, the Investigation Committee, in the case of an appeal against a decision of the Review Committee, the Review Committee; and in the case of an appeal against a decision of the Re-admissions Sub-committee, the Re-admissions Sub-committee.

(k) 'Re-admissions Sub-committee' means the Sub-committee of the Investigation Committee to which the Investigation Committee pursuant to Bye-law 49(b) has delegated its powers, authority or discretion in respect of applications for re-admission to membership.

(l) 'Review Committee' means the Committee appointed by the Council of the Institute to consider applications for review of any decision taken by the Audit Registration Committee, the Financial Services Authorisation Committee or the Insolvency Licensing Committee.

3 These Regulations, save where express reference is made, apply to the hearing by a panel of the Appeal Committee of any appeal, whether from the Investigation Committee (Intervention Orders only); a Tribunal of the Disciplinary Committee; the Review Committee or the Re-admissions Sub-committee.

4 Where notice of appeal has been served, but no grounds of appeal have been served, an application for an extension of the 28 day period for service of grounds of appeal must be made in writing to the Chairman within 28 days from the date of service of the written Record of Decision. Grounds served outside the 28 days may be admitted where in the Chairman's opinion the circumstances are exceptional and the interests of justice so requires.

5 Regulations 6, 7, and 35–41 do not apply to appeals against refusal to readmit to membership.

6 Where a tribunal orders exclusion and payment of a fine and/or costs, a defendant may apply in writing to the Chairman or Vice Chairman of the Appeal Committee for a reduction in the amount of costs payable in accordance with Disciplinary Bye-law 33(5) (payment of costs before a Notice of Appeal can be effective). Any such application shall be addressed to the Chairman c/o Metropolitan House, 321 Avebury Boulevard, Milton Keynes MK9 2FZ and must be made expeditiously but no later than 21 days from the date of the Tribunal order.

7 Notice of appeal by a defendant, who has had an order for exclusion made against him, shall not be an effective notice of appeal unless either: –

(a) all the costs ordered by the tribunal have been paid; or

(b) that part of the costs ordered by the tribunal, which have been determined by the Chairman or Vice Chairman of the Appeal Committee in accordance with Regulation 6 above, has been paid.

8 Where effective notice of appeal is received by the Director, he shall as soon as practicable thereafter arrange a date for the hearing of the appeal.

9 A respondent may, within 14 days of receipt of an effective notice of appeal, serve on the appellant an answer to the appeal.

10 Not less than 28 days before the date appointed for the hearing of the appeal, the Director shall provide the appellant with the following;

(a) a copy of the notice of appeal and grounds of appeal;
(b) a copy of any Answer to the appeal by the Respondent;
(c) a copy of any documents or any other material submitted to the Investigation Committee, Disciplinary Committee, Review Committee or the Re-admissions Sub-committee as appropriate;
(d) a transcript of the proceedings the subject of the appeal before the Disciplinary Committee or Review Committee.

New Evidence

11 (a) On the application of either party, the Appeal Committee may hear any witness or allow the production of any material that was not before the Tribunal/Re-admissions Sub Committee which heard the matter at first instance.

(b) Any such application must be made in writing to the Chairman of the Panel of the Appeal Committee appointed to hear the appeal not less than 21 days before the date fixed for hearing and give reasons for the application and specify the relevance to the grounds of appeal or the Answer of the new evidence;
(c) If the application to submit new evidence is granted, the successful party must immediately provide a copy of any new material and of any statement of any witness to be called at the hearing to the other party and make available for the panel, eight further copies;
(d) If one party is given leave to introduce new evidence for the appeal hearing, the other party may introduce evidence in rebuttal provided that they give the first party copies of any material or statements they intend to put in evidence and make copies available for the panel, not less than 10 days before the date fixed for the hearing.

Application for Leave to Serve Notice of Appeal Outside the 28 day Time Limit

12 An application for leave to serve notice of appeal after the expiry of 28 days from the date of the order under Disciplinary Bye-law 26(7) (which will include notice of appeal under Disciplinary Bye-law 31(1)) and in the case of appeals from the Re-admissions Sub Committee after expiry of 28 days from the date on which written reasons for refusal were sent under Membership Regulation 6 shall:

(a) be in writing, and sent to the Director at Metropolitan House, 321 Avebury Boulevard, Milton Keynes MK9 2FZ;
(b) set out the reasons why notice of appeal could not reasonably have been expected to be given within the period of 28 days originally allowed;

(c) be accompanied by documents or other material in support of the application including, where appropriate, a medical certificate or other confirmation of any medical condition;
(d) specify an address to which correspondence relating to the application and any appeal, if appropriate thereafter, should be sent.

13 On receipt of an application, in the form specified in Regulation 12, the Chairman shall appoint a panel to consider the application. Any such panel may include a panel already appointed under Disciplinary Bye-law 27(1).

14 Where a Panel considers an application for leave to serve notice of appeal the Director shall send written notice setting out the decision of the Panel to the defendant.

Pre-hearing Review

15 (a) The Director, Chairman of the Appeal Committee or Vice Chairman or Chairman of any Panel appointed to hear an appeal, may of his or its own volition or on application by either party at any stage in the proceedings direct that there be a pre-hearing review.

(b) On any pre-hearing review a Panel shall consider every application for directions made by any party and any written representations relating to the application and shall give such directions as it thinks necessary for the purpose of securing the just, expeditious or economical disposal of the proceedings.
(c) Without prejudice to the generality of paragraph (b) above, the Panel may give such directions as it thinks fit in relation to
    1) amendment of any notice and/or grounds or answer to the appeal or any other document;
    2) the admission of any facts or documents;
    3) the admissibility in evidence of any documents or other material;
    4) the way in which evidence is to be given at the hearing;
    5) the consideration of more than one appeal at the same time;
    6) the length of the hearing;
    7) the venue for the hearing.

Conduct of the Hearing

16 A respondent may be represented by a member of the secretariat or may instruct a barrister or solicitor.

17 The rules as to the admissibility of evidence in a court of law shall not apply. The Panel may determine the conduct of its hearings in such manner as it considers appropriate for the clarification of the issues in the appeal and generally for the just conduct of the proceedings. Without prejudice to the generality of this provision, the order of the proceedings will be:

(a) in the case of appeals from the Review Committee, the parties may address the panel on the question of whether or not any arguable ground of appeal has been given in accordance with Audit Regulation 9.07 or Regulation 7.04 of the Designated Professional Body Handbook or

Insolvency Licensing Regulation 5.24 as appropriate. The Panel shall then decide whether or not there is an arguable ground or grounds of appeal.

(b) where the appeal is from the Review Committee and the panel decides that there is one or more grounds of appeal then in respect of that ground or grounds and in relation to all other appeals the following provisions shall apply:
   1) the Appellant or his representative may address the Panel and adduce any new evidence in respect of which leave has been given or which is admissible under Regulation 11(a) above;
   2) the Respondent may then address the Panel and adduce any new evidence in respect of which leave has been given or which is admissible under Regulation 11(a) or (d) above;
   3) The Appellant may adduce any new evidence in rebuttal if the same is admissible under Regulation 11(d);
   4) where a witness is called by either party to the appeal he may, after being questioned by the party calling him, be questioned by the other party. He may then be re-examined by the party calling him. The Panel may ask questions of a witness at any stage. The Panel may, upon the application of a party, agree that the identity of a witness should not be revealed to the public;
   5) the Respondent may make a closing address to the Panel followed by the Appellant.

18 The Panel may in its absolute discretion hear two or more appeals from an Appellant at the same time.

19 The Panel may in its absolute discretion hear the appeals of two or more Appellants at the same time.

20 The Chairman or Vice Chairman of the Appeal Committee or the Chairman of a Panel, or a Panel may postpone or adjourn proceedings from time to time as they think fit of their own volition or upon application by either party.

21 An application for a further adjournment made before a hearing is resumed may be determined by the Chairman of the Panel or in his absence the Chairman or Vice Chairman of the Appeal Committee.

22 The Appellant may make written representations to a Panel, or appear in person or be represented by a barrister or solicitor or any other member of the Institute or with the agreement of a Panel, or the Chairman or Vice Chairman of the Appeal Committee, any person.

23 A shorthand record or a tape recording of the proceedings may be taken on behalf of a panel.

24 Any notice or document may be served by an Appellant personally or by sending the notice or document addressed to the Director at Metropolitan

House, 321 Avebury Boulevard, Milton Keynes MK9 2FZ by first class post. Any notice or document required to be served on the Appellant may be served personally or by first class post to the Appellant at his last known place of business appearing in the register or his last known home address. Where documents are served by post, service is deemed to have been effected 48 hours after posting.

Public Hearings

25 Subject to Regulation 26, the hearing shall be in public.

26 A Panel (including a Panel at a pre-hearing review) or, where regulation 27 below applies, the Chairman of the Panel appointed under disciplinary bye-law 27(1), may decide that the press and public shall be excluded from the whole or any part of the hearing where it appears desirable to do so in the interests of justice or for any other special reason provided always:

(a) the particular circumstances of the case outweigh the public interest in holding a public hearing; and
(b) the Panel or Chairman making the decision is satisfied that the parties have had an opportunity to make representations.

27 (a) If a party wishes to apply before the start of the hearing for the whole or part of any hearing to be held in private, that application must be made in writing and served in accordance with Regulation 24. The application should be addressed to the Chairman of the Panel appointed to hear the appeal under Disciplinary Bye-law 27(1), c/o the Director.
(b) The application must be received within 14 days of the date when notice of the day appointed for hearing the appeal is given under Disciplinary Bye-law 28(1).
(c) A copy of any written application made under this regulation will be sent to the other party or parties to the proceedings, who will be invited to make written representations to be received by the Director within 7 days of the date on which the copy of the application was sent.
(d) A written application will thereafter be determined by the Chairman of the Panel appointed under Disciplinary Bye-law 27(1) sitting alone. The application will be determined in accordance with regulation 26.
(e) The Chairman of the Panel shall give in writing to the parties the principal reason or reasons for allowing or dismissing any application made under this Regulation.
(f) Notwithstanding any decision made under this Regulation or under Regulation 28 below, a Panel (including a Panel at a pre-hearing review) may at any stage of a hearing consider an oral application relating to the exercise of its discretion under Regulation 26.

28 (a) On written application to the Chairman of the Panel appointed under Disciplinary Bye-law 27(1), the 14 day limit in regulation 27 above may be extended by a maximum of a further 14 days to permit an application to be made for a hearing or part of a hearing to be held in private.

(b) An extension shall not be given unless the Chairman of the Panel appointed under Disciplinary Bye-law 27(1) is satisfied that the Appellant could not reasonably be expected to have made an application within the period of 14 days originally allowed.
(c) If an extension is refused, the Chairman of the Panel appointed under Disciplinary Bye-law 27(1) shall give in writing to the party his principal reason or reasons for the refusal. If an extension is granted, the application shall proceed as if it had been made in accordance with regulation 27.

29 The name of the Appellant and the terms of the formal complaint that is the subject of the appeal will be published by the ICAEW 7 days in advance of the hearing, but if application has been made under regulation 27 by either of the parties, the name of the Appellant and the order that is the subject of the appeal will not be made public unless or until the written application has been dismissed.

30 (a) Where an oral application is made to a Panel to hold the hearing or part of the hearing in private, that application will be heard in private.
(b) Where the application is successful, or where the Panel otherwise decides of its own motion to exercise its power under regulation 26, the principal reason or reasons for holding the hearing or part of the hearing in private will be given by the Panel in public on the day that the decision is made provided always that such reasons as are given shall not in the opinion of the Panel unreasonably undermine the purpose of proceeding in private.
(c) In the event that an appeal against an adverse finding is dismissed, the Panel's reasons for having proceeded in private will be published with the record of its decision, provided always that such reasons as are given shall not in the opinion of the Panel unreasonably undermine the purpose of having proceeded in private. In the event that, on appeal, a Panel decides that a formal complaint has been proved neither in whole nor in part, such reasons will only be published if the Appellant so requests.

31 A Panel may deliberate in camera, in the absence of the parties and of their representatives, at any time.

32 Without prejudice to any other powers it may have, a Panel may exclude from the hearing or part of it any person or persons whose conduct has disrupted or, in the opinion of the tribunal, is likely to disrupt the hearing.

33 Regulations 25, 26, 27, 28, 29 and 30 do not apply to appeals from the Investigation Committee (Intervention Orders only), from the Review Committee or from the Re-admissions Sub-Committee.

Review of Decisions and Correction of Errors

34 (a) The Panel may of its own volition or upon application by either party, review any order made by it and may on such review revoke or vary that order on the grounds that: –

(i) the order was wrongly made as a result of an error on the part of the panel, secretariat or either party, or;
(ii) a party did not receive proper notice of the proceedings leading to the order.

(b) an application made under paragraph (a) above shall be made within 28 days from the date of receipt by the Appellant of the Panel's written record of decision.

(c) where at least one of the grounds in (a)(i) and (ii) above apply, the Panel may direct that an appeal should be re-heard by a new Panel of the Appeal Committee constituted under Disciplinary Bye-law 27(1).

Costs

35 The Panel may order the Appellant to pay such sum by way of costs as it, in its absolute discretion, thinks fit.

36 A Panel on finding a complaint not proved or proved in part only may, on the Appellant's application, order that the Institute pay a specified sum in respect of the Appellant's costs. In deciding whether such an order should be made, the Panel shall have regard to all the facts and matters it considers relevant including the conduct of the Appellant and the conduct of the Institute. The sum payable by the Institute shall be in the amount determined by the Panel in its absolute discretion.

37 For the purposes of Regulation 36, the Appellant's costs shall be limited to costs reasonably incurred by the Appellant since the date of the preferral of the Formal Complaint by the Investigation Committee to the Disciplinary Committee.

38 Where an application is made under Regulation 36, the Panel shall give opportunity to the representative of the Investigation Committee to be heard.

39 If the Panel considers that it cannot deal fairly with the issue of costs against the Institute at the hearing, because of lack of information, it will make such decisions of principle and detail as it can and will make directions as to the provision of further information to be provided by the Appellant and the final order will be made by the Chairman of the Panel having considered such additional information as is provided by the Appellant in accordance with the directions made by the Panel.

40 If for any reason the Chairman of the Panel considers that it would be inappropriate for him to make a final order, the order will be made by the Chairman or failing him the Vice Chairman of the Appeal Committee.

41 Unless a Panel orders an extended period, any costs to be paid by the Institute, will be paid within 28 days of the Institute authorising payment of the sum ordered.

Publication

42 All written material and information provided by either the ICAEW or the appellant in connection with any appeal, shall at all times remain confidential and no such material or information shall be disclosed (directly or indirectly) except: –

(a) any advance notice of the name of the appellant and the terms of the formal complaint that is the subject of the appeal;
(b) to legal advisers for the purposes of the disciplinary proceedings;
(c) where the appellant is a partner in or employed by a member firm to a partner in that firm;
(d) to any other person to whom disclosure is necessary for the purposes of obtaining evidence, information or assistance in connection with the disciplinary proceedings;
(e) to an insurer where disclosure is required under the terms of any policy or in connection with any application for insurance cover; and
(f) where information is disclosed indirectly to members of the public in the course of a public hearing.

This Regulation does not apply to the written record of decision published in accordance with Disciplinary Bye-laws 35(1), 35(5) and/or 36(6).

2.5 The Scheme adopted by the Accountancy & Actuarial Discipline Board

2.6 The Regulations adopted by the Accountancy & Actuarial Discipline Board

The Accountancy & Actuarial Discipline Board (AADB) is the investigative and disciplinary body responsible for considering cases raising important issues affecting the public interest.

The following professional accountancy bodies are participants in the scheme:

- the Institute of Chartered Accountants in England and Wales
- the Institute of Chartered Accountants of Scotland
- the Institute of Chartered Accountants in Ireland
- the Association of Chartered Certified Accountants
- the Chartered Institute of Management Accountants
- the Chartered Institute of Public Finance and Accountancy.

The normal channel of reference to the AADB for public interest cases is the accountancy or actuarial body primarily concerned. However, the AADB has the power to call in cases – after consultation with the relevant body – if it considers it is appropriate to do so.

To view the accountancy scheme and regulations, please visit www.frc.org.uk/aadb/.

The duty to report misconduct

The following guidance was approved by the Council on 4 August 1993. Amendments[1] have since been made to update references to legislation, bye-laws and guidance. The duty was introduced in December 1991 and the relevant bye-laws now are Disciplinary Bye-laws 9(1) and 9(2).

Introduction

1 The public interest requires the reporting of acts of misconduct which, if they were to go unreported, could adversely affect the good name of the profession. It does not require members or Institute staff to report the minor perceived faults of other members. This paper sets out the views of the Council as to the facts or matters which they are under a *duty* to report to the Institute in the public interest. It does not in any way affect the *right* of a member to report to the Institute or the *right* or *duty* to report elsewhere. (See paragraph 27 below.) Anyone in doubt as to the application of this guidance may consult the Institute. (See paragraphs 24–26 below.)

2 The purpose of the Institute's disciplinary arrangements is to allow consideration to be given to allegations that members and provisional members may have fallen short of the high ethical and technical standards expected of them. In doing so the Institute furthers the public interest.

3 Because members are in a unique position to discover and appreciate the significance of the acts of fellow members and provisional members Disciplinary Bye-laws 9(1) and 9(2) place on members a duty to report certain facts or matters to the Institute's Professional Conduct Department at Metropolitan House, 321 Avebury Boulevard, Milton Keynes MK9 2FZ (telephone: +44 (0)1908 546 235; email: psocomp@icaew.com) where such a report is in the public interest.

The Duty to Report

4 Disciplinary Bye-laws 9(1) and 9(2) provide that,

'It shall be the duty of every *member* where it is in the public interest to do so to report any facts or matters indicating that a *member* and/or *firm* or *provisional member* may have become liable to disciplinary action. In determining whether it is in the public interest to report such facts or matters regard shall be had to such guidance as the *Council* shall give from time to time.'

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[1] *Amended by the Professional Standards Board:*
- 3 September 2007
- 31 August 2006
- 26 August 2004

5 For the purpose of Disciplinary Bye-laws 9(1) and 9(2) it is in the public interest that a member's conduct should be considered by the Investigation Committee wherever a member or provisional member has or may have:

(i) committed any offence involving dishonesty, fraud or cheating;
(ii) committed any imprisonable offence under Part V of the Criminal Justice Act 1993, the Insolvency Act 1986, the Company Directors Disqualification Act 1986, the Companies Acts 1985 and 1989, the Financial Services and Markets Act 2000, the Proceeds of Crime Act 2002 (which includes provisions relating to money laundering) or any similar or related legislation in the corporate or financial services spheres; or
(iii) been convicted of any offence for which he or she has received a custodial sentence, whether suspended or not.

6 It is also in the public interest that a member's or provisional member's conduct should be considered by the Institute in the circumstances listed below. The circumstances are where the member or provisional member has or may have:

(i) as a member or employee of a firm at any time authorised or licensed by the Institute for investment business, been responsible for a serious breach of the Institute's Investment Business Regulations or the regulations contained in the Institute's Designated Professional Body Handbook under the Financial Services and Markets Act 2000;
(ii) as a member or employee of a firm registered by the Institute as an auditor, been responsible for a serious breach of the Institute's Audit Regulations;
(iii) as an insolvency practitioner licensed by the Institute, committed a serious breach of the Insolvency Act or Rules or the Institute's Insolvency Licensing Regulations;
(iv) been responsible for a serious breach of the Institute's Clients' Money Regulations;
(v) been responsible for a serious breach of the Money Laundering Regulations 2003 or 2007;
(vi) performed their professional work or the duties of their employment in a grossly incompetent manner;
(vii) committed a serious breach of faith in a professional respect; or
(viii) committed a serious financial irregularity.

7 In deciding whether the circumstances listed in paragraphs 5 and 6 above arise, members should take note of the commentary below.

Suspicion Alone is not Enough

8 It is important to understand that the reporting member does not have to conduct any investigations or to take a decision as to whether a member or provisional member has been guilty of misconduct. What they are required to report are facts or matters indicating that a member or provisional member may have become liable to disciplinary action. It is not enough merely to have a suspicion that a member or provisional member has committed

misconduct; nor is there any duty to report unsupported speculation or vexatious comment.

Information Available to more than one Member

9 Where a principal[2] or employee in a practising firm becomes aware of the misconduct of a fellow principal or employee of the same firm which is reportable under Disciplinary Bye-laws 9(1) and 9(2) and that misconduct is known to other members in the same firm, the primary duty to report rests on the senior principal with knowledge of the conduct in question. In such a case the duty to report may be discharged on their behalf by another principal, such as the compliance principal, according to the arrangements of the firm or the decision of the senior principal concerned. Where misconduct has been drawn to the attention of the senior or other responsible principal, other principals and employees privy to the information may rely on their decision as to whether a report should be made under Disciplinary Bye-laws 9(1) and 9(2) and the fact that no such report has been made does not place them under a duty to report unless they have clear evidence that the facts have been concealed for an improper motive. A similar approach should be adopted by members in business, but only if the more senior person is a member of the Institute.

Matters of Public Knowledge

10 Once facts are in the public arena, as a result of being reported in the national press or media, the Institute may be presumed to be aware of them and no duty to report arises. Members must nevertheless report to the Director of the Professional Conduct Directorate any facts concerning a matter so reported which might give rise to a disciplinary action against another member if they had information additional to that which is generally available and which might be of assistance to the Professional Conduct Directorate. Where a member is uncertain whether the Institute is aware of particular matters, eg, facts disclosed in the local press, they should take all reasonable steps to check the position, for example by contacting the Professional Conduct Directorate (Helpline: 01908 546235).

Confidentiality and Legal Constraints

11 Before making a report under Disciplinary Bye-laws 9(1) and 9(2), members should consider whether they are in any way constrained by a duty of confidentiality to a client, their employer or anyone else. There are circumstances in which the public interest may justify a breach of confidence and crime, fraud and other serious misconduct are not protected by the duty of confidentiality. This is a difficult area of law on which further guidance may be found in the Members' Handbook Section 3.2 at Section 140 of the Code of Ethics – 'Confidentiality', and in Section 7.1 – 'Professional conduct and disclosure in relation to defaults or unlawful acts'. Auditors should refer to the relevant standards and guidance issued by the Auditing Practices Board, for

[2]References to 'principal' include sole practitioner, partner of a partnership, director of a corporate practice engaged in public practice and member of a limited liability partnership engaged in public practice.

example the Auditing Standard ISA (UK and Ireland) 240 – 'The auditor's responsibility to consider fraud in an audit of financial statements', and ISA (UK and Ireland) 250 – 'Consideration of laws and regulations in an audit of financial statements'. Where necessary, members should seek legal advice.

12 The disclosure of information may also be prohibited by Acts of Parliament or court order. In considering any suspected failure to comply with Disciplinary Bye-laws 9(1) and 9(2), the Investigation Committee will have regard to any legal advice which the member has received concerning the obligation of confidentiality. If the member is aware that a Suspicious Activity Report (SAR) has been made relating to known or suspected money laundering, then caution should be taken to avoid committing the tipping off offence under money laundering legislation. Further guidance on this offence can be found in the Members' Handbook Section 9.5 'Anti-money laundering guidance for the accountancy sector'.

Members in Business

13 The duty to report applies to members in business as it does to members in practice.

14 The duty to report applies to the conduct of a member in business as it does to the conduct of a member in practice, but note particularly paragraphs 11 and 12 above.

A Member's own Conduct

15 Members are as responsible for reporting their own conduct (to the extent described in this guidance) as they are responsible for reporting the conduct of another. In the event of disciplinary proceedings, the fact that a member has made such a report will count in their favour.

When to Report

16 The duty to report arises when a member is aware of facts or matters which should, in light of the information known to that member at that time, indicate that a duty to report has arisen in accordance with this guidance. Any substantial delay in reporting could amount to a failure to report.

17 Occasionally (but not in circumstances to which paragraphs 12 and 27 apply), it may be reasonable and prudent for a member, before making a report, to invite the member who is the subject of a possible report to comment on the facts in the first member's possession. The purpose of such consultation would be to draw the suspected shortcomings to the member's attention and give him the opportunity to correct any misunderstanding. It would be highly improper for a member to use the threat of reporting as a means of securing any advantage over another member. Where a member delays reporting in order to consult the member in question and such delay is not unreasonable, this will not amount to a failure to report.

How to Report
18 The report, which should be in writing and accompanied by any relevant documents or copies thereof, should be sent to the Director, Professional Conduct Directorate.

The Consequences of Reporting
19 A report received under Disciplinary Bye-laws 9(1) and 9(2) will be considered and processed in accordance with the Disciplinary Bye-laws.

20 Reports will be assessed and, if appropriate, referred either for investigation or conciliation.

21 Members who are concerned that a report made under Disciplinary Bye-laws 9(1) and 9(2) to the Institute could result in a liability for defamation may wish to take their own legal advice. A report which is made exclusively to the Institute in good faith and without malice would, however, attract a defence of qualified privilege, ie, the statement was made in fulfilment of an obligation to a person who had a duty to receive it.

The Consequences of not Reporting
22 A failure to report where there is a requirement to report under Disciplinary Bye-laws 9(1) and 9(2) would constitute grounds for disciplinary action against a member under Disciplinary Bye-law 4(1)(c). In deciding whether a member is in breach of the Disciplinary Bye-laws for failing to make a report, the Investigation Committee will have regard to any duty of confidentiality to which the member may be subject (paragraphs 11 and 12 above) and to the promptness of the report (paragraphs 16 and 17 above). The committee also takes its decisions on the basis of the facts as they were known to the member at the time rather than as they might seem with the benefit of hindsight.

Commencement
23 This duty came into force on 19 December 1991. It applies to facts which occurred prior to that date, but only if they first became (sufficiently) known to the member in question on or after that date.

Consulting the Institute
24 Members who, having studied this guidance, are still unsure whether they are under a duty to report, may consult the Ethics Advisory Services, if necessary on a no-name basis. The Ethics Advisory Services are confidential and free from the duty to report misconduct within the Institute (see paragraph 25). Further information on the Ethics Advisory Services can be found at www.icaew.com/ethicsadvice.

25 It is not in the public interest that the duty to report misconduct should constrain members or Institute staff appointed by or on behalf of the Council to offer ethical advice to members from doing so or inhibit members or Institute staff needing advice from seeking it. Consequently, members and

staff appointed by or on behalf of the Council to offer ethical advice to members will not be under a duty to report information received by them in confidence from members seeking such advice, subject only to the requirements of the general law which apply to all citizens. The same exemption applies to members of the Support Members Scheme registered with the Ethics Advisory Services.

26 Members, when acting on behalf of the Chartered Accountants Benevolent Association, are also exempt from the duty to report misconduct.[3]

27 It should be noted that discussion with a counsellor does not relieve a member of the duty to report under Disciplinary Bye-laws 9(1) and 9(2) where such duty exists.

Duty to Report to Other Regulators

28 Members in practice, and others working in the regulated sector for the purposes of the money laundering legislation, have a duty to report the acquisition of criminal proceeds and other activities within the definition of 'money laundering' to their Money Laundering Reporting Officer or to the Serious Organised Crime Agency (SOCA). Known or suspected terrorist activity must also be reported without delay. Further guidance on this is given in the Members' Handbook, Section 9.5 'Anti-money laundering guidance for the accountancy sector'. There are a number of other specific requirements to report criminal activities, misconduct or other matters to clients, their management or governing bodies, to regulators or to other third parties. In addition, members may be in a position where they judge that it would be appropriate (and they have a right) to make further disclosures to third parties in the public interest. Further guidance on reporting defaults and unlawful acts by clients, employers or their staff is given in the Members' Handbook at Section 7.1 'Professional conduct and disclosure in relation to unlawful acts', or its successor. Auditors should refer to current Auditing Standards and guidance. In particular, attention is drawn to Auditing Standard ISA (UK and Ireland) 240, 'The auditor's responsibility to consider fraud in an audit of financial statements', section A – 'Considerations of laws and regulations in an audit of financial statements' and section B – 'The auditor's right and duty to report to regulators in the financial sector'; and related practice notes, for example, Practice Notes 18 (Building Societies), 19 (Banks), 20 (Insurers), 21 (Investment Business) and 24 (Friendly Societies). Auditors also have a duty to report matters of material regulatory significance to a number of regulators outside the financial services sector. Members are reminded that where they have a duty to report crime to the police or other proper authority, a report to the Professional Conduct Directorate does not relieve them of that duty.

Commentary on Paragraphs 5 and 6

Paragraph 5

It would be wrong for a member – when agreeing to a principal or employee

[3]Paragraph 26 is effective from 3 September 2007.

leaving or resigning from a practising firm – to accept a condition that the criminal acts of the latter would go unreported. Such an arrangement must be distinguished from the situation where a principal or employee leaves after denying allegations which it has not been possible to substantiate. Members should bear in mind that disciplinary action based on a criminal act would have to be established before the Disciplinary Committee to a level of proof similar to the high degree of proof called for in a criminal trial.

Paragraph 6
Members are not liable to disciplinary action for every mistake or omission, but only in the circumstances mentioned in Disciplinary Bye-law 4(1)(b) where those circumstances evidence serious incompetence.

Professional Indemnity Cases
It is not in the public interest that clients who have suffered financial loss as a result of the acts of members should be deterred from obtaining financial compensation where they are entitled to it at law. The mere fact that conduct has been or is the subject of a claim under a professional indemnity policy is not, of itself, sufficient to give rise to a duty to report.

The duty on firms to investigate complaints – guidance on how to handle or avoid them

1 The duty

1.1 Institute bye-laws

1.1.1 The bye-laws place a duty on firms to investigate complaints. The duty includes the requirement that:

- a firm must ensure that all new clients are made aware in writing of the principal to be contacted in the event of their wishing to complain about the firm's services and of their right to complain to the Institute;
- if a firm receives a complaint concerning the services it has provided or failed to provide to a client or former client, it must immediately cause the complaint to be investigated by a principal; and
- if, following such an investigation, the firm is of the opinion that the complaint is justified in whole or in part, it must do whatever is appropriate to resolve the complaint, whether by way of remedial work, apology, the provision of information, the return of books or documents, the reduction or repayment of fees, or otherwise.

1.2 Informing the client

1.2.1 The requirements include a formal duty to advise all **new** clients in **writing** of their right to complain to the Institute and of the name of a principal in the firm whom they should contact if they wish to complain. Although the duty as phrased only applies to 'new clients', it is best practice for firms to ensure that all clients of the practice, including existing clients, receive such a notification. In the case of new clients, it would be most convenient to include this notification in the engagement letter. Notification need not be a burden, nor should it be couched in legal or bureaucratic language. It might, for example, take the following form:

> **'Help us give you the best service**
>
> If, at any time you would like to discuss with us how our service to you could be improved or if you are dissatisfied with the service you are receiving, please let us know by contacting [*insert name and telephone number of relevant person*].
>
> We undertake to look into any complaint carefully and promptly and to do all we can to explain the position to you. If we do not answer your complaint to your satisfaction you may, of course, take up the matter with the Institute.'

1.2.2 General advice on engagement letters is given in a helpsheet, *Engagement Letters*, produced by Advisory Services and available at www.icaew.com/helpsheets or by phoning + 44 (0)1908 248 032.

1.3 Internal complaints procedures

1.3.1 The duty does not include a requirement for a formal complaints procedure. However, most firms, and particularly medium and large-sized firms, may well find it convenient to have such a procedure. A good complaints procedure will include the following elements:

- review by a principal other than the principal responsible for the client's affairs;
- reference to the client where the facts are not clearly established;
- prompt rectification of the error, with apology and offer of waiver or reduction of fee where appropriate – see section 2.6 below;
- full explanation to client if complaint unjustified (this is usually best achieved face to face, but it is always wise to record this explanation in the form of a letter);
- if complainant remains unsatisfied, notifying them of their right to make a complaint to the Institute;
- drawing serious complaints to the attention of the senior principal.

1.3.2 If a complainant reports a matter to the Institute, the firm concerned may have to demonstrate their compliance with the duty. In such circumstances, it is desirable that:

- the steps in the complaints procedure are set out in writing in a policy document; and
- the observance of the procedure is documented in the case of every complaint received.

1.4 The investigating principal

1.4.1 Personal responsibility lies with the investigating principal, once they have received the complaint, to ensure that:

- the steps in any formal complaints procedure (see above) are complied with;
- they deal personally with the complaint, thoroughly, expeditiously and with courtesy;
- the senior principal (or their nominee) is informed of the progress of the investigation;
- if the investigation does not resolve the complaint, in the case of a client remaining dissatisfied, the procedure set out in section 3 below is properly concluded.

1.4.2 Although the requirement to investigate complaints is framed so as to lie upon the firm, a principal – who has been informed by the client of a complaint and who fails to pursue it in accordance with the above – may personally become liable to disciplinary action also.

1.5 Sole practitioners

1.5.1 The formal procedure indicated in section 1.3 (above) will be impracticable for sole practitioners, but they are likely to find it helpful to establish an arrangement whereby complaints which they believe to be

unsubstantiated but which the client persists in making are reviewed by their alternate. Additionally, sole practitioners could ask a support member to review the complaint.

1.5.2 Section 1.4 (above) recommends documentation of the observance of the complaints procedure in the case of every complaint received. Since a sole practitioner is ultimately answerable in respect of any allegation regarding their firm, once a complaint is received such documentation is of equal importance to the practitioner.

2 Practical ways to avoid or defuse complaints

2.1 Types of complaint

2.1.1 Complaints received by the Institute relating to the services provided (or alleged lack thereof) by firms fall into the following main groups:

- fee disputes;
- delay;
- failure to respond to correspondence;
- failure to carry out duties;
- poor work or poor advice.

2.1.2 The Institute's experience is that a large majority of these complaints could have been avoided by a few simple measures usually at no extra cost to the firm. By contrast, the cost of dealing with a complaint, in terms of chargeable time and general disruption can be considerable. The following are a few practical suggestions to avoid the most obvious pitfalls which emerge from a consideration of complaints received.

2.2 Fees

2.2.1 Where an estimate or quotation is given, confirm it in writing and identify precisely the work which will be carried out.

2.2.2 Where there is likely to be an over-run on estimated fees, let the client know as soon as possible. Tell the client why the over-run has occurred, estimate the additional cost of finishing the work, and get the client's agreement to continue. Confirm the new agreement in writing as soon as possible.

2.2.3 Where no estimate or quotation has been given keep a sense of proportion between the cost to the client for the work and the value to the client of the work. If in doubt, refer to the client to confirm the instructions. (Further advice on fee disputes is given in section 2.8, and on the fee arbitration service in section 4 below.)

2.3 Delay

2.3.1 Prioritise work. Find out when the client wants it completed by and work to that date or earlier if possible.

2.3.2 If work has to be re-prioritised, make sure that the moving of clients' work down the queue does not create problems for the clients themselves.

2.3.3 Don't take on more work than your practice can handle. If you find that you have done so, you should consider using (reliable) sub-contractors or, if the increase in work looks permanent, engaging more staff.

2.3.4 If, for whatever reason, you are unable to attend to your clients' affairs for a period, let them know what is happening and give realistic estimates for the length of delay. Wherever possible, delegate the work to an appropriate level within your practice.

2.4 Failure to respond to correspondence

2.4.1 Consider instituting internal performance standards, communicated to clients, whereby a substantive response to correspondence is made within a (specified) reasonable period. Where this is not practicable or desirable, then:

- ensure all incoming correspondence is acknowledged upon receipt – even if only by way of card; and
- prioritise correspondence between urgent and non-urgent. Use phone, fax or e-mail to transmit urgent information, and confirm by way of letter.

2.4.2 If it is not convenient to deal with the correspondence now, and if it is not urgent, send a holding reply indicating when you are likely to be able to respond.

2.4.3 Make sure your office systems are such that correspondence does not get overlooked or mislaid.

2.5 Failure to carry out duties

2.5.1 Agree and confirm with your client the exact work you are going to be doing. Many complaints in this area relate to work which the clients *assume* will be done by their accountant, but no specific instructions were given. Make your engagement letters comprehensive and confirm in writing any additions or alterations.

2.5.2 Make sure *you* understand what your client has instructed you to do.

2.5.3 Install review procedures to ensure that all work has been properly completed.

2.6 Poor work or poor advice

2.6.1 Implement a system of quality control within your practice.

2.6.2 Be careful not to take on more work than your practice can handle. If you find that you have done so, you should consider using another firm or reliable sub-contractors or, if the increase in work looks permanent engaging more staff.

2.6.3 Make sure that:

- work within your practice is delegated to the appropriate level;
- the advice which you give is applicable to the client's particular circumstances;
- you have procedures to include diarising key dates, eg, tax election dates;
- you keep up to date with changes, especially in those areas subject to frequent change, eg, taxation legislation.

Even in the best regulated practices, clients may complain. When this occurs, the following general and specific guidance may prove to be useful.

2.7 When a complaint comes in

> The guidance which follows applies to all principals and not just the firm's nominated investigating principal.

2.7.1 Complaints are often construed (and sometimes presented) as personal criticism. Try not to be adversarial when you deal with a complaint because, if this occurs, objectivity and reasoned argument often disappear.

2.7.2 However emotionally a complaint is presented, at first clients usually still have a reservoir of goodwill for their accountants. At this stage, a genuine apology or an offer to make amends (without admitting liability), will often resolve the matter to everybody's satisfaction.

2.7.3 When dealing with a complaint, recognise that it is a sad fact of life that whilst clients who have the highest regard for their accountant will only recommend the practice to one or two close acquaintances, those who have a grievance that they feel is not being sufficiently addressed will spread the news to anyone willing to listen. The effect of this adverse publicity on a practice can be totally out of proportion to the matter at issue.

2.7.4 Try to see the matter from the client's viewpoint. Remember how you felt when you last had a problem with one of your suppliers or your local garage.

2.7.5 Try to resolve the matter speedily. Unresolved grievances can take up a disproportionate amount of your (otherwise chargeable) time.

2.7.6 Wherever possible, meet the client. Letters can appear impersonal and even telephone conversations do not always allow you to gain an accurate view of what is being expressed. A meeting can do a lot to resolve matters speedily to everyone's satisfaction. However, in certain cases you must be prepared for the meeting to open stormily and allow the client to vent their anger. If this happens, let the client have their say and do not be drawn on individual issues. If asked to comment, state that you will respond once you

have heard everything that your client has to say. Once the client has vented their anger, provided you have appeared to be concerned by what they have had to say, you will usually find that the subsequent discussion is more reasonable and productive.

You should always consider notifying your PII insurer about a complaint. (See section 5 below.)

2.8 Fee disputes

2.8.1 Your client is entitled, on request and without further charge, to a detailed breakdown of the bill in dispute. The minimum information that you should give is the number of hours involved, the chargeable rate per hour, and a description of the work undertaken. Show any discounts or write-offs that you have already applied in arriving at the fees invoiced. A helpsheet, *Fee disputes*, is available from www.icaew.com/complaints or by phoning the helpline, +44 (0)1908 546 235.

2.8.2 The right of lien is far from straightforward. Before exercising *any* lien over a client's property in your possession, check that it is in accordance with the guidance set out in the Members' Handbook Section 9.4 – 'Documents and records: ownership, lien and rights of access'. If in doubt consult your solicitors.

2.8.3 Remember that the purpose of a lien is to persuade otherwise reluctant clients to pay the amount they properly owe and not to exact payment from a client who has genuine reservations over the bill. If a client has indicated that the bill is in dispute (and especially where the dispute is to be resolved by formal means, eg, arbitration or litigation) the continued exercise of a lien may be inappropriate and may well be construed by the client as mere vindictiveness.

2.8.4 Your particular attention is drawn to Section 240 of the Code of Ethics – Fees and Other Types of Remuneration, particularly paragraph 240.4F (see the M*embers' Handbook*, Section 3.2) which requires a member exercising a lien to take reasonable and prompt steps to resolve any dispute relating to the amount of the fee so that the exercise of the lien becomes unnecessary.

2.8.5 The Institute has, for many years, operated its own fee arbitration scheme (see section 4 below).

2.9 Delay

2.9.1 Explain to the client the reason for the delay. You should agree (and confirm in writing) a timetable for the work to be completed and then adhere to it.

2.9.2 If you accept that you are responsible for the delay and there is a possibility of a claim for damages, you should consult with your PII insurer. In other cases, apologise to the client and consider making an ex gratia monetary offer, if appropriate.

2.9.3 If the delay has been caused by outside third parties, tell the client and explain what you have been doing to progress matters.

2.9.4 If the delay has been caused because you have been waiting for information from the client, check that they realise this. Are you sure they received your letter?

2.10 Failure to respond to correspondence

2.10.1 Find out why your firm has not responded. Did your firm receive the letter in the first place?

2.10.2 Explain the reason for the delay to the person who sent the letter. Agree a timetable for reply and adhere to it.

2.10.3 Use phone, fax or e-mail to transmit information required and then confirm later by letter.

2.11 Failure to carry out duties

2.11.1 Examine the complaint impartially. Was it clearly agreed that you would do this work? If so, explain to the client the reasons why it was not done and, without admitting liability, apologise or offer to make amends.

2.11.2 If it was not clearly agreed that you would do the work, ask yourself whether it was reasonable for the client to assume that you would be doing it. If there is any possibility of a claim for damages, consult your PII insurer. Otherwise, explain to the client the reason for the misunderstanding and, if appropriate, apologise or offer to make amends.

2.11.3 If it was not reasonable for your client to assume that you would be doing the work, explain the point at issue and why you require specific instructions to do the task. If they still wish you to act, get those specific instructions and find out if there are any other similar areas where the client has mistakenly assumed that you will be acting.

2.12 Poor work or poor advice

2.12.1 This is the most emotive area of complaint as there is often actual or implicit personal criticism. Try to remain impartial and focus on the problem (which is both yours and your client's) rather than the person involved (you).

2.12.2 Define the precise area of dissatisfaction and the reasons why your client is dissatisfied. By concentrating on and dealing with these you will stop the matter developing into a wide-ranging and unfocused complaint about the

overall standard of work which nobody will be able to defuse because it is too generalised.

2.12.3 If, on consideration, you feel the client has not received the standard of service that they should reasonably expect, and there is any possibility of a claim for damages, consult your PII insurer. In other cases, be frank and open, and apologise or offer to make amends.

2.12.4 If, however, you find no grounds for the complaint, do not dismiss it out of hand. Go through it with your client again, explaining why what happened did happen. Make sure your client understands what you are saying and try not to use too many technical terms if this is likely to cause confusion.

2.12.5 If the level of service provided is both good and bad, talk it through with your client. Explain where and why you do not agree with them, state where you are in agreement, and come up with positive proposals to resolve the matter.

2.12.6 Above all, try to see matters from your client's viewpoint. Put yourself in their shoes and think how *you* would feel were the positions reversed.

2.13 Conclusion

2.13.1 Remember, all complainants start with a problem that has given them a sense of grievance. To defuse a complaint, you must remove either the problem (which can include explaining why there is no problem) or the sense of grievance. You can do this far more easily in co-operation with your client than by attempting to dictate terms.

2.13.2 In other words, agree a solution; don't try to impose one.

3 Referral of a complaint to the Institute because the client remains dissatisfied

3.1.1 If you and your client cannot reach a mutually acceptable solution to the problem, you should remind them of their right to refer the matter to the Institute.

3.1.2 Don't worry about the possible repercussions. Your fears will probably be misplaced and may well be based on the monthly reports of the professional conduct committees published in *Accountancy*. Such reports represent a very small proportion of the total workload handled by the Professional Conduct Department.

3.1.3 When the Institute receives a letter from your client, our first reaction will usually be to see whether an impartial member of staff acting as a conciliator can intervene to help find a mutually acceptable resolution to the

problem. In fact, about 80% of all complaints received by the Institute are resolved at staff level and never go to a professional conduct committee.

3.1.4 The conciliation process is a user-friendly service. It is not legalistic in nature, nor is it adversarial. It concentrates on both the problem and the sense of grievance and, by setting these in the context of the Institute's bye-laws, guidance and regulations, tries to remove one or the other. If a matter is resolved by conciliation, it is most unlikely that disciplinary proceedings will follow.

3.1.5 It is only if the conciliation process fails that the matter may be transferred to a case manager for investigation. This is an entirely different process. The aim is to gather and impartially consider the evidence available to determine whether the matter justifies formal disciplinary proceedings. The approach is necessarily more rigorous and may foster a more adversarial attitude between the parties.

3.1.6 For further information, ask for our booklet, *How we investigate complaints*.

4 Fee arbitration service

4.1.1 Fee disputes are one of the commonest causes of complaint against chartered accountants, but the Institute will not usually adjudicate upon them because they are essentially questions for resolution in a court of law.

4.1.2 As a service to members and their clients, the Institute offers a fixed-cost fee arbitration scheme. Arbitration is a consensual process and the scheme requires both parties to agree to use the service.

The cost of the Institute's fee arbitration scheme is fixed in proportion to the fee in dispute. That cost is allocated between the parties in accordance with the following formula:

- if the arbitrator's award makes no change to the fee charged or is within 5% of that figure, the client will be liable to pay the award and arbitration cost;
- if the award is between 5% and 15% below the amount in dispute, the client will pay the award and share the arbitration cost equally with the member; or
- if the award is 15% or more below the amount in dispute, the member will bear all the arbitration cost.

4.1.3 Both parties are required to put the arbitration cost into the pot at the start of the process, and the winner under the formula above is refunded. The Institute makes a (non-returnable) administrative charge to both parties.

4.1.4 For further information, consult our helpsheet, *Fee arbitration*, at www.icaew.com/complaints or call +44 (0)1908 546 299.

5 Professional indemnity insurance

5.1.1 A complaint may be the first step along the road to making a claim that you will need to refer to your professional indemnity insurer. You must assess all complaints when they are lodged. If you consider that a complaint has the potential for a claim, you should notify your insurer or broker immediately.

5.1.2 If a complaint has to be referred to insurers, you must follow your insurer's advice so that your cover is not affected.

5.1.3 If you conclude that a complaint is not a potential insurance claim, any concession you make should be accompanied by a phrase such as, 'As a gesture of goodwill, and without admission of liability, we are prepared to . . .'

(Amended 26 August 2004; further amended 31 August 2006 – Professional Standards Board)

Council guidelines on publicity for the disciplinary and regulatory processes

Made under Disciplinary Bye-law 36

1 These guidelines apply to any announcement under Disciplinary Bye-law 36 concerning the affairs of a member or member firm, whether the member or member firm is named in the announcement or not.

2 In order to comply with the Disciplinary Bye-law such announcement:

a. must be confined to the consideration by any relevant Committee of
   i. any matter relating to or connected with the carrying out by the Institute of functions assumed by it under any statute; or of
   ii. any complaint; and
b. must be or involve a matter of public concern.

3 What amounts to a matter of public concern is largely subjective and a matter for judgement at the time, but the following will always be a matter of public concern:

a. the collapse with substantial loss of funds of a listed or other public interest company;*
b. any other matter in which the conduct of a member or member firm is the subject of criticism from an official body or gives rise to widespread public discussion;
c. except where it is insubstantial, unsupported by evidence or manifestly unsound:
   i. any complaint in which a member of the Council of the Institute is personally concerned; and
   ii. any complaint that the Institute or any of its officers, Committees or officials has acted corruptly, improperly or negligently.

4 Any announcement under Disciplinary Bye-law 36 will be made by the Chairman of the Investigation Committee or the Chairman of the appropriate regulatory Committee (or in their absence the Vice Chairman of the relevant Committee).

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* The term 'listed company' means:

a. a company whose shares or securities have been admitted to listing by a recognised stock exchange; and
b. a company whose equity share capital is marketed under the regulations of a recognised stock exchange, e.g. companies whose shares are dealt in on the Unlisted Securities Market.

The term 'other public interest company' means a company or other organisation in either the private and public sectors which is 'in the public eye' because of its size or the product or services it provides. Examples of such companies and organisations would be large charitable organisations and trusts, major monopolies, duopolies, building societies, industrial and provident societies or credit unions, deposit-taking organisations, and those holding investment business client money.

5 Examples of the sort of announcement which might be made under the paragraph are:

'The ICAEW has received from the Secretary of State a copy of the report of Inspectors appointed under section [ ] to look into the affairs of XYZ plc. The report is being studied and will be dealt with in accordance with the procedures laid down in the Institute's bye-laws. If those procedures should result in a finding adverse to any member or member firm, the finding will normally be the subject of a further announcement.'

'The ICAEW has received a complaint concerning the auditors of XYZ plc at the time of its collapse. It is being dealt with in accordance with procedures laid down in the Institute's bye-laws. If those procedures should result in a finding adverse to any member or member firm, that finding will normally be the subject of a further announcement.'

'The ICAEW is studying the collapse of XYZ plc with a view of determining whether there are grounds for investigating the conduct or competence of any member or member firm. If that examination should result in a finding adverse to any member or member firm, that finding will normally be the subject of a further announcement.'

'The ICAEW has considered a complaint against Messrs A, B & C and decided that there are no grounds for disciplinary or other action.' (Only to be used where the fact of the complaint is public knowledge or at the request of the member/firm concerned.).

'A Professional Conduct Committee of the ICAEW has found Mr AB not guilty of misconduct in relation to. . . .' (Only to be used where the fact of the complaint is public knowledge or at the request of the member/firm concerned.).

6 No announcement will name or otherwise identify a member or member firm unless this is necessary or desirable in order to maintain public confidence in the Institute or its members. It will be necessary or desirable to name a member or member firm:

i. where failure to do so would defeat the purpose of the announcement, for example because it would not be possible to relate the announcement to the subject of public concern; or
ii. where the name is already a matter of public knowledge.

7 Save where urgent action is desirable to maintain confidence in the profession or the Institute or its members any member or member firm named in an announcement will be given, not less than 48 hours before the making of an announcement, a copy of its terms.

8 An announcement under the Bye-law will be accompanied by a short written statement in standard form describing the disciplinary and regulatory

arrangements of the Institute, including the representation of non-accountants on relevant Committees and the relationship of the Professional Conduct Committees to the Joint Disciplinary Scheme or the Actuarial and Accountancy Discipline Board.

9 Once an announcement has been made, no further announcement will be made prior to the conclusion of any investigation, save in explanation of the Institute's procedures following a finding of not proved or the upholding of an appeal against a finding of proved or unless circumstances change in such a way as to make the original announcement incorrect or misleading.

Section 3

Code of Ethics

CONTENTS

Approach, scope and authority

(This Code of Ethics applies from 1 September 2006. Where guidance relates to projects commencing prior to that date, previous guidance may be applied up to completion of the project.)

Introduction

1.1 *One of the principal objects of the Royal Charter is to maintain a high standard of efficiency and professional conduct by members* of the Institute. The Code of Ethics ('this Code') applies to all members* of the Institute (which for the purposes of this Code also includes affiliates, provisional members*, and employees of a member firm* or an affiliate) and member firms* where relevant. These are referred to in the remainder of this Code as professional accountants*.*

1.2 *Professional accountants* have a responsibility to take into consideration the public interest (considered in more detail in paragraph 100.1) and to maintain the reputation of the accountancy profession. Personal self-interest must not prevail over those duties. This Code helps professional accountants* to meet these obligations by providing them with ethical guidance. Failure to follow this Code may lead to a professional accountant* becoming liable to disciplinary action as outlined in the Disciplinary Bye-laws 4, 5, 6 and 6A.*

Approach

1.3 *Guidance is given in the form of fundamental principles and illustrations of how they are to be applied in specific situations. These are available at the Institute's web site www.icaew.com/membershandbook. The fundamental principles are drawn from the duties owed by professional accountants*, whether in practice or not, and from the requirements of the Royal Charter. They are framed in broad and general terms and constitute basic requirements of professional behaviour. The illustrations provide guidance on what is expected of*

* See Definitions

professional accountants in relation to particular situations that commonly arise either in practice or in business. The value of this principles-based approach is that it avoids excessive legalism by not having to anticipate every contingency, whilst at the same time being helpful in giving examples of problem situations. In some instances, prohibitions or mandatory actions arise from the analysis of threats: these are considered further in 100.10 below.*

Scope

1.4 *Professional accountants* are expected to follow the guidance contained in the fundamental principles in all of their professional and business activities whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the profession. A professional accountant* should also follow the requirements in the illustrations, including prohibitions or mandatory actions, where circumstances are the same as, or analogous to, those addressed by those illustrations. Failure to follow such guidance may be justified in those rare circumstances where to follow a precise prohibition or mandated action would result in failure to adhere to the fundamental principles.*

1.5 *For convenience, the illustrations in this Code are grouped into parts applicable principally to professional accountants* working in public practice and business respectively, but professional accountants* may find any of them of use in relevant circumstances.*

1.6 *Professional accountants* should be guided not merely by the terms but also by the spirit of this Code and the fact that particular conduct does not appear among a list of examples does not prevent it amounting to misconduct. Professional accountants* should ensure that work for which they are responsible, which is undertaken by others on their behalf, is carried out in accordance with the requirements of this Code. Member firms* are reminded that this Code applies to their employees, whether members* or not and that they are responsible for applying this requirement.*

1.7 *Certain areas of work are reserved by statute to professional accountants* who are in practice, whether or not with other persons, namely investment business, insolvency and audit. In these areas professional accountants* may be subject to rules laid down by laws and regulation, breach of which can give rise to disciplinary proceedings against the professional accountant*.*

1.8 *Should the advice in this Code conflict with laws and regulations, professional accountants* are bound to follow the laws and regulations.*

1.9 *Professional accountants* working overseas should comply with this Code unless to do so would breach local laws and regulations.*

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* See Definitions

Authority

1.10 *In determining whether or not a complaint is proved, the Investigation and Disciplinary Committees may have regard to any Code of practice, ethical or technical, and to any regulations affecting professional accountants*, laid down or approved by the Council.*

1.11 *Paragraph 100.2 notes that safeguards are required to be put into place where the threats to adherence of the fundamental principles are other than clearly insignificant.* Thus, significance will be relevant in determining whether there has been a breach of the guidance. Where the intent behind and consequences of the action in question are trivial and inconsequential, the requirements of this Code will not have been breached. In the event of a complaint, the Investigation and Disciplinary Committees will consider the matter, including perceptions of a reasonable and informed third party, having knowledge of all relevant information and will be the arbiter.*

International Federation of Accountants Code of Ethics

1.12 *Except as noted below, this Code has been derived from the International Federation of Accountants (IFAC) Code of Ethics. Accordingly, compliance with the remainder of this Code will ensure compliance with the principles of the IFAC Code. Paragraph numbering in the rest of this Code replicates that used in the IFAC Code of Ethics, except in respect of:*

- *Sections 221, 241 and Part D which have no direct equivalent in the IFAC Code of Ethics;*
- *Wording in italics in the other Sections, where additional discussion and/or requirements have been considered by Council to be useful or necessary. The fact that wording is or is not in italics does not indicate any differences in the degree of importance that should be attached to it.*

A direct link has been retained to paragraph numbering in the IFAC Code of Ethics. However, as a result of the additional discussion and requirements noted above, and deletion of material that is not applicable to the professional accountants of the Institute, the paragraph referencing in this Code is not necessarily consecutive.*

1.13 *The Auditing Practices Board (APB) has stated, in ISA (UK and Ireland) 200, that it is not aware of any significant instances where the relevant parts of the International Federation of Accountants (IFAC) Code of Ethics are more restrictive than the APB's Ethical Standards.*

1.14 *If professional accountants* are conducting assurance engagements other than audit, whether provided to audit clients or others, they should follow the ethical guidance on assurance engagements contained in Section 290.*

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* See Definitions

1.15 *Legislation has required the Institute to adopt, as regards auditor independence requirements, the Ethical Standards for Auditors, issued by the Auditing Practices Board ('APB'). Accordingly, as considered in further detail at the start of Section 290, when conducting audit engagements* in the UK and the Republic of Ireland, professional accountants* should comply with the requirements of the APB's Ethical Standards for Auditors. When performing audit engagements* elsewhere, professional accountants* should comply with the requirements of Section 290 of the IFAC Code of Ethics (www.ifac.org/Store/).*

Other Sources of Guidance

1.16 *Professional accountants* who are in doubt as to their ethical position may seek advice from the following sources, available to all members* of the Institute:*

- *The Institute's Ethics Advisory Services by e-mail: ethics@icaew.com or phone +44 (0)1908 248258. The Ethics Advisory Services are confidential and free from the duty to report professional misconduct within the Institute. Further information on the Ethics Advisory Services can be found at www.icaew.com/ethicsadvice, along with helpsheets and answers to a number of frequently asked questions.*
- *The Institute's money laundering helpline, by e-mail: mlenquiries@icaew. com or telephone +44 (0)1908 248320. This provides advice on general issues concerning the regulations or specific issues, which can be discussed anonymously.*
- *The Support Members Scheme. This is wider in scope than the Ethics Advisory Services. The Support Members Scheme is run by volunteer members of the Institute from a wide range of backgrounds. It is a confidential, free service exempt from the duty to report misconduct and provides advice and help to members* in difficulties. A member* can contact the Support Members Scheme by phone on +44 (0) 800 917 3526.*

1.17 *Seeking advice from the Ethics Advisory Services does not discharge a professional accountant's* duty to report misconduct, including their own misconduct (see Section 2.7, 'The duty to report misconduct' in the Members' Handbook (www.icaew.com/membershandbook)).*

1.18 *A professional accountant* should consider taking legal advice to resolve issues arising from the application of laws and regulations to particular situations relating to confidentiality, disclosure, privilege, self-incrimination and other areas.*

Additional support material and case studies on ethics are included in the Institute's Continual Professional Development (CPD) website at www.icaew.com/cpd.

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* See Definitions

General application of this Code (Part A)

Section 100 Introduction and fundamental principles

100.1 A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest.

Acting in the public interest involves having regard to the legitimate interests of clients, government, financial institutions, employers, employees, investors, the business and financial community and others who rely upon the objectivity and integrity of the accounting profession to support the propriety and orderly functioning of commerce. This reliance imposes a public interest responsibility on the profession. Professional accountants should take into consideration the public interest and reasonable and informed public perception in deciding whether to accept or continue with an engagement or appointment, bearing in mind that the level of the public interest will be greater in larger entities and entities which are in the public eye.*

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* should observe and comply with the ethical requirements of this Code.

100.2 This Code is in three parts. Part A establishes the fundamental principles of professional ethics for professional accountants* and provides a conceptual framework for applying those principles. The conceptual framework provides guidance on fundamental ethical principles. Professional accountants* are required to apply this conceptual framework to identify threats to compliance with the fundamental principles, to evaluate their significance and, if such threats are other than clearly insignificant* to apply safeguards to eliminate them or reduce them to an acceptable level such that compliance with the fundamental principles is not compromised.

* See Definitions

100.3 Parts B and C illustrate how the conceptual framework is to be applied in specific situations. It provides examples of safeguards that may be appropriate to address threats to compliance with the fundamental principles and also provides examples of situations where safeguards are not available to address the threats and consequently the activity or relationship creating the threats should be avoided. Part B applies to professional accountants in public practice*. Part C applies to professional accountants in business*. Professional accountants in public practice* may also find the guidance in Part C relevant to their particular circumstances.

Fundamental Principles

100.4 A professional accountant* is required to comply with the following fundamental principles:

(a) Integrity
A professional accountant* should be straightforward and honest in all professional and business relationships.

(b) Objectivity
A professional accountant* should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

(c) Professional Competence and Due Care
A professional accountant* has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. A professional accountant* should act diligently and in accordance with applicable technical and professional standards when providing professional services*.

(d) Confidentiality
A professional accountant* should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the professional accountant* or third parties.

(e) Professional Behaviour
A professional accountant* should comply with relevant laws and regulations and should avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail in Sections 110–150.

* See Definitions

Conceptual Framework Approach

100.5 The circumstances in which professional accountants* operate may give rise to specific threats to compliance with the fundamental principles. It is impossible to define every situation that creates such threats and specify the appropriate mitigating action. In addition, the nature of engagements and work assignments may differ and consequently different threats may exist, requiring the application of different safeguards. A conceptual framework that requires a professional accountant* to identify, evaluate and address threats to compliance with the fundamental principles, rather than merely comply with a set of specific rules which may be arbitrary, is, therefore, in the public interest. This Code provides a framework to assist a professional accountant* to identify, evaluate and respond to threats to compliance with the fundamental principles. If identified threats are other than clearly insignificant*, a professional accountant* should, where appropriate, apply safeguards to eliminate the threats or reduce them to an acceptable level, such that compliance with the fundamental principles is not compromised.

100.6 A professional accountant* has an obligation to evaluate any threats to compliance with the fundamental principles when the professional accountant* knows, or could reasonably be expected to know, of circumstances or relationships that may compromise compliance with the fundamental principles.

100.7 A professional accountant* should take qualitative as well as quantitative factors into account when considering the significance of a threat. If a professional accountant* cannot implement appropriate safeguards, the professional accountant* should decline or discontinue the specific professional service involved, or where necessary resign from the client (in the case of a professional accountant in public practice*) or the employing organisation (in the case of a professional accountant in business*).

100.8 A professional accountant* may inadvertently violate a provision of this Code. Such an inadvertent violation, depending on the nature and significance of the matter, may not compromise compliance with the fundamental principles provided, once the violation is discovered, the violation is corrected promptly and any necessary safeguards are applied.

100.9 Parts B and C of this Code include examples that are intended to illustrate how the conceptual framework is to be applied. The examples are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a professional accountant* that may create threats to compliance with the fundamental principles. Consequently, it is not sufficient for a professional accountant* merely to comply with the examples presented; rather, the framework should be applied to the particular circumstances encountered by the professional accountant*.

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* See Definitions

Threats and Safeguards

100.10 Compliance with the fundamental principles may potentially be threatened by a broad range of circumstances. Many threats fall into the following categories:

(a) Self-interest threats, which may occur as a result of the financial or other interests of a professional accountant* or of an immediate or close family* member;
(b) Self-review threats, which may occur when a previous judgement needs to be re-evaluated by the professional accountant* responsible for that judgement;
(c) Advocacy threats, which may occur when a professional accountant* promotes a position or opinion to the point that subsequent objectivity may be compromised;
(d) Familiarity threats, which may occur when, because of a close relationship, a professional accountant* becomes too sympathetic to the interests of others; and
(e) Intimidation threats, which may occur when a professional accountant* may be deterred from acting objectively by threats, actual or perceived.

Parts B and C of this Code, respectively, provide examples of circumstances that may create these categories of threats for professional accountants in public practice* and professional accountants in business*. Professional accountants in public practice* may also find the guidance in Part C relevant to their particular circumstances. *Part D deals with professional accountants* undertaking insolvency work*.

Professional accountants should note that each of the categories of threat discussed above may arise in relation to the professional accountant's* own person or in relation to connected persons such as members of their family or partners* or persons who are close to the professional accountants* for some other reason, for instance by reason of a past or present association, obligation or indebtedness.*

100.11 Safeguards that may eliminate or reduce such threats to an acceptable level fall into two broad categories:

(a) Safeguards created by the profession, legislation or regulation; and
(b) Safeguards in the work environment.

100.12 Safeguards created by the profession, legislation or regulation include, but are not restricted to:

- Educational, training and experience requirements for entry into the profession.
- Continuing professional development requirements.
- Corporate governance regulations.
- Professional standards.
- Professional or regulatory monitoring and disciplinary procedures.

* See Definitions

- External review by a legally empowered third party of the reports, returns, communications or information produced by a professional accountant*.

100.13 Parts B and C of this Code, respectively, discuss safeguards in the work environment for professional accountants in public practice* and those in business. *Part D deals with professional accountants* undertaking insolvency work*.

100.14 Certain safeguards may increase the likelihood of identifying or deterring unethical behaviour. Such safeguards, which may be created by the accounting profession, legislation, regulation or an employing organisation, include, but are not restricted to:

- Effective, well publicised complaints systems operated by the employing organisation, the profession or a regulator, which enable colleagues, employers and members of the public to draw attention to unprofessional or unethical behaviour.
- An explicitly stated duty to report breaches of ethical requirements.

100.15 The nature of the safeguards to be applied will vary depending on the circumstances. In exercising professional judgement, a professional accountant* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would conclude to be unacceptable.

Where a professional accountant decides to accept or continue an engagement, appointment, task or employment in a situation where a significant threat to the fundamental principles has been identified, the professional accountant* should be able to demonstrate that the availability and effectiveness of safeguards has been considered and it was reasonable to conclude that those safeguards will adequately preserve their compliance with the fundamental principles. It may be useful to document the reasoning and other evidence which supports the evaluation of threats and safeguards to such an extent that it enables a reasonable and informed third party to conclude that the decisions are acceptable.*

Ethical Conflict Resolution

100.16 In evaluating compliance with the fundamental principles, a professional accountant* may be required to resolve a conflict in the application of fundamental principles.

100.17 When initiating either a formal or informal conflict resolution process, a professional accountant* should consider the following, either individually or together with others, as part of the resolution process:

(a) Relevant facts;
(b) Relevant parties;
(c) Ethical issues involved;

* See Definitions

(d) Fundamental principles related to the matter in question;
(e) Established internal procedures; and
(f) Alternative courses of action.

Having considered these issues, a professional accountant* should determine the appropriate course of action that is consistent with the fundamental principles identified. The professional accountant* should also weigh the consequences of each possible course of action. If the matter remains unresolved, the professional accountant* should consult with other appropriate persons within the firm* or employing organisation for help in obtaining resolution.

It will generally be preferable for the ethical conflict to be resolved within the employing organisation before consulting individuals outside the employing organisation.

100.18 Where a matter involves a conflict with, or within, an organisation, a professional accountant* should also consider consulting with those charged with governance of the organisation, such as the board of directors or the audit committee*.

100.19 It may be in the best interests of the professional accountant* to document the substance of the issue and details of any discussions held or decisions taken, concerning that issue.

100.20 If a significant conflict cannot be resolved, a professional accountant* may wish to obtain professional advice from the *Institute* or legal advisors, and thereby obtain guidance on ethical issues without breaching confidentiality. For example, a professional accountant* may have encountered a fraud, the reporting of which could breach the professional accountant's* responsibility to respect confidentiality. The professional accountant* should consider obtaining legal advice to determine whether there is a requirement to report.

Further information on sources of guidance is available in Section 1.

100.21 If, after exhausting all relevant possibilities, the ethical conflict remains unresolved, a professional accountant* should, where possible, refuse to remain associated with the matter creating the conflict. The professional accountant* may determine that, in the circumstances, it is appropriate to withdraw from the engagement team* or specific assignment, or to resign altogether from the engagement, the firm* or the employing organisation.

More detailed guidance on the ethical conflict resolution process is available in the Appendix to Part A.

* See Definitions

Section 110 Integrity

110.1 The principle of integrity imposes an obligation on all professional accountants* to be straightforward and honest in professional and business relationships. Integrity also implies fair dealing and truthfulness.

It follows that a professional accountant's advice and work must be uncorrupted by self-interest and not be influenced by the interests of other parties.*

110.2 A professional accountant* should not be associated with reports, returns, communications or other information where they believe that the information:

(a) Contains a materially false or misleading statement;
(b) Contains statements or information furnished recklessly; or
(c) Omits or obscures information required to be included where such omission or obscurity would be misleading.

110.3 A professional accountant* will not be considered to be in breach of paragraph 110.2 if the professional accountant* provides a modified report in respect of a matter contained in paragraph 110.2.

Section 120 Objectivity

120.1 The principle of objectivity imposes an obligation on all professional accountants* not to compromise their professional or business judgement because of bias, conflict of interest or the undue influence of others.

Objectivity is the state of mind which has regard to all considerations relevant to the task in hand but no other.

120.2 A professional accountant* may be exposed to situations that may impair objectivity. It is impracticable to define and prescribe all such situations. Relationships that bias or unduly influence the professional judgement of the professional accountant* should be avoided.

Section 130 Professional competence and due care

130.1 The principle of professional competence and due care imposes the following obligations on professional accountants*:

(a) To maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent professional service; and
(b) To act diligently in accordance with applicable technical and professional standards when providing professional services*.

* See Definitions

130.2 Competent professional service requires the exercise of sound judgement in applying professional knowledge and skill in the performance of such service. Professional competence may be divided into two separate phases:

(a) Attainment of professional competence; and
(b) Maintenance of professional competence.

130.3 The maintenance of professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development develops and maintains the capabilities that enable a professional accountant* to perform competently within the professional environments.

Further guidance on continuing professional development is available at www.icaew.com/cpd and in the Regulations relating to learning and professional development which are available in the Members Handbook at www.icaew.com/membershandbook.

130.4 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

130.5 A professional accountant* should take steps to ensure that those working under the professional accountant's* authority in a professional capacity have appropriate training and supervision.

130.6 Where appropriate, a professional accountant* should make clients, employers or other users of the professional services* aware of limitations inherent in the services to avoid the misinterpretation of an expression of opinion as an assertion of fact.

Section 140 Confidentiality

The Principle of Confidentiality
140.0 *The principle of confidentiality is not only to keep information confidential, but also to take all reasonable steps to preserve confidentiality. Whether information is confidential or not will depend on its nature. A safe and proper approach for professional accountants* to adopt is to assume that all unpublished information about a client's or employer's affairs, however gained, is confidential. Professional accountants* should be aware that some clients or employers may regard the mere fact of their relationship with a professional accountant* as being confidential.*

140.1 The principle of confidentiality imposes an obligation on professional accountants* to refrain from:

(a) Disclosing outside the firm* or employing organisation confidential information acquired as a result of professional and business relationships

* See Definitions

without proper and specific authority or unless there is a legal or professional right or duty to disclose; and

(b) Using confidential information acquired as a result of professional and business relationships to their personal advantage or the advantage of third parties.

Professional accountants in public practice must not disclose confidential information to a client even though the information is relevant to an engagement for, or would be beneficial to, that client.*

Where professional accountants in public practice have confidential information which affects an assurance report, or other report which requires a professional accountant* to state their opinion, the professional accountant* cannot provide an opinion which they already know, from whatever source, to be untrue. If the professional accountant in public practice* is to continue the engagement, the professional accountant* must resolve this disparity. In order to do so, the professional accountant* is entitled to apply normal procedures and to make such enquiries in order to enable the professional accountant* to obtain that same information but from another source. Under no circumstances, however, should there be any disclosure of confidential information outside the firm*.*

140.2 A professional accountant* should maintain confidentiality even in a social environment. The professional accountant* should be alert to the possibility of inadvertent disclosure, particularly in circumstances involving long association with a business associate or a close or immediate family* member.

140.3 A professional accountant* should also maintain confidentiality of information disclosed by a prospective client or employer.

This requirement extends not only to clients, past and present, but also to third parties from or about whom information has been received in confidence. The principle of confidentiality clearly does not prevent an employee from using the skills acquired while working with a former employer in undertaking a new role with a different organisation. Professional accountants should neither use nor appear to use special knowledge which could only have been acquired with access to confidential information. It is a matter of judgement as to the dividing line which separates experience gained, from special knowledge acquired.*

140.4 A professional accountant* should also consider the need to maintain confidentiality of information within the firm* or employing organisation.

140.5 A professional accountant* should take all reasonable steps to ensure that staff under the professional accountant's* control and persons from whom advice and assistance is obtained respect the professional accountant's* duty of confidentiality.

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* See Definitions

Member firms should ensure that all who work on their behalf are trained in, and understand:*

- *The importance of confidentiality;*
- *The importance of identifying any conflicts of interest and confidentiality issues between clients, or between themselves or the firm and a client, in relation to a current or prospective engagement; and*
- *The procedures the firm* has in place for the recognition and consideration of possible conflicts of interest and confidentiality issues.*

140.6 The need to comply with the principle of confidentiality continues even after the end of relationships between a professional accountant* and a client or employer. When a professional accountant* changes employment or acquires a new client, the professional accountant* is entitled to use prior experience. The professional accountant* should not, however, use or disclose any confidential information either acquired or received as a result of a professional or business relationship.

140.6A *Detailed guidance on conflicts of interest, including situations where such conflicts may result in threats (or perceived threats) to preservation of confidentiality, are included in Section 220.*

Disclosure of Confidential Information

140.7 The following are circumstances where professional accountants* are or may be required to disclose confidential information or when such disclosure may be appropriate:

(a) Disclosure is permitted by law and is authorised by the client or the employer;
(b) Disclosure is required by law, for example:
  (i) Production of documents or other provision of evidence in the course of legal proceedings; or
  (ii) Disclosure to the appropriate public authorities of infringements of the law that come to light; and

Where required by law or regulations to disclose confidential information, for example as a result of anti-money laundering or anti-terrorist legislation, or in connection with legal proceedings involving either themselves or their employing organisation, professional accountants should always disclose that information in compliance with relevant legal requirements. Professional accountants* should take care when communicating relevant facts to others relating to known or suspected money laundering or terrorist activities. Under the Money Laundering Regulations 2007, the Terrorism Act 2000 and the Terrorism Act 2006, it is a criminal offence to 'tip off' a money launderer or terrorist. For further discussion, please refer to the money laundering legislation and guidance available at www.icaew.com/moneylaundering.*

* See Definitions

(c) There is a professional duty or right to disclose, when not prohibited by law:
  (i) To comply with the quality review of a member body or professional body;
  (ii) To respond to an inquiry or investigation by a member body or regulatory body;
  (iii) To protect the professional interests of a professional accountant* in legal proceedings; or
  (iv) To comply with technical standards and ethics requirements.

A professional accountant may disclose confidential information to third parties, when not obliged to do so by law or regulations, if the disclosure can be justified in the public interest and is not contrary to laws and regulations. Before making such disclosure, professional accountants* should obtain legal or professional advice as to their duties and obligations in the context of their professional and business relationships, and possible protection under the Public Interest Disclosure Act 1998. Further guidance on disclosure in the public interest is available in Section 7.1, 'Professional conduct and disclosure in relation to defaults or unlawful acts' in the Members' Handbook (www.icaew.com/membershandbook).*

Confidentiality and privilege is a complex area. For example, information which is confidential may not be privileged and, therefore, may be admissible in court proceedings. Privilege is a difficult area, quite distinct from confidentiality, and it is recommended that further advice be taken if a professional accountant is in doubt as to the action that should be taken.*

Guidance on money laundering reporting requirements in privileged circumstances is included in Technical Release 02/06, available at www.icaew.com/technical.

140.8 In deciding whether to disclose confidential information, professional accountants* should consider the following points:

(a) Whether the interests of all parties, including third parties whose interests may be affected, could be harmed if the client or employer consents to the disclosure of information by the professional accountant*;
(b) whether all the relevant information is known and substantiated, to the extent it is practicable; when the situation involves unsubstantiated facts, incomplete information or unsubstantiated conclusions, professional judgement should be used in determining the type of disclosure to be made, if any;
(c) the type of communication that is expected and to whom it is addressed; in particular, professional accountants* should be satisfied that the parties to whom the communication is addressed are appropriate recipients;
(d) whether or not the information is privileged, either under Legal Professional

* See Definitions

Privilege or in Privileged Circumstances under Section 330 of the Proceeds of Crime Act 2002 (see Technical release 02/06); and

(e) the legal and regulatory obligations and the possible implications of disclosure for the professional accountant.*

140.9 *The paragraphs above deal with professional accountants'* treatment of confidential information belonging to a client or employer. There is another context in which professional accountants* will be given or may obtain information which they must handle sensitively. Professional accountants* may be approached in confidence with information about alleged illegal or improper actions on the part of employees or management of the business for which the informant works or with which the informant has some other relationship. Professional accountants* may receive that information because of being trusted by the informant, or may receive it in connection with work their firm* is carrying out for the informant's employer.*

Whatever the circumstances in which the information comes to professional accountants, the professional accountants* should:*

- *Advise informants to pass the information to their employer through the medium of the employer's own internal procedures (if they exist);*
- *Use their best endeavours to protect the identity of the informant, taking care not to mislead the informant as to the extent to which this can be done, and should only cause the employer to be made aware of the informant's identity where this cannot be avoided; and*
- *Take care in determining the quality of the information and how best to use it, if at all.*

140.10 *For a more detailed explanation of the operation of the provisions of the Public Interest Disclosure Act 1998, professional accountants* are referred to ICAEW Technical Releases 16/99 'Receipt of Information in Confidence by Auditors' and 17/99 'Public Interest Disclosure Act 1998' (www.icaew.com/technical).*

Section 150 Professional Behaviour

150.1 The principle of professional behaviour imposes an obligation on professional accountants* to comply with relevant laws and regulations and avoid any action that may bring discredit to the profession. This includes actions which a reasonable and informed third party, having knowledge of all relevant information, would conclude negatively affects the good reputation of the profession.

Professional accountants should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.*

* See Definitions

150.2 In marketing and promoting themselves and their work, professional accountants* should not bring the profession into disrepute. Professional accountants* should be honest and truthful and should not:

(a) Make exaggerated claims for the services they are able to offer, the qualifications they possess, or experience they have gained; or
(b) Make disparaging references or unsubstantiated comparisons to the work of others.

Appendix to Part A – Further guidance on Ethical Conflict Resolution

Further guidance on the matters discussed in paragraph 100.17:

(a) Relevant facts
In order to clarify and identify the problem, the professional accountant should seek to establish the known facts of the situation and any limitations. It may not be possible to obtain all relevant facts but the professional accountant* may be able to obtain more background information to address the limitations by:*
- *Referring to the organisation's policy, procedures, code of conduct and previous history;*
- *Discussing the matter with parties internal and external to the organisation. For example trusted managers and colleagues.*

(b) Relevant parties
The professional accountant should consider affected parties ranging from individuals, organisations to society. The parties to be considered include, but are not limited to, employees, employers, shareholders, consumers/clients, investors, government and the community at large.*

(c) Ethical issues involved.
The professional accountant should consider the professional, organisational and personal ethical issues of the matter.*

(d) Fundamental principles related to the matter in question.
The professional accountant should refer to the guidance contained in this Code in order to establish which fundamental principles are affected by the situation.*

(e) Established internal procedures
The professional accountant should refer to the employing organisation's internal procedures and also consider which parties should be involved in the ethical conflict resolution process, in what role and at what stage. For example, the professional accountant* needs to consider when it would be*

* See Definitions

appropriate to refer to external sources for help, such as the Institute (see paragraphs 1.16 to 1.19 of this Code for sources of advice and guidance). Professional accountants may find it useful to discuss the ethical conflict issue within the organisation with the following parties:*

- *Immediate superior;*
- *The next level of management;*
- *A corporate governance body, for example, the audit committee*;*
- *Other departments in the organisation which include, but are not limited to, legal, audit and human resources departments.*

(f) Alternative courses of action
In considering courses of action, the professional accountant should consider the following:*

- *The organisation's policies, procedures and guidelines;*
- *Applicable laws and regulations;*
- *Universal values and principles adopted by society;*
- *Long term and short term consequences;*
- *Symbolic consequences;*
- *Private and public consequences.*

When evaluating the suggested course of action, a professional accountant should test the adequacy of the suggested course of action by considering the following:*

- *Have all consequences associated with the course of action been discussed and evaluated?*
- *Is there any reason why the suggested course of action should not stand the test of time?*
- *Would a similar course of action be undertaken in a similar situation?*
- *Would the suggested course of action stand scrutiny from peers, family and friends?*

* See Definitions

Professional accountants in public practice (Part B)

Section 200 Introduction

200.1 This Part of this Code illustrates how the conceptual framework contained in Part A is to be applied by professional accountants in public practice*. The examples in the following Sections are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a professional accountant in public practice* that may create threats to compliance with the principles. Consequently, it is not sufficient for a professional accountant in public practice* merely to comply with the examples presented; rather, the framework should be applied to the particular circumstances faced.

200.2 A professional accountant in public practice* should not engage in any business, occupation or activity that impairs or might impair integrity, objectivity or the good reputation of the profession and as a result would be incompatible with the rendering of professional services*.

Fundamental Principles

200.2A *Professional accountants are required to comply with the following fundamental principles:*

* See Definitions

(a) Integrity
Professional accountants should be straightforward and honest in all professional and business relationships.*

(b) Objectivity
Professional accountants should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.*

(c) Professional Competence and Due Care
Professional accountants have a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. Professional accountants* should act diligently and in accordance with applicable technical and professional standards when providing professional services*.*

(d) Confidentiality
Professional accountants should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the professional accountant* or third parties.*

(e) Professional Behaviour
Professional accountants should comply with relevant laws and regulations and should avoid any action that discredits the profession.*

Threats and Safeguards
200.3 Compliance with the fundamental principles may potentially be threatened by a broad range of circumstances. Many threats fall into the following categories:

(a) Self-interest;
(b) Self-review;
(c) Advocacy;
(d) Familiarity; and
(e) Intimidation.

These threats are discussed further in Part A of this Code.

The nature and significance of the threats may differ depending on whether they arise in relation to the provision of services to a financial statement audit client*, a non-financial statement audit assurance client* or a non-assurance client.

* See Definitions

200.4 Examples of circumstances that may create self-interest threats for a professional accountant in public practice* include, but are not limited to:

- A financial interest* in a client or jointly holding a financial interest* with a client.
- Undue dependence on total fees from a client.
- Having a close business relationship with a client.
- Concern about the possibility of losing a client.
- Potential employment with a client.
- Contingent fees* relating to an assurance engagement*.
- A loan* to or from an assurance client* or any of its directors or officers.

200.5 Examples of circumstances that may create self-review threats include, but are not limited to:

- The discovery of a significant error during a re-evaluation of the work of the professional accountant in public practice*.
- Reporting on the operation of financial systems after being involved in their design or implementation.
- Having prepared the original data used to generate records that are the subject matter of the engagement.
- A member of the assurance team* being, or having recently been, a director or officer* of that client.
- A member of the assurance team* being, or having recently been, employed by the client in a position to exert direct and significant influence over the subject matter of the engagement.
- Performing a service for a client that directly affects the subject matter of the assurance engagement*.

200.6 Examples of circumstances that may create advocacy threats include, but are not limited to:

- Promoting shares* in a listed entity* when that entity is a financial statement audit client*.
- Acting as an advocate on behalf of an assurance client* in litigation or disputes with third parties.

200.7 Examples of circumstances that may create familiarity threats include, but are not limited to:

- A member of the engagement team* having a close or immediate family* relationship with a director or officer* of the client.
- A member of the engagement team* having a close or immediate family* relationship with an employee of the client who is in a position to exert direct and significant influence over the subject matter of the engagement.
- A former partner* of the firm* being a director or officer* of the client or an employee in a position to exert direct and significant influence over the subject matter of the engagement.
- Accepting gifts or preferential treatment from a client, unless the value is clearly insignificant*.
- Long association of senior personnel with the assurance client.

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* See Definitions

200.8 Examples of circumstances that may create intimidation threats include, but are not limited to:

- Being threatened with dismissal or replacement in relation to a client engagement.
- Being threatened with litigation.
- Being pressured to reduce inappropriately the extent of work performed in order to reduce fees.

200.9 A professional accountant in public practice* may also find that specific circumstances give rise to unique threats to compliance with one or more of the fundamental principles. Such unique threats obviously cannot be categorised. In either professional or business relationships, a professional accountant in public practice* should always be on the alert for such circumstances and threats.

200.10 Safeguards that may eliminate or reduce threats to an acceptable level fall into two broad categories:

(a) Safeguards created by the profession, legislation or regulation; and
(b) Safeguards in the work environment.

Examples of safeguards created by the profession, legislation or regulation are described in paragraph 100.12 of Part A of this Code.

200.11 In the work environment, the relevant safeguards will vary depending on the circumstances. Work environment safeguards comprise firm-wide safeguards and engagement specific safeguards. A professional accountant in public practice* should exercise judgement to determine how to best deal with an identified threat. In exercising this judgement a professional accountant in public practice* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would reasonably conclude to be acceptable. This consideration will be affected by matters such as the significance of the threat, the nature of the engagement and the structure of the firm*.

200.12 Firm-wide safeguards in the work environment may include:

- Leadership of the firm* that stresses the importance of compliance with the fundamental principles.
- Leadership of the firm* that establishes the expectation that members of an assurance team* will act in the public interest.
- Policies and procedures to implement and monitor quality control of engagements.
- Documented policies regarding the identification of threats to compliance with the fundamental principles, the evaluation of the significance of these threats and the identification and the application of safeguards to eliminate or reduce the threats, other than those that are clearly insignificant*, to an acceptable level.

* See Definitions

- For firms* that perform assurance engagements, documented independence* policies regarding the identification of threats to independence*, the evaluation of the significance of these threats and the evaluation and application of safeguards to eliminate or reduce the threats, other than those that are clearly insignificant*, to an acceptable level.
- Documented internal policies and procedures requiring compliance with the fundamental principles.
- Policies and procedures that will enable the identification of interests or relationships between the firm* or members of engagement teams* and clients.
- Policies and procedures to monitor and, if necessary, manage the reliance on revenue received from a single client.
- Using different partners* and engagement teams* with separate reporting lines for the provision of non-assurance services to an assurance client*.
- Policies and procedures to prohibit individuals who are not members of an engagement team* from inappropriately influencing the outcome of the engagement.
- Timely communication of a firm's* policies and procedures, including any changes to them, to all partners* and professional staff, and appropriate training and education on such policies and procedures.
- Designating a member of senior management to be responsible for overseeing the adequate functioning of the firm's* quality control system.
- Advising partners* and professional staff of those assurance clients* and related entities from which they must be independent.
- A disciplinary mechanism to promote compliance with policies and procedures.
- Published policies and procedures to encourage and empower staff to communicate to senior levels within the firm* any issue relating to compliance with the fundamental principles that concerns them.

200.13 Engagement-specific safeguards in the work environment may include:

- Involving an additional professional accountant* to review the work done or otherwise advise as necessary.
- Consulting an independent third party, such as a committee of independent directors, a professional regulatory body or another professional accountant*.
- Discussing ethical issues with those charged with governance of the client.
- Disclosing to those charged with governance of the client the nature of services provided and extent of fees charged.
- Involving another firm* to perform or re-perform part of the engagement.
- Rotating senior assurance team* personnel.

200.14 Depending on the nature of the engagement, a professional accountant in public practice* may also be able to rely on safeguards that the client has implemented. However, it is not possible to rely solely on such safeguards to reduce threats to an acceptable level.

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* See Definitions

200.15 Safeguards within the client's systems and procedures may include:

- When a client appoints a firm* in public practice to perform an engagement, persons other than management ratify or approve the appointment.
- The client has competent employees with experience and seniority to make managerial decisions.
- The client has implemented internal procedures that ensure objective choices in commissioning non-assurance engagements.
- The client has a corporate governance structure that provides appropriate oversight and communications regarding the firm's* services.

200.16 *Professional accountants* who are in doubt as to their ethical position may seek advice from the Institute's Ethics Advisory Services by e-mail: ethics@icaew.com or phone +44 (0)1908 248258. Further information on guidance is available in Section 3.1, paragraphs 1.16 to 1.19.*

Section 210 Professional Appointment

210.0 *Clients have the right to choose their accountants, whether as auditors or professional advisers, and to change their accountants if they so desire. Professional accountants* have the right to choose for whom they act.*

Client Acceptance

210.1 Before accepting a new client relationship, a professional accountant in public practice* should consider whether acceptance would create any threats to compliance with the fundamental principles. Potential threats to integrity or professional behaviour may be created from, for example, questionable issues associated with the client (its owners, management and activities).

210.2 Client issues that, if known, could threaten compliance with the fundamental principles include, for example, client involvement in illegal activities (such as money laundering), dishonesty or questionable financial reporting practices.

Further information relating to money laundering legislation and guidance is included in paragraph 210.12.

210.3 The significance of any threats should be evaluated. If identified threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level.

210.4 Appropriate safeguards may include obtaining knowledge and understanding of the client, its owners, managers and those responsible for

* See Definitions

its governance and business activities, or securing the client's commitment to improve corporate governance practices or internal controls.

210.5 Where it is not possible to reduce the threats to an acceptable level, a professional accountant in public practice* should decline to enter into the client relationship.

210.6 Acceptance decisions should be periodically reviewed for recurring client engagements.

Engagement Acceptance

210.7 A professional accountant in public practice* should agree to provide only those services that the professional accountant in public practice* is competent to perform. Before accepting a specific client engagement, a professional accountant in public practice* should consider whether acceptance would create any threats to compliance with the fundamental principles. For example, a self-interest threat to professional competence and due care is created if the engagement team* does not possess, or cannot acquire, the competencies necessary to properly carry out the engagement.

210.8 A professional accountant in public practice* should evaluate the significance of identified threats and, if they are other than clearly insignificant*, safeguards should be applied as necessary to eliminate them or reduce them to an acceptable level. Such safeguards may include:

- Acquiring an appropriate understanding of the nature of the client's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.
- Acquiring knowledge of relevant industries or subject matters.
- Possessing or obtaining experience with relevant regulatory or reporting requirements.
- Assigning sufficient staff with the necessary competencies.
- Using experts where necessary.
- Agreeing on a realistic time frame for the performance of the engagement.
- Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

210.9 When a professional accountant in public practice* intends to rely on the advice or work of an expert, the professional accountant in public practice* should evaluate whether such reliance is warranted. The professional accountant in public practice* should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards. Such information may be gained from prior association with the expert or from consulting others.

Changes in a Professional Appointment

210.10 A professional accountant in public practice* who is asked to replace

* See Definitions

another professional accountant in public practice*, or who is considering tendering for an engagement currently held by another professional accountant in public practice*, should determine whether there are any reasons, professional or other, for not accepting the engagement, such as circumstances that threaten compliance with the fundamental principles. For example, there may be a threat to professional competence and due care if a professional accountant in public practice* accepts the engagement before knowing all the pertinent facts.

The Institute is of the view that upon being asked to accept an appointment, professional accountants should undertake the same procedures with all accountants and should consider whether they should be applied when replacing other professional advisers.*

210.11 The significance of the threats should be evaluated. Depending on the nature of the engagement, this may require direct communication with the existing accountant* to establish the facts and circumstances behind the proposed change so that the professional accountant in public practice* can decide whether it would be appropriate to accept the engagement. For example, the apparent reasons for the change in appointment may not fully reflect the facts and may indicate disagreements with the existing accountant* that may influence the decision as to whether to accept the appointment.

The Institute is of the view that there are unlikely to be any circumstances where, having been asked to accept an appointment, the professional accountant in public practice should not at least seek to contact the existing accountant*. The appropriate procedures are considered further in the Appendix to this Section.*

210.12 An existing accountant* is bound by confidentiality. The extent to which the professional accountant in public practice* can and should discuss the affairs of a client with a proposed accountant will depend on the nature of the engagement and on:

(a) Whether the client's permission to do so has been obtained; or
(b) The legal or ethical requirements relating to such communications and disclosure, which may vary by jurisdiction.

However, care must be taken when communicating all relevant facts to a professional accountant in situations where the existing accountant* knows or suspects that their client is involved in money laundering or a terrorist activity. Under the Money Laundering Regulations 2007, the Terrorism Act 2000 and the Terrorism Act 2006, it is a criminal offence to 'tip off' a money launderer or terrorist. Accordingly:*

- *The prospective accountant should not specifically enquire whether the existing accountant* has reported suspicions of money laundering or terrorism. Such questions place the existing accountant* in a difficult position and are likely not to be answered. In addition, the prospective accountant should not ask the existing accountant* whether client identification or 'knowing*

* See Definitions

your client' procedures have been carried out under anti-money laundering legislation. The prospective accountant has responsibility for obtaining information for client identification and 'knowing your client' and this cannot be delegated to the existing accountant.*

- *Disclosure of money laundering or terrorist suspicion reporting by the existing accountant* to the potential successor should be avoided because this information may be discussed with the client or former client.*

For further discussion, please refer to the money laundering legislation and guidance (www.icaew.com/moneylaundering) and the Institute's Ethics Advisory helpsheet on 'Changes in professional appointments' (www.icaew.com/ethicsadvice).

210.13 In the absence of specific instructions by the client, an existing accountant* should not ordinarily volunteer information about the client's affairs. Circumstances where it may be appropriate to disclose confidential information are set out in Section 140 of Part A of this Code.

210.14 If identified threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level.

210.15 Such safeguards may include:

- Discussing the client's affairs fully and freely with the existing accountant*;
- Asking the existing accountant* to provide known information on any facts or circumstances, that, in the existing accountant's* opinion, the proposed accountant should be aware of before deciding whether to accept the engagement.

When replying to requests to submit tenders, stating in the tender that, before accepting the engagement, contact with the existing accountant* will be requested so that inquiries may be made as to whether there are any professional or other reasons why the appointment should not be accepted.

Counsel has advised that an existing accountant who communicates to a prospective accountant matters damaging to the client or to any individuals concerned with the client's business will have a strong measure of protection where any action for defamation to be brought against the existing accountant* in that the communication will be protected by qualified privilege. This means that the existing accountant* should not be liable to pay damages for defamatory statements even if they turn out to be untrue, provided that they are made without malice. There is little likelihood of an existing accountant* being held to have acted maliciously provided that:*

- *Only what is sincerely believed to be true is stated; and*
- *Reckless imputations are not made against a client or connected individuals for which there can be no reason to believe they are true.*

210.16 A professional accountant in public practice* will ordinarily need to obtain the client's permission, preferably in writing, to initiate discussion

* See Definitions

with an existing accountant*. Once that permission is obtained, the existing accountant* should comply with relevant legal and other regulations governing such requests. Where the existing accountant* provides information, it should be provided honestly and unambiguously. If the proposed accountant is unable to communicate with the existing accountant*, the proposed accountant should try to obtain information about any possible threats by other means such as through inquiries of third parties or background investigations on senior management or those charged with governance of the client.

If the client fails or refuses to grant the existing accountant permission to discuss the client's affairs with the proposed successor, the existing accountant* should report that fact to the prospective accountant who should consider carefully the reason for such failure or refusal when determining whether or not to accept nomination/appointment.*

210.17 Where the threats cannot be eliminated or reduced to an acceptable level through the application of safeguards, a professional accountant in public practice* should, unless there is satisfaction as to necessary facts by other means, decline the engagement.

210.18 A professional accountant in public practice* may be asked to undertake work that is complementary or additional to the work of the existing accountant*. Such circumstances may give rise to potential threats to professional competence and due care resulting from, for example, a lack of or incomplete information. Safeguards against such threats include notifying the existing accountant* of the proposed work, which would give the existing accountant* the opportunity to provide any relevant information needed for the proper conduct of the work.

The Institute is of the view that in circumstances where the professional accountant is asked to undertake work which is relevant to the work of the existing accountant, the professional accountant* should notify the existing accountant* of the proposed work, unless the client provides acceptable reasons why the existing accountant* should not be informed. The professional accountant* should be aware of the risks of undertaking such work without the advantage of communicating with the other accountants. Further guidance on providing second opinions is available in Section 230 of this Code.*

210.19 *Guidance on appropriate procedures to be adopted by professional accountants* relating to changes in professional appointments is included as an Appendix to this Section.*

Transfer of Records

210.20 *An existing accountant* should deal promptly with any reasonable request for the transfer of records and may have the right of particular lien if there are unpaid fees (see Section 240 of this Code and Section 9.4,*

* See Definitions

'Documents and records: ownership, lien and right of access' in the Members' Handbook (www.icaew.com/membershandbook)). Professional accountants should be aware that the courts have held that no lien can exist over books or documents of a registered company which, either by statute or by articles of association of the company, have to be available for public inspection (see Section 9.4, 'Documents and records: ownership, lien and rights of access' in the Members' Handbook (www.icaew.com/membershandbook)). It may be necessary for professional accountants* to obtain legal advice prior to the exercise of a lien.*

If the existing accountant has fees outstanding from a client they are entitled to mention this to the potential successor. However, if this is as a result of genuine reservations by the client this may not be a reason to withhold cooperation with a successor. It may be useful to consider the section on fee disputes in Section 2.8, 'Duty on firms to investigate complaints – guidance on how to handle or avoid them' in the Members' Handbook (www.icaew.com/membershandbook).*

210.21 *The prospective accountant often asks the existing accountant* for information as to the client's affairs. If the client is unable to provide the information and lack thereof might prejudice the client's interests, such information should be promptly given. In such circumstances, no charge should normally be made unless there is good reason to the contrary. An example of such a reason would be that a significant amount of work is involved. Where a charge is made, the arrangements should comply with Section 240 of this Code.*

210.22 *Attention is drawn to Chapter 3 of the Audit Regulations and Guidance relating to access to all relevant information held by the existing accounting in respect of the last audit report and Technical Release AAF 01/08 Access to Information by Successor Auditors.*

Appendix to Section 210 – Changes in Professional Appointments Procedures

Prospective Accountants

1 *In the majority of cases, the appropriate procedures for any professional accountant* who is invited to act in succession to another, whether the changeover is at the insistence of the client or of the existing accountant*, is to:*

- *Explain to the prospective client that there is a professional duty to communicate with the existing accountant*; and*
- *Request the client (i) to confirm the proposed change in accountant to the existing accountant* and (ii) to authorise the existing accountant* to co-operate with the prospective accountant; and*
- *Write to the existing accountant* regarding the prospective involvement with the client and request disclosure of any issue or circumstance which might be relevant to the successor's decision to accept or decline the appointment (making oral enquiry if no written reply is forthcoming).*

* See Definitions

2 *When these procedural steps have been taken, the prospective accountant should consider, in light of the information received from the existing accountant*, or any other factors, including conclusions reached following discussion with the client, whether:*

- *To accept the engagement, or*
- *Accept it only after having addressed any factors arising from the information received from the existing accountant* (this may include imposing conditions on acceptance), or*
- *Decline it.*

3 *The prospective accountant should ordinarily treat in confidence any information provided by the existing accountant*, unless it is needed to be disclosed to perform the role required (such as making investigations into matters which need the perspective of the client's officers or senior employees).*

4 *In circumstances where the enquiries referred to above are not answered, the prospective accountant should write to the existing accountant* by recorded delivery service stating an intention to accept the engagement in the absence of a reply within a specific and reasonable period. The prospective accountant is entitled to assume that the existing accountant's* silence implies there was no adverse comment to be made, although this does not obviate the requirement in 210.11 to consider all appropriate circumstances.*

5 *A professional accountant* which is nominated as a joint auditor should communicate with all existing auditors and be guided by similar principles to those set out in relation to nomination as an auditor. Where it is proposed that a joint audit appointment becomes a sole appointment, the surviving auditor should communicate formally with the other joint auditor as though for a new appointment.*

6 *A professional accountant* invited to accept nomination on the death of a sole practitioner should endeavour to obtain such information as may be needed from the latter's alternate (where appropriate), the administrators of the estate, or other source.*

7 *If the prospective accountant accepts the engagement, the prospective accountant should comply with the relevant legal and regulatory requirements as indicated in paragraph 13.*

Existing Accountants*

8 *The appropriate procedure for any professional accountant* who receives any communication in terms of the above paragraphs, whether or not the professional accountant* is still in office, is to:*

- *Answer promptly any communication from the potential successor about the client's affairs; and*

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* See Definitions

- *Confirm whether there are any matters about those affairs which the prospective accountant ought to know, explaining them meaningfully, or confirm there are no such matters.*

9 *If the existing accountant* has made one or more suspicious activity reports relating to money laundering or terrorism, the existing accountant* should not disclose that fact to the prospective accountant, or make other disclosures that could amount to tipping off. However, the existing accountant's* legal and professional obligations remain. In order to meet these obligations, the existing accountant* can undertake one or more of the following actions:*

- *Contacting the relevant investigating authority, for example, the Serious Organised Crime Agency (SOCA), to ascertain if appropriate wording can be agreed in a communication;*
- *Include a factual reference to the irregularities; (further discussion is included in the Institute's Ethics Advisory Services Helpsheet on Changes in Professional Appointments);*
- *Consider seeking legal advice.*

Guidance on money laundering reporting requirements in privileged circumstances is included in Technical Release 02/06, available at www.icaew.com/technical.

10 *The above actions are also relevant when the existing accountant* is preparing the required statement of circumstances in accordance with Section 51 of the Companies Act 2006, or other similar statutory provisions, of matters connected with ceasing to hold office which, the auditor believes, should be brought to the notice of the professional accountants*, shareholders or creditors of the client or under the relevant professional and other regulatory bodies. Further guidance can be found in Chapter 3 of the 2008 Audit Regulations and Guidance.*

11 *It is best practice for the prospective accountant and the existing accountant* to record in writing such discussions as are referred to in the paragraphs above.*

12 *Where the professional accountant* decides to accept nomination/appointment having been given notice of any matters which are the subject of contention between the existing accountant* and the client, the professional accountant* should be prepared, if requested to do so, to demonstrate to the professional and regulatory investigating authorities that proper consideration has been given to those matters and the relevant legal, regulatory and ethical requirements have been met.*

Further Information

13 *Professional accountants*' attention is drawn to additional guidance as follows:*

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* See Definitions

- *Chapter 3 of the 2008 Audit Regulations and Guidance, in particular technical standards relating to changes in professional appointments and access to relevant information relating to the signed audit report.*
- *ISQC (UK & Ireland) – quality control for firms that perform audits and reviews of historical financial information, and other assurance and related services engagements (www.frc.org.uk/apb/publications).*
- *Statement of Auditing Standards (www.frc.org.uk/apb/publications):*
  - *ISA 240 (UK and Ireland) – The auditor's responsibility to consider fraud in an audit of financial statements;*
  - *ISA 250 (UK and Ireland) – Consideration of laws and regulations in an audit of financial statements;*
  - *ISA 510 (UK and Ireland) Initial engagements – opening balances and continuing engagements – opening balances.*
- *Practice Note 12 (Revised) 'Money laundering' (www.frc.org.uk/apb/publications).*
- *Section 9.5 – Anti-money laundering for the Acountancy Sector in the Members' Handbook (www.icaew.com/membershandbook).*
- *Technical Release 02/06 – 'Guidance on changes to the money laundering reporting requirements: the exemption from reporting knowledge or suspicion of money laundering formed in privileged circumstances' (www.icaew.com/technical).*
- *Helpsheet 5 – Changes in professional appointments (www.icaew.com/ethicsadvice).*

Section 220 Conflicts of Interest

220.1 A professional accountant in public practice* should take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles. For example, a threat to objectivity may be created when a professional accountant in public practice* competes directly with a client or has a joint venture or similar arrangement with a major competitor of a client. A threat to objectivity or confidentiality may also be created when a professional accountant in public practice* performs services for clients whose interests are in conflict or the clients are in dispute with each other in relation to the matter or transaction in question.

Subject to the specific provisions, there is, however, nothing improper in a professional accountant in public practice having two clients whose interests are in conflict.*

220.2 A professional accountant in public practice* should evaluate the significance of any threats. Evaluation includes considering, before accepting or continuing a client relationship or specific engagement, whether the professional accountant in public practice* has any business interests, or

* See Definitions

relationships with the client or a third party that could give rise to threats. If threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level.

A test is whether a reasonable and informed observer would perceive that the objectivity of professional accountants or their firms* is likely to be impaired. The professional accountants* or their firms* should be able to satisfy themselves and the client that any conflict can be managed with available safeguards. Attention is also drawn to the ethical conflict resolution process in Part A.*

Safeguards

220.3 Depending upon the circumstances giving rise to the conflict, safeguards should ordinarily include the professional accountant in public practice*:

(a) Notifying the client of the firm's* business interest or activities that may represent a conflict of interest, and obtaining their consent to act in such circumstances; or
(b) Notifying all known relevant parties that the professional accountant in public practice* is acting for two or more parties in respect of a matter where their respective interests are in conflict, and obtaining their consent to so act; or
(c) Notifying the client that the professional accountant in public practice* does not act exclusively for any one client in the provision of proposed services (for example, in a particular market sector or with respect to a specific service) and obtaining their consent to so act.

Professional accountants' attention is drawn to Section 240 Fees and other types of remuneration and Section 241 Agencies and referrals which provides additional guidance on the ethical and legal considerations relating to these areas, including fiduciary relationships and accounting for commission and other benefits.*

220.4 The following additional safeguards should also be considered:

(a) The use of separate engagement teams*; and
(b) Procedures to prevent access to information (e.g., strict physical separation of such teams, confidential and secure data filing); and
(c) Clear guidelines for members of the engagement team* on issues of security and confidentiality; and
(d) The use of confidentiality agreements signed by employees and partners* of the firm*; and
(e) Regular review of the application of safeguards by a senior individual not involved with relevant client engagements.

220.4A *Where a conflict of interest arises, the preservation of confidentiality, and the perception thereof will be of paramount importance. Therefore firms* should deploy safeguards, which generally will take the form of information barriers, whose principle features may include:*

* See Definitions

- *Ensuring that there is, and continues to be, no overlap between the teams servicing the relevant clients and that each has separate internal reporting lines;*
- *Physically separating, and restricting access to, departments providing different professional services*, or creating such divisions within departments if necessary, so that confidential information about one client is not accessible by anyone providing services to another client where their interests conflict;*
- *Setting strict and carefully defined procedures for dealing with any apparent need to disseminate information beyond a barrier and for maintaining proper records where this occurs.*

The professional accountant should ensure that the adequacy and effectiveness of the barriers are closely and independently monitored and that appropriate disciplinary sanctions are applied for breaches of them. The overall arrangements should regularly be reviewed by a designated senior partner*.*

Professional accountants should note that it has been suggested by the courts that in some circumstances information barriers must be constructed as part of the organisational structure of the firm to be effective, rather than on an ad hoc basis.*

220.4B *If client service issues render it impracticable to put in place such safeguards or suitable alternatives, it is important that relevant parties who have conflicts of interest which may result in threats to preservation of confidentiality, are made aware of and agree to the professional accountant* continuing to act for them.*

220.5 Where a conflict of interest poses a threat to one or more of the fundamental principles, including objectivity, confidentiality or professional behaviour, that cannot be eliminated or reduced to an acceptable level through the application of safeguards, the professional accountant in public practice* should conclude that it is not appropriate to accept a specific engagement or that resignation from one or more conflicting engagements is required.

220.6 Where a professional accountant in public practice* has requested consent from a client to act for another party (which may or may not be an existing client) in respect of a matter where the respective interests are in conflict and that consent has been refused by the client, then they must not continue to act for one of the parties in the matter giving rise to the conflict of interest.

Professional accountants' attention is drawn to Section 221, Corporate Finance Advice, Section 290, Independence – Assurance Engagements, Section 400, Code of Ethics for Insolvency Practitioners, for guidance on issues arising from certain corporate finance activities, reporting assignments, and insolvency appointments.*

* See Definitions

Section 221 Corporate Finance Advice

(Issued as Statement 1.203 October 2002: reformatted and updated as regards to changes in legislation as at 1 August 2006)

Introduction

221.0 *The nature of corporate finance activities is so wide ranging that all the threats to objectivity and conflicts of interest identified respectively in Section 200 and Section 220 can arise when professional accountants* provide corporate finance advice.*

Categories of Corporate Finance Activity

221.1 *Categories of activity covered by this Section are as follows:*

(a) general corporate finance advice;
(b) acting as adviser in relation to takeovers and mergers;
(c) underwriting and marketing or placing securities on behalf of a client; and
(d) acting as sponsor or nominated adviser under the Listing Rules and the AIM Rules respectively.

221.2 *Professional accountants* should note that the guidance given in relation to general corporate finance advice is applicable to all categories of activity.*

General Principles applicable to all Professional Accountants*

Statutory and Other Regulatory Requirements

221.3 *Professional accountants* must be aware of and comply with current legislative and regulatory measures and professional guidance governing corporate finance assignments. As a guide, a list of legislative and regulatory measures current at 1 August 2006 is given in Appendix 1 to this Section but professional accountants* should ensure that they are aware of the most up-to-date legislative and regulatory requirements.*

221.4 *Professional accountants* are required to comply with the City Code on Takeovers and Mergers ('the City Code') (see Appendix 2 to this Section) in respect of all relevant takeover transactions involving companies governed by the City Code and should treat the general principles of the City Code as best practice guidance in respect of other takeover transactions.*

221.5 *Professional accountants* proposing to provide corporate finance advice to a client or his employer should at the outset draw attention to the legislative and regulatory responsibilities which will apply to the client or his employer. The professional accountant* should make clear to the client or his employer that, where necessary, legal advice should be taken. The professional accountant* should also draw attention to his own responsibilities under professional ethical guidance.*

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* See Definitions

Acquisition Searches
221.6 *It may be appropriate for a professional accountant* to conduct an acquisition search which could identify another client or his employer as a target provided the search is based solely on information which is not confidential to that client.*

Interests of Shareholders and Owners
221.7 *Professional accountants* should remain aware when giving advice that they should have regard to the interests of all shareholders and owners unless they are specifically acting for a single or defined group thereof. This is particularly so when advising on a proposal which is stated to be agreed by directors and/or majority shareholders or owners.*

Preparation of Documents
221.8 *Any document should be prepared in accordance with normal professional standards of integrity and objectivity and with a proper degree of care. All statements or observations therein must be capable, taken individually or as a whole, of being justified on an objective examination of the available facts.*

221.9 *In order to differentiate the roles and responsibilities of the various advisers, professional accountants* should ensure that these roles and responsibilities are clearly described in all public documents and circulars and that each adviser is named.*

221.10 *Professional accountants* intending to comment on published audited accounts should act in accordance with paragraph 221.21 below.*

Overseas Transactions
221.11 *This Section has been drafted with regard to the situation in the United Kingdom and the Republic of Ireland. Professional accountants* should apply the spirit of the guidance, subject to local legislation and regulation, to overseas transactions of a similar nature.*

General Corporate Finance Advice Applicable to Professional Accountants in Public Practice*
221.12 *The nature of corporate finance activities is so wide ranging that all the threats to objectivity identified in Section 100 and Section 200, can arise when professional accountants in public practice* provide corporate finance advice to both assurance* and non-assurance clients: the self-interest threat, the self-review threat, the advocacy threat, the familiarity or trust threat and the intimidation threat.*

When advising a non-assurance client there can be no objection to a professional accountant in public practice accepting an engagement which is designed primarily with a view to advancing that client's case, though the professional accountant in public practice* should be aware that the self-interest*

* See Definitions

threat could arise. Where a non-assurance client has received advice over a period of time on a series of related or unrelated transactions it is likely that, additionally, the familiarity or trust threats may exist. But where a professional accountant in public practice advises an assurance client* which is subject to a takeover bid or where a professional accountant in public practice* acts as sponsor or nominated adviser to an assurance client involved in the issue of securities, the self-interest threat will become more acute and the advocacy threat will arise.*

Some corporate finance activities such as marketing or underwriting of securities contain so strong an element of advocacy as to be incompatible with the objectivity required for the reporting roles of an auditor or reporting accountant. Even where the activities of an auditor or reporting accountant are restricted to ensuring their clients' compliance with the Listing Rules or the AIM Rules, it is likely that a self-review threat could arise.

221.13 *It may be in the best interests of a company for corporate finance advice to be provided by its auditor and there is nothing improper in the professional accountant in public practice* supporting an assurance client* in this way.*

221.14 *A professional accountant in public practice's* objectivity may be seriously threatened if he should extend his role into management of an assurance client. Co-ordination tasks, such as initiating and organising meetings, issuing timetables and reporting progress, are unlikely to threaten reporting objectivity. When involved in negotiations on behalf of an assurance client, the professional accountant in public practice* should ensure that he does not assume the role of taking decisions for a client which would prejudice reporting objectivity. Accordingly, the professional accountant in public practice* should ensure that the client takes full responsibility for the final decisions arising from any such negotiations.*

Conflict of Interest

221.15 *Professional accountants in public practice* should be aware of the danger of a conflict of interest arising. All reasonable steps should be taken to ascertain whether a conflict of interest exists or is likely to arise in the future between a professional accountant in public practice* and his clients, both with regard to new clients and to the changing circumstances of existing clients, and including any implications arising from the possession of confidential information.*

221.16 *The attention of professional accountants in public practice* is directed to Section 220, 'Conflicts of interest' and to the safeguards indicated in paragraphs 220.3 and 220.4 of that Section. Where there appears to be a conflict of interest between clients but after careful consideration the professional accountant in public practice* believes that either the conflict is not material or is unlikely seriously to prejudice the interests of any of those clients and that its*

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* See Definitions

safeguards are sufficient, the professional accountant in public practice may accept or continue the engagement. Unless client confidentiality considerations dictate otherwise it would be advisable, if appropriate, to seek the clients' consent. Considerations that lead to a conclusion to accept or continue the engagement should be explicitly recorded.*

221.17 *Where a professional accountant in public practice* acts or continues to act for two or more clients having obtained consent, if appropriate, in accordance with the previous paragraphs, safeguards will need to be implemented to manage any conflict which arises. The safeguards may include:*

(a) the use of different partners and teams for different clients, each having separate internal reporting lines;
(b) all necessary steps being taken to prevent the leakage of confidential information between different teams and sections within the firm;
(c) regular review of the situation by a senior partner or compliance officer not personally involved with either client; and
(d) advising the clients to seek additional independent advice, where it is appropriate.

Any decision on the part of a sole practitioner should take account of the fact that the safeguards at (a) to (c) of the above paragraph will not be available to him or her. Similar considerations apply to small firms where the number of partners is insufficient to spread the work as indicated above.

221.18 *Where a conflict of interest is so fundamental that it cannot be managed effectively by the implementation of appropriate safeguards and is likely seriously to prejudice the interests of a client, the engagement should not be accepted or continued even if all relevant clients consent to the engagement.*

221.19 *Where a professional accountant in public practice* is required for any reason to disengage from an existing client, the professional accountant in public practice* should do so as speedily as practicable having regard to the interest of the client.*

Documents for Client and Public Use
221.20 *In the case of a document prepared solely for the client and its professional advisers, it should be a condition of the engagement that the document should not be disclosed to any third party without the firm's prior written consent.*

221.21 *A professional accountant in public practice* is, in the absence of any indication to the contrary, entitled to assume that a company's published financial information that has been reported on by a professional accountant in public practice* has been prepared properly and in accordance with all relevant Accounting Standards. If a professional accountant in public practice* is commenting in a public document on such financial information and where*

* See Definitions

scope for alternative accounting treatment exists, and the accuracy of the comment or observation is dependent on an assumption as to the actual accounting treatment chosen, that assumption must be stated, together with any other assumptions material to the commentary. Where the professional accountant in public practice is not in possession of sufficient information to warrant a clear opinion this should be declared in the document.*

221.22 *A professional accountant in public practice* must take responsibility for anything published under his name, provided he consented to such publication, and the published document should make clear the client for whom the professional accountant in public practice* is acting. To prevent misleading or out-of-context quotations, it should be a condition of the engagement that, if anything less than the full document is to be published, the text and its context should be expressly agreed with the professional accountant in public practice*.*

Takeovers and Mergers

City Code Transactions

221.23 *Professional accountants in public practice* are reminded that, if in doubt as to the propriety of any aspect of a City Code transaction with which they are involved, they should consult the Panel on Takeovers and Mergers ('the Takeover Panel'). (See Appendix 2 of this Section).*

221.24 *Where a professional accountant in public practice* finds itself acting as auditor or reporting accountant for two or more parties involved in a transaction subject to the City Code, a perceived conflict of interest may arise. In such circumstances (subject to paragraph 221.26 below) a professional accountant in public practice* may act for more than one party, including both offeror and offeree companies as auditor, as reporting accountants, and in the provision of incidental advice consistent with these roles but must implement adequate safeguards (see paragraph 221.27 above).*

Lead Advisers in City Code Transactions

221.25 *For the purposes of this Section, a 'lead adviser' is the professional accountant in public practice* primarily responsible for advising on, organising and presenting an offer or the response to an offer. This definition would include an 'independent financial adviser' required under Rule 3 of the City Code.*

221.26 *In no circumstances should a professional accountant in public practice* be a lead adviser to more than one party involved in a transaction subject to the City Code. Where a professional accountant in public practice* finds itself* acting in *an auditor or reporting accountant role for any party involved in a transaction subject to the City Code, the professional accountant in public practice* should not act as lead adviser for any party involved, save in the circumstances set out below in paragraphs 221.27–221.29.*

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* See Definitions

221.27 *A professional accountant in public practice* who is auditor to a target company may be requested to act as lead adviser to a bidder on an offer subject to the City Code. Where the bid is hostile, it is likely that the professional accountant in public practice's* objectivity will be perceived to be prejudiced by its possession of material confidential information on the target and it will not therefore be able to advise on the offer. However, if the bid is agreed, the professional accountant in public practice* may be able to act or continue to act as lead adviser to the bidder with the agreement of the target and subject to the prior approval of the Takeover Panel. The professional accountant in public practice* should obtain confirmation from its clients that their interests would not be prejudiced if the professional accountant in public practice* were to act or continue to act in both capacities.*

221.28 *Where a professional accountant in public practice* is acting as lead adviser to a company which is involved in a bid subject to the City Code, conflicts of interest for the professional accountant in public practice* may arise due to an existing relationship with a second or subsequent bidder. Providing that the relationship with the second or subsequent bidder is confined to that of auditor or reporting accountant, and subject to the prior approval of the Takeover Panel, the professional accountant in public practice* may continue to act as lead adviser, providing that it is satisfied that the implementation of safeguards (see paragraph 221.27 above) provides the necessary level of protection to each of the clients involved.*

221.29 *Where a professional accountant in public practice* is requested to act as lead adviser to a target company in relation to a bid which is subject to the City Code from a company which is an existing assurance client, it may act as lead adviser to the target company only with the prior approval of the Takeover Panel.*

The ethical guidance for professional accountants in public practice seeking to act for more than one party in a takeover transaction subject to the City Code is summarised in Appendix 3 to this Section. Appendix 3 has been prepared only as a useful reference and is not intended to form part of this Section.*

Transactions not Subject to the City Code

221.30 *Where a takeover is not subject to the City Code, and there is no substantial public interest involved, a professional accountant in public practice* may, subject to the implementation of appropriate safeguards (see paragraphs 221.16 and 221.17 above), provide financial advice to both sides or to competing bidders. However, the professional accountant in public practice* should not act as lead adviser to both the target and a bidder in respect of such a transaction. The professional accountant in public practice* should be alive to the possibility of conflicts of interest arising in relation to minority interests and should ensure that any such conflicts are addressed. Where appropriate, the advisory client and minority interests should be advised as to the desirability of the minority interests appointing a wholly independent adviser.*

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* See Definitions

Underwriting and Marketing of Shares

221.31 *A professional accountant in public practice* should not underwrite or market an issue or sale to the public of shares or securities of a company on which he has reported within the last two years or is to report as auditor or as reporting accountant. Nor should the professional accountant in public practice* undertake to accept nomination as auditor or reporting accountant of a company whose shares he is underwriting or marketing. Involvement of this kind would give rise to an advocacy threat, self-review threat and self-interest threat such that the professional accountant in public practice's* objectivity in the auditor and/or reporting accountant function would be endangered.*

221.32 *It may be appropriate:*

(a) for an auditor or reporting accountant otherwise to assist a client in raising capital; or

(b) for an auditor or reporting accountant otherwise to provide independent advice to a client, or its professional advisers, in connection with the issue or sale of shares or securities to the public; or

(c) for an auditor or reporting accountant otherwise to provide advice as sponsor or as an AIM nominated adviser to a company as set out below.

In these situations the professional accountant in public practice should adopt steps similar to those described in paragraph 220.3 and 220.4 of Section 220 and, additionally, set up procedures to review and identify any potential conflicts of interest which could compromise the professional accountant in public practice's* objectivity.*

Sponsors and Nominated Advisers

221.33 *The attention of professional accountants in public practice* is drawn to:*

(a) the UK Listing Authority's Listing Rules when a firm accepts the responsibilities of a sponsor;

(b) the London Stock Exchange's Alternative Investment Market ('AIM') Rules and, in particular, the Nominated Adviser Eligibility Criteria when acting as a nominated adviser defined by the AIM Rules. AIM's requirement is that for AIM companies to maintain their trading facility they should have a nominated adviser at all times. In this context professional accountants in public practice should have in place procedures to enable them to identify whether any conflicts exist or are likely to arise in the future before acting as a nominated adviser. Professional accountants in public practice* should note the policy of the London Stock Exchange that it will not normally allow a nominated adviser to be the reporting accountant to the issuer unless appropriate safeguards are in place as set out in paragraph 221.17 above. Furthermore, professional accountants in public practice* should note that the London Stock Exchange does not permit a nominated adviser to act for any other party to a transaction or takeover other than its AIM client company. In cases of doubt, professional accountants in public practice* should consult the London Stock Exchange.*

* See Definitions

221.34 *Considerable care needs to be taken if a professional accountant in public practice* is also to act as sponsor or nominated adviser to an assurance client*. A threat to the objectivity of the auditor or reporting accountant can arise as the duties of a sponsor or nominated adviser are different from those of an auditor or reporting accountant and are owed to a different party. Although it is quite possible that no conflict will arise between the two roles, professional accountants in public practice* need to recognise the possibility of conflicts arising, particularly if the role of sponsor or nominated adviser is to include any advocacy of the directors' views or if the transaction is to involve any issue of securities. To comply with the requirements of paragraph 221.31 above, where there is an issue of securities associated with such a transaction, a separate broker should be appointed to take responsibility for any underwriting or marketing of the company's shares.*

Appendix 1 to Section 221 – Corporate Finance Advice

Information on Statutory and Other Regulatory and Professional Requirements
For the assistance of professional accountants a list of the relevant legislative and regulatory measures and professional guidance is set out below. This reflects the position as at* ***1 August 2006****. Professional accountants* should be aware that this list may be subject to variation in the future and when undertaking corporate finance assignments professional accountants* should ensure they are aware of the current status of the list.*

1 *The Financial Services and Markets Act 2000, the Companies Act 1985 as amended, Part V of the Criminal Justice Act 1993 and, where applicable, the requirements of the Financial Services Authority's Handbook (http://www.fsa.gov.uk/Pages/handbook/) or the Institute's Designated Professional Body Handbook (www.icaew.com/dpb);*

2 *The City Code on Takeovers and Mergers (the 'City Code');*

3 *The Financial Services Authority Handbook Listing, Prospectus and Disclosure Rules and the London Stock Exchange Alternative Investment Market (AIM) Rules;*

4 *The AIM authority's Nominated Adviser Eligibility Criteria;*

5 *The Admission and Disclosure Standards of the London Stock Exchange;*

6 *The Auditing Practices Board's Ethical Standards, in particular ES 5 Non-Audit Services Provided to Audit Clients (www.frc.org.uk/apb/publications.);*

And in the Republic of Ireland:

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* See Definitions

7 *Investment Intermediaries Act, 1995 as amended by the Investor Compensation Act, 1998 and the Insurance Act, 2000 ('IIA'), and where applicable the requirements of the Central Bank of Ireland's Rule Book or the Institute's Investment Business Regulations and Guidance;*

8 *Irish Takeover Panel Act, 1997;*

9 *The Listing Rules of the Irish Stock Exchange: the IEX Rules;*

10 *Code of Conduct issued by the Central Bank of Ireland under Section 37 of the IIA, as amended by S. 30 of the Insurance Act 2000;*

11 *European Communities (Takeover Bides (Directive 2004/25/EC) Regulations 2006 (RoI);*

12 *Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (RoI);*

13 *Market Abuse (Directive 2003/6/EC) Regulations 2005 (RoI);*

14 *Prospectus (Directive 2003/71/EC) Regulations 2005.*

Appendix 2 to Section 221 – Corporate Finance Advice

1 *A professional accountant in public practice* who provides takeover services for clients is required to comply with the City Code on Takeovers and Mergers: ('the City Code') and with all rulings made and guidance issued under them by the Panel on Takeovers and Mergers ('the Takeover Panel').*

2 *Accordingly a professional accountant in public practice* proposing to provide takeover services to a client should at the outset:*

(a) explain that these responsibilities will apply; and
(b) include in the terms of the engagement recognition of the professional accountant in public practice's obligation to comply with the City Code including any steps which the professional accountant in public practice* may be obliged to take in performing those responsibilities. A specimen clause for the engagement letter is set out in paragraph 3 below.*

Specimen Clause for Engagement Letters
3 *The client agrees and acknowledges that where the services provided by the professional accountant in public practice* relate to a transaction within the scope of the City Code on Takeovers and Mergers ('the City Code'), the client and the professional accountant in public practice* will comply with the provisions of the City Code and will observe the terms of the Guidance Note published by the*

* See Definitions

Institutes of Chartered Accountants relevant to such services or transactions. In particular, the client acknowledges that:

(a) if the client or its advisers or agents fail to comply with the City Code then the professional accountant in public practice may withdraw from acting for the client; and*

(b) the professional accountant in public practice is obliged to supply to the Takeover Panel any information, books, documents or other records concerning the services or transaction which the Takeover Panel may require.*

Scope of Takeover Services

4 *'Takeover services' means any professional services provided by a professional accountant in public practice* to a client in connection with a transaction to which the City Code applies.*

5 *The kinds of activities most commonly relevant for this purpose include:*

(a) acting as financial adviser to one of the parties (for example, as 'Rule 3 adviser' to the offeree company);

(b) reporting on profit forecasts and/or valuations for the purposes of takeover documents;

(c) approving financial promotions issued in connection with a takeover transaction for the purposes of s. 21 of the Financial Services and Markets Act 2000;

(d) conducting acquisition searches for clients, and introducing clients to other parties with a view to effecting transactions; and

(e) advising in relation to acquisitions and disposals of securities of companies which are subject to City Code.

6 *Whilst the City Code does not define precisely the range of activities and transactions within its scope, paragraph 3 of the Introduction to the City Code describes the companies and transactions which are subject to the City Code. In practice, those engaged in providing takeover services rarely experience difficulty in determining whether the City Code is or may be relevant to the activities proposed to be undertaken for any particular client. In cases of any doubt the Takeover Panel should be consulted.*

Special Responsibilities

7 *A professional accountant in public practice* who has provided or is providing takeover services to a client should:*

(a) supply to the Takeover Panel any information, books, documents or other records concerning the relevant transaction or arrangement which the Takeover Panel may properly require and which are in the possession or under the control of the professional accountant in public practice; and*

(b) otherwise render all such assistance as the professional accountant in public practice is reasonably able to give to the Takeover Panel, provided that in each case the relevant information, books, documents or other records were acquired by the professional accountant in public practice* in the course of providing the relevant takeover services.*

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* See Definitions

8 *Except with the consent of the Takeover Panel, a professional accountant in public practice* should not provide or continue to provide any takeover services to any person if the Takeover Panel has stated that it considers that such a person is not likely to comply with the standards of conduct for the time being expected in the United Kingdom concerning the practices of those involved in takeovers, mergers or substantial acquisitions of shares and the Takeover Panel has not subsequently indicated a change in this view. A person to whom this paragraph applies will normally have been named in a statement published by the Takeover Panel, inter alia, for the purposes of Rule 4.3.1 of the Financial Services Authority's Handbook on Market Conduct.*

9 *If professional accountants in public practice* have included in the engagement letter agreed with the client a provision as outlined in paragraph 3 above, they will be able to discharge their responsibilities under paragraph 7 and/or 8 above, without any breach of confidentiality or duty to the client. While professional accountants in public practice* should include such a provision, it is recognised that, on occasion, compliance with such responsibilities may still involve a breach of confidentiality to a third party or a breach of some other duty owed to the client. In such circumstances this Appendix is not applicable.*

The Financial Services and Markets Act 2000

10 *The provision of corporate finance services may require authorisation by the Financial Services Authority or a licence under the Designated Professional Body arrangements. However, this Guidance Note applies to all professional accountants in public practice* whether authorised/licensed or not.*

Appendix 3 to Section 221 – Corporate Finance Advice

Guidance for firms* seeking to act for more than on party in a takeover subject to the City Code

This table is intended for illustrative purposes only and should be read in conjunction with Section 221, Corporate Finance Advice.

	Bid Situation	***Target***	***Bidder***	***Subsequent Bidder***	*Comments*
A	*Agreed – relationship with one bidder*	*Ass*	*Ass*	*–*	*Permitted – paragraph 221.24*
B		*Adv*	*Ass*	*–*	*Permitted by agreement with the Takeover Panel – see paragraph 221.29*

* See Definitions

C		*Ass*	*Adv*	–	*Permitted with conditions – see paragraph 221.27*
D		*Adv*	*Adv*	–	*Prohibited – see paragraph 221.26*
E	*Hostile – one bidder*	*Ass*	*Ass*	–	*Permitted with conditions – see paragraph 221.24*
F		*Adv*	*Ass*	–	*Permitted by agreement with the Takeover Panel – see paragraph 221.29*
G		*Ass*	*Adv*	–	*Prohibited – see paragraph 221.26 and 221.27*
H		*Adv*	*Adv*	–	*Prohibited – see paragraph 221.26*
I	*Subsequent bidder emerges*	*Ass*	*Ass*	*Ass*	*Permitted – see paragraph 221.24*
J		*Ass*	–	*Ass*	*Permitted – see paragraph 221.24*
K		*Adv*	–	*Ass*	*Permitted – see paragraph 221.28*
L		*Ass*	–	*Adv*	*Prohibited – see paragraph 221.26*
M		*Adv*	–	*Adv*	*Prohibited – see paragraph 221.26*
N	*Acting for rival bidders*	–	*Ass*	*Ass*	*Permitted – see paragraph 221.24*
O		–	*Adv*	*Ass*	*Permitted – see paragraph 221.28*
P		–	*Ass*	*Adv*	*Prohibited – see paragraph 221.26*
Q		–	*Adv*	*Adv*	*Prohibited – see paragraph 221.26*

In all of the above cases where a professional accountant in public practice may be permitted to act for more than one party, professional accountants in public practice* must*

* See Definitions

consider the potential threats and put in place the appropriate safeguards as set out in paragraph 221.33. Furthermore, where stated, permission for the professional accountant in public practice to act for more than one party should be obtained from the Takeover Panel.*

Key

Adv Professional accountant in public practice acts as lead adviser (see paragraph 221.17)*

Ass Professional accountant in public practice acts as auditor or reporting accountant.*

As regards the application of this guidance to non-audit assurance engagements, professional accountant in public practice's* attention is drawn to the explanatory note contained in Definitions.*

Notes

1) This matrix does not address a reverse takeover situation, where the offeror is required by the City Code to appoint advisers.

2) The matrix does not cover the takeover of private companies, except those which are subject to the City Code. Private companies are subject to the general requirements of the Institute's Code of Ethics.

Section 230 Second Opinions

230.0 *Opinions expressed informally by a professional accountant* may be acted on, and professional accountants* should bear in mind the potential consequences of those opinions. Oral opinions should as a matter of good practice, because of legal implications, be confirmed in writing as soon as practicable after giving the opinion. If a professional accountant* is asked for a 'general opinion' (one relative to a hypothetical situation not related to specific entities or circumstances), whether written or oral, the professional accountant* should ensure that the recipient of the opinion understands that it has been given in the context of that particular hypothetical situation only.*

230.1 Situations where a professional accountant in public practice* is asked to provide a second opinion on the application of accounting, auditing, reporting or other standards or principles to specific circumstances or transactions by or on behalf of a company or an entity that is not an existing client may give rise to threats to compliance with the fundamental principles. For example, there may be a threat to professional competence and due care in circumstances where the second opinion is not based on the same set of facts that were made available to the existing accountant*, or is based on inadequate evidence. The significance of the threat will depend on the circumstances of the request and all the other available facts and assumptions relevant to the expression of a professional judgement.

This Section does not apply to expert evidence assignments, opinions pursuant to litigation and opinions provided to other firms and their clients jointly.*

* See Definitions

230.2 When asked to provide such an opinion, a professional accountant in public practice* should evaluate the significance of the threats and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Such safeguards may include seeking client permission to contact the existing accountant*, describing the limitations surrounding any opinion in communications with the client and providing the existing accountant* with a copy of the opinion.

The Institute is of the view that a professional accountant providing a second opinion will normally need to seek contact with the existing accountant* (particularly if the existing accountant* is engaged as auditor) and the client in order to:*

- *Ascertain the circumstances in which the consultation has been made; and*
- *Be apprised of all the facts relevant to the issue at the time the opinion is given.*

230.3 If the company or entity seeking the opinion will not permit communication with the existing accountant*, a professional accountant in public practice* should consider whether, taking all the circumstances into account, it is appropriate to provide the opinion sought.

The Institute is of the view that if the client will not allow the opinion-giver to carry out any of the steps referred to above, the opinion-giver must normally decline to act (particularly if the existing accountant is engaged as auditor).

Section 240 Fees and Other Types of Remuneration

240.0 *The Institute does not set charge-out rates or otherwise prescribe the basis for calculating fees, nor does it ordinarily investigate complaints relating solely to the quantum of fees charged. However, professional accountants in public practice* have certain professional responsibilities in relation to fees as set out in the following paragraphs.*

240.1 When entering into negotiations regarding professional services*, a professional accountant in public practice* may quote whatever fee deemed to be appropriate. The fact that one professional accountant in public practice* may quote a fee lower than another is not in itself unethical. Nevertheless, there may be threats to compliance with the fundamental principles arising from the level of fees quoted. For example, a self interest threat to professional competence and due care is created if the fee quoted is so low that it may be difficult to perform the engagement in accordance with applicable technical and professional standards for that price.

* See Definitions

240.2 The significance of such threats will depend on factors such as the level of fee quoted and the services to which it applies. In view of these potential threats, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Safeguards which may be adopted include:

- Making the client aware of the terms of the engagement and, in particular, the basis on which fees are charged and which services are covered by the quoted fee.
- Assigning appropriate time and qualified staff to the task.

240.2A *The basis on which fees will be calculated should be discussed and explained at the earliest opportunity together with, where practicable, the estimated initial fee. Fees should 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;*
- *Together with any expenses properly incurred.*

240.2B *The Institute is of the view that the arrangements agreed should be confirmed in writing prior to the commencement of any engagement, normally in an engagement letter, including a confirmation of any estimate, quotation or other indication, and where the basis of future fees will differ from that of initial fees, the basis on which such fees will be rendered. Where there is no engagement letter the professional accountant in public practice* should confirm the initial discussion in writing to the client as soon as practicable.*

240.2C *In the case of assurance work, and in particular audit work, professional accountants in public practice* who obtain work having quoted levels of fees which they have reason to believe are significantly lower than existing fees or, for example, those quoted by other tendering firms*, should be aware that their objectivity and the quality of their work may appear to be threatened by self-interest in securing the client. Such professional accountants in public practice* should ensure that their work complies with relevant standards guidelines and regulations and, in particular, quality control procedures.*

240.2D *In the event of a complaint being made to the Institute where fees were a feature in obtaining or retaining the work, professional accountants in public practice* should be prepared to demonstrate that:*

- *The work done was in accordance with relevant standards; and*
- *The client was not misled as to the basis on which fees for the current and/or subsequent years are to be determined.*

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* See Definitions

Contingent Fees*

240.3 Contingent fees* are widely used for certain types of non-assurance engagements.[1] They may, however, give rise to threats to compliance with the fundamental principles in certain circumstances. They may give rise to a self-interest threat to objectivity. The significance of such threats will depend on factors including:

- The nature of the engagement.
- The range of possible fee amounts.
- The basis for determining the fee.
- Whether the outcome or result of the transaction is to be reviewed by an independent third party.

240.4 The significance of such threats should be evaluated and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate or reduce them to an acceptable level. Such safeguards may include:

- An advance written agreement with the client as to the basis of remuneration.
- Disclosure to intended users of the work performed by the professional accountant in public practice* and the basis of remuneration.
- Quality control policies and procedures.
- Review by an objective third party of the work performed by the professional accountant in public practice*.

240.4A *In some formal appointments under insolvency legislation, in particular bankruptcies, liquidations and administrations, the remuneration of the professional accountant in public practice* may, by statute, be based on a percentage of:*

- *Realisations or the value of the property with which the professional accountant in public practice* has to deal; and/or*
- *Distributions.*

Consequently, it may not be possible to base the fee on the principle in paragraph 240.4 above.

240.4B *In some circumstances, such as advising on a management buy-in or buy-out, the raising of venture capital, acquisition searches or sales mandates, where no professional opinion is given, it may not be appropriate to charge fees save on a contingent fee* basis: to require otherwise might deprive potential clients of professional assistance, for example where the capacity of the client to pay is dependent upon the success or failure of the venture.*

240.4C *Due diligence* assignments, particularly those performed in relation to a prospective transaction, typically involve a high level of risk and responsibility. A higher fee may be charged for such work in respect of a completed transaction*

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* See Definitions

[1] *Contingent fees* for non-assurance services provided to assurance clients* are discussed in Section 290 of this part of this Code.*

than for the same transaction if it is not completed, for whatever reason, provided that the difference reflects any additional risk and responsibility.

Fee Information and Disputes

240.4D *A professional accountant in public practice* should furnish, either in the fee account or subsequently on request, and without further charge, such details as are reasonable to enable the client to understand the basis on which the fee account has been prepared.*

240.4E *Where fees rendered without prior agreement exceed, by more than a reasonable amount, a quotation or estimate or indication of fees given by a professional accountant in public practice*, the professional accountant in public practice should be prepared to provide the client with a full and detailed explanation of the excess and to take steps to resolve speedily any dispute which arises.*

240.4F *A professional accountant in public practice* whose fees have not been paid may be entitled to retain certain books and papers of a client by exercising a lien and may refuse to pass on information to the client or the successor accountant until those fees are paid (but see Section 210, 'Professional appointment'). However, a professional accountant in public practice* who so acts should be prepared to take reasonable and prompt steps to resolve any dispute relating to the amount of that fee. In respect of any fee dispute, a professional accountant in public practice* should be aware of the fee arbitration services offered by the Institute.*

240.4G *Overdue fees may give rise to a perceived or real self-interest threat. They may be regarded as a loan made to a client (see Section 280). Similar considerations apply to work-in-progress for a client if billing is unduly deferred.*

Referrals and Commissions

240.5 In certain circumstances, a professional accountant in public practice* may receive a referral fee or commission relating to a client. For example, where the professional accountant in public practice* does not provide the specific service required, a fee may be received for referring a continuing client to another professional accountant in public practice* or other expert. A professional accountant in public practice* may receive a commission from a third party (e.g., a software vendor) in connection with the sale of goods or services to a client. Accepting such a referral fee or commission may give rise to self-interest threats to objectivity and professional competence and due care.

240.6 A professional accountant in public practice* may also pay a referral fee to obtain a client, for example, where the client continues as a client of another professional accountant in public practice* but requires specialist services not offered by the existing accountant*. The payment of such a referral fee may also create a self-interest threat to objectivity and professional competence and due care.

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* See Definitions

240.7 A professional accountant in public practice* should not pay or receive a referral fee or commission, unless the professional accountant in public practice* has established safeguards to eliminate the threats or reduce them to an acceptable level. Such safeguards may include:

- Disclosing to the client any arrangements to pay a referral fee to another professional accountant* for the work referred.
- Disclosing to the client any arrangements to receive a referral fee for referring the client to another professional accountant in public practice*.
- Obtaining advance agreement from the client for commission arrangements in connection with the sale by a third party of goods or services to the client.

Remuneration of employees would not normally be included within the scope of the payments addressed above.

240.7A *A fiduciary relationship between a professional accountant in public practice* and his or her client will arise where the accountant acts as the client's agent; and/or where the accountant gives professional advice to the client so as to give rise to a relationship which the law would regard as one of 'trust and confidence'. Where a fiduciary relationship exists at the time between a professional accountant in public practice* and a client, the professional accountant in public practice* is legally bound to account to the client for any commission, fee or other benefit received from a third party at any time. The Institute is advised that the effect is that a professional accountant in public practice* will require the informed consent of the client if the professional accountant in public practice* is to retain the commission, fee or other benefit or any part of it. If professional accountants in public practice* are in doubt as to whether the circumstances give rise to a fiduciary relationship, they are recommended to seek appropriate legal advice.*

240.7B *Under the general law, professional accountants* must adopt one of the following courses in respect of commission receivable[2]:*

(a) Account to the client for the commission or other benefit
This could be effected:
- *By payment of the whole commission or benefit to the client, or*
- *By deducting the amount received from the fees otherwise chargeable to the client and by showing such deduction on the face of the bill.*

(b) Obtain the client's advance consent to each receipt of commission
This involves obtaining consent before the commission is received and the firm must disclose, in advance, the actual amount of the commission (or its basis of calculation) and the terms and timing of its payment.*

(c) Obtain the client's advance general consent to the member's retaining commission.*

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* See Definitions

[2] *Professional accountants* are reminded that where detailed regulatory requirements cover the same issues as this Code, the regulatory requirements prevail where theses are more onerous.*

This could be by way of the engagement letter, or by a supplementary agreement, containing explicit wording permitting such retention, such as the following:

'In some circumstances, commissions or other benefits may become payable to us [or to one of our associates] in respect of transactions we [or such associates] arrange for you, in which case you will be notified in writing of the amount and terms of payment. [The fees that would otherwise be payable by you as described above will [or will not] be abated by such amounts.] You consent to such commission or other benefits being retained by us [or, as the case may be, by our associates,] without our, [or their,] being liable to account to you for any such amounts.'

Note:

i. *Before the client agrees to any such provision, examples must be given of likely commissions that may be received and the likely amounts, and it should be emphasised that these are only examples and may not cover all receipts in the future. If, in the future, abnormally large commissions are received which were not envisaged when the engagement letter was signed, it would be advisable to obtain specific consent to the retention of those commissions in order to meet any assertion that retention of such commission was not authorised by the engagement letter.*

ii. *Any further provision which indicated likely levels of commission, and then continued 'Commissions of less than £X will be retained by us, and commissions of more than £X will be divided equally between yourselves and ourselves' might be effective. Members* are advised, however, to consult with their lawyers before including such a provision.*

iii. *Where an existing client of the member* is to sign a new engagement letter containing such a provision as is referred to above, the firm* should explain that, in the absence of the signed engagement letter, the firm* could retain the commission only if the client gave full and informed consent on each occasion after receiving full disclosure of the amount involved, whereas, once the letter is signed, the firm* can keep the commission.*

(d) Obtain the client's subsequent consent

If the member does not obtain the client's consent in one of the ways referred to in paragraphs 240.7B ii or 240.7B iii above, the commission may still be able to be retained if the client subsequently expressly consents to such retention (on the basis of full disclosure of the amount, terms and timing of payment).*

240.7C *Alternatively professional accountants* will be able to retain the commission if the client (with knowledge of all relevant facts) impliedly consents by acquiescing in such retention, for instance by deciding to proceed with the transaction having been notified both of the fact that the firm* will receive commission and of the full details of that commission.*

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* See Definitions

240.7D *Even where a fiduciary relationship does not exist, where a professional accountant in public practice* becomes aware that any commission, fee or other benefit may be received (directly or indirectly), there should be disclosed to the client in writing:*

- *That commission or benefit will result or is likely to result, and*
- *When the fact is known, that such commission or benefit will be received, and*
- *As early as possible, the amount and terms of the benefit to the professional accountant in public practice*.*

240.7E *As regards payments of referral fees, professional accountants in public practice* have a responsibility to ascertain that a referral manner is in accordance with this Code because professional accountants in public practice* must not do, or be seen to do, through others what they may not do themselves. To this end, professional accountants in public practice* should consider whether there are any indications that the work or client has been initially procured in an unprofessional manner.*

In addition, where needed to complete a referred engagement properly, professional accountants in public practice should:*

- *Satisfy themselves as to the competence and professional standards of staff within their firm* whose work on the engagement it would be their duty to review; and*
- *Ensure their right of direct access to the client and, in appropriate circumstances, render their own fee account to the client.*

240.7F *In the case of insolvency work, Insolvency Practitioners should have regard to Part D of this Code.*

240.7G *Where an invitation to conduct a statutory audit comes other than directly from the client, the professional accountant in public practice should first ensure that the audit appointment has properly been made in accordance with statute. It should be made clear to all interested parties on all relevant documents that the professional accountant in public practice* is acting as principal*, with all that that function implies. In those circumstances, professional accountants in public practice* should deal directly with the client and should render their own fee account in addition to complying with the other requirements above.*

240.8 A professional accountant in public practice* may purchase all or part of another firm* on the basis that payments will be made to individuals formerly owning the firm* or to their heirs or estates. Such payments are not regarded as commissions or referral fees for the purpose of paragraphs 240.5–240.7 above.

Attention is drawn to additional requirements in respect of agency and referral arrangements, in Section 241.

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* See Definitions

Section 241 Agencies and Referrals

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 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 should be considered. Professional accountants in public practice should 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* should 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?*

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* See Definitions

- *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* should 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 should 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 should 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 should 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 should 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 should also be disclosed.*

241.8 *In summary, professional accountants in public practice* should:*

- *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*

* See Definitions

professional accountant in public practice should 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 who it can refer to for particular types of work. When professional accountants in public practice* are considering the establishment of an agency, it is important that the terms of the agency contract (actual or implied) should not require exclusive referral of all clients regardless of suitability. For example, a professional accountant in public practice* should not be party to an agency by which it is 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* should consider whether the agency constitutes a material business relationship. See Section 290, 'Independence – assurance engagements.'*

241.12 *Professional accountants in public practice* should 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* should satisfy themselves that their ability to discharge their professional obligations to their clients is not compromised.*

241.14 *A professional accountant in public practice* should not in any circumstances conduct its practice in such a manner as to give the impression that it 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 Section 9.3, 'The names and letterheads of practising firms' in the Members' Handbook (www.icaew.com/membershandbook).*

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* See Definitions

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 should 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* should 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 the Institute 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.*

241.19 *Having established that an introduction can be made in compliance with regulatory requirements, professional accountants in public practice* should bear in mind the need to provide their clients with objective advice, in compliance with these ethical standards.*

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* See Definitions

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* should 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 should 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:**

Type of firm	*What the firm can recommend*	*Can there generally be introductions to this type of firm?*
• *Independent*	*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.*	*Yes (241.24 below)*
• *Whole of market (UK only)*	*Recommend products from the whole market but do not offer clients the ability to pay by fee. The firm is remunerated by commission.*	*Yes (241.25 below)*
• *Multi-tied* • *(Multi-agency in RoI)*	*Recommend the products of more than one product provider with whom the firm has agreements, but recommends on less than the whole market.*	*Depends on scope of choice (241.26 below)*
• *Tied*	*Recommend the products of one product provider.*	*No (241.27 below)*

* See Definitions

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* will need to 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* should 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* should 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.*

Section 250 Marketing Professional Services*

250.1 When a professional accountant in public practice* solicits new work through advertising* or other forms of marketing, there may be potential threats to compliance with the fundamental principles. For example, a self-

* See Definitions

interest threat to compliance with the principle of professional behaviour is created if services, achievements or products are marketed in a way that is inconsistent with that principle.

250.2 A professional accountant in public practice* should not bring the profession into disrepute when marketing professional services*. The professional accountant in public practice* should be honest and truthful and should not:

- Make exaggerated claims for services offered, qualifications possessed or experience gained; or
- Make disparaging references to unsubstantiated comparisons to the work of another.

In particular, where professional accountants in public practice seek to make comparisons of their promotional material between their practices or services and those of others, great care will be required. In particular, they should ensure that such comparisons:*

- *Are objective and not misleading*,
- *Relate to the same services*,
- *Are factual and verifiable, and*
- *Do not discredit or denigrate the practice or services of others*.

Particular care is needed in unclear or subjective claims of size or quality. For example, it is impossible to know whether a claim to be 'the largest firm' in an area is a reference to the number of partners or staff, the number of offices or the amount of fee income. A claim to be 'the best firm' is unlikely to be able to be substantiated.*

If the professional accountant in public practice* is in doubt whether a proposed form of advertising* or marketing is appropriate, the professional accountant in public practice* should consult with the *Institute*.

250.3 *A professional accountant in public practice* should ensure that all advertisements, including in letterheads, invoices and other practice documents, comply with the law and should conform with the requirements of the relevant Advertising Standards Authority (for example, the British Code of Advertising) notably, as to legality, decency, clarity, honesty and truthfulness.*

250.4 *If reference is made in promotional material to fees, the basis on which the fees are calculated, or to hourly or other charging rates, the greatest care should be taken to ensure that such reference does not mislead as to the precise range of services and the time commitment that the reference is intended to cover. Professional accountants in public practice* are unlikely to be able to comply with the requirements of 250.2 if making a comparison in such material between their fees and the fees of another accounting practice, whether members* or not. A professional accountant in public practice* may offer a free consultation at which fees are discussed.*

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* See Definitions

250.5 *Professional accountants in public practice* should never promote or seek to promote their services, or the services of other professional accountants in public practice*, in such a way, or to such an extent, as to amount to harassment of a potential client.*

It should be noted that special rules apply in relation to the conduct of Insolvency Practice and licensed practitioners should have regard to the relevant legislation and to Part D. Similarly professional accountants in public practice whose firm* is registered for the conduct of investment business should have recourse to the relevant Investment Business Regulations.*

250.6 *Further guidance on marketing professional services* is available to members in a helpsheet from the Ethics Advisory Services (www.icaew.com/ethicsadvice). See also Sections 210, 'Professional appointment' and 230, 'Second opinions'.*

Section 260 Gifts and Hospitality

260.1 A professional accountant in public practice*, or an immediate or close family* member, may be offered gifts and hospitality from a client. Such an offer ordinarily gives rise to threats to compliance with the fundamental principles. For example, self-interest threats to objectivity may be created if a gift from a client is accepted; intimidation threats to objectivity may result from the possibility of such offers being made public.

260.2 The significance of such threats will depend on the nature, value and intent behind the offer. Where gifts or hospitality which a reasonable and informed third party, having knowledge of all relevant information, would consider clearly insignificant* are made, a professional accountant in public practice* may conclude that the offer is made in the normal course of business without the specific intent to influence decision making or to obtain information. In such cases, the professional accountant in public practice* may generally conclude that there is no significant threat to compliance with the fundamental principles.

260.3 If evaluated threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. When the threats cannot be eliminated or reduced to an acceptable level through the application of safeguards, a professional accountant in public practice* should not accept such an offer.

260.4 *Further guidance on dealing with gifts and hospitality in an assurance engagement is available in paragraph 290.213.*

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* See Definitions

Section 270 Custody of Client Assets

270.1 A professional accountant in public practice* should not assume custody of client monies or other assets unless permitted to do so by law and, if so, in compliance with any additional legal duties imposed on a professional accountant in public practice* holding such assets.

270.2 The holding of client assets creates threats to compliance with the fundamental principles; for example, there is a self-interest threat to professional behaviour and may be a self-interest threat to objectivity arising from holding client assets. To safeguard against such threats, a professional accountant in public practice* entrusted with money (or other assets) belonging to others should:

(a) Keep such assets separately from personal or firm* assets;
(b) Use such assets only for the purpose for which they are intended;
(c) At all times, be ready to account for those assets, and any income, dividends or gains generated, to any persons entitled to such accounting; and
(d) Comply with all relevant laws and regulations relevant to the holding of and accounting for such assets.

Regulations on the procedures required to be adopted by professional accountants holding client monies are available in the 'Clients' money regulations' in the Members' Handbook, which is available at (www.icaew.com/membershandbook.). For firms* licensed by the Institute under the Designated Professional Bodies arrangements, additional requirements are included in Chapter 4 of the Designated Professional Bodies Handbook (www.icaew.com/dpb).*

270.3 In addition, professional accountants in public practice* should be aware of threats to compliance with the fundamental principles through association with such assets, for example, if the assets were found to derive from illegal activities, such as money laundering. As part of client and engagement acceptance procedures for such services, professional accountants in public practice* should make appropriate inquiries about the source of such assets and should consider their legal and regulatory obligations. They may also consider seeking legal advice.

Further guidance on money laundering regulation and legislation is available in Section 9.5, 'Anti-money laundering guidance for the accountancy sector' in the Members' Handbook, which is available at www.icaew.com/members handbook.

See also Section 9.4, 'Document and records: ownership, lien and rights of access' in the Members' Handbook (www.icaew.com/membershandbook).

* See Definitions

Section 280 Objectivity – All services

280.1 A professional accountant in public practice* should consider when providing any professional service whether there are threats to compliance with the fundamental principle of objectivity resulting from having interests in, or relationships with, a client or directors, officers or employees. For example, a familiarity threat to objectivity may be created from a family or close personal or business relationship.

280.2 A professional accountant in public practice* who provides an assurance service is required to be independent of the assurance client*. Independence of mind and in appearance is necessary to enable the professional accountant in public practice* to express a conclusion, and be seen to express a conclusion, without bias, conflict of interest or undue influence of others. Section 290 provides specific guidance on independence* requirements for professional accountants in public practice* when performing an assurance engagement*.

280.3 The existence of threats to objectivity when providing any professional service will depend upon the particular circumstances of the engagement and the nature of the work that the professional accountant in public practice* is performing.

In particular objectivity may be subject to self-interest or familiarity threats in the following circumstances.

a) Family, other personal or business relationships
Objectivity may be subject to a self-interest threat where a mutual business interest exists with a client or any officer or employee of the client. In such circumstances, safeguards should be applied and adequate disclosure of any conflict of interest should be made to all relevant parties.

Professional accountants in public practice who hold office in a client company or have a comparable business relationship with a client, should be aware of the dangers inherent in seeking to combine such a role with that of business adviser or other professional service having regard to the self-interest threat to their objectivity. In such circumstances, professional accountants in public practice* should be aware of the distinctive nature of each of the roles in which they are professionally engaged, and employ safeguards, including disclosure where appropriate.*

*b) Loans**
Objectivity may be subject to a self-interest threat if a firm, or any principal* of the firm* should directly or indirectly make a loan* to, or receive a loan* from the client, or give or accept any guarantee in relation to a debt of the client, firm* or principal*.*

* See Definitions

A firm or principal* in the firm* should not receive from or make a loan* to a client unless the client is a bank or similar institution and the transaction is under normal commercial conditions. This is because the perceived self-interest threat arising in such circumstances is generally seen as being too great to be reduced to an acceptable level by the application of any safeguards.*

c) *Beneficial Interest in Shares* and other Investments*
A self-interest threat to objectivity of a professional accountant in public practice may arise in relation to any investment in a company or undertaking with which there is a professional relationship. The threats should be evaluated and safeguards should be considered and applied as necessary. If the value of the investment is material to the financial circumstances of the professional accountant in public practice*, the threat to independence* cannot be reduced to an acceptable level by the application of any safeguards. Consequently the professional accountant in public practice* should cease to advise professionally or dispose of the interest.*

See also Section 260, 'Gifts and hospitality'.

280.4 A professional accountant in public practice* should evaluate the significance of identified threats and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Such safeguards may include:

- Withdrawing from the engagement team*.
- Supervisory procedures.
- Terminating the financial or business relationship giving rise to the threat.
- Discussing the issue with higher levels of management within the firm.*
- Discussing the issue with those charged with governance of the client.

See also Section 220, 'Conflicts of interest'.

Section 290 Independence – Assurance engagements*

Scope
290.0 *When conducting audit engagements* in the UK and Republic of Ireland, members* should comply with the requirements of the Auditing Practices Board's ('APB's') Ethical Standards[3]. Before undertaking other assurance engagements* for audit clients, members* should consider the impact of the proposed engagement on the integrity and independence* of the audit, by reference to the APB's Ethical Standards.*

290.0A *When performing audit engagements* in other territories, professional accountants* should comply with the requirements of Section 290 of the IFAC Code of Ethics (www.ifac.org/Store/) in force at the time of the engagement.*

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* See Definitions

[3] *APB Ethical Standards 1 to 5 and the Provisions Available for Smaller Entities, available at www.frc.org.uk/apb/publications.*

The Auditing Practices Board (APB) has stated, in ISA (UK and Ireland) 200, that it is not aware of any significant instances where the relevant parts of the IFAC Code of Ethics are more restrictive than the Ethical Standards.

290.0B *The remainder of this Section applies to assurance engagements * other than audits. Accordingly, elements of Section 290 of the IFAC Code of Ethics which relate only to audit engagements* have not been reproduced in this Section and paragraph numbering is therefore not sequential.*

290.0C *Note that the Statements of Investment Circular Reporting Standards (SIRS), issued by the APB, require compliance with an Ethical Statement for Reporting Accountants (ESRA), also issued by the APB. Accordingly any professional accountant in public practice* issuing a report that states that the work has been carried out in accordance with the SIRS will need to comply with the independence* requirements of the ESRA.*

290.1 In the case of an assurance engagement* it is in the public interest and, therefore, required by this Code of Ethics, that members of assurance teams*, firms* and, when applicable, network firms* be independent of assurance clients*.

Objectivity required in respect of non-assurance engagements is considered in Section 280.*

Other Assurance Engagements*

290.2 Assurance engagements* are designed to enhance intended users' degree of confidence about the outcome of the evaluation or measurement of a subject matter against criteria. The International Framework for Assurance engagements* (the Assurance Framework) issued by the International Auditing and Assurance Standards Board describes the elements and objectives of an assurance engagement*, and identifies engagements to which International Standards on Auditing (ISAs), International Standards on Review Engagements (ISREs) and International Standards on Assurance Engagements (ISAEs) apply. For a description of the elements and objectives of an assurance engagement*, reference should be made to the Assurance Framework (www.ifac.org/IAASB/).

290.3 As further explained in the Assurance Framework, in an assurance engagement* the professional accountant in public practice* expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.

290.4 The outcome of the evaluation or measurement of a subject matter is the information that results from applying the criteria to the subject matter. The term 'subject matter information' is used to mean the outcome of the evaluation or measurement of subject matter. For example:

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* See Definitions

- The recognition, measurement, presentation and disclosure represented in the financial statements* (subject matter information) result from applying a financial reporting framework for recognition, measurement, presentation and disclosure, such as International Financial Reporting Standards (criteria), to an entity's financial position, financial performance and cash flows (subject matter).
- An assertion about the effectiveness of internal control (subject matter information) results from applying a framework for evaluating the effectiveness of internal control, such as COSO[4] or CoCo[5] (criteria), to internal control, a process (subject matter).

290.5 Assurance engagements* may be assertion-based or direct reporting. In either case they involve three separate parties: a public accountant in public practice*, a responsible party and intended users.

290.6 In an assertion-based assurance engagement*, the evaluation or measurement of the subject matter is performed by the responsible party, and the subject matter information is in the form of an assertion by the responsible party that is made available to the intended users.

290.7 In a direct reporting assurance engagement* the professional accountant in public practice* either directly performs the evaluation or measurement of the subject matter, or obtains a representation from the responsible party that has performed the evaluation or measurement that is not available to the intended users. The subject matter information is provided to the intended users in the assurance report.

290.8 Independence* requires:

Independence* of Mind

The state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgement, allowing an individual to act with integrity, and exercise objectivity and professional scepticism.

Independence* in Appearance

The avoidance of facts and circumstances that are so significant that a reasonable and informed third party, having knowledge of all relevant information, including safeguards applied, would reasonably conclude a firm's, or a member of the assurance team's*, integrity, objectivity or professional scepticism had been compromised.

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* See Definitions

[4] *A U.S. publication used to conduct an evaluation of an organisation's internal control system.*

[5] *A publication from the Canadian Institute of Chartered Accountants which provides advice and guidance on the criteria for control.*

290.9 The use of the word 'independence'* on its own may create misunderstandings. Standing alone, the word may lead observers to suppose that a person exercising professional judgement ought to be free from all economic, financial and other relationships. This is impossible, as every member of society has relationships with others. Therefore, the significance of economic, financial and other relationships should also be evaluated in the light of what a reasonable and informed third party having knowledge of all relevant information would reasonably conclude to be unacceptable.

290.10 Many different circumstances, or combination of circumstances, may be relevant and accordingly it is impossible to define every situation that creates threats to independence* and specify the appropriate mitigating action that should be taken. In addition, the nature of assurance engagements* may differ and consequently different threats may exist, requiring the application of different safeguards. A conceptual framework that requires firms* and members of assurance teams* to identify, evaluate and address threats to independence*, rather than merely comply with a set of specific rules which may be arbitrary, is, therefore, in the public interest.

A Conceptual Approach to Independence*

290.11 Members of assurance teams*, firms* and network firms* are required to apply the conceptual framework contained in Section 100 to the particular circumstances under consideration. In addition to identifying relationships between the firm*, network firms*, members of the assurance team* and the assurance client*, consideration should be given to whether relationships between individuals outside of the assurance team* and the assurance client* create threats to independence*.

290.12 The examples presented in this Section are intended to illustrate the application of the conceptual framework and are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances that may create threats to independence*. Consequently, it is not sufficient for a member of an assurance team*, a firm* or a network firm* merely to comply with the examples presented, rather they should apply the framework to the particular circumstances they face.

290.13 The nature of the threats to independence* and the applicable safeguards necessary to eliminate the threats or reduce them to an acceptable level differ depending on the characteristics of the individual assurance engagement*, that is, the purpose, subject matter information and intended users of the report. A firm* should, therefore, evaluate the relevant circumstances, the nature of the assurance engagement* and the threats to independence* in deciding whether it is appropriate to accept or continue an engagement, as well as the nature of the safeguards required and whether a particular individual should be a member of the assurance team*.

* See Definitions

Further consideration of the nature of threats and safeguards that may be appropriate is included in Section 200.

Assertion-based Assurance Engagements*[6]

290.15 In an assertion-based assurance engagement*, the members of the assurance team* and the firm* are required to be independent of the assurance client* (the responsible party, which is responsible for the subject matter information and may be responsible for the subject matter). Such independence* requirements include prohibitions regarding certain relationships between members of the assurance team* and directors, officers and employees of the client in a position to exert direct and significant influence over the subject matter information. Also, consideration should be given to whether threats to independence* are created by relationships with employees of the client in a position to exert direct and significant influence over the subject matter of the engagement. Consideration should also be given to any threats that the firm* has reason to believe may be created by network firm* interests and relationships.

290.16 In the majority of assertion-based assurance engagements*, the responsible party is responsible for the subject matter information and the subject matter. However, in some engagements the responsible party may not be responsible for the subject matter. For example, when a professional accountant in public practice* is engaged to perform an assurance engagement* regarding a report that an environmental consultant has prepared about a company's sustainability practices, for distribution to intended users, the environmental consultant is the responsible party for the subject matter information but the company is responsible for the subject matter (the sustainability practices).

290.17 In those assertion-based assurance engagements* where the responsible party is responsible for the subject matter information but not the subject matter the members of the assurance team* and the firm* are required to be independent of the party responsible for the subject matter information (the assurance client*). In addition, consideration should be given to any threats the firm* has reason to believe may be created by interests and relationships between a member of the assurance team*, the firm*, a network firm* and the party responsible for the subject matter.

Direct Reporting Assurance Engagements*[7]

290.18 In a direct reporting assurance engagement* the members of the assurance team* and the firm* are required to be independent of the assurance client* (the party responsible for the subject matter).

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* See Definitions

[6] *See appendix to Definitions, paragraph 10*

[7] *See appendix to Definitions, paragraph 10*

Restricted use reports

290.19 In the case of an assurance report expressly restricted for use by identified users, the users of the report are considered to be knowledgeable as to the purpose, subject matter information and limitations of the report through their participation in establishing the nature and scope of the firm's* instructions to deliver the services, including the criteria against which the subject matter are to be evaluated or measured. This knowledge and the enhanced ability of the firm* to communicate about safeguards with all users of the report increase the effectiveness of safeguards to independence* in appearance. These circumstances may be taken into account by the firm* in evaluating the threats to independence* and considering the applicable safeguards necessary to eliminate the threats or reduce them to an acceptable level. At a minimum, it will be necessary to apply the provisions of this Section in evaluating the independence* of members of the assurance team* and their immediate and close family*. Further, if the firm* had a material financial interest*, whether direct or indirect, in the assurance client*, the self-interest threat created would be so significant no safeguard could reduce the threat to an acceptable level. Limited consideration of any threats created by network firm* interests and relationships may be sufficient.

Independence* from Assurance Client* – Summary

290.19A *The independent requirements for assurance engagements* can be summarised as follows:*

Parties needing to be independent of the assurance client*	***Type of assurance engagement****
*Assurance team**	*All assurance engagements*.*
*Firm**	*Assurance engagements* where there is not a restricted use report.* *For assurance engagements* for non-audit clients, where there is a restricted use report, the firm* may not need to comply with the full independence* requirements of this Statement but should not have a material financial interest* in the client.*
*Network firms**	*All assurance engagements* for financial statement audit clients* (because of auditor independence* requirements)*

Multiple Responsible Parties

290.20 In some assurance engagements*, whether assertion-based or direct reporting, there might be several responsible parties. In such engagements, in determining whether it is necessary to apply the provisions in this Section to

* See Definitions

each responsible party, the firm* may take into account whether an interest or relationship between the firm*, or a member of the assurance team*, and a particular responsible party would create a threat to independence* that is other than clearly insignificant* in the context of the subject matter information. This will take into account factors such as:

- The materiality of the subject matter information (or the subject matter) for which the particular responsible party is responsible; and
- The degree of public interest associated with the engagement. If the firm* determines that the threat to independence* created by any such interest or relationship with a particular responsible party would be clearly insignificant* it may not be necessary to apply all of the provisions of this Section to that responsible party.

Other Considerations

290.21 The threats and safeguards identified in this Section are generally discussed in the context of interests or relationships between the firm*, network firms*, members of the assurance team* and the assurance client*. When the assurance team* has reason to believe that a related entity* of an assurance client* is relevant to the evaluation of the firm's* independence* of the client, the assurance team* should consider that related entity* when evaluating independence* and applying appropriate safeguards.

290.22 The evaluation of threats to independence* and subsequent action should be supported by evidence obtained before accepting the engagement and while it is being performed. The obligation to make such an evaluation and take action arises when a firm*, a network firm* or a member of the assurance team* knows, or could reasonably be expected to know, of circumstances or relationships that might compromise independence*. There may be occasions when the firm*, a network firm* or an individual inadvertently violates this Section. If such an inadvertent violation occurs, it would generally not compromise independence* with respect to an assurance client* provided the firm* has appropriate quality control policies and procedures in place to promote independence* and, once discovered, the violation is corrected promptly and any necessary safeguards are applied.

290.23 Throughout this Section, reference is made to significant and clearly insignificant* threats in the evaluation of independence*. In considering the significance of any particular matter, qualitative as well as quantitative factors should be taken into account. A matter should be considered clearly insignificant* only if it is deemed to be both trivial and inconsequential.

Objective and Structure of this Section

290.24 The objective of this Section is to assist firms* and members of assurance teams* in:

(a) Identifying threats to independence*;
(b) Evaluating whether these threats are clearly insignificant*; and

* See Definitions

(c) In cases when the threats are not clearly insignificant*, identifying and applying appropriate safeguards to eliminate or reduce the threats to an acceptable level.

Consideration should always be given to what a reasonable and informed third party having knowledge of all relevant information, including safeguards applied, would reasonably conclude to be unacceptable. In situations when no safeguards are available to reduce the threat to an acceptable level, the only possible actions are to eliminate the activities or interest creating the threat, or to refuse to accept or continue the assurance engagement*.

290.25 This Section concludes with some examples of how this conceptual approach to independence* is to be applied to specific circumstances and relationships. The examples discuss threats to independence* that may be created by specific circumstances and relationships (paragraphs 290.100 onwards). Professional judgement is used to determine the appropriate safeguards to eliminate threats to independence* or to reduce them to an acceptable level. In certain examples, the threats to independence* are so significant the only possible actions are to eliminate the activities or interest creating the threat, or to refuse to accept or continue the assurance engagement*. In other examples, the threat can be eliminated or reduced to an acceptable level by the application of safeguards. The examples are not intended to be all-inclusive.

290.27 When threats to independence* that are not clearly insignificant* are identified, and the firm* decides to accept or continue the assurance engagement*, the decision should be documented. The documentation should include a description of the threats identified and the safeguards applied to eliminate or reduce the threats to an acceptable level.

290.29 Audit committees* can have an important corporate governance role when they are independent of client management and can assist the Board of Directors in satisfying themselves that a firm* is independent in carrying out its audit role. There should be regular communications between the firm* and the audit committee* (or other governance body if there is no audit committee*) of listed entities regarding relationships and other matters that might, in the firm's* opinion, reasonably be thought to bear on independence*.

290.30 Firms* should establish policies and procedures relating to independence* communications with audit committees*, or others charged with governance of the client. Matters to be communicated will vary in each circumstance and should be decided by the firm*, but should generally address the relevant matters set out in this Section.

Engagement Period

290.31 The members of the assurance team* and the firm* should be independent of the assurance client* during the period of the assurance engagement*. The period of the engagement starts when the assurance team* begins to perform assurance services and ends when the assurance report is

* See Definitions

issued, except when the assurance engagement* is of a recurring nature. If the assurance engagement* is expected to recur, the period of the assurance engagement* ends with the notification by either party that the professional relationship has terminated or the issuance of the final assurance report, whichever is later.

290.32 The firm* should consider whether any financial or business relationships or previous services may create threats to independence*.

* See Definitions

APPLICATION OF FRAMEWORK TO SPECIFIC SITUATIONS: CONTENTS

Introduction

290.100 The following examples describe specific circumstances and relationships that may create threats to independence*. The examples describe the potential threats created and the safeguards that may be appropriate to eliminate the threats or reduce them to an acceptable level in each circumstance. The examples are not all inclusive. In practice, the firm*, network firms* and the members of the assurance team* will be required to assess the implications of similar, but different, circumstances and relationships and to determine whether safeguards, including the safeguards in paragraphs 200.12 to 200.15 can be applied to satisfactorily address the threats to independence*.

290.101 The examples illustrate how safeguards should be applied to fulfill the requirement for the members of the assurance team* and the firm* to be independent of an assurance client* that is not a financial statement audit client*. The examples do not include assurance reports expressly restricted for use by identified users. As stated in paragraph 290.19 for such engagements, members of the assurance team* and their immediate and close family* are

* See Definitions

required to be independent of the assurance client*. Further, the firm* should not have a material financial interest*, direct or indirect, in the assurance client*.

290.102 The examples should be read in conjunction with paragraphs 290.20 which explain that, in the majority of assurance engagements*, there is one responsible party and that responsible party comprises the assurance client*. However, in some assurance engagements* there are two responsible parties. In such circumstances, consideration should be given to any threats the firm* has reason to believe may be created by interests and relationships between a member of the assurance team*, the firm*, a network firm* and the party responsible for the subject matter.

290.103 Interpretation 2005–01 to this Section provides further guidance on the application of the independence* requirements contained in this Section to assurance engagements* that are not financial statement audit engagements* *in a number of example situations. This is included as an Appendix to this Section.*

Financial Interests*

290.104 A financial interest* in an assurance client* may create a self-interest threat. In evaluating the significance of the threat, and the appropriate safeguards to be applied to eliminate the threat or reduce it to an acceptable level, it is necessary to examine the nature of the financial interest*. This includes an evaluation of the role of the person holding the financial interest*, the materiality of the financial interest* and the type of financial interest* (direct or indirect).

290.105 When evaluating the type of financial interest*, consideration should be given to the fact that financial interests* range from those where the individual has no control over the investment vehicle or the financial interest* held (e.g., a mutual fund, unit trust or similar intermediary vehicle) to those where the individual has control over the financial interest* (e.g., as a trustee) or is able to influence investment decisions. In evaluating the significance of any threat to independence*, it is important to consider the degree of control or influence that can be exercised over the intermediary, the financial interest* held, or its investment strategy. When control exists, the financial interest* should be considered direct. Conversely, when the holder of the financial interest* has no ability to exercise such control the financial interest* should be considered indirect.

290.106 If a member of the assurance team*, or their immediate family* member, has a direct financial interest*, or a material indirect financial interest*, in the assurance client*, the self-interest threat created would be so significant the only safeguards available to eliminate the threat or reduce it to an acceptable level would be to:

(a) Dispose of the direct financial interest* prior to the individual becoming a member of the assurance team*;

* See Definitions

(b) Dispose of the indirect financial interest* in total or dispose of a sufficient amount of it so that the remaining interest is no longer material prior to the individual becoming a member of the assurance team*; or
(c) Remove the member of the assurance team* from the assurance engagement*.

290.107 If a member of the assurance team*, or their immediate family* member receives, by way of, for example, an inheritance, gift or, as a result of a merger, a direct financial interest* or a material indirect financial interest* in the assurance client*, a self-interest threat would be created. The following safeguards should be applied to eliminate the threat or reduce it to an acceptable level:

(a) Disposing of the financial interest* at the earliest practical date; or
(b) Removing the member of the assurance team* from the assurance engagement*.

During the period prior to disposal of the financial interest* or the removal of the individual from the assurance team*, consideration should be given to whether additional safeguards are necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Discussing the matter with those charged with governance, such as the audit committee*; or
- Involving an additional professional accountant* to review the work done, or otherwise advise as necessary.

290.108 When a member of the assurance team* knows that his or her close family* member has a direct financial interest* or a material indirect financial interest* in the assurance client*, a self-interest threat may be created. In evaluating the significance of any threat, consideration should be given to the nature of the relationship between the member of the assurance team* and the close family* member and the materiality of the financial interest*. Once the significance of the threat has been evaluated, safeguards should be considered and applied as necessary. Such safeguards might include:

- The close family* member disposing of all or a sufficient portion of the financial interest* at the earliest practical date;
- Discussing the matter with those charged with governance, such as the audit committee*;
- Involving an additional professional accountant* who did not take part in the assurance engagement* to review the work done by the member of the assurance team* with the close family* relationship or otherwise advise as necessary; or
- Removing the individual from the assurance engagement*.

290.109 When a firm* or a member of the assurance team* holds a direct financial interest* or a material indirect financial interest* in the assurance client* as a trustee, a self-interest threat may be created by the possible influence of the trust over the assurance client*. Accordingly, such an interest should only be held when:

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* See Definitions

(a) The member of the assurance team*, an immediate family* member of the member of the assurance team*, and the firm* are not beneficiaries of the trust;
(b) The interest held by the trust in the assurance client* is not material to the trust;
(c) The trust is not able to exercise significant influence over the assurance client*; and
(d) The member of the assurance team* or the firm* does not have significant influence over any investment decision involving a financial interest* in the assurance client*.

290.110 Consideration should be given to whether a self-interest threat may be created by the financial interests* of individuals outside of the assurance team* and their immediate and close family* members. Such individuals would include:

- Partners*, and their immediate family* members, who are not members of the assurance team*;
- Partners and managerial employees who provide non-assurance services to the assurance client*; and
- Individuals who have a close personal relationship with a member of the assurance team*.

Whether the interests held by such individuals may create a self-interest threat will depend upon factors such as:

- The firm's* organisational, operating and reporting structure; and
- The nature of the relationship between the individual and the member of the assurance team*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Where appropriate, policies to restrict people from holding such interests;
- Discussing the matter with those charged with governance, such as the audit committee*; or
- Involving an additional professional accountant* who did not take part in the assurance engagement* to review the work done or otherwise advise as necessary.

290.111 An inadvertent violation of this Section as it relates to a financial interest* in an assurance client* would not impair the independence* of the firm*, the network firm* or a member of the assurance team* when:

(a) The firm*, and the network firm*, have established policies and procedures that require all professionals to report promptly to the firm* any breaches resulting from the purchase, inheritance or other acquisition of a financial interest* in the assurance client*;
(b) The firm*, and the network firm*, promptly notify the professional that the financial interest* should be disposed of; and

* See Definitions

(c) The disposal occurs at the earliest practical date after identification of the issue, or the professional is removed from the assurance team*.

290.112 When an inadvertent violation of this Section relating to a financial interest* in an assurance client* has occurred, the firm* should consider whether any safeguards should be applied. Such safeguards might include:

- Involving an additional professional accountant* who did not take part in the assurance engagement* to review the work done by the member of the assurance team*; or
- Excluding the individual from any substantive decision-making concerning the assurance engagement*.

290.122 If a firm* has a direct financial interest* in an assurance client* the self-interest threat created would be so significant no safeguard could reduce the threat to an acceptable level. Consequently, disposal of the financial interest* would be the only action appropriate to permit the firm* to perform the engagement.

290.123 If a firm* has a material indirect financial interest* in an assurance client* a self-interest threat is also created. The only action appropriate to permit the firm* to perform the engagement would be for the firm* to either dispose of the indirect interest in total or to dispose of a sufficient amount of it so that the remaining interest is no longer material.

290.124 If a firm* has a material financial interest* in an entity that has a controlling interest in an assurance client*, the self-interest threat created would be so significant no safeguard could reduce the threat to an acceptable level. The only action appropriate to permit the firm* to perform the engagement would be for the firm* either to dispose of the financial interest* in total or to dispose of a sufficient amount of it so that the remaining interest is no longer material.

290.125 When a restricted use report for an assurance engagement* is issued, exceptions to the provisions in paragraphs 290.106 to 290.110 and 290.122 to 290.124 are set out in 290.19.

Loans* and Guarantees

290.126 A loan*, or a guarantee of a loan*, to the firm* from an assurance client* that is a bank or a similar institution, would not create a threat to independence* provided the loan*, or guarantee, is made under normal lending procedures, terms and requirements and the loan* is immaterial to both the firm* and the assurance client*. If the loan* is material to the assurance client* or the firm* it may be possible, through the application of safeguards, to reduce the self-interest threat created to an acceptable level. Such safeguards might include involving an additional professional accountant* from outside the firm*, or network firm*, to review the work performed.

* See Definitions

290.127 A loan*, or a guarantee of a loan*, from an assurance client* that is a bank or a similar institution, to a member of the assurance team* or their immediate family* would not create a threat to independence* provided the loan*, or guarantee, is made under normal lending procedures, terms and requirements. Examples of such loans* include home mortgages, bank overdrafts, car loans* and credit card balances.

290.128 Similarly, deposits made by, or brokerage accounts of, a firm* or a member of the assurance team* with an assurance client* that is a bank, broker or similar institution would not create a threat to independence* provided the deposit or account is held under normal commercial terms.

290.129 If the firm*, or a member of the assurance team*, makes a loan* to an assurance client*, that is not a bank or similar institution, or guarantees such an assurance client's* borrowing, the self-interest threat created would be so significant no safeguard could reduce the threat to an acceptable level, unless the loan* or guarantee is immaterial to both the firm* or the member of the assurance team* and the assurance client*.

290.130 Similarly, if the firm* or a member of the assurance team* accepts a loan* from, or has borrowing guaranteed by, an assurance client* that is not a bank or similar institution, the self-interest threat created would be so significant no safeguard could reduce the threat to an acceptable level, unless the loan* or guarantee is immaterial to both the firm* or the member of the assurance team* and the assurance client*.

Close Business Relationships with Assurance Clients*

290.132 A close business relationship between a firm* or a member of the assurance team* and the assurance client* or its management, will involve a commercial or common financial interest* and may create self-interest and intimidation threats. The following are examples of such relationships:

- Having a material financial interest* in a joint venture with the assurance client* or a controlling owner, director, officer or other individual who performs senior managerial functions for that client.
- Arrangements to combine one or more services or products of the firm* with one or more services or products of the assurance client* and to market the package with reference to both parties.
- Distribution or marketing arrangements under which the firm* acts as a distributor or marketer of the assurance client's* products or services, or the assurance client* acts as the distributor or marketer of the products or services of the firm*.

Unless the financial interest* is immaterial and the relationship is clearly insignificant* to the firm* and the assurance client*, no safeguards could reduce the threat to an acceptable level. Consequently, in both these circumstances the only possible courses of action are to:

(a) Terminate the business relationship;

* See Definitions

(b) Reduce the magnitude of the relationship so that the financial interest* is immaterial and the relationship is clearly insignificant*; or
(c) Refuse to perform the assurance engagement*.

Unless any such financial interest* is immaterial and the relationship is clearly insignificant* to the member of the assurance team*, the only appropriate safeguard would be to remove the individual from the assurance team*.

290.134 The purchase of goods and services from an assurance client* by the firm* or a member of the assurance team* would not generally create a threat to independence* providing the transaction is in the normal course of business and on an arm's length basis. However, such transactions may be of a nature or magnitude so as to create a self-interest threat. If the threat created is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Eliminating or reducing the magnitude of the transaction;
- Removing the individual from the assurance team*; or
- Discussing the issue with those charged with governance, such as the audit committee*.

Family and Personal Relationships

290.135 Family and personal relationships between a member of the assurance team* and a director, an officer or certain employees, depending on their role, of the assurance client*, may create self-interest, familiarity or intimidation threats. It is impracticable to attempt to describe in detail the significance of the threats that such relationships may create. The significance will depend upon a number of factors including the individual's responsibilities on the assurance engagement*, the closeness of the relationship and the role of the family member or other individual within the assurance client*. Consequently, there is a wide spectrum of circumstances that will need to be evaluated and safeguards to be applied to reduce the threat to an acceptable level.

290.136 When an immediate family* member of a member of the assurance team* is a director, an officer or an employee of the assurance client* in a position to exert direct and significant influence over the subject matter information of the assurance engagement*, or was in such a position during any period covered by the engagement, the threats to independence* can only be reduced to an acceptable level by removing the individual from the assurance team*. The closeness of the relationship is such that no other safeguard could reduce the threat to independence* to an acceptable level. If application of this safeguard is not used, the only course of action is to withdraw from the assurance engagement*.

290.137 When an immediate family* member of a member of the assurance team* is an employee in a position to exert direct and significant influence over the subject matter of the engagement, threats to independence* may be created. The significance of the threats will depend on factors such as:

* See Definitions

- The position the immediate family* member holds with the client; and
- The role of the professional on the assurance team*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Removing the individual from the assurance team*;
- Where possible, structuring the responsibilities of the assurance team* so that the professional does not deal with matters that are within the responsibility of the immediate family* member; or
- Policies and procedures to empower staff to communicate to senior levels within the firm* any issue of independence* and objectivity that concerns them.

290.138 When a close family* member of a member of the assurance team* is a director, an officer, or an employee of the assurance client* in a position to exert direct and significant influence over the subject matter information of the assurance engagement*, threats to independence* may be created. The significance of the threats will depend on factors such as:

- The position the close family* member holds with the client; and
- The role of the professional on the assurance team*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Removing the individual from the assurance team*;
- Where possible, structuring the responsibilities of the assurance team* so that the professional does not deal with matters that are within the responsibility of the close family* member; or
- Policies and procedures to empower staff to communicate to senior levels within the firm* any issue of independence* and objectivity that concerns them.

290.139 In addition, self-interest, familiarity or intimidation threats may be created when a person who is other than an immediate or close family* member of a member of the assurance team* has a close relationship with the member of the assurance team* and is a director, an officer or an employee of the assurance client* in a position to exert direct and significant influence over the subject matter information of the assurance engagement*. Therefore, members of the assurance team* are responsible for identifying any such persons and for consulting in accordance with firm* procedures. The evaluation of the significance of any threat created and the safeguards appropriate to eliminate the threat or reduce it to an acceptable level will include considering matters such as the closeness of the relationship and the role of the individual within the assurance client*.

* See Definitions

290.140 Consideration should be given to whether self-interest, familiarity or intimidation threats may be created by a personal or family relationship between a partner* or employee of the firm* who is not a member of the assurance team* and a director, an officer or an employee of the assurance client* in a position to exert direct and significant influence over the subject matter information of the assurance engagement*. Therefore partners* and employees of the firm* are responsible for identifying any such relationships and for consulting in accordance with firm* procedures. The evaluation of the significance of any threat created and the safeguards appropriate to eliminate the threat or reduce it to an acceptable level will include considering matters such as the closeness of the relationship, the interaction of the firm* professional with the assurance team*, the position held within the firm*, and the role of the individual within the assurance client*.

290.141 An inadvertent violation of this Section as it relates to family and personal relationships would not impair the independence* of a firm* or a member of the assurance team* when:

(a) The firm* has established policies and procedures that require all professionals to report promptly to the firm* any breaches resulting from changes in the employment status of their immediate or close family* members or other personal relationships that create threats to independence*;
(b) Either the responsibilities of the assurance team* are re-structured so that the professional does not deal with matters that are within the responsibility of the person with whom he or she is related or has a personal relationship, or, if this is not possible, the firm* promptly removes the professional from the assurance engagement*; and
(c) Additional care is given to reviewing the work of the professional.

290.142 When an inadvertent violation of this Section relating to family and personal relationships has occurred, the firm* should consider whether any safeguards should be applied. Such safeguards might include:

- Involving an additional professional accountant* who did not take part in the assurance engagement* to review the work done by the member of the assurance team*; or
- Excluding the individual from any substantive decision-making concerning the assurance engagement*.

Employment with Assurance Clients*

290.143 A firm* or a member of the assurance team's* independence* may be threatened if a director, an officer or an employee of the assurance client* in a position to exert direct and significant influence over the subject matter information of the assurance engagement* has been a member of the assurance team* or partner* of the firm*. Such circumstances may create self-interest, familiarity and intimidation threats particularly when significant connections remain between the individual and his or her former firm*. Similarly, a member of the assurance team's* independence* may be

* See Definitions

threatened when an individual participates in the assurance engagement* knowing, or having reason to believe, that he or she is to, or may, join the assurance client* some time in the future.

290.144 If a member of the assurance team*, partner* or former partner of the firm* has joined the assurance client*, the significance of the self-interest, familiarity or intimidation threats created will depend upon the following factors:

(a) The position the individual has taken at the assurance client*.
(b) The amount of any involvement the individual will have with the assurance team*.
(c) The length of time that has passed since the individual was a member of the assurance team* or firm*.
(d) The former position of the individual within the assurance team* or firm*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Considering the appropriateness or necessity of modifying the assurance plan for the assurance engagement*;
- Assigning an assurance team* to the subsequent assurance engagement* that is of sufficient experience in relation to the individual who has joined the assurance client*;
- Involving an additional professional accountant* who was not a member of the assurance team* to review the work done or otherwise advise as necessary; or
- Quality control review of the assurance engagement*.

In all cases, all of the following safeguards are necessary to reduce the threat to an acceptable level:

(a) The individual concerned is not entitled to any benefits or payments from the firm* unless these are made in accordance with fixed pre-determined arrangements. In addition, any amount owed to the individual should not be of such significance to threaten the firm's* independence*.
(b) The individual does not continue to participate or appear to participate in the firm's* business or professional activities.

290.145 A self-interest threat is created when a member of the assurance team* participates in the assurance engagement* while knowing, or having reason to believe, that he or she is to, or may, join the assurance client* some time in the future. This threat can be reduced to an acceptable level by the application of all of the following safeguards:

(a) Policies and procedures to require the individual to notify the firm* when entering serious employment negotiations with the assurance client*.
(b) Removal of the individual from the assurance engagement*.

* See Definitions

In addition, consideration should be given to performing an independent review of any significant judgements made by that individual while on the engagement.

Recent Service with Assurance Clients*

290.146 To have a former officer, director or employee of the assurance client* serve as a member of the assurance team* may create self-interest, self-review and familiarity threats. This would be particularly true when a member of the assurance team* has to report on, for example, subject matter information he or she had prepared or elements of the financial statements* he or she had valued while with the assurance client*.

290.147 If, during the period covered by the assurance report, a member of the assurance team* had served as an officer or director of the assurance client*, or had been an employee in a position to exert direct and significant influence over the subject matter information of the assurance engagement*, the threat created would be so significant no safeguard could reduce the threat to an acceptable level. Consequently, such individuals should not be assigned to the assurance team*.

290.148 If, prior to the period covered by the assurance report, a member of the assurance team* had served as an officer or director of the assurance client*, or had been an employee in a position to exert direct and significant influence over the subject matter information of the assurance engagement*, this may create self-interest, self-review and familiarity threats. For example, such threats would be created if a decision made or work performed by the individual in the prior period, while employed by the assurance client*, is to be evaluated in the current period as part of the current assurance engagement*. The significance of the threats will depend upon factors such as:

- The position the individual held with the assurance client*;
- The length of time that has passed since the individual left the assurance client*; and
- The role the individual plays on the assurance team*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Involving an additional professional accountant* to review the work done by the individual as part of the assurance team* or otherwise advise as necessary; or
- Discussing the issue with those charged with governance, such as the audit committee*.

Serving as an Officer or Director on the Board of Assurance Clients*

290.149 If a partner or employee of the firm* serves as an officer or as a

* See Definitions

director on the board of an assurance client* the self-review and self-interest threats created would be so significant no safeguard could reduce the threats to an acceptable level. Consequently, if such an individual were to accept such a position the only course of action is to refuse to perform, or to withdraw from the assurance engagement*.

290.150 The position of Company Secretary has different implications in different jurisdictions. The duties may range from administrative duties such as personnel management and the maintenance of company records and registers, to duties as diverse as ensuring that the company complies with regulations or providing advice on corporate governance matters. Generally this position is seen to imply a close degree of association with the entity and may create self-review and advocacy threats.

290.152 Routine administrative services to support a company secretarial function or advisory work in relation to company secretarial administration matters is generally not perceived to impair independence*, provided client management makes all relevant decisions.

Long Association of Senior Personnel with Assurance Clients*

290.153 Using the same senior personnel on an assurance engagement* over a long period of time may create a familiarity threat. The significance of the threat will depend upon factors such as:

- The length of time that the individual has been a member of the assurance team*;
- The role of the individual on the assurance team*;
- The structure of the firm*; and
- The nature of the assurance engagement*.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied to reduce the threat to an acceptable level. Such safeguards might include:

- Rotating the senior personnel off the assurance team*;
- Involving an additional professional accountant* who was not a member of the assurance team* to review the work done by the senior personnel or otherwise advise as necessary; or
- Independent internal quality reviews.

Provision of Non-assurance Services to Assurance Clients*

290.158 Firms* have traditionally provided to their assurance clients* a range of non-assurance services that are consistent with their skills and expertise. Assurance clients* value the benefits that derive from having these firms*, which have a good understanding of the business, bring their knowledge and skill to bear in other areas. Furthermore, the provision of such non-assurance services will often result in the assurance team* obtaining information regarding the assurance client's* business and operations that is

* See Definitions

helpful in relation to the assurance engagement*. The greater the knowledge of the assurance client's* business, the better the assurance team* will understand the assurance client's* procedures and controls, and the business and financial risks that it faces. The provision of non-assurance services may, however, create threats to the independence* of the firm*, a network firm* or the members of the assurance team*, particularly with respect to perceived threats to independence*. Consequently, it is necessary to evaluate the significance of any threat created by the provision of such services. In some cases, it may be possible to eliminate or reduce the threat created by application of safeguards. In other cases, no safeguards are available to reduce the threat to an acceptable level.

290.159 The following activities would generally create self-interest or self-review threats that are so significant that only avoidance of the activity or refusal to perform the assurance engagement* would reduce the threats to an acceptable level:

- Authorising, executing or consummating a transaction, or otherwise exercising authority on behalf of the assurance client*, or having the authority to do so.
- Determining which recommendation of the firm* should be implemented.
- Reporting, in a management role, to those charged with governance.

290.160 The examples set out in paragraphs 290.169 to 290.205 are addressed in the context of the provision of non-assurance services to an assurance client*. The subject matter information of *non-audit* assurance services may be limited in nature. Threats to independence*, however, may arise when a firm* provides a non-assurance service related to the subject matter information, of a non-financial statement audit assurance engagement*. In such cases, consideration should be given to the significance of the firm's* involvement with the subject matter information, of the engagement, whether any self-review threats are created and whether any threats to independence* could be reduced to an acceptable level by application of safeguards, or whether the engagement should be declined. When the non-assurance service is not related to the subject matter information, of the non-financial statement audit assurance engagement*, the threats to independence* will generally be clearly insignificant*.

290.161 The following activities may also create self-review or self-interest threats:

- Having custody of an assurance client's* assets.
- Supervising assurance client* employees in the performance of their normal recurring activities.
- Preparing source documents or originating data, in electronic or other form, evidencing the occurrence of a transaction (for example, purchase orders, payroll time records and customer orders).

The significance of any threat created should be evaluated and, if the threat is

* See Definitions

other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate the threat or reduce it to an acceptable level. Such safeguards might include:

- Making arrangements so that personnel providing such services do not participate in the assurance engagement*;
- Involving an additional professional accountant* to advise on the potential impact of the activities on the independence* of the firm* and the assurance team*.

290.162 New developments in business, the evolution of financial markets, rapid changes in information technology, and the consequences for management and control, make it impossible to draw up an all-inclusive list of all situations when providing non-assurance services to an assurance client* might create threats to independence* and of the different safeguards that might eliminate these threats or reduce them to an acceptable level. In general, however, a firm* may provide services beyond the assurance engagement* provided any threats to independence* have been reduced to an acceptable level.

290.163 The following safeguards may be particularly relevant in reducing to an acceptable level threats created by the provision of non-assurance services to assurance clients*:

- Policies and procedures to prohibit professional staff from making management decisions for the assurance client*, or assuming responsibility for such decisions.
- Discussing independence* issues related to the provision of non-assurance services with those charged with governance, such as the audit committee*.
- Policies within the assurance client* regarding the oversight responsibility for provision of non-assurance services by the firm*.
- Involving an additional professional accountant* to advise on the potential impact of the non-assurance engagement* on the independence* of the member of the assurance team* and the firm*.
- Involving an additional professional accountant* outside of the firm* to provide assurance on a discrete aspect of the assurance engagement*.
- Obtaining the assurance client's* acknowledgement of responsibility for the results of the work performed by the firm*.
- Disclosing to those charged with governance, such as the audit committee*, the nature and extent of fees charged.
- Making arrangements so that personnel providing non-assurance services do not participate in the assurance engagement*.

290.164 Before the firm* accepts an engagement to provide a non-assurance service to an assurance client*, consideration should be given to whether the provision of such a service would create a threat to independence*. In situations when a threat created is other than clearly insignificant*, the non-assurance engagement* should be declined unless appropriate safeguards can be applied to eliminate the threat or reduce it to an acceptable level.

* See Definitions

Preparing Accounting Records and Financial Statements*

290.169 Self-review threats may be created if, for example, the firm* developed and prepared prospective financial information and subsequently provided assurance on this prospective financial information. Consequently, the firm* should evaluate the significance of any self-review threat created by the provision of such services. If the self-review threat is other than clearly insignificant* safeguards should be considered and applied as necessary to reduce the threat to an acceptable level.

Such safeguards might include:

- *Making arrangements so such services are not performed by a member of the assurance team*;*
- *Implementing policies and procedures to prohibit the individual providing such services from making any managerial decisions on behalf of the assurance client*;*
- *Requiring the source data for the accounting entries to be originated by the assurance client*;*
- *Requiring the underlying assumptions to be originated and approved by the assurance client*.*

Valuation Services

290.174 A valuation comprises the making of assumptions with regard to future developments, the application of certain methodologies and techniques, and the combination of both in order to compute a certain value, or range of values, for an asset, a liability or for a business as a whole.

290.179 When the firm* performs a valuation that forms part of the subject matter information of an assurance engagement*, the firm* should consider any self-review threats. If the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate the threat or reduce it to an acceptable level.

Such safeguards might include:

- *Involving an additional professional accountant* who was not a member of the assurance team* to review the work done or otherwise advise as necessary;*
- *Confirming with the assurance client* their understanding of the underlying assumptions of the valuation and the methodology to be used and obtaining approval for their use;*
- *Obtaining the assurance client's* acknowledgement of responsibility for the results of the work performed by the firm*;*
- *Making arrangements so that personnel providing such services do not participate in the assurance engagement*, and*
- *The extent and clarity of any disclosures.*

In determining whether the above safeguards would be effective, consideration should be given to the following matters:

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* See Definitions

- *The extent of the assurance client's* knowledge, experience and ability to evaluate the issues concerned, and the extent of their involvement in determining and approving significant matters of judgement.*
- *The degree to which established methodologies and professional guidelines are applied when performing a particular valuation service.*
- *For valuations involving standard or established methodologies, the degree of subjectivity inherent in the item concerned.*
- *The reliability and extent of the underlying data.*
- *The degree of dependence on future events of a nature which could create significant volatility inherent in the amounts involved.*

Recruiting Senior Management

290.203 The recruitment of senior management for an assurance client*, such as those in a position to affect the subject matter information of the assurance engagement*, may create current or future self-interest, familiarity and intimidation threats. The significance of the threat will depend upon factors such as:

- The role of the person to be recruited; and
- The nature of the assistance sought.

The firm* could generally provide such services as reviewing the professional qualifications of a number of applicants and provide advice on their suitability for the post. In addition, the firm* could generally produce a short-list of candidates for interview, provided it has been drawn up using criteria specified by the assurance client*.

The significance of the threat created should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. In all cases, the firm* should not make management decisions and the decision as to whom to hire should be left to the client.

Corporate Finance and Similar Activities

290.204 The provision of corporate finance services, advice or assistance to an assurance client* may create advocacy and self-review threats. In the case of certain corporate finance services, the independence* threats created would be so significant no safeguards could be applied to reduce the threats to an acceptable level. For example, promoting, dealing in, or underwriting of an assurance client's* shares* is not compatible with providing assurance services. Moreover, committing the assurance client* to the terms of a transaction or consummating a transaction on behalf of the client would create a threat to independence* so significant no safeguard could reduce the threat to an acceptable level.

290.205 Other corporate finance services may create advocacy or self-review threats; however, safeguards may be available to reduce these threats to an acceptable level. Examples of such services include assisting a client in

* See Definitions

developing corporate strategies, assisting in identifying or introducing a client to possible sources of capital that meet the client specifications or criteria, and providing structuring advice and assisting a client in analyzing the accounting effects of proposed transactions. Safeguards that should be considered include:

- Policies and procedures to prohibit individuals assisting the assurance client* from making managerial decisions on behalf of the client;
- Using professionals who are not members of the assurance team* to provide the services; and
- Ensuring the firm* does not commit the assurance client* to the terms of any transaction or consummate a transaction on behalf of the client.

Fees – Relative Size

290.206 When the total fees generated by an assurance client* represent a large proportion of a firm's* total fees, the dependence on that client or client group and concern about the possibility of losing the client may create a self-interest threat. The significance of the threat will depend upon factors such as:

- The structure of the firm*; and
- Whether the firm* is well established or newly created.

The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Discussing the extent and nature of fees charged with the audit committee* or others charged with governance;
- Taking steps to reduce dependency on the client;
- External quality control reviews; and
- Consulting a third party, such as a professional regulatory body or another professional accountant*.

A presumption of dependence on a client or intermediary arises where it is expected that annual fee income from all services provided by the firm or its network firm* to that client or a related entity*, or intermediary, will regularly exceed 15 per cent of the aggregate gross practice income of the firm* or its network. In the case of listed entities the proportion falls to 10 per cent.*

Where the percentage of income from a client represents 10 per cent or more of the firm's total income it should carry out a review to ensure that there is no significant threat to independence* and apply safeguards where necessary. In the case of listed clients the firm* should initiate a review where the income from the client represents 5 per cent or more of the firm's* total income and disclose this percentage to the assurance client's* governance body.*

290.207 A self-interest threat may also be created when the fees generated by the assurance client* represent a large proportion of the revenue of an

* See Definitions

individual partner*. The significance of the threat should be evaluated and, if the threat is other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threat to an acceptable level. Such safeguards might include:

- Policies and procedures to monitor and implement quality control of assurance engagements*; and
- Involving an additional professional accountant* who was not a member of the assurance team* to review the work done or otherwise advise as necessary.

Fees – Overdue

290.208 A self-interest threat may be created if fees due from an assurance client* for professional services* remain unpaid for a long time, especially if a significant part is not paid before the issue of the assurance report for the following year. Generally the payment of such fees should be required before the report is issued. The following safeguards may be applicable:

- Discussing the level of outstanding fees with the audit committee* or others charged with governance.
- Involving an additional professional accountant* who did not take part in the assurance engagement* to provide advice or review the work performed.

The firm* should also consider whether the overdue fees might be regarded as being equivalent to a loan* to the client and whether, because of the significance of the overdue fees, it is appropriate for the firm* to be re-appointed.

Pricing

290.209 When a firm* obtains an assurance engagement* at a significantly lower fee level than that charged by the predecessor firm*, or quoted by other firms*, the self-interest threat created will not be reduced to an acceptable level unless:

(a) The firm* is able to demonstrate that appropriate time and qualified staff are assigned to the task; and
(b) All applicable assurance standards, guidelines and quality control procedures are being complied with.

Contingent Fees*

290.210 Contingent fees* are fees calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed. For the purposes of this Section, fees are not regarded as being contingent if a court or other public authority has established them.

290.211 A contingent fee* charged by a firm* in respect of an assurance engagement* creates self-interest and advocacy threats that cannot be reduced to an acceptable level by the application of any safeguard. Accordingly, a firm* should not enter into any fee arrangement for an assurance engagement* under which the amount of the fee is contingent on the result of

* See Definitions

the assurance work or on items that are the subject matter information of the assurance engagement*.

290.212 A contingent fee* charged by a firm* in respect of a non-assurance service provided to an assurance client* may also create self-interest and advocacy threats. If the amount of the fee for a non-assurance engagement* was agreed to, or contemplated, during an assurance engagement* and was contingent on the result of that assurance engagement*, the threats could not be reduced to an acceptable level by the application of any safeguard. Accordingly, the only acceptable action is not to accept such arrangements. For other types of contingent fee* arrangements, the significance of the threats created will depend on factors such as:

- The range of possible fee amounts;
- The degree of variability;
- The basis on which the fee is to be determined;
- Whether the outcome or result of the transaction is to be reviewed by an independent third party; and
- The effect of the event or transaction on the assurance engagement*.

The significance of the threats should be evaluated and, if the threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to reduce the threats to an acceptable level. Such safeguards might include:

- Disclosing to the audit committee* or others charged with governance, the extent and nature of fees charged;
- Review or determination of the final fee by an unrelated third party; or
- Quality and control policies and procedures.

Due diligence assignments, particularly those performed in relation to a prospective transaction, typically involve a high level of risk and responsibility. A firm* carrying out a due diligence* assignment may charge a higher fee for work relating to a completed transaction than for the same transaction if it is not completed, for whatever reason, provided that the difference reflects any additional risk and responsibility.*

Gifts and Hospitality

290.213 Accepting gifts or hospitality from an assurance client* may create self-interest and familiarity threats. When a firm* or a member of the assurance team* accepts gifts or hospitality, unless the value is clearly insignificant*, the threats to independence* cannot be reduced to an acceptable level by the application of any safeguard. Consequently, a firm* or a member of the assurance team* should not accept such gifts or hospitality.

A similar consideration will apply to an immediate or close family member of a member of the assurance team* other than where a person receives a benefit in their own right and not because of the connection.*

* See Definitions

Actual or Threatened Litigation

290.214 When litigation takes place, or appears likely, between the firm* or a member of the assurance team* and the assurance client*, a self-interest or intimidation threat may be created. The relationship between client management and the members of the assurance team* must be characterised by complete candor and full disclosure regarding all aspects of a client's business operations. The firm* and the client's management may be placed in adversarial positions by litigation, affecting management's willingness to make complete disclosures and the firm* may face a self-interest threat. The significance of the threat created will depend upon such factors as:

- The materiality of the litigation;
- The nature of the assurance engagement*; and
- Whether the litigation relates to a prior assurance engagement*.

Once the significance of the threat has been evaluated the following safeguards should be applied, if necessary, to reduce the threats to an acceptable level:

(a) Disclosing to the audit committee*, or others charged with governance, the extent and nature of the litigation;
(b) If the litigation involves a member of the assurance team*, removing that individual from the assurance team*; or
(c) Involving an additional professional accountant* in the firm* who was not a member of the assurance team* to review the work done or otherwise advise as necessary.

If such safeguards do not reduce the threat to an appropriate level, the only appropriate action is to withdraw from, or refuse to accept, the assurance engagement*.

Appendix to Section 290

This interpretation *(2005–01)* provides guidance on the application of the independence* requirements contained in Section 290 to assurance engagements* that are not financial statement audit engagements*.

This interpretation focuses on the application issues that are particular to assurance engagements* that are not financial statement audit engagements*. There are other matters noted in Section 290 that are relevant in the consideration of independence* requirements for all assurance engagements*. For example, paragraph 290.15 states that consideration should be given to any threats the firm* has reason to believe may be created by network firms* interests and relationships. Similarly, paragraph 290.21 states that for assurance clients*, that are other than listed entity* financial statement audit clients*, when the assurance team* has reason to believe that a related entity* of such an assurance client* is relevant to the evaluation of the firm's* independence* of the client, the assurance team* should consider that related entity* when evaluating independence* and applying appropriate safeguards. These matters are not specifically addressed in this interpretation.

* See Definitions

As explained in The International Framework for Assurance Engagements issued by the International Auditing and Assurance Standards Board, in an assurance engagement*, the professional accountant in public practice* expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.

Assertion-based Assurance Engagements*
In an assertion-based assurance engagement*, the evaluation or measurement of the subject matter is performed by the responsible party, and the subject matter information is in the form of an assertion by the responsible party that is made available to the intended users.

In an assertion-based assurance engagement* independence* is required from the responsible party, which is responsible for the subject matter information and may be responsible for the subject matter. In those assertion-based assurance engagements* where the responsible party is responsible for the subject matter information but not the subject matter, independence* is required from the responsible party. In addition, consideration should be given to any threats the firm* has reason to believe may be created by interests and relationships between a member of the assurance team*, the firm*, a network firm* and the party responsible for the subject matter.

Direct Reporting Assurance Engagements*
In a direct reporting assurance engagement*, the professional accountant in public practice* either directly performs the evaluation or measurement of the subject matter, or obtains a representation from the responsible party that has performed the evaluation or measurement that is not available to the intended users. The subject matter information is provided to the intended users in the assurance report.

In a direct reporting assurance engagement* independence* is required from the responsible party, which is responsible for the subject matter.

Multiple Responsible Parties
In both assertion-based assurance engagements* and direct reporting assurance engagements* there may be several responsible parties. For example, a public accountant in public practice* may be asked to provide assurance on the monthly circulation statistics of a number of independently owned newspapers. The assignment could be an assertion-based assurance engagement* where each newspaper measures its circulation and the statistics are presented in an assertion that is available to the intended users. Alternatively, the assignment could be a direct reporting assurance engagement*, where there is no assertion and there may or may not be a written representation from the newspapers.

In such engagements, when determining whether it is necessary to apply the provisions in Section 290 to each responsible party, the firm* may take into

* See Definitions

account whether an interest or relationship between the firm*, or a member of the assurance team*, and a particular responsible party would create a threat to independence* that is other than clearly insignificant in the context of the subject matter information. This will take into account:

- The materiality of the subject matter information (or the subject matter) for which the particular responsible party is responsible; and
- The degree of public interest that is associated with the engagement.

If the firm* determines that the threat to independence* created by any such relationships with a particular responsible party would be clearly insignificant* it may not be necessary to apply all of the provisions of this Section to that responsible party.

The following example has been developed to demonstrate the application of Section 290. It is assumed that the client is not also a financial statement audit client* of the firm*, or a network firm*.

A firm* is engaged to provide assurance on the total proven oil reserves of 10 independent companies. Each company has conducted geographical and engineering surveys to determine their reserves (subject matter). There are established criteria to determine when a reserve may be considered to be proven which the professional accountant in public practice* determines to be suitable criteria for the engagement.

The proven reserves for each company as at December 31, 20X0 were as follows:

	Proven oil reserves thousands barrels
Company 1	5,200
Company 2	725
Company 3	3,260
Company 4	15,000
Company 5	6,700
Company 6	39,126
Company 7	345
Company 8	175
Company 9	24,135
Company 10	9,635
Total	**104,301**

* See Definitions

The engagement could be structured in differing ways:

Assertion-based Engagements
A1 Each company measures its reserves and provides an assertion to the firm* and to intended users.

A2 An entity other than the companies measures the reserves and provides an assertion to the firm* and to intended users.

Direct Reporting Engagements
D1 Each company measures the reserves and provides the firm* with a written representation that measures its reserves against the established criteria for measuring proven reserves. The representation is not available to the intended users.

D2 The firm* directly measures the reserves of some of the companies.

Application of Approach
A1 Each company measures its reserves and provides an assertion to the firm* and to intended users.

There are several responsible parties in this engagement (companies 1–10). When determining whether it is necessary to apply the independence* provisions to all of the companies, the firm* may take into account whether an interest or relationship with a particular company would create a threat to independence* that is other than clearly insignificant*. This will take into account factors such as:

- The materiality of the company's proven reserves in relation to the total reserves to be reported on; and
- The degree of public interest associated with the engagement (paragraph 290.20).

For example Company 8 accounts for 0.16% of the total reserves, therefore a business relationship or interest with Company 8 would create less of a threat than a similar relationship with Company 6, which accounts for approximately 37.5% of the reserves.

Having determined those companies to which the independence* requirements apply, the assurance team* and the firm* are required to be independent of those responsible parties which would be considered to be the assurance client* (paragraph 290.20).

A2 An entity other than the companies measures the reserves and provides an assertion to the firm* and to intended users.

The firm* would be required to be independent of the entity that measures the reserves and provides an assertion to the firm* and to intended users

* See Definitions

(paragraph 290.17). That entity is not responsible for the subject matter and so consideration should be given to any threats the firm* has reason to believe may be created by interests/relationships with the party responsible for the subject matter (paragraph 290.17). There are several parties responsible for subject matter in this engagement (companies 1–10). As discussed in example A1 above, the firm* may take into account whether an interest or relationship with a particular company would create a threat to independence* that is other than clearly insignificant*.

D1 Each company provides the firm* with a representation that measures its reserves against the established criteria for measuring proven reserves. The representation is not available to the intended users.

There are several responsible parties in this engagement (companies 1–10). When determining whether it is necessary to apply the independence* provisions to all of the companies, the firm* may take into account whether an interest or relationship with a particular company would create a threat to independence* that is other than clearly insignificant*. This will take into account factors such as:

- The materiality of the company's proven reserves in relation to the total reserves to be reported on; and
- The degree of public interest associated with the engagement (paragraph 290.20).

For example Company 8 accounts for 0.16% of the reserves, therefore a business relationship or interest with the Company 8 would create less of a threat than a similar relationship with Company 6 that accounts for approximately 37.5% of the reserves.

Having determined those companies to which the independence* requirements apply, the assurance team* and the firm* are required to be independent of those responsible parties which would be considered to be the assurance client* (paragraph 290.20).

D2 The firm* directly measures the reserves of some of the companies.

The application is the same as in example D1.

* See Definitions

Professional accountants in business (Part C)

Section 300 Introduction

300.1 This Part of this Code illustrates how the conceptual framework contained in Part A is to be applied by professional accountants in business*.

Professional accountants in business should also read Part A which sets out the fundamental principles and conceptual framework that professional accountants* are required to adhere to. It may also be helpful for professional accountants in business* to refer to other parts of this Code in relevant circumstances: for example, Sections 221, 'Corporate finance advice', and 241, 'Agencies and referrals.'*

300.2 Investors, creditors, employers and other sectors of the business community, as well as governments and the public at large, all may rely on the work of professional accountants in business*. Professional accountants in business* may be solely or jointly responsible for the preparation and reporting of financial and other information, which both their employing organisations and third parties may rely on. They may also be responsible for providing effective financial management and competent advice on a variety of business-related matters.

Professional accountants in business are engaged in an executive or non-executive capacity in such areas as commerce, industry, the public and service sectors (including public sector bodies), education, the not for profit sector, regulatory bodies or professional bodies.*

300.3 A professional accountant in business* may be a salaried employee, a partner*, director (whether executive or non-executive), an owner manager, a volunteer, or another working for one or more employing organisations. The legal form of the relationship with the employing organisation, if any, has no

* See Definitions

bearing on the ethical responsibilities incumbent on the professional accountant in business*.

Professional accountants are reminded that this Code applies to all their professional and business activities, with and without reward.*

300.4 A professional accountant in business* has a responsibility to further the legitimate aims of their employing organisation. This Code does not seek to hinder a professional accountant in business* from properly fulfilling that responsibility, but considers circumstances in which conflicts may be created with the absolute duty to comply with the fundamental principles.

300.5 A professional accountant in business* often holds a senior position within an organisation. The more senior the position, the greater will be the ability and opportunity to influence events, practices and attitudes. A professional accountant in business* is expected, therefore, to encourage an ethics-based culture in an employing organisation that emphasises the importance that senior management places on ethical behaviour.

300.6 The examples presented in the following Sections are intended to illustrate how the conceptual framework is to be applied and are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a professional accountant in business* that may create threats to compliance with the principles. Consequently, it is not sufficient for a professional accountant in business* merely to comply with the examples; rather, the framework should be applied to the particular circumstances faced.

Fundamental Principles

300.6A *Professional accountants* are required to comply with the following fundamental principles:*

(a) Integrity
Professional accountants should be straightforward and honest in all professional and business relationships.*

(b) Objectivity
Professional accountants should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.*

(c) Professional Competence and Due Care
Professional accountants have a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. Professional accountants* should act*

* See Definitions

diligently and in accordance with applicable technical and professional standards when providing professional services.*

(d) Confidentiality
Professional accountants should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the professional accountant* or third parties.*

(e) Professional Behaviour
Professional accountants should comply with relevant laws and regulations and should avoid any action that discredits the profession.*

Threats and Safeguards
300.7 Compliance with the fundamental principles may potentially be threatened by a broad range of circumstances. Many threats fall into the following categories:

(a) Self-interest;
(b) Self-review;
(c) Advocacy;
(d) Familiarity; and
(e) Intimidation.

These threats are discussed further in Part A of this Code.

300.8 Examples of circumstances that may create self-interest threats for a professional accountant in business* include, but are not limited to:

- Financial interests*, loans* or guarantees.
- Incentive compensation arrangements.
- Inappropriate personal use of corporate assets.
- Concern over employment security.
- Commercial pressure from outside the employing organisation.

300.9 Circumstances that may create self-review threats include, but are not limited to, business decisions or data being subject to review and justification by the same professional accountant in business* responsible for making those decisions or preparing that data.

300.10 When furthering the legitimate goals and objectives of their employing organisations, professional accountants in business* may promote the organisation's position, provided any statements made are neither false nor misleading. Such actions generally would not create an advocacy threat.

* See Definitions

300.11 Examples of circumstances that may create familiarity threats include, but are not limited to:

- A professional accountant in business* in a position to influence financial or non-financial reporting or business decisions having an immediate or close family* member who is in a position to benefit from that influence.
- Long association with business contacts influencing business decisions.
- Acceptance of a gift or preferential treatment, unless the value is clearly insignificant*.

300.12 Examples of circumstances that may create intimidation threats include, but are not limited to:

- Threat of dismissal or replacement of the professional accountant in business* or a close or immediate family* member over a disagreement about the application of an accounting principle or the way in which financial information is to be reported.
- A dominant personality attempting to influence the decision making process, for example with regard to the awarding of contracts or the application of an accounting principle.

300.13 Professional accountants in business* may also find that specific circumstances give rise to unique threats to compliance with one or more of the fundamental principles. Such unique threats obviously cannot be categorised. In all professional and business relationships, professional accountants in business* should always be on the alert for such circumstances and threats.

300.14 Safeguards that may eliminate or reduce to an acceptable level the threats faced by professional accountants in business* fall into two broad categories:

(a) Safeguards created by the profession, legislation or regulation; and
(b) Safeguards in the work environment.

300.15 Examples of safeguards created by the profession, legislation or regulation are detailed in paragraph 100.12 of Part A of this Code.

300.16 Safeguards in the work environment include, but are not restricted to:

- The employing organisation's systems of corporate oversight or other oversight structures.
- The employing organisation's ethics and conduct programs.
- Recruitment procedures in the employing organisation emphasising the importance of employing high calibre competent staff.
- Strong internal controls.
- Appropriate disciplinary processes.
- Leadership that stresses the importance of ethical behaviour and the expectation that employees will act in an ethical manner.
- Policies and procedures to implement and monitor the quality of employee performance.

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* See Definitions

- Timely communication of the employing organisation's policies and procedures, including any changes to them, to all employees and appropriate training and education on such policies and procedures.
- Policies and procedures to empower and encourage employees to communicate to senior levels within the employing organisation any ethical issues that concern them without fear of retribution.
- Consultation with another appropriate professional accountant*.

Safeguards created by the individual include, but are not restricted to:

- *Continuing Professional Development, including keeping up to date with technical and ethical requirements;*
- *Keeping records of contentious issues and approach to decision making;*
- *Maintaining a broader perspective on how similar organisations function through establishing business relationships with other professionals;*
- *Using an independent mentor;*
- *Maintaining contact with legal advisers and professional bodies.*

The professional accountant's attention is drawn to the discussions on ethical conflict resolution in Section 100 and on other sources of guidance in paragraphs 1.16 to 1.19 of this Code.*

300.17 In circumstances where a professional accountant in business* believes that unethical behaviour or actions by others will continue to occur within the employing organisation, the professional accountant in business* should consider seeking legal advice. In those extreme situations where all available safeguards have been exhausted and it is not possible to reduce the threat to an acceptable level, a professional accountant in business* may conclude that it is appropriate to *disassociate from the task and/or* resign from the employing organisation.

300.18 *To assist professional accountants* to determine an appropriate course of action when faced with a situation which could threaten their compliance with the fundamental principles the following Sections (preparing and reporting of information; acting with sufficient expertise; financial information; inducements and disclosing confidential information) give examples of specific areas of activity which could give rise to ethical dilemmas and the action which could be taken in response. This is not a comprehensive list of examples but aims to cover the key areas most likely to be encountered by professional accountants*. Illustrative case studies of how the guidance might be applied in example situations are included in the Appendix to this guidance.*

300.19 *Professional accountants* who are in doubt as to their ethical position may seek advice from the Institute's Ethics Advisory Services by e-mail: ethics@icaew.com or phone +44 (0)1980 248258. Further guidance on sources of advice is available in Section 1.*

* See Definitions

Section 310 Potential Conflicts

310.1 A professional accountant in business* has a professional obligation to comply with the fundamental principles. There may be times, however, when their responsibilities to an employing organisation and the professional obligations to comply with the fundamental principles are in conflict. Ordinarily, a professional accountant in business* should support the legitimate and ethical objectives established by the employer and the rules and procedures drawn up in support of those objectives. Nevertheless, where compliance with the fundamental principles is threatened, a professional accountant in business* must consider a response to the circumstances.

310.2 As a consequence of responsibilities to an employing organisation, a professional accountant in business* may be under pressure to act or behave in ways that could directly or indirectly threaten compliance with the fundamental principles. Such pressure may be explicit or implicit; it may come from a supervisor, manager, director or another individual within the employing organisation. A professional accountant in business* may face pressure to:

- Act contrary to law or regulation.
- Act contrary to technical or professional standards.
- Facilitate unethical or illegal earnings management strategies.
- Lie to, or otherwise intentionally mislead (including misleading by remaining silent) others, in particular:
  - The auditors of the employing organisation; or
  - Regulators.
- Issue, or otherwise be associated with, a financial or non-financial report that materially misrepresents the facts, including statements in connection with, for example:
  - The financial statements*;
  - Tax compliance;
  - Legal compliance; or
  - Reports required by securities regulators.

310.3 The significance of threats arising from such pressures, such as intimidation threats should be evaluated and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Such safeguards may include:

- Obtaining advice where appropriate from within the employing organisation, an independent professional advisor or *the Institute* (see Section 1 of this Code).
- The existence of a formal dispute resolution process within the employing organisation.
- Seeking legal advice.

* See Definitions

Informal discussions with fellow professional accountants in business or in practice may assist in clarifying the steps needed to be taken.*

Section 320 Preparation and Reporting of Information

320.1 Professional accountants in business* are often involved in the preparation and reporting of information that may either be made public or used by others inside or outside the employing organisation. Such information may include financial or management information, for example, forecasts and budgets, financial statements*, management discussion and analysis, and the management letter of representation provided to the auditors as part of an audit of financial statements*. A professional accountant in business* should prepare or present such information fairly, honestly and in accordance with relevant professional standards so that the information will be understood in its context.

320.2 A professional accountant in business* who has responsibility for the preparation or approval of the general purpose financial statements* of an employing organisation should ensure that those financial statements* are presented in accordance with the applicable financial reporting standards.

320.3 A professional accountant in business* should maintain information for which the professional accountant in business* is responsible in a manner that:

(a) Describes clearly the true nature of business transactions, assets or liabilities;
(b) Classifies and records information in a timely and proper manner; and
(c) Represents the facts accurately and completely in all material respects.

320.4 Threats to compliance with the fundamental principles, for example self-interest or intimidation threats to objectivity or professional competence and due care, may be created where a professional accountant in business* may be pressured (either externally or by the possibility of personal gain) to become associated with misleading information or to become associated with misleading information through the actions of others.

Accordingly, professional accountants should not be associated with reports, returns, communications or other information where they believe that the information:*

- *Contains a materially false or misleading statement;*
- *Contains statements or information furnished recklessly;*
- *Omits or obscures information required to be included where such omission or obscurity would be misleading.*

320.5 The significance of such threats will depend on factors such as the source of the pressure and the degree to which the information is, or may be,

* See Definitions

misleading. The significance of the threats should be evaluated and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Such safeguards may include consultation with superiors within the employing organisation, for example, the audit committee* or other body responsible for governance, or with the Institute.

320.6 Where it is not possible to reduce the threat to an acceptable level, a professional accountant in business* should refuse to remain associated with information they consider is or may be misleading. Should the professional accountant in business* be aware that the issuance of misleading information is either significant or persistent, the professional accountant in business* should consider informing appropriate authorities in line with the guidance in Section 140. The professional accountant in business* may also wish to seek legal advice or resign.

Section 330 Acting with Sufficient Expertise

330.1 The fundamental principle of professional competence and due care requires that a professional accountant in business* should only undertake significant tasks for which the professional accountant in business* has, or can obtain, sufficient specific training or experience. A professional accountant in business* should not intentionally mislead an employer as to the level of expertise or experience possessed, nor should a professional accountant in business* fail to seek appropriate expert advice and assistance when required.

330.2 Circumstances that threaten the ability of a professional accountant in business* to perform duties with the appropriate degree of professional competence and due care include:

- Insufficient time for properly performing or completing the relevant duties.
- Incomplete, restricted or otherwise inadequate information for performing the duties properly.
- Insufficient experience, training and/or education.
- Inadequate resources for the proper performance of the duties.

330.3 The significance of such threats will depend on factors such as the extent to which the professional accountant in business* is working with others, relative seniority in the business and the level of supervision and review applied to the work. The significance of the threats should be evaluated and, if they are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. Safeguards that may be considered include:

- Obtaining additional advice or training.
- Ensuring that there is adequate time available for performing the relevant duties.

* See Definitions

- Obtaining assistance from someone with the necessary expertise.
- Consulting, where appropriate, with:
  - Superiors within the employing organisation;
  - Independent experts; or
  - The Institute.

330.4 Where threats cannot be eliminated or reduced to an acceptable level, professional accountants in business* should consider whether to refuse to perform the duties in question. If the professional accountant in business* determines that refusal is appropriate the reasons for doing so should be clearly communicated.

Section 340 Financial Interests*

340.1 Professional accountants in business* may have financial interests*, or may know of financial interests* of immediate or close family* members, that could, in certain circumstances, give rise to threats to compliance with the fundamental principles. For example, self-interest threats to objectivity or confidentiality may be created through the existence of the motive and opportunity to manipulate price sensitive information in order to gain financially. Examples of circumstances that may create self-interest threats include, but are not limited to situations where the professional accountant in business* or an immediate or close family* member:

- Holds a direct or indirect financial interest* in the employing organisation and the value of that financial interest* could be directly affected by decisions made by the professional accountant in business*;
- Is eligible for a profit related bonus and the value of that bonus could be directly affected by decisions made by the professional accountant in business*;
- Holds, directly or indirectly, share options in the employing organisation, the value of which could be directly affected by decisions made by the professional accountant in business*;
- Holds, directly or indirectly, share options in the employing organisation which are, or will soon be, eligible for conversion; or
- May qualify for share options in the employing organisation or performance-related bonuses if certain targets are achieved.

340.2 In evaluating the significance of such a threat, and the appropriate safeguards to be applied to eliminate the threat or reduce it to an acceptable level, professional accountants in business* must examine the nature of the financial interest*. This includes an evaluation of the significance of the financial interest* and whether it is direct or indirect. Clearly, what constitutes a significant or valuable stake in an organisation will vary from individual to individual, depending on personal circumstances.

* See Definitions

340.3 If threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate or reduce them to an acceptable level. Such safeguards may include:

- Policies and procedures for a committee independent of management to determine the level of form of remuneration of senior management.
- Disclosure of all relevant interests and of any plans to trade in relevant shares* to those charged with the governance of the employing organisation, in accordance with any internal policies.
- Consultation, where appropriate, with superiors within the employing organisation.
- Consultation, where appropriate, with those charged with the governance of the employing organisation or relevant professional bodies.
- Internal and external audit procedures.
- Up-to-date education on ethical issues and the legal restrictions and other regulations around potential insider trading.

340.4 A professional accountant in business* should neither manipulate information nor use confidential information for personal gain.

Section 350 Inducements

Receiving Offers

350.1 A professional accountant in business* or an immediate or close family* member may be offered an inducement. Inducements may take various forms, including gifts, hospitality, preferential treatment and inappropriate appeals to friendship or loyalty.

350.2 Offers of inducements may create threats to compliance with the fundamental principles. When a professional accountant in business* or an immediate or close family* member is offered an inducement, the situation should be carefully considered. Self-interest threats to objectivity or confidentiality are created where an inducement is made in an attempt to unduly influence actions or decisions, encourage illegal or dishonest behaviour or obtain confidential information. Intimidation threats to objectivity or confidentiality are created if such an inducement is accepted and it is followed by threats to make that offer public and damage the reputation of either the professional accountant in business* or an immediate or close family* member.

350.3 The significance of such threats will depend on the nature, value and intent behind the offer. If a reasonable and informed third party, having knowledge of all relevant information, would consider the inducement insignificant and not intended to encourage unethical behaviour, then a professional accountant in business* may conclude that the offer is made in the normal course of business and may generally conclude that there is no significant threat to compliance with the fundamental principles.

* See Definitions

350.4 If evaluated threats are other than clearly insignificant*, safeguards should be considered and applied as necessary to eliminate them or reduce them to an acceptable level. When the threats cannot be eliminated or reduced to an acceptable level through the application of safeguards, a professional accountant in business* should not accept the inducement. As the real or apparent threats to compliance with the fundamental principles do not merely arise from acceptance of an inducement but, sometimes, merely from the fact of the offer having been made, additional safeguards should be adopted. A professional accountant in business* should assess the risk associated with all such offers and consider whether the following actions should be taken:

(a) Where such offers have been made, immediately inform higher levels of management or those charged with governance of the employing organisation;
(b) Inform third parties of the offer – for example, a professional body or the employer of the individual who made the offer; a professional accountant in business* should, however, consider seeking legal advice before taking such a step;
(c) Advise immediate or close family* members of relevant threats and safeguards where they are potentially in positions that might result in offers of inducements, for example as a result of their employment situation; and
(d) Inform higher levels of management or those charged with governance of the employing organisation where immediate or close family* members are employed by competitors or potential suppliers of that organisation.

Making Offers

350.5 A professional accountant in business* may be in a situation where the professional accountant in business* is expected to, or is under other pressure to, offer inducements to subordinate the judgement of another individual or organisation, influence a decision making process or obtain confidential information.

350.6 Such pressure may come from within the employing organisation, for example, from a colleague or superior. It may also come from an external individual or organisation suggesting actions or business decisions that would be advantageous to the employing organisation possibly influencing the professional accountant in business* improperly.

350.7 A professional accountant in business* should not offer an inducement to improperly influence professional judgement of a third party.

350.8 Where the pressure to offer an unethical inducement comes from within the employing organisation, the professional accountant* should follow the principles and guidance regarding ethical conflict resolution set out in Part A of this Code.

* See Definitions

*Appendix to Part C – Case Studies of Circumstances Faced By Professional Accountants in Business**

The case studies are illustrative and should be read in conjunction with the guidance contained in this Code. Ultimately it is the requirements contained in this Code that must be applied to the particular circumstances. In addition, a number of interactive case studies on common ethical issues encountered by professional accountants in business can be found on www.icaew.com/cpd/ethicaldilemmas/reallifeexamples.*

The case studies below provide examples of work place dilemmas that could arise in the areas of activity described in Sections 310 to 350 of the guidance. The case studies are intended for illustrative purposes only and should be read in conjunction with the guidance.

The possible course of action included in the case studies below may differ according to a variety of variables, including but not limited to: industry sector, size of business, seniority, organisation structure, role and culture.

Case studies

1. *Unsupported expenses*
2. *Incorrect reporting of financial information*
3. *Non-disclosure to auditors*
4. *Acting without sufficient expertise*
5. *Personal financial interest* in a proposal*
6. *Inappropriate business practices*
7. *Inducements for non-disclosure of information*
8. *Earnings management*
9. *Disclosing of personal information*
10. *Transfer of funds to an offshore account*

Case Study 1 Unsupported expenses
Case outline
You are the Finance Director of an organisation. You become concerned that the Chief Executive is making frequent overseas trips and charging the expense to the organisation. The relevance of the destinations and the nature of the activities undertaken appear to have only partial relevance to your organisation's activities. *You raise your concerns with the Chief Executive, who gives assurances that the nature and purpose of these trips is covered by an 'understanding' with the organisation's Chairman. This is not evidenced in writing, and no further justification for the expenses is forthcoming.*

* See Definitions

Case Study 1 Unsupported expenses (continued)

Key fundamental principles

Integrity—*Would processing the payments without adequate explanation be seen as being honest and fair by others?*

Objectivity—*How will you be able to demonstrate your independence*, actual or perceived, from the Chief Executive?*

Professional Competence and Due Care—*How can allowing the expense payments to be processed without adequate explanation be seen as acting with due skill, care and diligence?*

Professional Behaviour—*How should you proceed so as not to discredit yourself?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, best practices, Code of Ethics, applicable laws and regulations. Is it possible to obtain details or documentation of the 'understanding' between the Chief Executive and the Chairman? Have you discussed the matter directly with the Chief Executive and lor Chairman to ensure you have the real facts?

Identify affected parties: Key affected parties are you, the Chief Executive and the Board. Other possible affected parties are the expense processing department, human resources, internal audit, tax department, Audit committee, employees, shareholders and financial backers.*

Who should be involved in resolution: Consider not just who should be involved, but also for what reason and timing of their involvement. Have you thought of contacting the Institute for advice and guidance? Do you have trusted colleagues with whom you can discuss your position? At what point will you consider involving the Board and the Audit committee?*

Possible course of action

Discuss the issue further with the Chief Executive and ask for details of the trip or documentary evidence of this 'understanding' between the Chief Executive and the Chairman. During this discussion, explain to the Chief Executive the reasons why this information is needed, for example, to conform with the organisation's policies, procedures and guidelines. Explain to the Chief Executive that it may be necessary to ensure that the contentious items are included in a P11D, and argued as a deductible expense with the Revenue. If the Chief Executive will not provide the necessary information, explain that the matter will have to be discussed with the Chairman, and you will set up a meeting with all three of you.

* See Definitions

Case Study 1 Unsupported expenses (continued)

If no satisfactory response is obtained from the Chief Executive and the Chairman, next steps could include discussion with the Board, internal audit, Audit committee and external auditors.*

During the resolution process, it may be helpful to document your involvement, the substance of the discussions held, who else was involved, what decisions were made and why.

Case Study 2 Incorrect reporting of financial information

Case outline

You are a reporting accountant in a company. Your immediate manager is a very forceful, domineering individual and you have accepted his views over the last two years on the level of work in progress. He has given you specific assurances that work in progress has increased by 200% during the current reporting period, and instructed you to report this level in the monthly management accounts. The year end draft financial accounts show that the organisation has only just met its business plan financial targets.

Evidence then becomes available (which you were not aware of when the draft accounts were produced) to indicate that something is clearly wrong and the work in progress had not increased at anywhere near the rate advised by your manager.

Key fundamental principles

***Integrity**—Will you be able to demonstrate that the accounts are true and fair without re-drafting?*

***Objectivity**—How would you maintain your objectivity given that your immediate manager is a forceful, perhaps intimidating individual?*

***Professional Competence and Due Care**—Are the draft accounts prepared in accordance with technical and professional standards?*

***Professional Behaviour**—How should you proceed so as not to discredit yourself?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, best practices, Code of Ethics, applicable laws and regulations. Is the evidence that work in progress is

* See Definitions

Case Study 2 Incorrect reporting of financial information (continued)

incorrectly stated supported by other documentation, for example, any hard copy relating to the valuation, or analytical review of cost of sales, margins and cash flows?

Identify affected parties: Key affected parties are you and your immediate manager. Other possible affected parties are the next levels of management, recipients of the management accounts and the financial accounts, finance, purchasing, accounts payable, human resources, internal audit, Audit committee, Board, external auditors, shareholders and financial backers.*

Who should be involved in resolution: Consider not just who should be involved, but also for what reason and the timing of their involvement. Have you thought of contacting the Institute for advice and guidance? Have you discussed the matter with your immediate line manager in light of all the available evidence and possible consequences? Can you discuss the matter with recipients of the management and financial accounts? At what point will you consider involving other affected parties?

Possible course of action

Check the relevant facts by corroborating with other available documentation, for example, cost of sales calculations, margins, previous stock counts and other financial information. Discuss the matter with your immediate line manager to determine an appropriate course of action, for example, undertaking another stock count.

If you feel that your manager's response is not appropriate, discuss the matter with recipients of the management and draft financial accounts and the next level of management. Next steps could include discussion with the senior management, internal audit, Audit committee, the Board, external auditors or other actions indicated in internal whistle-blowing procedures.*

During the resolution process, it may be helpful to document your involvement, the substance of the discussions held, who else was involved, what decisions were made and why.

* See Definitions

Case Study 3 Non-disclosure to auditors

Case outline

You are employed as an Accounting Systems Manager. During your work you overhear a Financial Controller in one department, saying that she had not been disclosing certain things to the auditor. You don't know whether to believe this but are uneasy, as the culture appears to be one of 'getting away with as much as possible'. In addition, you have heard that a bribe was paid to an overseas company to secure work. You are uneasy about the situation and worried that a poor relationship with your line manager may prevent you from exploring the accuracy of the statements given to you.

Key fundamental principles

Integrity—*Can you overlook the financial controller's comments, the culture and the bribe allegedly paid to the overseas company and still demonstrate integrity?*

Objectivity—*Knowing that something may be wrong, how can you maintain your objectivity?*

Confidentiality—*Is there any basis in which you could or should make disclosures?*

Professional Behaviour—*How should you proceed so as not to discredit yourself?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, best practices, Code of Ethics, applicable laws and regulations. Can you corroborate the facts further with documentation or discussion with relevant parties? Do you have an internal process for whistle-blowing? What steps have you taken to understand money laundering legislation and the Public Interest Disclosure Act?

Identify affected parties: Key affected parties are you, the financial controller, the employee raising allegations about a bribe, line manager and auditor. Other possible affected parties are employees, next level of management, internal audit, Audit committees, the Board, shareholders and financial backers.*

Who should be involved in resolution: Consider not just who should be involved, but also for what reason and timing of their involvement. Have you thought of contacting the Institute for advice and guidance?

* See Definitions

Case Study 3 Non-disclosure to auditors (continued)

Do you have trusted colleagues with whom you can discuss your position? At what point will you consider involving your line manager, next level of management, the Board and the Audit committee?*

Possible course of action

Check the relevant facts and discuss the matter with your immediate line manager. If you feel that the response by the line manager is not satisfactory, next steps may be to discuss the matter further with the next level of management, internal audit, Audit committee and the Board.*

If you have suspicions or evidence of money laundering, contact the Institute or the Money Laundering Helpline and/or take legal advice.

During the resolution process, it may be helpful to document your involvement, the substance of the discussions held, who else was involved, what decisions were made and why.

Case Study 4 Acting without sufficient expertise

Case outline

Your employer has put you in charge of a project, which you consider requires detailed actuarial knowledge. You are uneasy about doing the work given that you do not possess the necessary expertise and are uncertain about what to say to the employer.

Key fundamental principles

***Professional Competence and Due Care**—Do you have the necessary skills and experience to undertake the work?*

***Professional Behaviour**—How should you proceed so as not to bring discredit yourself?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, best practices, Code of Ethics, applicable laws and regulations, Can you demonstrate your lack of expertise in this area, the potential impact on the organisation and pension fund and offer alternatives? Can you make reference to the Institute's professional values and disciplinary process?

* See Definitions

Case Study 4 Acting without sufficient expertise (continued)

Identify affected parties: Key affected parties are you and your employer. Other possible affected parties are the auditors, employees, human resources, pensioners, shareholders and financial backers.

Who should be involved in resolution: Consider not just who should be involved, but also for what reason and the timing of their involvement. Have you thought of contacting the Institute for advice and guidance? Do you have trusted colleagues with whom you can discuss your position? At what point will you consider involving the next level of management and human resources?

Possible course of action

Discuss your concern of lack of actuarial knowledge with your employer and suggest clearly defining the scope of the project and a course of action for addressing issues such as lack of actuarial knowledge, e.g., employing a person with the necessary expertise. During the discussion focus on the potential consequences to the business, pension fund and you personally, of undertaking this project. Explain that employing a person with the necessary expertise does not remove your obligation to ensure that the work is conducted in accordance with accounting standards, laws and regulations.

If your employer does not agree to the suggested course of action, it may be appropriate to discuss the matter with the next level of management. If the response from management is not satisfactory, it may be necessary to involve internal audit, Audit committee, pension and/or Investment Committee and the Board.*

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

Case Study 5 Personal financial interest* in a proposal

Case outline

You have been appointed Finance Director (FD) to a public sector organisation, which has major difficulty attracting and retaining skilled staff. The Board has asked you to draw up a benefits package to assist in overcoming this problem. You are told that your entitlement to benefits will be in accordance with the new scheme. You conduct appropriate research and conclude that a significant increase in the whole range of benefits is required in order to achieve the Board's objective.

* See Definitions

Case Study 5 Personal financial interest* in a proposal (continued)

Key fundamental principles

Integrity*—How will you manage your personal interest with the need to be true and fair?*

Objectivity*—How will you manage your personal interest in the benefits package with the need to remain unbiased and consider only the relevant facts?*

Professional Competence and Due Care*—Do you have all the necessary skills to draw up such a package?*

Professional Behaviour*—How should you proceed so as not to bring discredit yourself?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, best practices, Code of Ethics, applicable laws and regulations. Is the information used for assessing the potential new benefits package independent? Who else has been involved in the proposal for the new benefits package?

Identify affected parties: Key affected parties are you and the Board. Other possible affected parties are employees, human resources, shareholders and financial backers.

Who should be involved in resolution: Consider not just who should be involved, but also for what reason and timing of their involvement. Have you thought of contacting the Institute for advice and guidance? Do you have trusted colleagues with whom you can discuss your position? Have you discussed the matter with the Board and/or human resources?

Possible course of action

Before explaining your findings to the Board, it may be advisable to tell the Board how you approached the project and who else was involved, for example, human resources. You should declare your conflict of interest and not vote on the proposal for the new benefits package. It may be advisable to involve human resources or another independent party to present the findings to the Board. During the presentation, demonstrate how your findings were arrived at and who else was involved in the project.

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

* See Definitions

Case Study 6 Inappropriate business practices

Case outline

You have recently accepted a new, and better-paid, job and are due to start in a week. At interview, the company explained its charging system. On reflection it appears that customers are charged inflated rates that exceed agreed fixed prices. You are beginning to feel uncomfortable, and worry that you might be doing the wrong thing accepting this position.

Key fundamental principles

Integrity*—If your assessment is accurate, should you associate yourself with this kind of practice? How can you withdraw with integrity?*

Objectivity*—How can you overcome the risk that that your self-interest (better pay/career opportunities) will cause you to accept the role, despite your concerns?*

Professional Behaviour*—How should you proceed so as not to bring discredit on yourself?*

Discussion

Identify relevant facts: Do you have facts, or could you have misunderstood the charging scheme? Do you have supporting evidence (from, for example, employees of your potential employer)? Did you explore this problem area during the interview? Can you discuss it at this stage?

Identify affected parties: Key parties affected are you and the prospective employer. Other possible parties affected are your current employer (e.g., if you have resigned), and your family (who may be affected whether you accept or decline the new job).

Who should be involved in resolution: Consider not just whom you should involve, but also why and when. Can your Institute provide help and advice? Are there trusted colleagues with whom you can discuss your position? Can you talk with the prospective employer about your concerns?

Possible course of action

Check out your facts. Arrange an informal talk with a sales person to explain their practices again. Consider whether what you learn supports your initial views. Discuss remaining concerns with a trusted colleague (take care not to reveal confidential information). Consider whether you will be able to influence the business practices of the company. Discuss your concerns

* See Definitions

Case Study 6 Inappropriate business practices (continued)

with the new employer and ask whether they can help resolve this issue with you. If this seems unlikely, and you wish to withdraw, consider taking legal advice (e.g., through the Citizens Advice Bureau), and withdraw from the role. At all times keep your family aware of your concerns, approach and possible implications.

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

Case Study 7 Inducements for non-disclosure of information

Outline of the case

You have been with your employer less than a year but things have not turned out well and you are moving on. You have some grave concerns about business conduct, and believe there maybe issues which should be disclosed (to auditors or the regulator). You are negotiating a compromise agreement, and you have been led to understand that if you report any concerns you will not receive a settlement, whereas if you agree to a gagging clause then you will receive a substantial payoff.

Key fundamental principles

***Integrity**—How far do you need to go to demonstrate your integrity?*

***Objectivity**—How will you manage the conflict between financial benefit and integrity?*

***Confidentiality**—Is there any basis on which you could make disclosures?*

Discussion

Identify relevant facts: Do you have the facts to back up your discomfort? Do you have all the facts, or only a selection, and can you get to the rest? What steps have you already taken to try to resolve your concerns, and are they documented? Do you understand how to use Public Interest Disclosure Act (PIDA) to obtain protection?

Identify affected parties: Key affected parties are you and the employer. Other possible affected parties are the regulator, auditor, and the public, as well as your family.

Who should be involved in resolution: Consider not just whom you should involve, but also why and when. Can your Institute provide help and advice? Are there trusted colleagues with whom you can discuss your position?

* See Definitions

Case Study 7 Inducements for non-disclosure of information (continued)

Can you talk with the prospective employer about your concerns? Have you made full disclosures to your solicitor, and received advice? Have you discussed the matter with your family?

Possible course of action

Try to keep the issues clear. One is how to deal with the issues of concern; the second is achieving a satisfactory financial settlement. Take advice early and often. It is key to establish whether the facts support your concerns. If so, you must judge if there is a basis for disclosure—your Institute can advise you—and whether PIDA can provide any protection to you (Public Concern at Work can provide confidential advice http://www.pcaw.co.uk). If there is a basis, you need to determine what the value and consequences of that disclosure might be for you, your family, the firm, the industry and the profession. Resist the gagging clause, and argue for your concerns about the company's behaviour to be documented and considered by the executive body. Ensure that your family is at all times aware of your concerns, actions and implications, but take care not to reveal confidential information.*

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

Case Study 8 Earnings management

Outline of the case

You are the Financial Controller in a family business, though in reality you would be considered to be the Finance Director. After some financial difficulties a bank and a venture capitalist have invested and acquired over 33% of the shares, but no Board seats. The continuing support of the Bank and Venture Capitalist are dependent on performance figures being achieved. You have been told that if you put in the 'right' figures you will get a large bonus and 1% share option.*

The company is secretive and as little information as possible being given to the auditors and the investors. You believe that some figures may be being 'massaged'. You have tentatively raised your concerns with the father and son Chairman and Chief Executive. You have been told that if you pursue the matter and/or fail to put in the right figures you will lose the bonus and share option.

* See Definitions

Case Study 8 Earnings management (continued)

Key fundamental principles

Integrity*—Can you support the business without being involved in potentially misleading information?*

Objectivity*—How can you avoid your financial interest* influencing your professional judgement?*

Professional Behaviour*—How will you manage relationships with the affected parties?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, applicable laws and regulations. Double check your facts, including forecast figures and the assumptions underlying them. Consider whether the culture of secrecy means that you are not in possession of material facts and challenge the management if necessary.

Identify affected parties: Key parties are you, the family, professional advisers, bankers and venture capitalists. Other possible affected parties are your family, the Institute and the profession.

Who should be involved in resolution: Consider not just whom you should involve, but also why and when. Are there trusted colleagues or friends with whom you can discuss your position? Can your Institute provide advice and assistance? Have you discussed the matter with your family?

Possible course of action

Discount the short-term financial benefits on offer. Prepare a range of forecasts for the family, and impress on them the implications of short-term manipulation in the long term. Encourage the family to focus on the underlying business issues, and address them to enhance long term value. Draw up realistic figures for presentation, and explain how your professional standing demands that these be presented. Do not become involved in manipulation, and do not allow your name to be associated with figures not prepared by you. Consider whether the values of the organisation are consistent with your own, and if necessary your employment options.

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

* See Definitions

Case Study 9 Disclosing personal information

Outline of the case

You are the Finance Director of a district council. The Chairman of the finance committee approaches you asking to see all the information the housing benefits Section of your department hold about the financial and personal affairs of a councilor.

The Chairman of the finance committee insists on seeing this information (saying he will not disclose the source), even though he cannot identify any legitimate reason. The Chairman is not willing for you to contact the councillor about this.

Key fundamental principles

***Integrity**—Would the actions proposed be fair and honest? Would there be any breaches of trust?*

***Objectivity**—Where is the boundary between your duty to the employer and that to the claimant? How do you avoid being brought into political wrangling that could compromise you in the future?*

***Confidentiality**—Are there proper grounds for disclosing the information?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, applicable laws and regulations. Relevant facts may include allegations of fraud or impropriety on the part of the councilor, whether in the public domain or not.

Identify affected parties: Key affected parties are the Chairman and the Councilor. Other possible affected parties are the committee the Chairman represents, political allies and opponents of the two core parties, those responsible for the administration of Housing Benefit, and the officer responsible for Data Protection.

Who should be involved in resolution: Consider not just whom you should involve, but also why and when. You and Chairman must engage effectively. Other parties may need to be drawn in depending on the facts, but may include Data Protection officers, housing benefits officers, legal officers and Internal Audit representatives. It is possible that senior council figures may need to support you in resisting the Chairman.

* See Definitions

Case Study 9 Disclosing personal information (continued)

Possible course of action

Try to get the request formalised in memorandum form, with reasons appended, and maintain a file of related correspondence. If this is not forthcoming, ensure that notes are made and kept off site. Impress on the Chairman, the duty of confidentiality and legal implications associated with the request, if necessary with the help of specialist or legal knowledge. Refer the Chairman to public domain information, if any, but deny access to other information. Try to establish whether there is a basis for investigating the councilor, e.g., for reasons of suspected impropriety, and the reasons why the councilor should not be asked for consent. Determine whether in the light of those reasons, internal or external investigation may be appropriate, and who by; and whether or not it is appropriate to inform the councilor of the request and any follow-up actions.

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

Case Study 10 Transfer of funds to an offshore account

Outline of the case

You work as an interim Finance Director. You are not an Executive Director, do not attend board meetings and don't appear as a Director on the Companies House register. A newly appointed director paid a substantial sum of money into the company to save it from financial collapse. The new director asked you to transfer several thousands of pounds into an off-shore account. When an explanation was sought the director told you that the sum was to pay for work. However, no invoice or supporting documents were offered. You received a memorandum instructing you to make the payment and confirmation that the transaction was to pay for legitimate expenses. You conclude that as you are an employee you cannot refuse in the absence of evidence that you are being asked to commit a crime or other irregularity. You therefore make the payment but express concern to the Chief Executive and Chairman. Shortly after challenging the director you are informed your interim role could not continue due to financial difficulties.

An Insolvency Practitioner who has been appointed as administrator has contacted you. He is seeking details from you.

* See Definitions

Case Study 10 Transfer of funds to an offshore account (continued)

Key fundamental principles

Integrity—*Were the actions you took, and would any conversation with the liquidator be, unfair, untruthful or dishonest in any way?*

Objectivity—*Where is the boundary between your duty to the former employer and the Insolvency Practitioner?*

Confidentiality—*Are there proper grounds for disclosing the information?*

Discussion

Identify relevant facts: Consider the business' policies, procedures and guidelines, accounting standards, applicable laws and regulations. Of particular relevance might be Proceeds of Crime Act 2002, and provisions relating to 'furthering, concealing, aiding, abetting' money laundering. Have you made records of how you attempted to deal with the offshore payment, and the responses?

Identify affected parties: Key affected parties are you, the investor/ director, the Administrator and creditors. Other possible affected parties are the Institute and profession as a whole, as well as your family.

Who should be involved in resolution: Consider not just whom you should involve, but also when and why. Take advice early and often from your Institute, and if necessary from a lawyer.

Possible course of action

You will normally be able to cooperate openly with an administrator, but you should ask for an explicit statement from the Administrator of the authority under which he is requesting the information. On receipt, consider seeking legal advice, unless you are very familiar with the law and your duties in respect of it. Open a dialogue with the administrator, and try to establish the scope of the enquiry. If there is any suggestion of potential action against you for wrong-doing, seek further legal advice and continue your discussions under legal guidance. Ensure that you keep a record of all interactions with the administrator.

During the resolution process, it may be helpful to document the substance of the discussions held, who was involved, what decisions were made and why, and your involvement.

* See Definitions

Definitions for Parts A, B and C

In this Code the following expressions have the following meanings assigned to them:

Advertising	The communication to the public of information as to the services or skills provided by professional accountants in public practice* with a view to procuring professional business.
Assurance client	The responsible party that is the person (or persons) who: (a) in a direct reporting engagement, is responsible for the subject matter; or (b) in an assertion-based engagement, is responsible for the subject matter information and may be responsible for the subject matter. (For an assurance client that is a financial statement audit client see the definition of financial statement audit client*.)
Assurance Engagement	An engagement in which a professional accountant in public practice* expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria. (For guidance on assurance engagements see the International Framework for Assurance Engagements issued by the International Auditing and Assurance Standards Board which describes the elements and objectives of an assurance engagement and identifies engagements to which International Standards on Auditing (ISAs), International Standards on Review Engagements (ISREs) and International Standards on Assurance Engagements (ISAEs) apply (www.ifac.org/IAASB/).)

* See elsewhere within Definitions

Note on assurance engagements

To assist the professional accountant in determining what engagements fall to be considered as assurance engagements, and thus fall within the scope of Section 290, a number of paragraphs from the International Framework for Assurance Engagements issued by the International Auditing and Assurance Standards Board, are included in an Appendix to these Definitions.*

Assurance team

(a) all members of the engagement team* for the assurance engagement*;

(b) all others within a firm* who can directly influence the outcome of the assurance engagement*, including:

(i) those who recommend the compensation of, or who provide direct supervisory, management or other oversight of the assurance engagement partner* in connection with the performance of the assurance engagement*. For the purposes of a financial statement audit engagement* this includes those at all successively senior levels above the engagement partner* through the firm's* chief executive;

(ii) those who provide consultation regarding technical or industry specific issues, transactions or events for the assurance engagement*; and

(iii) those who provide quality control for the assurance engagement*, including those who perform the engagement quality control review for the assurance engagement*; and

(c) For the purposes of a financial statement audit client*, all those within a network firm* who can directly influence the outcome of the financial statement audit engagement*.

Audit committee

Those charged with governance. This may be a separate committee or the full Board.

Audit engagement

An engagement to perform an audit of financial statements, that requires to be performed in accordance with auditing standards issued by the Auditing Practices Board.*

* See elsewhere within Definitions

	Note on the definition of Audit engagement *The Auditing Practices Board (APB) auditing standards apply to audits of financial statements. Paragraphs 2 and 2–1 of ISA (UK and Ireland) 200, issued by the APB, state:* *'2. The objective of an audit of financial statements is to enable the auditor to express an opinion whether the financial statements are prepared, in all material respects, in accordance with an applicable financial reporting framework. The phrases used to express the auditor's opinion are "give a true and fair view" or "present fairly, in all material respects," which are equivalent terms.* *2–1. The "applicable financial reporting framework" comprises those requirements of accounting standards, law and regulations applicable to the entity that determine the form and content of its financial statements.'*
Clearly insignificant	A matter that is deemed to be both trivial and inconsequential.
Close family	A parent, child or sibling, who is not an immediate family* member.
Contingent fee	A fee calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed. A fee that is established by a court or other public authority is not a contingent fee.
Direct financial interest	A financial interest*: • Owned directly by and under the control of an individual or entity (including those managed on a discretionary basis by others); or • Beneficially owned through a collective investment vehicle, estate, trust or other intermediary over which the individual or entity has control.
Director or officer	Those charged with the governance of an entity, regardless of their title, which may vary from country to country. *Whether or not a person is an officer within the meanings of the Companies Acts is not relevant for the purposes of this Code.*

* See elsewhere within Definitions

Due diligence	*A term used to describe a wide range of services with or without the inclusion of an expression of professional opinion. It is work commissioned by a client involving enquiries into specified aspects of the accounts, organisation and activities of an undertaking.*
Engagement team	All personnel performing an engagement, including any experts contracted by the firm* in connection with that engagement.
Existing accountant	A professional accountant in public practice* currently holding an audit appointment or carrying out accounting, taxation, consulting or similar professional services* for a client.
Financial interest	An interest in an equity or other security, debenture, loan* or other debt instrument of an entity, including rights and obligations to acquire such an interest and derivatives directly related to such interest.
Financial statements	The balance sheets, income statements or profit and loss accounts, statements of changes in financial position (which may be presented in a variety of ways, for example, as a statement of cash flows or a statement of fund flows), notes and other statements and explanatory material which are identified as being part of the financial statements.
Financial statement audit client	An entity in respect of which a firm* conducts a financial statement audit engagement*. When the client is a listed entity*, financial statement audit client* will always include its related entities*.
Financial statement audit engagement	A reasonable assurance engagement* in which a professional accountant in public practice* expresses an opinion whether financial statements* are prepared in all material respects in accordance with an identified financial reporting framework, such as an engagement conducted in accordance with International Standards on Auditing. This includes a Statutory Audit, which is a financial statement audit required by legislation or other regulation.

* See elsewhere within Definitions

	Note that 'reasonable assurance' is a term used by the International Auditing and Assurance Standards Board to denote an assurance opinion which, while giving less than absolute assurance, is expressed in a positive form.
Firm	(a) A *member firm**; (b) An entity that controls such parties; and (c) An entity controlled by such parties.
Immediate family	A spouse (or equivalent) or dependant.
Independence	Independence is: (a) Independence of mind – the states of mind that permits the provision of an opinion without being affected by influences that compromise professional judgement, allowing an individual to act with integrity, and exercise objectivity and professional judgement. (b) Independence in appearance – the avoidance of facts and circumstances that are so significant a reasonable and informed third party, having knowledge of all relevant information, including any safeguards applied, would reasonably conclude a firm's*, or a member of the assurance team's*, integrity, objectivity or professionals scepticism had been compromised.
Indirect financial Interest	A financial interest* beneficially owned through a collective investment vehicle, estate, trust or other intermediary over which the individual or entity has no control.
Listed entity	An entity whose shares*, stock or debt are quoted or listed on a recognised stock exchange, or are marketed under the regulations of a recognised stock exchange or other equivalent body.
Loan	*A loan is a sum of money lent, whether direct or through a third party, with the intention that it will be repaid with or without interest.*
Member	*A member of the Institute, an affiliate, an employee of a member firm* or affiliate, or a provisional member*.
Member firm	*This means, for the purposes of this Code:*

* See elsewhere within Definitions

(a) A member engaged in public practice as a sole practitioner; or*

(b) A partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or*

(c) A limited liability partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or*

(d) Any body corporate (other than a limited liability partnership) engaged in public practice of which:

(i) 50 per cent or more of the directors are members; and*

(ii) More than 50 per cent of the nominal value of the voting shares is held by members*; and*

(iii) More than 50 per cent of the aggregate in nominal value of the voting and non-voting shares is held by members*.*

Network firm — An entity under common control, ownership or management with the firm or any entity that a reasonable and informed third party having knowledge of all relevant information would reasonably conclude as being part of the firm* nationally or internationally.

Partner or Principal — *References to a partner or principal of a firm* include the following:*

- *A partner/principal;*
- *A sole-practitioner;*
- *A director of a corporate firm;*
- *A member of a limited liability partnership;*
- *An employee of a corporate firm who is:*
  - *A responsible individual within the meaning of the Audit Regulations;*
  - *A licensed insolvency practitioner; or*
  - *Defined as such in circumstances determined by Council.*

Professional Accountant — *A member* or where appropriate, member firm*.*

* See elsewhere within Definitions

Professional accountant in business	A professional accountant* employed or engaged in an executive or non-executive capacity in such areas as commerce, industry, service, the public sector, education, the not for profit sector, regulatory bodies or professional bodies, or a professional accountant* contracted by such entities. *A professional accountant in business* may be a salaried employee, a partner, director (whether executive or non-executive), an owner manager, a volunteer, or another working for one or more employing organisation. The legal form of the relationship with the employing organisation, if any, has no bearing on the ethical responsibilities incumbent on the professional accountant in business*.*
Professional accountant in public practice	A professional accountant*, irrespective of functional classification (e.g., audit, tax or consulting) in a firm that provides professional services*. This term is also used to refer to a firm* of professional accountants in public practice.
Professional services	Services requiring accountancy or related skills performed by a professional accountant* including accounting, auditing, taxation, management consulting and financial management services.
Related entity	An entity that has any of the following relationships with the client: (a) An entity that has direct or indirect control over the client provided the client is material to such entity; (b) An entity with a direct financial interest* in the client provided that such entity has significant influence over the client and the interest in the client is material to such entity; (c) An entity over which the client has direct or indirect control; (d) An entity in which the client, or an entity related to the client under (c) above, has a direct financial interest* that gives it significant influence over such entity and the interest is material to the client and its related entity in (c); and

* See elsewhere within Definitions

(e) An entity which is under common control with the client (hereinafter a 'sister entity') provided the sister entity and the client are both material to the entity that controls both the client and sister entity.

In the above definition, 'client' refers to an assurance client or a financial statement audit client* as appropriate to the engagement.*

Shares — *Reference to shares should be taken to include debentures, loan stocks, bonds, units, rights, warrants, options, partnership interests and the like. A person's holdings include holdings by a nominee on behalf of that person or by a trust created by that person for his or her personal benefit.*

Note on use of 'should' in this Code.

As noted in Section 1, professional accountants are expected to follow the guidance contained in the fundamental principles in all of their professional and business activities whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the profession. A professional accountant should also follow the requirements in the illustrations, including prohibitions or mandatory actions, where circumstances are the same as, or analogous to, those addressed by those illustrations. Failure to follow such guidance may be justified in those rare circumstances where to follow a precise prohibition or mandated action would result in failure to adhere to the fundamental principles. See also Section 1, paragraphs 1.1 and 1.4.*

Appendix to Definitions – Extracts from International Framework for Assurance Engagements issued by the International Auditing and Assurance Standards Board

7 *'Assurance engagement' means an engagement in which a practitioner expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.*

8 *The outcome of the evaluation or measurement of a subject matter is the information that results from applying the criteria to the subject matter. For example:*

- *The recognition, measurement, presentation and disclosure represented in the financial statements (outcome) result from applying a financial reporting framework for recognition, measurement, presentation and disclosure, such as International Financial Reporting Standards, (criteria) to an entity's financial position, financial performance and cash flows (subject matter).*

* See elsewhere within Definitions

- *An assertion about the effectiveness of internal control (outcome) results from applying a framework for evaluating the effectiveness of internal control, such as COSO[8] or CoCo[9] (criteria), to internal control, a process (subject matter).*

In the remainder of this Framework, the term 'subject matter information' will be used to mean the outcome of the evaluation or measurement of a subject matter. It is the subject matter information about which the practitioner gathers sufficient appropriate evidence to provide a reasonable basis for expressing a conclusion in an assurance report.

9 *Subject matter information can fail to be properly expressed in the context of the subject matter and the criteria, and can therefore be misstated, potentially to a material extent. This occurs when the subject matter information does not properly reflect the application of the criteria to the subject matter, for example, when an entity's financial statements do not give a true and fair view of (or present fairly, in all material respects) its financial position, financial performance and cash flows in accordance with International Financial Reporting Standards, or when an entity's assertion that its internal control is effective is not fairly stated, in all material respects, based on COSO or CoCo.*

10 *In some assurance engagements, the evaluation or measurement of the subject matter is performed by the responsible party, and the subject matter information is in the form of an assertion by the responsible party that is made available to the intended users. These engagements are called 'assertion-based engagements'. In other assurance engagements, the practitioner either directly performs the evaluation or measurement of the subject matter, or obtains a representation from the responsible party that has performed the evaluation or measurement that is not available to the intended users. The subject matter information is provided to the intended users in the assurance report. These engagements are called 'direct reporting engagements'.*

11 *Under this Framework, there are two types of assurance engagement a practitioner is permitted to perform: a reasonable assurance engagement and a limited assurance engagement. The objective of a reasonable assurance engagement is a reduction in assurance engagement risk to an acceptably low level in the circumstances of the engagement[10] as the basis for a positive from of expression of the practitioner's conclusion. The objective of a limited assurance*

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[8] 'Internal Control – Integrated Framework', The Committee of Sponsoring Organizations of the Treadway Commission.

[9] 'Guidance on Assessing Control – The CoCo Principles', Criteria of Control Board, The Canadian Institute of Chartered Accountants.

[10] Engagement circumstances include the terms of the engagement, including whether it is a reasonable assurance engagement or a limited assurance engagement, the characteristics of the subject matter, the criteria to be used, the needs of the intended users, relevant characteristics of the responsible party and its environment, and other matters, for example events, transactions, conditions and practices, that may have a significant effect on the engagement.

engagement is a reduction in assurance engagement risk to a level that is acceptable in the circumstances of the engagement, but where that risk is greater than for a reasonable assurance engagement, as the basis for a negative form of expression of the practitioner's conclusion.

12 *Not all engagements performed by practitioners are assurance engagements. Other frequently performed engagements that do not meet the above definition (and therefore are not covered by this Framework) include:*

- *Engagements covered by International Standards for Related Services, such as agreed-upon procedures engagements and compilations of financial or other information.*
- *The preparation of tax returns where no conclusion conveying assurance is expressed.*
- *Consulting (or advisory) engagements*[11] *such as management and tax consulting.*

13 *An assurance engagement may be part of a larger engagement, for example, when a business acquisition consulting engagement includes a requirement to convey assurance regarding historical or prospective financial information. In such circumstances, this Framework is relevant only to the assurance portion of the engagement.*

14 *The following engagements, which may meet the definition in paragraph 7, need not be performed in accordance with this Framework:*

(a) Engagements to testify in legal proceedings regarding accounting, auditing, taxation or other matters; and

(b) Engagements that include professional opinions, views or wording from which a user may derive some assurance, if all of the following apply:

(i) Those opinions, views or wording are merely incidental to the overall engagement;

(ii) Any written report issued is expressly restricted for use by only the intended users specified in the report;

(iii) Under a written understanding with the specified intended users, the engagement is not intended to be an assurance engagement; and

(iv) The engagement is not represented as an assurance engagement in the professional accountant's report.

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[11] Consulting engagements employ a professional accountant's technical skills, education, observations, experiences, and knowledge of the consulting process. The consulting process is an analytical process that typically involves some combination of activities relating to: objective-setting, fact-finding, definition of problems or opportunities, evaluation of alternatives, development of recommendations including actions, communication of results, and sometimes implementation and follow-up. Reports (if issued) are generally written in a narrative (or 'long form') style. Generally the work performed is only for the use and benefit of the client. The nature and scope of work is determined by agreement between the professional accountant and the client. Any service that meets the definition of an assurance engagement is not a consulting engagement but an assurance engagement.

15 *A practitioner reporting on an engagement that is not an assurance engagement within the scope of this Framework, clearly distinguishes that report from an assurance report. So as not to confuse users, a report that is not an assurance report avoids, for example:*

- *Implying compliance with this Framework, ISAs, ISREs or ISAEs.*
- *Inappropriately using the words 'assurance', 'audit' or 'review'.*
- *Including a statement that could reasonably be mistaken for a conclusion designed to enhance the degree of confidence of intended users about the outcome of the evaluation or measurement of a subject matter against criteria.*

Insolvency practitioners (Part D)

Code of Ethics for insolvency practitioners

Insolvency Practitioners should also read Part A which sets out the fundamental principles and conceptual framework that they are required to adhere to. It may also be helpful for insolvency practitioners to refer to other parts of the Code in relevant circumstances.*

PART 1 GENERAL APPLICATION OF THE CODE

The Practice of Insolvency

Introduction

400.1 *This Code is intended to assist Insolvency Practitioners* to meet the obligations expected of them by providing professional and ethical guidance.*

400.2 *This Code applies to all Insolvency Practitioners*. Insolvency Practitioners should take steps to ensure that the Code is applied in all professional work relating to an insolvency appointment*, and to any professional work that may lead to such an insolvency appointment*. Although an insolvency appointment* will be of the Insolvency Practitioner* personally rather than his practice*, he should ensure that the standards set out in this Code are applied to all members of the insolvency team*.*

400.3 *It is this Code, and the spirit that underlies it, that governs the conduct of Insolvency Practitioners*. Failure to observe this Code may not, of itself, constitute professional misconduct, but will be taken into account in assessing the conduct of an Insolvency Practitioner*.*

Fundamental Principles

400.4 *An Insolvency Practitioner* is required to comply with the following fundamental principles:*

(a) Integrity
An Insolvency Practitioner should be straightforward and honest in all professional and business relationships.*

(b) Objectivity
An Insolvency Practitioner should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.*

(c) Professional Competence and Due Care
An Insolvency Practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in*

* See Definitions

practice, legislation and techniques. An Insolvency Practitioner should act diligently and in accordance with applicable technical and professional standards when providing professional services.*

(d) Confidentiality

An Insolvency Practitioner should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the Insolvency Practitioner* or third parties.*

(e) Professional Behaviour

An Insolvency Practitioner should comply with relevant laws and regulations and should avoid any action that discredits the profession. Insolvency Practitioners should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.*

Framework Approach

400.5 *The framework approach is a method which Insolvency Practitioners* can use to identify actual or potential threats to the fundamental principles and determine whether there are any safeguards that might be available to offset them. The framework approach requires an Insolvency Practitioner* to:*

(a) take reasonable steps to identify any threats to compliance with the fundamental principles;
(b) evaluate any such threats; and
(c) respond in an appropriate manner to those threats.

400.6 *Throughout this Code there are examples of threats and possible safeguards. These examples are illustrative and should not be considered as exhaustive lists of all relevant threats or safeguards. It is impossible to define every situation that creates a threat to compliance with the fundamental principles or to specify the safeguards that may be available.*

Identification of threats to the fundamental principles

400.7 *An Insolvency Practitioner* should take reasonable steps to identify the existence of any threats to compliance with the fundamental principles which arise during the course of his professional work.*

400.8 *An Insolvency Practitioner* should take particular care to identify the existence of threats which exist prior to or at the time of taking an insolvency appointment* or which, at that stage, it may reasonably be expected might arise during the course of such an insolvency appointment*. Sections on insolvency appointments and professional and personal relationships below contain particular factors an Insolvency Practitioner* should take into account when deciding whether to accept an insolvency appointment*.*

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* See Definitions

400.9 *In identifying the existence of any threats, an Insolvency Practitioner* should have regard to relationships whereby the practice* is held out as being part of a national or an international association.*

400.10 *Many threats fall into one or more of five categories:*

(a) ***Self-interest threats****: which may occur as a result of the financial or other interests of a practice* or an Insolvency Practitioner* or of a close or immediate family* member of an individual within the practice*;*

(b) ***Self-review threats****: which may occur when a previous judgement made by an individual within the practice* needs to be re-evaluated by the Insolvency Practitioner*;*

(c) ***Advocacy threats****: which may occur when an individual within the practice* promotes a position or opinion to the point that subsequent objectivity may be compromised;*

(d) ***Familiarity threats****: which may occur when, because of a close relationship, an individual within the practice* becomes too sympathetic or antagonistic to the interests of others; and*

(e) ***Intimidation threats****: which may occur when an Insolvency Practitioner* may be deterred from acting objectively by threats, actual or perceived.*

400.11 *The following paragraphs give examples of the possible threats that an Insolvency Practitioner* may face.*

400.12 *Examples of circumstances that may create self-interest threats for an Insolvency Practitioner* include:*

(a) An individual within the practice having an interest in a creditor or potential creditor with a claim which requires subjective adjudication.*

(b) Concern about the possibility of damaging a business relationship.

(c) Concerns about potential future employment.

400.13 *Examples of circumstances that may create self-review threats include:*

(a) The acceptance of an insolvency appointment in respect of an entity* where an individual within the practice* has recently been employed by or seconded to that entity*.*

(b) An Insolvency Practitioner or the practice* has carried out professional work of any description, including sequential insolvency appointments*, for that entity*.*

Such self-review threats may diminish over the passage of time.

400.14 *Examples of circumstances that may create advocacy threats include:*

(a) Acting in an advisory capacity for a creditor of an entity.*

(b) Acting as an advocate for a client in litigation or dispute with an entity.*

400.15 *Examples of circumstances that may create familiarity threats include:*

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* See Definitions

(a) An individual within the practice having a close relationship with any individual having a financial interest in the insolvent entity*.*
(b) An individual within the practice having a close relationship with a potential purchaser of an insolvent's assets and/or business.*

In this regard a close relationship includes both a close professional relationship and a close personal relationship.

400.16 *Examples of circumstances that may create intimidation threats include:*

(a) The threat of dismissal or replacement being used to :
(i) Apply pressure not to follow regulations, this Code, any other applicable code, technical or professional standards.
(ii) Exert influence over an insolvency appointment where the Insolvency Practitioner* is an employee rather than a principal of the practice.*
(b) Being threatened with litigation.
(c) The threat of a complaint being made to the Insolvency Practitioner's authorising body*.*

Evaluation of threats
400.17 *An Insolvency Practitioner* should take reasonable steps to evaluate any threats to compliance with the fundamental principles that he has identified.*

400.18 *In particular, an Insolvency Practitioner* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.*

Possible Safeguards
400.19 *Having identified and evaluated a threat to the fundamental principles an Insolvency Practitioner* should consider whether there any safeguards that may be available to reduce the threat to an acceptable level. The relevant safeguards will vary depending on the circumstances. Generally safeguards fall into two broad categories. Firstly, safeguards created by the profession, legislation or regulation. Secondly, safeguards in the work environment. In the insolvency context safeguards in the work environment can include safeguards specific to an insolvency appointment*. These are considered in section insolvency appointments below. In addition, safeguards can be introduced across the practice. These safeguards seek to create a work environment in which threats are identified and the introduction of appropriate safeguards is encouraged. Some examples include:*

(a) Leadership that stresses the importance of compliance with the fundamental principles.
(b) Policies and procedures to implement and monitor quality control of engagements.

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* See Definitions

(c) Documented policies regarding the identification of threats to compliance with the fundamental principles, the evaluation of the significance of these threats and the identification and the application of safeguards to eliminate or reduce the threats, other than those that are trivial, to an acceptable level.
(d) Documented internal policies and procedures requiring compliance with the fundamental principles.
(e) Policies and procedures to consider the fundamental principles of this Code before the acceptance of an insolvency appointment.*
(f) Policies and procedures regarding the identification of interests or relationships between individuals within the practice and third parties.*
(g) Policies and procedures to prohibit individuals who are not members of the insolvency team from inappropriately influencing the outcome of an insolvency appointment*.*
(h) Timely communication of a practice's policies and procedures, including any changes to them, to all individuals within the practice*, and appropriate training and education on such policies and procedures.*
(i) Designating a member of senior management to be responsible for overseeing the adequate functioning of the safeguarding system.
(j) A disciplinary mechanism to promote compliance with policies and procedures.
(k) Published policies and procedures to encourage and empower individuals within the practice to communicate to senior levels within the practice and/ or the Insolvency Practitioner* any issue relating to compliance with the fundamental principles that concerns them.*

PART 2 SPECIFIC APPLICATION OF THE CODE

Insolvency Appointments

400.20 *The practice of insolvency is principally governed by statute and secondary legislation and in many cases is subject ultimately to the control of the Court. Where circumstances are dealt with by statute or secondary legislation, an Insolvency Practitioner* must comply with such provisions. An Insolvency Practitioner* must also comply with any relevant judicial authority relating to his conduct and any directions given by the Court.*

400.21 *An Insolvency Practitioner* should act in a manner appropriate to his position as an officer of the Court (where applicable) and in accordance with any quasi-judicial, fiduciary or other duties that he may be under.*

400.22 *Before agreeing to accept any insolvency appointment* (including a joint appointment), an Insolvency Practitioner* should consider whether acceptance would create any threats to compliance with the fundamental principles. Of particular importance will be any threats to the fundamental principle of objectivity created by conflicts of interest or by any significant professional or personal relationships. These are considered in more detail below.*

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* See Definitions

400.23 *In considering whether objectivity or integrity may be threatened, an Insolvency Practitioner* should identify and evaluate any professional or personal relationship (see section dealing with the assets of an entity* below) which may affect compliance with the fundamental principles. The appropriate response to the threats arising from any such relationships should then be considered, together with the introduction of any possible safeguards.*

400.24 *Generally, it will be inappropriate for an Insolvency Practitioner* to accept an insolvency appointment* where a threat to the fundamental principles exists or may reasonably be expected might arise during the course of the insolvency appointment* unless:*

(a) disclosure is made, prior to the insolvency appointment, of the existence of such a threat to the Court or to the creditors on whose behalf the Insolvency Practitioner* would be appointed to act and no objection is made to the Insolvency Practitioner* being appointed; and*
(b) safeguards are or will be available to eliminate or reduce that threat to an acceptable level. If the threat is other than trivial, safeguards should be considered and applied as necessary to reduce them to an acceptable level, where possible.

400.25 *The following safeguards may be considered:*

(a) Involving and/or consulting another Insolvency Practitioner from within the practice* to review the work done.*
(b) Consulting an independent third party, such as a committee of creditors, an authorising body or another Insolvency Practitioner*.*
(c) Involving another Insolvency Practitioner to perform part of the work, which may include another Insolvency Practitioner* taking a joint appointment where the conflict arises during the course of the insolvency appointment*.*
(d) Obtaining legal advice from a solicitor or barrister with appropriate experience and expertise.
(e) Changing the members of the insolvency team.*
(f) The use of separate Insolvency Practitioners and/or staff.*
(g) Procedures to prevent access to information by the use of information barriers (e.g. strict physical separation of such teams, confidential and secure data filing).
(h) Clear guidelines for individuals within the practice on issues of security and confidentiality.*
(i) The use of confidentiality agreements signed by individuals within the practice.*
(j) Regular review of the application of safeguards by a senior individual within the practice not involved with the insolvency appointment*.*
(k) Terminating the financial or business relationship that gives rise to the threat.
(l) Seeking directions from the court.

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* See Definitions

400.26 *As regards joint appointments, where an Insolvency Practitioner* is specifically precluded by this Code from accepting an insolvency appointment* as an individual, a joint appointment will not be an appropriate safeguard and will not make accepting the insolvency appointment* appropriate.*

400.27 *In deciding whether to take an insolvency appointment* in circumstances where a threat to the fundamental principles has been identified, the Insolvency Practitioner* should consider whether the interests of those on whose behalf he would be appointed to act would best be served by the appointment of another Insolvency Practitioner* who did not face the same threat and, if so, whether any such appropriately qualified and experienced other Insolvency Practitioner* is likely to be available to be appointed.*

400.28 *An Insolvency Practitioner* will encounter situations where no safeguards can reduce a threat to an acceptable level. Where this is the case, an Insolvency Practitioner* should conclude that it is not appropriate to accept an insolvency appointment*.*

400.29 *Following acceptance, any threats should continue to be kept under appropriate review and an Insolvency Practitioner* should be mindful that other threats may come to light or arise. There may be occasions when the Insolvency Practitioner* is no longer in compliance with this Code because of changed circumstances or something which has been inadvertently overlooked. This would generally not be an issue provided the Insolvency Practitioner* has appropriate quality control policies and procedures in place to deal with such matters and, once discovered, the matter is corrected promptly and any necessary safeguards are applied. In deciding whether to continue an insolvency appointment* the Insolvency Practitioner* may take into account the wishes of the creditors, who after full disclosure has been made have the right to retain or replace the Insolvency Practitioner*.*

400.30 *In all cases an Insolvency Practitioner* will need to exercise his judgment to determine how best to deal with an identified threat. In exercising his judgment, an Insolvency Practitioner* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would conclude to be acceptable. This consideration will be affected by matters such as the significance of the threat, the nature of the work and the structure of the practice*.*

Conflicts of interest

400.31 *An Insolvency Practitioner* should take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles. Examples of where a conflict of interest may arise are where:*

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* See Definitions

(a) An Insolvency Practitioner has to deal with claims between the separate and conflicting interests of entities over whom he is appointed.*
(b) There are a succession of or sequential insolvency appointments (see section on the application of the framework to specific situations).*
(c) A significant relationship has existed with the entity or someone connected with the entity* (see also section on professional and personal relationships).*

400.32 *Some of the safeguards listed at 400.25 may be applied to reduce the threats created by a conflict of interest to an acceptable level. Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance; therefore, the safeguards used should generally include the use of effective information barriers.*

Practice mergers
400.33 *Where practices merge, they should subsequently be treated as one for the purposes of assessing threats to the fundamental principles. At the time of the merger, existing insolvency appointments* should be reviewed and any threats identified. Principals* and employees of the merged practice become subject to common ethical constraints in relation to accepting new insolvency appointments* to clients of either of the former practices*. However, existing insolvency appointments* which are rendered in apparent breach of the Code by such a merger need not be determined automatically, provided that a considered review of the situation by the practice* discloses no obvious and immediate ethical conflict.*

400.34 *Where an individual within the practice* has, in any former practice*, undertaken work upon the affairs of an entity* in a capacity that is incompatible with an insolvency appointment* of the new practice*, the individual should not work or be employed on that assignment.*

Transparency
400.35 *Both before and during an insolvency appointment* an Insolvency Practitioner* may acquire personal information that is not directly relevant to the insolvency or confidential commercial information relating to the affairs of third parties. The information may be such that others might expect that confidentiality would be maintained.*

400.36 *Nevertheless an Insolvency Practitioner* in the role as office holder has a professional duty to report openly to those with an interest in the outcome of the insolvency. An Insolvency Practitioner* should always report on his acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable. An Insolvency Practitioner* should bear in mind the expectations of others and what a reasonable and informed third party would consider appropriate.*

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* See Definitions

Professional Competence and due care

400.37 *Prior to accepting an insolvency appointment* the Insolvency Practitioner* should ensure that he is satisfied that the following matters have been considered:*

(a) Obtaining knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities.*
(b) Acquiring an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.*
(c) Acquiring knowledge of relevant industries or subject matters.
(d) Possessing or obtaining experience with relevant regulatory or reporting requirements.
(e) Assigning sufficient staff with the necessary competencies.
(f) Using experts where necessary.
(g) Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

400.38 *The fundamental principle of professional competence and due care requires that an Insolvency Practitioner* should only accept an insolvency appointment* when the Insolvency Practitioner* has sufficient expertise. For example, a self interest threat to the fundamental principle of professional competence and due care is created if the Insolvency Practitioner* or the insolvency team* does not possess or cannot acquire the competencies necessary to carry out the insolvency appointment*. Expertise will include appropriate training, technical knowledge, knowledge of the entity* and the business with which the entity* is concerned.*

400.39 *Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments, including:*

(a) Developments in insolvency legislation.
(b) Statements of Insolvency Practice.
(c) The regulations of their authorising body, including any continuing professional development requirements.*
*(d) Guidance issued by their authorising body*or the Insolvency Service.*
(e) Technical issues being discussed within the profession.

Professional and personal relationships

400.40 *The environment in which Insolvency Practitioners* work and the relationships formed in their professional and personal lives can lead to threats to the fundamental principle of objectivity.*

Identifying relationships

400.41 *In particular, the principle of objectivity may be threatened if any individual within the practice*, the close or immediate family* of an individual*

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* See Definitions

within the practice or the practice* itself, has or has had a professional or personal relationship which relates to the insolvency appointment* being considered.*

400.42 *Professional or personal relationships may include (but are not restricted to) relationships with: –*

(a) the entity;*
(b) any director or shadow director or former director or shadow director of the entity;*
(c) shareholders of the entity;*
(d) any principal or employee of the entity*;*
(e) business partners of the entity;*
(f) companies or entities controlled by the entity;*
(g) companies which are under common control;
(h) creditors (including debenture holders) of the entity;
(i) debtors of the entity;*
(j) close or immediate family of the entity*(if an individual) or its officers (if a corporate body);*
(k) others with commercial relationships with the practice.*

400.43 *Safeguards within the practice should include policies and procedures to identify relationships between individuals within the practice* and third parties in a way that is proportionate and reasonable in relation to the insolvency appointment* being considered.*

Is the relationship significant to the conduct of the insolvency appointment*?
400.44 *Where a professional or personal relationship of the type described in paragraph 400.41 has been identified the Insolvency Practitioner* should evaluate the impact of the relationship in the context of the insolvency appointment* being sought or considered. Issues to consider in evaluating whether a relationship creates a threat to the fundamental principles may include the following:*

(a) The nature of the previous duties undertaken by a practice during an earlier relationship with the entity.*
(b) The impact of the work conducted by the practice on the financial state and/or the financial stability of the entity in respect of which the insolvency appointment* is being considered.*
(c) Whether the fee received for the work by the practice is or was significant to the practice* itself or is or was substantial.*
(d) How recently any professional work was carried out. It is likely that greater threats will arise (or may be seen to arise) where work has been carried out within the previous three years. However, there may still be instances where, in respect of non-audit work, any threat is at an acceptable level. Conversely, there may be situations whereby the nature of the work carried out was such that a considerably longer period should elapse before any threat can be reduced to an acceptable level.

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* See Definitions

(e) Whether the insolvency appointment being considered involves consideration of any work previously undertaken by the practice* for that entity*.*
(f) The nature of any personal relationship and the proximity of the Insolvency Practitioner to the individual with whom the relationship exists and, where appropriate, the proximity of that individual to the entity* in relation to which the insolvency appointment* relates.*
(g) Whether any reporting obligations will arise in respect of the relevant individual with whom the relationship exists (e.g. an obligation to report on the conduct of directors and shadow directors of a company to which the insolvency appointment relates).*
(h) The nature of any previous duties undertaken by an individual within the practice during any earlier relationship with the entity*.*
(i) The extent of the insolvency team's familiarity with the individuals connected with the entity*.*

400.45 *Having identified and evaluated a relationship that may create a threat to the fundamental principles, the Insolvency Practitioner* should consider his response including the introduction of any possible safeguards to reduce the threat to an acceptable level.*

400.46 *Some of the safeguards which may be considered to reduce the threat created by a professional or personal relationship to an acceptable level are considered in paragraph 400.25. Other safeguards may include:*

(a) Withdrawing from the insolvency team.*
(b) Terminating (where possible) the financial or business relationship giving rise to the threat.
(c) Disclosure of the relationship and any financial benefit received by the practice (whether directly or indirectly) to the entity*or to those on whose behalf the Insolvency Practitioner* would be appointed to act.*

400.47 *An Insolvency Practitioner* may encounter situations in which no or no reasonable safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level. In such situations, the relationship in question will constitute a **significant** professional relationship ('Significant Professional Relationship') or a **significant** personal relationship ('Significant Personal Relationship'). Where this is case the Insolvency Practitioner* should conclude that it is not appropriate to take the insolvency appointment*.*

400.48 *Consideration should always be given to the perception of others when deciding whether to accept an insolvency appointment*. Whilst an Insolvency Practitioner* may regard a relationship as not being significant to the insolvency appointment*, the perception of others may differ and this may in some circumstances be sufficient to make the relationship significant.*

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* See Definitions

Dealing with the assets of an entity*

400.49 *Actual or perceived threats (for example self interest threats) to the fundamental principles may arise when during an insolvency appointment*, an Insolvency Practitioner* realises assets.*

400.50 *Save in circumstances which clearly do not impair the Insolvency Practitioner's* objectivity, Insolvency Practitioners*appointed to any insolvency appointment* in relation to an entity*, should not themselves acquire, directly or indirectly, any of the assets of an entity*, nor knowingly permit any individual within the practice*, or any close or immediate family member* of the Insolvency Practitioner* or of an individual within the practice*, directly or indirectly, to do so.*

400.51 *Where the assets and business of an insolvent company are sold by an Insolvency Practitioner* shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity. The sale may also be seen as a threat to objectivity by creditors or others not involved in the prior agreement. The threat to objectivity may be eliminated or reduced to an acceptable level by safeguards such as obtaining an independent valuation of the assets or business being sold, or the consideration of other potential purchasers.*

400.52 *It is also particularly important for an Insolvency Practitioner* to take care to ensure (where to do so does not conflict with any legal or professional obligation) that his decision making processes are transparent, understandable and readily identifiable to all third parties who may be affected by the sale or proposed sale.*

Obtaining specialist advice and services

400.53 *When an Insolvency Practitioner* intends to rely on the advice or work of another, the Insolvency Practitioner* should evaluate whether such reliance is warranted. The Insolvency Practitioner* 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.*

400.54 *Threats to the fundamental principles (for example familiarity threats and self interest threats) can arise if services are provided by a regular source independent of the practice*.*

400.55 *Safeguards should be introduced to reduce such threats to an acceptable level. These safeguards should ensure that a proper business relationship is maintained between the parties and that such relationships are reviewed periodically to ensure that best value and service is being obtained in relation to each insolvency appointment*. Additional safeguards may include clear guidelines and policies within the practice on such relationships. An Insolvency Practitioner* should also consider disclosure of the existence of such business*

* See Definitions

relationships to the general body of creditors or the creditor's committee if one exists.

400.56 *Threats to the fundamental principles can also arise where services are provided from within the practice or by a party with whom the practice, or an individual within the practice*, has a business or personal relationship. An Insolvency Practitioner* should take particular care in such circumstances to ensure that the best value and service is being provided.*

Fees and other types of remuneration
*Prior to accepting an insolvency appointment**
400.57 *Where an engagement may lead to an insolvency appointment*, an Insolvency Practitioner* should make any party to the work aware of the terms of the work and, in particular, the basis on which any fees are charged and which services are covered by those fees.*

400.58 *Where an engagement may lead to an insolvency appointment*, Insolvency Practitioners* should not accept referral fees or commissions unless they have established safeguards to reduce the threats created by such fees or commissions to an acceptable level.*

400.59 *Safeguards may include disclosure in advance of any arrangements. If after receiving any such payments, an Insolvency Practitioner* accepts an insolvency appointment*, the amount and source of any fees or commissions received should be disclosed to creditors.*

*After accepting an insolvency appointment**
400.60 *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.*

400.61 *If such fees or commissions are accepted they should only be accepted for the benefit of the estate; not for the benefit of the Insolvency Practitioner* or the practice*.*

400.62 *Further, where such fees or commissions are accepted an Insolvency Practitioner* should consider making disclosure to creditors.*

Obtaining insolvency appointments*
400.63 *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. This does not, however, preclude an arrangement between an Insolvency Practitioner* and an employee whereby the employee's remuneration is based in whole or in part on*

* See Definitions

introductions obtained for the Insolvency Practitioner through the efforts of the employee.*

400.64 *When an Insolvency Practitioner* seeks an insolvency appointment* or work that may lead to an insolvency appointment* through advertising or other forms of marketing, there may be threats to compliance with the fundamental principles.*

400.65 *When considering whether to accept an insolvency appointment* an Insolvency Practitioner* should satisfy himself that any advertising or other form of marketing pursuant to which the insolvency appointment* may have been obtained is or has been:*

(a) Fair and not misleading.
(b) Avoids unsubstantiated or disparaging statements.
(c) Complies with relevant codes of practice and guidance in relation to advertising.

400.66 *Advertisements and other forms of marketing should be clearly distinguishable as such and be legal, decent, honest and truthful.*

400.67 *If reference is made in advertisements or other forms of marketing to fees or to the cost of the services to be provided, the basis of calculation and the range of services that the reference is intended to cover should be provided. Care should be taken to ensure that such references do not mislead as to the precise range of services and the time commitment that the reference is intended to cover.*

400.68 *An Insolvency Practitioner* should never promote or seek to promote his services, or the services of another Insolvency Practitioner*, in such a way, or to such an extent as to amount to harassment.*

400.69 *Where an Insolvency Practitioner* or the practice* advertises for work via a third party, the Insolvency Practitioner* is responsible for ensuring that the third party follows the above guidance.*

Gifts and hospitality

400.70 *An Insolvency Practitioner*, 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.*

400.71 *The significance of such threats will depend on the nature, value and intent behind the offer. In deciding whether to accept any offer of a gift or hospitality the Insolvency Practitioner* should have regard to what a reasonable*

* See Definitions

and informed third party having knowledge of all relevant information would consider to be appropriate. Where such a reasonable and informed third party would consider the gift to be made in the normal course of business without the specific intent to influence decision making or obtain information the Insolvency Practitioner may generally conclude that there is no significant threat to compliance with the fundamental principles.*

400.72 *Where appropriate, safeguards should be considered and applied as necessary to eliminate any threats to the fundamental principles or reduce them to an acceptable level. If an Insolvency Practitioner* encounters a situation in which no or no reasonable safeguards can be introduced to reduce a threat arising from offers of gifts or hospitality to an acceptable level he should conclude that it is not appropriate to accept the offer.*

400.73 *An Insolvency Practitioner* should also not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.*

Record keeping
400.74 *It will always be for the Insolvency Practitioner* to justify his actions. An Insolvency Practitioner* 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.*

400.75 *The records an Insolvency Practitioner* 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.*

THE APPLICATION OF THE FRAMEWORK TO SPECIFIC SITUATIONS

Introduction to specific situations
400.76 *The following examples describe specific circumstances and relationships that will create threats to compliance with the fundamental principles. The examples may assist an Insolvency Practitioner* and the members of the insolvency team* to assess the implications of similar, but different, circumstances and relationships.*

400.77 *The examples are divided into three parts. Part 1 contains examples which do not relate to a previous or existing insolvency appointment*. Part 2 contains examples that do relate to a previous or existing insolvency appointment*. Part 3 contains some examples under Scottish law. The examples are not intended to be exhaustive.*

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* See Definitions

Part 1 – Examples that do not relate to a previous or existing insolvency appointment*

400.78 *The following situations involve a professional relationship which does not consist of a previous insolvency appointment.*

400.79 ***Insolvency appointment following audit related work***
Relationship: *The practice* or an individual within the practice* has previously carried out audit related work within the previous 3 years.*

Response: *A Significant Professional Relationship will arise: an Insolvency Practitioner* should conclude that it is not appropriate to take the insolvency appointment*.*

Where audit related work was carried out more than three years before the proposed date of the appointment of the Insolvency Practitioner a threat to compliance with the fundamental principles may still arise. The Insolvency Practitioner* should evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the existence or introduction of safeguards.*

This restriction does not apply where the insolvency appointment is in a members' voluntary liquidation; an Insolvency Practitioner* may normally take an appointment as liquidator. However, the Insolvency Practitioner* should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles. Further, the Insolvency Practitioner* should satisfy himself that the directors' declaration of solvency is likely to be substantiated by events.*

400.80 ***Appointment as Investigating Accountant at the instigation of a creditor***
Previous relationship*: The practice* or an individual within the practice* was instructed by, or at the instigation of, a creditor or other party having a financial interest in an entity*, to investigate, monitor or advise on its affairs.*

Response: *A Significant Professional Relationship would not normally arise in these circumstances provided that: –*

(a) there has not been a direct involvement by an individual within the practice in the management of the entity*; and*
(b) the practice had its principal client relationship with the creditor or other party, rather than with the company or proprietor of the business; and*
(c) the entity was aware of this.*

An Insolvency Practitioner should however consider all the circumstances before accepting an insolvency appointment*, including the effect of any*

* See Definitions

discussions or lack of discussions about the financial affairs of the company with its directors, and whether such circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

Where such an investigation was conducted at the request of, or at the instigation of, a secured creditor who then requests an Insolvency Practitioner to accept an insolvency appointment* as an administrator or administrative receiver, the Insolvency Practitioner* should satisfy himself that the company, acting by its board of directors, does not object to him taking such an insolvency appointment*. If the secured creditor does not give prior warning of the insolvency appointment* to the company or if such warning is given and the company objects but the secured creditor still wishes to appoint the Insolvency Practitioner*, he should consider whether the circumstances give rise to an unacceptable threat to compliance with the fundamental principles.*

Part 2 – Examples relating to previous or existing insolvency appointments*

400.81 *The following situations involve a prior professional relationship that involves a previous or existing insolvency appointment*: –*

400.82 ***Insolvency appointment following an appointment as Administrative or other Receiver***
Previous appointment: *An individual within the practice* has been administrative or other receiver.*

Proposed appointment: *Any insolvency appointment*.*

Response: *An Insolvency Practitioner* should not accept any insolvency appointment*.*

This restriction does not, however, apply where the individual within the practice was appointed a receiver by the Court. In such circumstances, the Insolvency Practitioner* should however consider whether any other circumstances which give rise to an unacceptable threat to compliance with the fundamental principles.*

400.83 ***Administration or Liquidation following appointment as Supervisor of a Voluntary Arrangement***

Previous appointment*: An individual within the practice* has been supervisor of a company voluntary arrangement.*

Proposed appointment*: Administrator or liquidator.*

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* See Definitions

Response: *An Insolvency Practitioner* may normally accept an appointment as administrator or liquidator. However the Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

400.84 ***Liquidation following appointment as Administrator***
Previous appointment: *An individual within the practice* has been administrator.*

Proposed appointment: *Liquidator.*

Response: *An Insolvency Practitioner* may normally accept an appointment as liquidator provided he has complied with the relevant legislative requirements. However, the Insolvency Practitioner* should also consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

400.85 ***Conversion of Members' Voluntary Liquation into Creditors' Voluntary Liquidation***
Previous appointment: *An individual within the practice* has been the liquidator of a company in a members' voluntary liquidation.*

Proposed appointment: *Liquidator in a creditors' voluntary liquidation, where it has been necessary to convene a creditors' meeting.*

Response: *Where there has been a Significant Professional Relationship, an Insolvency Practitioner* may continue or accept an appointment (subject to creditors' approval) only if he concludes that the company will eventually be able to pay its debts in full, together with interest.*

However, the Insolvency Practitioner should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

400.86 ***Bankruptcy following appointment as Supervisor of an Individual Voluntary Arrangement***
Previous appointment*: An individual within the practice* has been supervisor of an individual voluntary arrangement.*

Proposed Appointment*: Trustee in bankruptcy.*

Response*: An Insolvency Practitioner* may normally accept an appointment as trustee in bankruptcy. However, the Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

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* See Definitions

Part 3 – Examples in respect of cases conducted under Scottish Law

400.87 ***Sequestration following appointment as Trustee under a Trust Deed for creditors***

Previous appointment: *An individual within the practice* has been trustee under a trust deed for creditors.*

Proposed appointment: *Interim trustee or trustee in sequestration.*

Response: *An Insolvency Practitioner* may normally accept an appointment as an interim trustee or trustee in sequestration. However, the Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

400.88 ***Sequestration where the Accountant in Bankruptcy is Trustee following appointment as Trustee under a Trust Deed for creditors***

Previous appointment: *An individual within the practice* has been trustee under a trust deed for creditors.*

Proposed appointment: *Agent for the Accountant in Bankruptcy in sequestration.*

Response: *An Insolvency Practitioner* may normally accept an appointment as agent for the Accountant in Bankruptcy. However, the Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.*

Definitions

Authorising body	*A body declared to be a recognised professional body or a competent authority under any legislation governing the administration of insolvency in the United Kingdom.*
Close or immediate family	*A spouse (or equivalent), dependant, parent, child or sibling.*
Entity	*Any natural or legal person or any group of such persons, including a partnership.*
He/she	*In this Code, he is to be read as including she.*
Individual within the practice	*The Insolvency Practitioner*, any principals in the practice and any employees within the practice.*
Insolvency appointment	*A formal appointment:* *(a) which, under the terms of legislation must be undertaken by an Insolvency Practitioner; or* *(b) as a nominee or supervisor of a voluntary arrangement.*

* See Definitions

Insolvency Practitioner	*An individual who is authorised or recognised to act as an Insolvency Practitioner in the United Kingdom by an authorising body*. For the purpose of the application of this Code only, the term Insolvency Practitioner also includes an individual who acts as a nominee or supervisor of a voluntary arrangement.*
Insolvency team	*Any person under the control or direction of an Insolvency Practitioner.*
Practice	*The organisation in which the Insolvency Practitioner* practises.*
Principal	*In respect of a practice*:* *(a) which is a company: a director;* *(b) which is a partnership: a partner;* *(c) which is a limited liability partnership: a member;* *(d) which is comprised of a sole practitioner: that person.* *Alternatively any person within the practice* who is held out as being a director, partner or member.*

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Section 4

Regulations relating to membership

Regulations governing the information to be supplied by members

1 The Regulations
These Regulations were made by the Council under Bye-law 49(a).

2 Definitions
Words and expressions defined in the Bye-laws have the same meanings in these Regulations.

The following definitions are relevant to these Regulations.

Annual Members Data Questionnaire means a questionnaire or profile document sent to a member from time-to-time.

Members' Registrar means the person of that title appointed by the Chief Executive.

NOTE: (This note does not form part of the Regulations.) Bye-law 1 provides that the term 'registered address' means:

(a) in the case of a *member in practice*, the place of business registered by him with the Institute or, where more than one such business is registered by him, such place of business indicated by him as being his principal place of business; and,
(b) in the case of a *member not in practice*, the address registered by him with the Institute.

3 Information to be supplied
Upon admission, an associate shall provide the Members' Registrar with particulars of his full names, and his Registered Address.

A member may provide a further address in addition to a Registered Address to which he may elect to have all correspondence sent and this shall be recorded as the Second Address.

A member shall complete and return to the Members' Registrar the Annual Members Data Questionnaire or profile document.

A member shall inform the Members' Registrar of any change or changes to information previously provided to the Members' Registrar under these Regulations within a period of 28 days from any such change or changes taking effect.

A member shall supply the Members' Registrar with any other information relative to his membership, practice or employment which the Council may

reasonably require for carrying out the provisions of the Royal Charter, Byelaws, Regulations or in pursuing the Institute's aims.

Regulations governing the payment of the annual subscription

1 The regulations
These Regulations were made by the Council under Bye-law 49(a).

2 Definitions
Words and expressions defined in the Bye-laws have the same meanings in these Regulations.

The following definitions are relevant to these Regulations.

Status means whether or not a member is employed, is retired, is unemployed or is taking a career break and, the country of residence of a member indicated by the Registered Address.

NOTE: (This note does not form part of the Regulations.) Bye-law 1 provides that the term 'registered address' means:

(a) in the case of a *member in practice*, the place of business registered by him with the Institute or, where more than one such business is registered by him, such place of business indicated by him as being his principal place of business; and,
(b) in the case of a *member not in practice*, the address registered by him with the Institute.

3 Payment of subscriptions
Save as otherwise provided below the rate of subscription applicable to a member throughout any calendar year shall be determined by reference to the status of the member on the first day of January in that year or on the date of his admission if later than the first day of January.

Where a person is admitted to membership after the last day of June in any year he shall pay one-half only of the subscription otherwise applicable to him for that year.

Regulations governing the power to waive, reduce, remit or refund fees and subscriptions

1 The Regulations
These Regulations were made by the Council under Bye-law 49(a).[1]

2 Definitions
Words and expressions defined in the Bye-laws have the same meanings in these Regulations:

The following definitions are relevant to these Regulations.

Admission Fee means the fee for admission to membership.

Annual subscription means the subscription payable by a member from time-to-time.

Applicant means a member of the Institute applying for a waiver, reduction, remission or refund of a fee or subscription.

Application means an application to the Members' Registrar for a waiver, reduction, remission or refund of a fee or subscription.

Designated Countries means countries which are known to the Members' Registrar as having Exchange Control regulations with delays of three or more months before release of funds or which otherwise prevent payment of the annual subscription.

Half rate means half of the annual subscription which would normally be payable by a member.

Income means all income of the applicant, whether earned or unearned, from all sources except that, for the purposes of calculating such income all pensions and State Benefits shall not be taken into account.

Life Membership Fee means the fee payable by an applicant seeking Life Membership.

Low rate means the rate of reduced subscription payable by an applicant granted such a reduction.

The Members' Registrar means the person of that title appointed by the Chief Executive.

[1] These regulations were last amended by Council on 1 March 2006 with effect from 1 January 2007.

3 Income limits
Reduced subscriptions shall be authorised in accordance with this regulation. The rate payable shall be calculated as follows:

Level A An applicant with an income (excluding pensions and state benefits) less than £11,900 shall pay the Low Rate; or,

Level B An applicant with an income (excluding pensions and state benefits) between £11,901 and £23,800 shall pay the Half Rate.

4 Reduced Subscriptions
Applications must be received by the Members' Registrar before 31 March in the year to which the subscription applies but no application shall be considered in respect of previous years.

Applications are invited from any member whose status on 1 January in any year is covered by one of the categories below:

(a) A member taking a career break to bring up a young family, the youngest child of whom is under 12 years of age on 1 January;
(b) A member who is 'registered' unemployed on 1 January;
(c) A member registered as a full-time student attending structured study, on 1 January, subject to a maximum of one year;
(d) A member suffering from any illness that prevents the taking up of gainful employment for a period of not less than 3 months which includes 1 January and, is not receiving income from any company scheme;
(e) A member with an income below Level 'B' of Regulation 3.

5 Retired Members
Applications are invited from any member who has attained the age of 60 and whose status on 1 January in any year is that they are retired from **all** remunerated business and professional activities and do not hold a current practicing certificate.

Retired members shall pay the Half Rate.

Applications must be received by the Members' Registrar before 31 March in the year to which the subscription applies but no application shall be considered in respect of previous years.

6 Life Membership
(a) A member who has attained the age of 60 and has been a member for at least 30 years shall, on payment of the appropriate fee, be granted Life Membership provided that **all** remunerated business and professional activities have ceased and that a practising certificate, if held, is surrendered.
(b) A member who is prevented from taking up gainful employment due to illness diagnosed as incurable and or progressive shall, on production of adequate documentary medical justification, be granted

'Life Membership' and shall be given a waiver of the fee. The age requirement of Regulation 6(a) above shall not apply.

(c) A member who has attained the age of 75 years or who has been a member of the Institute for at least 50 years, and who has no remunerated business activities, shall be granted Life Membership without payment of the Life Membership fee.

(d) The Life Membership fee shall be a sum equal to twice the subscription payable by a member whose Registered Address is in continental Europe.

7 Documentation and justification

It shall be the responsibility of the applicant to ensure that his application is supported by documentation in a form prescribed from time-to-time by the Members' Registrar, the cost of which shall be met by the applicant.

8 Deferment of payment

The Members' Registrar may defer the period within which payment of the annual subscription or other fees must be made as follows:

(a) Where payment of the annual subscription is due from a member residing in a Designated Country;

(b) Where payment of the annual subscription is due from a member retained in membership at the request of the Secretary of the Investigation Committee;

(c) Where advance payment of the subscription or fee would cause unnecessary hardship;

(d) Where a member has applied for a reduction of subscription and is awaiting a decision;

(e) Where the Members' Registrar considers a deferment to be appropriate.

9 Appeals

(a) Any member aggrieved at any determination by the Members' Registrar under these regulations shall have a right of appeal to the Treasurer or a person nominated by the Treasurer provided that he gives the Members' Registrar written notice of his intention to appeal within 28 days of receiving such notification.

(b) On hearing an appeal the Treasurer or a person nominated by the Treasurer shall have power on the basis of written representation from the applicant to make whatever determinations in accordance with these regulations he sees fit.

Regulations relating to membership cessation, re-admission and resignation

1 These Regulations were made by the Council on 3 December 2002[1] under Clause 16 of the Supplemental Charter and Principal Bye-law 49(a).

2 In these Regulations, unless the context otherwise requires, the following expressions have the meanings assigned to them and any other expressions shall have the same meanings as in the Principal Bye-laws:

(a) the 'Members' Registrar' means the person of that title appointed by the Chief Executive;
(b) the 'Re-admissions Sub-Committee' means the Sub-Committee of the Investigation Committee to which the Investigation Committee pursuant to Principal Bye-law 49(b) has delegated its powers, authorities or discretion in respect of applications for re-admission to membership. Such Sub-Committee shall consist of not fewer than 3 members of the Investigation Committee, of whom at least one shall not be an accountant.
(c) the 'Director' means the person for the time being holding the office of the Director of the Professional Conduct Directorate of the Institute of Chartered Accountants in England and Wales (ICAEW) or any member of his department authorised by him to act in his name.

Cessation of membership for non-payment of fine and costs

3 The Secretary to the Disciplinary Committee may exercise the power of the Investigation Committee under Principal Bye-law 7(c) to extend the period within which a fine or costs must be paid by a member whose registered address is outside the United Kingdom where the Secretary of the Disciplinary Committee is satisfied that for reasons beyond the member's control he is unable to remit the amount due.

Re-admissions to membership

4 The Members' Registrar shall (save in those cases set out in Regulation 5 below) re-admit to membership of the Institute under Principal Bye-law 9 any person who having ceased to be a member applies for re-admission to membership and who in the opinion of the Members' Registrar has satisfactorily answered all the questions in the form of application approved by the Investigation Committee. Such re-admission shall be unconditional or subject only to conditions affecting future payments.

5 In those cases set out as follows the discretion of the Council to re-admit to membership under Principal Bye-law 9 shall be exercised by the Re-admissions Sub-Committee (on consideration of papers submitted to it) in accordance

[1] Last amended on 31 August 2006 by the Professional Standards Board; changes take effect from 1 January 2007.

with guidelines approved by the Investigation Committee and as amended from time-to-time:

(a) a person whose membership ceased by operation of an order made pursuant to the Disciplinary Bye-laws;
(b) a person whose membership ceased by virtue of bankruptcy;
(c) a person against whom the Members' Registrar has been notified that there is an unresolved complaint;
(d) a person whose membership ceased by virtue of his failure to pay fines and/or costs imposed pursuant to the Disciplinary Bye-laws;
(e) a person who has been out of membership for more than four years;
(f) any other person whose application for re-admission to membership the Members' Registrar for any reason considers should be dealt with by the Re-admissions Sub-Committee.

Re-admission fees

6 Where a person:

(a) applies to be re-admitted under Regulation 4 they shall pay on application a re-admission fee equivalent to the annual subscription applicable to their Registered Address in the year of application; or
(b) applies to be re-admitted under Regulation 5 they shall pay on application a re-admission fee equivalent to twice the annual subscription applicable to their Registered Address in the year of application.

7 In the case of either 6(a) or 6(b) above, the re-admission fee payable is additional to any subscriptions either outstanding from the year in which the person ceased to be a member or payable for the year in which they are re-admitted to membership.

8 Where a person is not re-admitted, any fees and subscriptions paid pursuant to these regulations will be repayable.

Waivers

9 An applicant seeking re-admission to membership whose membership has ceased under the terms of Principal Bye-law 7(b), failure to pay the annual subscription by 31 March, shall be granted a waiver of either part or whole of the re-admission fee provided he can demonstrate to the Members' Registrar's satisfaction that the non or late payment of the annual subscription was due to circumstances which were wholly outside the applicant's control.

10 In the event that the Re-admissions Sub-Committee refuses an application for re-admission to membership it shall give written reasons for refusal.

Appeals against Refusal to re-admit to Membership

11 An applicant refused readmission to membership may, within 28 days of the date on which the written reasons for such refusal are sent to him, give notice of appeal to the Director. Any such notice shall state the grounds of appeal.

12 As soon as practicable after receipt by the Director of an effective notice of appeal under Regulation 11 above, the Chairman of the Appeal Committee, or failing him its Vice Chairman, shall appoint a panel to hear the appeal and Disciplinary Bye-laws 27, 28 and 29 shall apply as appropriate. With the exception of Appeal Committee Regulations 6, 7, 12, 13 and 27–33 the Appeal Committee Regulations shall apply to the hearing of the appeal.

Resignations

13 The Members' Registrar shall accept the resignation of any member tendered under Principal Bye-law 6 unless (i) he has been notified that there is an unresolved complaint against that member; or (ii) there is in his view any other reason why the resignation should be considered by the Investigation Committee in either of which cases the Members' Registrar shall refer the tendered resignation to the Investigation Committee to be dealt with.

14 In all other cases the discretion of the Council to accept the resignation of a member under Principal Bye-law 6 shall be exercised by the Investigation Committee.

Commencement

15 These Regulations shall apply to all matters considered after 1 January 2007 notwithstanding the date upon which any application was made.

Section 5

Regulations relating to learning and professional development

Regulations relating to learning and professional development

The regulations relating to learning and professional development have been reviewed and updated.

The new version of the regulations comes in to force on 1 January 2009.

For this reason, and to prevent any misdirection, no regulations relating to learning and professional development are shown in this edition of the *Members' Handbook*.

Please visit www.icaew.com/membershandbook for the most up-to-date version of this section. The revised regulations will be published online once the review has been completed and will comprise:

5.1 Regulations relating to provisional members
5.2 Regulations relating to ICAEW authorised training employers
5.3 Regulations relating to members
5.4 Regulations relating to non-ACA qualifications
5.5 Regulations relating to rights of appeal.

Section 6

Regulations and guidance relating to practice

Council statement on engaging in public practice

(Effective from 1 January 2008)

1 If you engage in public practice in the United Kingdom (which, for this purpose, includes the Channel Islands and the Isle of Man) or the European Community (which is the European member states and Iceland, Liechtenstein and Norway) you must hold a practising certificate. If you are in public practice in the United Kingdom or the Republic of Ireland you must comply with the Professional Indemnity Insurance Regulations. A practising certificate holder is also subject to practice assurance as set out in the Practice Assurance Regulations.

2 In order to clarify the scope of public practice, Council has produced this statement and guidance which seek to define when you are, and are not, considered to be engaging in public practice and so in need of a practising certificate. You should consider the contents of the statement and the annexes (annex 1 – public practice and annex 2 – accountancy services) before concluding whether a practising certificate is needed. Your considerations should also cover all the roles that you have as a practising certificate may be needed for any of them.

3 You should read this statement in conjunction with the Continuing Professional Development Regulations and the Learning and Professional Development Regulations set out in the *Members' Handbook*.

4 Definitions used in the statement:

accountancy services	• the preparation of financial records, returns, statements or information; or • the provision of consultancy or advice concerning accounting, auditing, insolvency or taxation matters; or • the provision of a service that requires a specific licence that the Institute can provide (even if the licence is not obtained from the Institute); or • the representation of a client to/before third parties in matters concerning accounting, auditing, insolvency or taxation
entity	a sole practice, partnership, limited liability partnership, company, other corporate body or any other entity used to provide accountancy services
group	a parent undertaking and its subsidiary undertakings where the undertaking is a body corporate, partnership or an unincorporated association

principal	an individual in sole practice, a person who is a partner (including both salaried and equity partners), a member of a limited liability partnership, a director or a trustee regardless of the role of the member as a principal in that entity or any individual who is held out as being a principal
public practitioner	an entity which provides accountancy services to clients in anticipation of reward where: • a substantial part of the activities of that entity is the provision of such services; and • if the entity is part of a group, a substantial part of the activities of the group is the provision of such services
substantial part	more than 10% of the total annual turnover of the entity or the group
client	a body or person to whom an accountancy service is provided, except if the accountancy service is provided to another entity in the same group

5 A member is engaged in public practice if he is a principal in:

- a public practitioner; or
- the parent entity of a public practitioner; or
- an entity which is a principal of a public practitioner.

6 A member must hold a practising certificate to be a responsible individual in an audit firm under the Institute's audit regulations or to be a licensed insolvency practitioner who accepts appointments.

Exemptions

7 A member employed by a public practitioner does not, by virtue of his employment, engage in public practice.

8 A member who is employed to provide accountancy services to his employer does not thereby engage in public practice. For the purposes of deciding if a practising certificate is needed, employment includes situations where the relationship between the member and the recipient of the accountancy services is similar to that of an employer/employee.

9 An employee of a firm of public practitioners who is required by his or her employer to act as a trustee, administrator or the donee of a power of attorney is not subject to the direction of his employer in the exercise of the duties of such an office and, in these respects, acts more as a sole practitioner than as an employee. Nevertheless, since the employee is not holding himself out **personally** as providing services to the public he is not merely by reason of such an appointment engaged in public practice.

10 An ex-principal of a firm of public practitioners, commonly known as a consultant, is not engaged in public practice if he provides accountancy services to that firm.

11 A member is not engaged in public practice if he gratuitously or for a nominal amount (which is in the nature of expenses and does not exceed £500 per appointment):

- provides accountancy services to a small charitable, community, religious or sporting body, or to similar bodies of a non profit-making nature, whose income is less than £100,000; or
- acts as auditor to a small entity (as described above) that is not required to be audited by a registered auditor.

(The income limit is the point at which accruals accounting is required for charities and should this change, the limit in this exemption would be changed. If a member undertakes an audit, he should be very careful that he does not represent himself as a registered auditor if this is not the case.)

12 A member who acts as a director, trustee, treasurer or other officer of an entity (unless the entity is a public practitioner) does not need a practising certificate even if in that role the member provides accountancy service to the entity. Whether or not the office is remunerated is not a consideration.

13 A member who gratuitously and not in anticipation of reward applies his skills for the private benefit of friends or family does not thereby engage in public practice.

14 A member who gratuitously and not in anticipation of reward applies his or her skills for the benefit of others via an organisation such as a voluntary advice bureau for the public does not thereby engage in public practice.

General

15 Additional guidance is given on 'public practice' and 'accountancy services' in annexes 1 and 2 respectively. Annex 3 contains a flowchart to help members ascertain whether a practising certificate is needed. Further information, including how to apply for a practising certificate, can be found on the Institute's website at www.icaew.com/pc.

16 It is each member's responsibility to ascertain whether or not he is engaged in public practice and whether he is thus required to hold a practising certificate and professional indemnity insurance.

17 If a member remains in doubt as to whether his activities amount to engaging in public practice, he should contact Ethics Advisory Services on +44 (0)1908 248 258 and give all the facts of his circumstances.

18 A member who is not engaged in public practice may nevertheless incur liabilities against which protection can be obtained only by holding professional indemnity insurance. Members should therefore be mindful of

the possible consequences to themselves and others from acting in a professional capacity without insurance. A member who provides accountancy services in circumstances where a practising certificate is not needed should inform the recipient of the accountancy services of the absence of professional indemnity insurance.

19 A member who does not require a practising certificate under this statement may still fall within the requirements to be monitored under anti-money laundering legislation. This is particularly the case for those who provide 'accountancy services by way of business', which may include, for example, interim managers who use a company to provide interim management services. Monitoring can be by the Institute and this would be as part of Practice Assurance; for others it would normally be done by HM Revenue and Customs. Such members may wish to consider obtaining a practising certificate and so fall within the anti-money laundering monitoring that is part of Practice Assurance.

Annex 1

Guidance on 'public practice'

The definition of 'public practice' sets out the situations in which a practising certificate is needed, assuming the 'entity' is providing accountancy services. The following notes give guidance on this definition.

It does not matter if the individual member is not directly providing accountancy services. It is sufficient that the member is a principal in an entity that provides such services. It is also the case that, if a member is a principal of an entity which itself is principal of a firm providing accountancy services, then that member is engaged in public practice.

If the member is a principal of a company in a group, the situation of the group needs considering. If a substantial part (as defined above) of the activities of the group is accountancy services, then members who are principals in the holding company (even if it is not providing accountancy services) or the subsidiaries providing the accountancy services are engaged in public practice. If accountancy services are not a substantial part of the group's activities, then a member is not engaged in public practice, even if the particular entity in which the member is a principal does provide accountancy services.

Accountancy services have to be provided in anticipation of reward for a member to be engaged in public practice. Thus, although accountancy services may be provided to a family member or a friend, it is the absence of any expectation of reward that is the key issue. If a reward is subsequently received, this does not change the original provision of accountancy services. However, the member would have to be sure that any subsequent provision of services to that individual was not in the anticipation of further reward.

The following is a list of common situations which members may find useful in deciding if they are engaged in public practice. (Depending on the example, the assumption is that the member concerned is not already in public practice.)

	Member role	Practising certificate needed or not
1	My only role is as the marketing principal in a public practitioner.	The role of the individual principal is irrelevant. If you are a principal in a public practitioner, you need a practising certificate.
2	I act as an expert in tax matters for other firms of chartered accountants.	If your relationship to the other firms is as a principal, then you are engaged in public practice and need a practising certificate.
3	I am a principal in a firm whose only activity is to be a principal in a public practitioner.	This constitutes a group where the group meets the definition of a public practitioner so you are in public practice and need a practising certificate.
4	I am a principal in a non-trading holding company where more than 10% of the turnover of the group is the provision of accountancy services.	As the group meets the definition of a public practitioner, and you are a director of the holding company, then you are engaged in public practice and need a practising certificate.
5	I am an employee responsible individual for audit work.	It is a requirement of the audit regulations that you have a practising certificate.
6	I am a principal in a holding company where less than 10% of the turnover of the holding company is the provision of accountancy services but more than 10% of the turnover of the group is the provision of accountancy services.	As the group meets the definition of a public practitioner and you are a director in the holding company, you are engaged in public practice and need a practising certificate.
7	I provide audit review services etc. to firms of chartered accountants.	If you are acting on your own account as a principal in relation to those other firms, you are engaged in public practice and need a practising certificate.
8	I am an employee holding an insolvency licence and I accept insolvency appointments.	It is a requirement of the insolvency regulations that you have a practising certificate. If you do not take appointments, there is no requirement under the insolvency regulations to have a practising certificate.

9	I have been asked to undertake an independent examination of a charity.	Depending on the size of the charity and any income you receive you may not need a practising certificate.
10	I have retired but remain with my former practice as a consultant.	As you are no longer a principal then you do not meet the definition of being in practice so no practising certificate is needed. However, you should be careful that you are not held out as a principal by the firm as this could have other legal consequences, as well as bringing you back into the definition of a principal and so needing a practising certificate.
11	I am an employee/principal of an entity whose primary purpose is to provide financial services (ie, services that would need a licence from the Financial Services Authority), insurance services, and computer installation or computer applications.	You are not engaged in public practice. However, remember that the group situation may need to be considered. If the main objective of the group is the provision of accountancy services and the entity described in the adjacent column is the holding company, then, if you are a principal in that entity, you need a practising certificate.
12	I am the finance director of a company that has nothing to do with providing accountancy services.	Principals (including directors) do not need a practising certificate unless the activities of the business meet the definition of a public practitioner.
13	I act as an interim manager, either personally or through a corporate entity, to businesses. In this relationship, the businesses effectively act as my employer and I effectively work as an employee.	If your relationship to the entities that you work for is not a principal/client relationship, then you are not engaged in public practice and do not need a practising certificate.
14	I give time voluntarily to act as a trustee (or treasurer) of a charity and this involves preparing the entity's accounts.	You are not acting in a public practice role and do not need a practising certificate.
15	I have been asked to undertake the audit of a small charity (that is one whose income is less than £100,000) and there is no legal requirement (and no requirement in the charity's constitution or from a regulator) for the audit to be undertaken by a registered auditor. I will not receive a fee.	As there is no legal (or other) requirement for an audit by a registered auditor and this is a 'small' charity, there is no need for a practising certificate (but you should make sure that you do not represent yourself as a registered auditor).

16	I give time voluntarily to advise the clients of the local Citizens Advice Bureau (or similar).	You are not doing this in anticipation of reward and so are not in public practice and do not need a practising certificate.
17	I am a principal in a company where more than 10% of the turnover of the company is the provision of accountancy services but less than 10% of the turnover of the group is the provision of accountancy services.	As the group does not meet the definition of a public practitioner you are not engaged in public practice and do not need a practising certificate.
18	I act as a subcontractor providing accountancy services to an accountancy firm. In such working relationships, the firm effectively acts as my employer and I effectively work as an employee.	You are not holding yourself out, or being held out, as providing accountancy services to third parties so you are not in public practice and do not need a practising certificate. This also applies if an agency contracts for the work. Also, the relationship to the firms that you work for is not a principal-client relationship.
19	I am not a principal but my firm wants me to act as a trustee (or administrator or donee of a power of attorney).	As you are not being held out as providing services to the public, you are not engaged in public practice and do not need a practising certificate.

Annex 2

Guidance on accountancy services

Members may find the following lists of common activities useful in deciding if the work that they undertake falls within the definition of accountancy services.

These services are regarded as accountancy services

1 bookkeeping (ie, the entry of transactions into the accounting records)
2 preparation of management or financial accounts
3 external audit and assurance services
4 internal audit of accounting and internal control systems
5 advice or consultancy on accounting and financial reporting systems
6 payroll services
7 dealing with personal/business tax returns
8 providing tax advice
9 representing a client in a tax situation (eg. client is having an investigation and needs someone to deal with the tax authorities)
10 investment business advice undertaken under a licence from a Designated Professional Body
11 preparation of cash flows and budgets

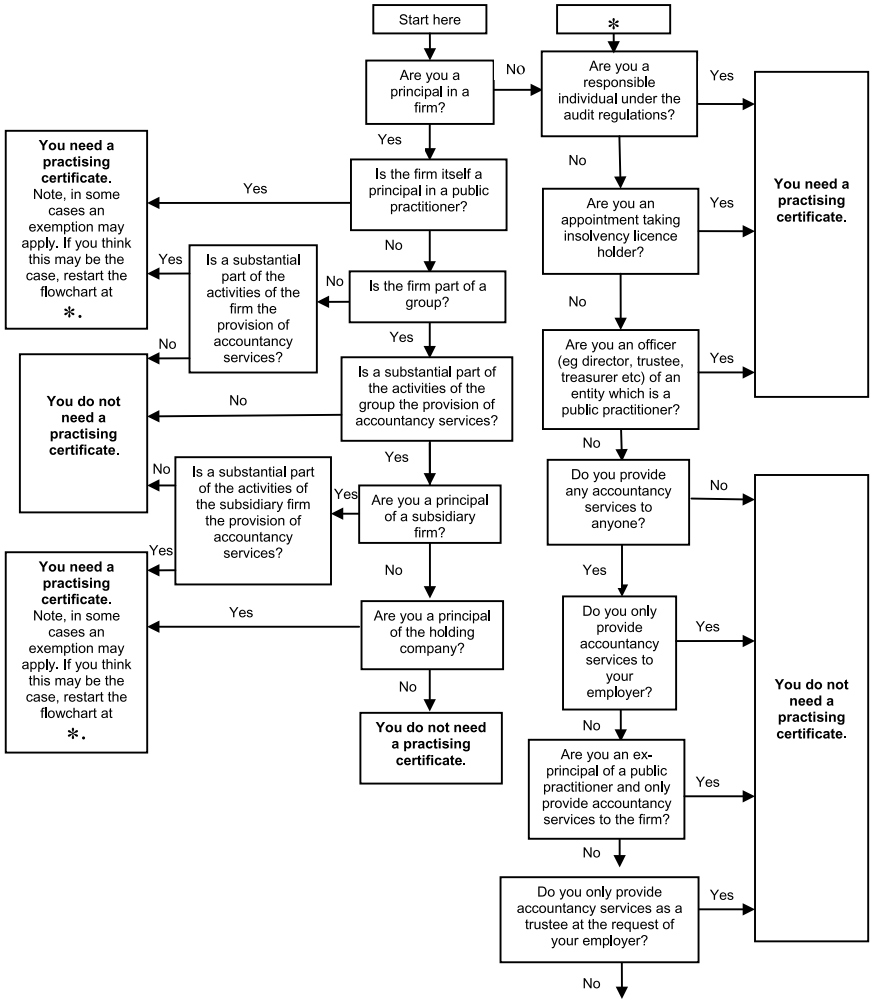
12 business funding advice, except where the purpose of the advice is to actively seek/negotiate the source of funds
13 due diligence (ie, investigations into the accounting or financial aspects of a transaction such as a company take over)
14 preparation of business plans
15 management consulting on accountancy activities
16 accepting insolvency appointments
17 debt counselling
18 compliance services (including file reviews) supplied to firms of accountants
19 valuing incorporated and unincorporated businesses, shares and related instruments, and intangible assets
20 forensic accounting

These services are not regarded as accountancy services.

21 investment business activities conducted under FSA authorisation
22 acting as a trustee
23 training services to accounting firms or students
24 business funding advice where this only involves seeking/negotiating the source of funds
25 management consulting on non-accounting matters
26 company secretarial matters
27 computer hardware and software installation
28 computer training

Annex 3

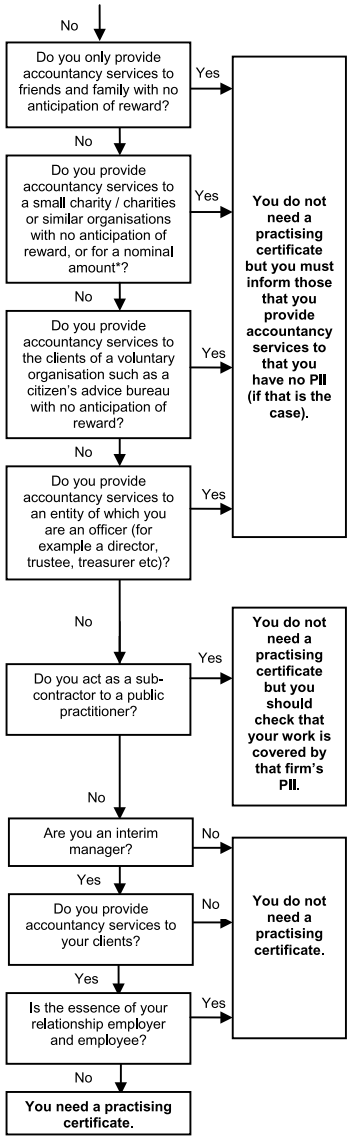
This flowchart is to help members decide if they need a practising certificate. Please note, a member may have a number of roles, some of which need a practising certificate. A member should use the flowchart for each role to establish if a practising certificate is needed. The flowchart uses some of the defined terms from the Council statement and these are included below.


Start here
Are you a principal in a firm?
No
Yes
Is the firm itself a principal in a public practitioner?
Yes
You need a practising certificate. Note, in some cases an exemption may apply. If you think this may be the case, restart the flowchart at *.
No
Is the firm part of a group?
No
Is a substantial part of the activities of the firm the provision of accountancy services?
Yes
No
You do not need a practising certificate.
Yes
Is a substantial part of the group the provision of accountancy services?
No
Yes
Are you a principal of a subsidiary firm?
Yes
Is a substantial part of the activities of the subsidiary firm the provision of accountancy services?
No
Yes
You need a practising certificate. Note, in some cases an exemption may apply. If you think this may be the case, restart the flowchart at *.
No
Are you a principal of the holding company?
Yes
No
You do not need a practising certificate.
*
Are you a responsible individual under the audit regulations?
Yes
No
Are you an appointment taking insolvency licence holder?
Yes
No
Are you an officer (eg director, trustee, treasurer etc) of an entity which is a public practitioner?
Yes
No
Do you provide any accountancy services to anyone?
No
Yes
Do you only provide accountancy services to your employer?
Yes
No
Are you an ex-principal of a public practitioner and only provide accountancy services to the firm?
Yes
No
Do you only provide accountancy services as a trustee at the request of your employer?
Yes
No
You need a practising certificate.
You do not need a practising certificate.

Accountancy services	• the preparation of financial records, returns, statements or information; • the provision of consultancy or advice concerning accounting, auditing, insolvency or taxation matters; or • the provision of a service that requires a specific licence that the Institute can provide (even if the licence is not obtained from the Institute); or • the representation of a client to/before third parties in matters concerning accounting, auditing, insolvency or taxation.
Public practitioner	an entity which provides accountancy services to clients in anticipation of reward where: • a substantial part of the activities of that entity is the provision of such services; and • if the entity is part of a group, a substantial part of the activities of the group is the provision of such services.
Substantial part	more than 10% of the total annual turnover of the entity or the group.

* These entities are small charitable, community, religious or sporting bodies, or similar bodies of a non profit-making nature, whose income is less than £100,000, the service is not an audit (which can only be undertaken by a registered auditor) and any amount received does not exceed £500 and is more in the nature of expenses.

A member who does not require a practising certificate under this statement may still fall within the requirements to be monitored under anti-money laundering legislation. This is particularly the case for those who provide 'accountancy services by way of business', which may include, for example, interim managers who use a company to provide interim management services. Monitoring can be by the Institute and this would be as part of Practice Assurance; for others it would normally be done by HM Revenue and Customs. Such members may wish to consider obtaining a practising certificate and so fall within the anti-money laundering monitoring that is part of Practice Assurance.



Regulations governing corporate practice

(This edition includes all amendments made up to 1 January 2008 and none have been made since.)

1 These regulations were made by the Council on 6 November 1991 under former Bye-law 59(b) (now Bye-law 51(b)). They came into force on 1 December 1991.

Interpretation

2 Words and phrases used in these regulations have the same meaning as in the bye-laws.

3 The term 'director' means any person occupying the position of director, by whatever name called and includes a shadow director within the meaning of the Companies Act 2006, section 251.

Corporate Practice

4 A member is, by virtue of being a director of a body corporate, to be regarded as engaging in public practice if the body corporate is engaged in public practice.

5 A member may not so engage in public practice if it is contrary to any applicable law for the body corporate in question to engage in public practice.

Notes

(These notes do not form part of the regulations)

(i) Regulation 4 permits members to engage in public practice as directors of bodies corporate. Under Bye-law 51(b) members are already permitted to engage in public practice as sole practitioners and partners and under Bye-law 1 practice as an employee is not treated as public practice.

(ii) As a result of these regulations the only restrictions on corporate practice are now:
  (a) those contained in the Institute's Audit Regulations and Guidance;
  (b) those contained in the Institute's Designated Professional Body Handbook; and
  (c) those contained in the Institute's Regulations governing the use of the description 'chartered accountants'.

(iii) A member who is an employee of a corporate firm is required to hold a practising certificate:

(a) if he is a responsible individual within the meaning of the Audit Regulations and Guidance;
(b) if he is an insolvency practitioner licensed by the Institute; or
(c) in circumstances prescribed by the Council.

(iv) Guidance on what constitutes engaging in public practice is contained in the Council statement in section 6.1.

(v) The Companies Act 2006, section 251(1) and (2), states that:
'(1) In the Companies Acts "shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.
(2) A person is not be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity.'

Regulations governing the use of the description 'Chartered Accountants'; and general affiliates[1] *of the Institute of Chartered Accountants in England and Wales*

1 These regulations were made by the Council under Clauses 12A and 16 of the Supplemental Charter and Bye-law 55 on the fifth day of April 2000 and came into effect on the first day of May 2000[2].

2 In these regulations the term 'Chartered Accountant' means a member of the Institute of Chartered Accountants in England and Wales (the Institute) or a member of one of the following bodies:

The Institute of Chartered Accountants of Scotland;
The Institute of Chartered Accountants in Ireland;
The Institute of Chartered Accountants in Australia;
The Canadian Institute of Chartered Accountants;
The South African Institute of Chartered Accountants;
The Institute of Chartered Accountants of Zimbabwe;
The Institute of Chartered Accountants of New Zealand.

3 'Member Firm' shall mean: –

(a) a member engaged in public practice as a sole practitioner; or
(b) a partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or
(c) a limited liability partnership engaged in public practice of which more than 50 per cent of the rights to vote on all, or substantially all, matters of substance at meetings of the partnership are held by members; or
(d) any body corporate (other than a limited liability partnership) engaged in public practice of which: (i) 50 per cent or more of the directors are members; and (ii) more than 50 per cent of the nominal value of the voting shares is held by members; and (iii) more than 50 per cent of the aggregate in nominal value of the voting and non-voting shares is held by members.

[1] Different requirements apply to applications for affiliate status in the regulated areas. Such applicants should refer, as appropriate, to the Audit Regulations and Guidance, the Insolvency Licensing Regulations and the Designated Professional Body Handbook.
[2] Amended on 28 August 2008 by the Professional Standards Board; changes take effect from 1 September 2008.

4 The Interpretation Act 1978 applies to these regulations in the same way as it applies to an enactment.

5 In these regulations, unless the context otherwise requires:

(a) words importing the masculine gender include the neuter (as well as, by virtue of the Interpretation Act 1978 as applied by regulation 5, the feminine);
(b) words importing the neuter gender include both the masculine and the feminine.

6 A member firm which engages in public practice is entitled to describe itself as 'Chartered Accountants' provided that any partner, member (in the case of a limited liability partnership) or director (in the case of a company) who is not a chartered accountant holds affiliate status from the Institute under its *Designated Professional Handbook Regulations*, *Audit Regulations*, *Insolvency Licensing Regulations* or these Regulations.

7 If the requirements of regulation 6 are not met during a period of up to 3 months a firm will be entitled to continue to use the description 'Chartered Accountants' during that period if it can demonstrate its intentions to meet the requirements.

8 An applicant for recognition as a general affiliate under these regulations shall submit an application and provide an undertaking in the form set out in the Schedule to these regulations or any subsequent amendment of it approved by the Investigation Committee.

9 A person recognised as a general affiliate shall not have any right or entitlement under the Institute's Royal Charter, Supplemental Charter, Bye-laws and Regulations save as expressly conferred by these regulations and in particular, shall have no right to use the designatory letters ACA or FCA.

10 A general affiliate who makes any representation that he has any right or entitlement other than as conferred on him by these regulations shall render himself liable to disciplinary action.

11 The Disciplinary Bye-laws shall apply to a complaint against a general affiliate as they apply to complaints against members and without prejudice to the generality of the foregoing the term 'defendant' shall be read and construed as including a general affiliate.

12 Where a formal complaint against a general affiliate is found proved in whole or in part a tribunal may make against him such one or more of the following orders as it considers appropriate having regard to his past disciplinary record, its view as to the nature and seriousness of the formal complaint (so far as proved); and any other circumstances which the tribunal considers relevant:

(i) that he cease to be a general affiliate;

(ii) that he be reprimanded;
(iii) that he be severely reprimanded;
(iv) that he be fined a specified sum; or
(v) that he pay the whole or part of the costs incurred by the Institute in investigating a complaint and bringing disciplinary proceedings in respect of any complaint found proved.

13 In addition to making an order against a general affiliate a tribunal shall be entitled to order that a member firm cease to be entitled to describe itself as 'Chartered Accountants' for so long as the person concerned remains a partner in or a member (in the case of a limited liability partnership) or director (in the case of a company) of the member firm.

14 These regulations may be amended or repealed by the Professional Standards Board.

15 The Investigation Committee shall be responsible for determining applications for general affiliate status. Such status may be granted if it is satisfied that:

(i) the applicant is a partner, or has been offered a partnership, in a member firm;
(ii) the applicant is a member (in the case of a limited liability partnership) or director (in the case of a company) or has been offered the position of a member or director (as appropriate) in a member firm;
(iii) the applicant is a fit and proper person to be granted general affiliate status and is certified to be such by at least two other members. Without prejudice to the generality of the foregoing the following shall be regarded as events giving rise to a presumption that an applicant is not fit and proper and therefore unsuitable to be granted general affiliate status:
  (a) that he is or has been bankrupt or entered into an individual voluntary arrangement;
  (b) that he has, individually or as a partner, made an assignment by reason of insolvency of some or all of his assets for the benefit of his creditors;
  (c) that he has made any arrangement or entered into a composition with his creditors to satisfy his debts, whether by resolution of his creditors or court order or under any deed or other document by reason of insolvency;
  (d) that he is a partner in a firm which:
    (i) has had a winding-up order made against it on grounds of insolvency; or
    (ii) has made a proposal to enter into a voluntary arrangement on grounds of insolvency, or has entered into such a voluntary arrangement; or
    (iii) has had an administration order made against it on grounds of insolvency; or
    (iv) has had a receiver appointed by a creditor or by a court on the application of a creditor;

(e) that he is a member of a limited liability partnership or director of a company which:
  (i) has been the subject of an effective resolution passed by the shareholders (or in the case of a limited liability partnership, by its members) for it to be wound up or has had a winding-up order made against it on grounds of insolvency; or
  (ii) has made a proposal to enter into a voluntary arrangement on grounds of insolvency, or has entered into such a voluntary arrangement; or
  (iii) has had an administration order made against it on grounds of insolvency; or
  (iv) has had a receiver appointed by a creditor or by a court on the application of a creditor;

(f) that he has had an adverse finding of a disciplinary nature made against him by any professional or regulatory body;

(g) that he has been removed on the ground of misconduct from the office of liquidator, trustee, receiver, receiver and manager, administrative receiver, administrator or supervisor of a voluntary arrangement;

(h) that he has been the subject of a Disqualification Order under the Company Directors Disqualification Act 1986 or under the Insolvency Act 1985 or 1986;

(i) that he has been found to have knowingly and wilfully in relation to the conduct of insolvency as an Office Holder or potential Office Holder infringed the requirements of the Companies Act 1985 or the Insolvency Act 1986, or the Bankruptcy (Scotland) Act 1985 or any equivalent predecessor legislation, and/or any subordinate legislation including any Rules, Regulations or Orders, as from time-to-time re-enacted or amended and equivalent legislation in Northern Ireland (i.e. the Insolvency (Northern Ireland) Order 1989 and its subordinate legislation);

(j) that he has pleaded guilty to or been found guilty of any indictable offence in England and Wales or to any comparable offence elsewhere;

(iv) the applicant has completed a form of undertaking in the terms set out in the Schedule to these regulations or in a form approved by the Investigation Committee;

(v) the applicant is able to demonstrate appropriate and relevant experience of accountancy or of a related discipline or has one or more of the following qualifications:
  (a) Membership of the Association of Chartered Certified Accountants;
  (b) Membership of the Chartered Institute of Management Accountants;
  (c) Membership of the Chartered Institute of Public Finance and Accountancy;
  (d) Membership of the Chartered Institute of Taxation;
  (e) Membership of the Institute of Management Consultants; or
  (f) Membership of the Association of Accounting Technicians.

16 Sub-paragraph (v) of Regulation 15 shall not apply to an applicant for general affiliate status who is a director of a member firm engaged in public practice which has been incorporated in the Isle of Man or Singapore and which has only two directors, provided that one director is a Chartered Accountant and holds more than 50 per cent of the voting rights in the Board of Directors, committee or other management body. For the avoidance of doubt all other requirements of these Regulations apply to Isle of Man and Singapore incorporated bodies in the same way as they apply to bodies incorporated elsewhere.

17 A general affiliate shall pay such annual subscription as the Council may determine from time-to-time.

18 The Investigation Committee may delegate to any member of the Institute's staff or to any committee or sub-committee of the Institute power to take any decision under these regulations which it is empowered to take other than the power to amend or repeal them.

19 The Investigation Committee may at any time withdraw general affiliate status from an individual if:

(i) it considers that he is no longer a fit and proper person;
(ii) he has ceased to be engaged, or to be entitled to engage in accountancy or a discipline relevant to the profession of Accountancy;
(iii) the member firm of which he is a partner, member or director (as appropriate) has ceased to be a member firm;
(iv) he has ceased to be a partner, member or director (as appropriate) in the member firm to which his affiliate status related;
(v) he has failed to comply with any restriction or condition imposed on him with the authority of the Institute;
(vi) he has failed to pay the annual subscription within 30 days of the due date;
(vii) he has breached or not complied with any applicable requirement of the Royal Charter, Supplemental Charter, Bye-laws or Regulations of the Institute;
(viii) it is satisfied that any information provided in support of an application for general affiliate status was false or misleading whether or not knowingly so.

20 A general affiliate may tender his resignation by notice in writing to the Chief Executive and on its acceptance by the Investigation Committee, but not until then, he shall cease to be a general affiliate.

21 The Investigation Committee may impose restrictions or conditions at the time of grant of general affiliate status, or at any time thereafter, if it considers it appropriate to do so.

22 A general affiliate or an applicant for general affiliate status must provide details in writing within 14 days of any change to information provided by him in an application for general affiliate status.

23 Any notice or other document required to be served on a general affiliate may be sent by pre-paid post to him at his registered address or at his last known or usual place of residence or business.

24 Any notice or other document required under these regulations to be served by a general affiliate shall be sent to the ICAEW, Metropolitan House, 321 Avebury Boulevard, Milton Keynes, MK9 2FZ.

25 The regulations made by the Council on 2 October 1991 and subsequently amended and entitled 'Regulations Governing the Use of the Description Chartered Accountants' (the 1991 Regulations) shall cease to have effect save to the extent necessary for any disciplinary purpose from the date that these regulations take effect.

26 These regulations shall not affect the validity of any dispensation previously granted to a member firm under the authority given by the Council on 3 December 1997 (allowing a lesser percentage than 50 per cent of Chartered Accountant directors), subject to such a firm otherwise complying fully with these regulations.

27 These regulations shall apply to any person who immediately prior to these regulations taking effect was an affiliate by virtue of the 1991 regulations and who shall while he is subject to these regulations be referred to as a general affiliate.

SCHEDULE

Part I

Form of Application

APPLICATION TO BECOME A GENERAL AFFILIATE

1 Firm details

Firm name

Firm number

Firm address

Postcode

Phone

Fax

Firm's email address

Please enclose a copy of the firm's proposed letterhead

2 Applicant's details

Title (Mr, Mrs, Ms, Dr, etc)

Last name

First names

Designatory letters (see Section 3)

Date of birth DD MM YYYY

Home address

Postcode

Daytime phone number

Fax

Applicant's email address

Has the Institute previously granted you 'affiliate' or 'non-member' status? For example, 'audit affiliate', 'DPB affiliate' or 'insolvency affiliate' status. Yes No

If 'Yes', please give details.

If your application is successful, when would you like your status as a general affiliate to start? DD MM YYYY

3 Applicant's professional qualifications and relevant experience

If you are a member of ACCA, CIMA, CIPFA, CIT, IMC, or AAT, you do not need to fill in this section.

All other applicants – Please give details of any qualifications you hold which you consider relevant to the work of an accountancy practice: name of qualification; date of qualification; name, address and telephone number of awarding body; your membership number.

Please give details of your experience in accountancy and any other areas which you consider to be relevant to the work of an accountancy practice: name and address of entities within which you gained this experience; your role and responsibilities within the entity; dates, etc.

Please attach a separate sheet if necessary.

4 Applicant's confirmations and undertakings

1 I, the undersigned, hereby apply to the Institute of Chartered Accountants in England and Wales to be accepted as a general affiliate under the 'Regulations governing the use of the description "Chartered Accountants" and to general affiliates of the Institute of Chartered Accountants in England and Wales' (*Members' Handbook*, Section 6.3).

2 I certify that the information given in this application is correct and I confirm that:

a I have never been declared bankrupt or subject to an individual voluntary arrangement under the Insolvency Act 1986 or any other arrangement or composition with creditors nor to a deed of arrangement or an assignment by reason of insolvency of my assets for the benefit of my creditors, nor have I been a partner in a firm or director of a corporate body which has been the subject of insolvency proceedings;

b I have not been the subject of an adverse disciplinary finding made against me by any professional or regulatory body;

c I have not been removed for misconduct from the office of liquidator, trustee, receiver, receiver and manager, administrative receiver, administrator or supervisor of a voluntary arrangement;

d I have not been the subject of a disqualification order under the Company Directors Disqualification Act 1986 or under the Insolvency Act 1985 or 1986;

e I have not been found to have knowingly and wilfully – in relation to the conduct of an insolvency or as an office holder or potential office holder – infringed the requirements of the Companies Act 1985 or the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985 or any equivalent predecessor legislation, including any subordinate legislation including any rules, regulations or orders, as from time to time re-enacted or amended, any equivalent legislation in Northern Ireland (ie the Insolvency (Northern Ireland) Order 1989 and its subordinate legislation); and

f I have not pleaded guilty to, or been found guilty of, any indictable offence in England or Wales, nor have I pleaded guilty to, or been found guilty of, a comparable offence elsewhere.

3 I undertake that, if accepted as a general affiliate, I will comply with the Charter, Supplemental Charter, the Principal Bye-laws, the Disciplinary Bye-laws and Regulations which, at the time of acceptance or thereafter, are in force. In particular, I will:

a observe and uphold the ethical and professional standards of the Institute;

b perform faithfully and promptly any service that I am retained or employed to undertake in my professional capacity;

c provide promptly and willingly all such information and assistance as I am able, if asked to do so by the Institute in pursuance of its duties; and

d pay any fee required by the Institute of Chartered Accountants in England and Wales.

4 I understand that I shall not be entitled to call myself a chartered accountant and that general affiliate status does not confer any rights, acknowledgements, status or designatory letters on a general affiliate nor entitle a general affiliate to be publicly represented as having such.

5 I acknowledge and agree that if I am accepted as a general affiliate, I shall be subject to the disciplinary procedures of the Institute for any failure to comply with its bye-laws or regulations or to fulfil the undertakings in this application or any false or misleading statement made in this application.

6 I acknowledge that my general affiliate status will be withdrawn if the firm ceases to be a member firm or if I cease to be a principal in the member firm to which my general affiliate status relates.

Signature

Full name

Date

5 Sole practitioners – *please complete this section if you intend to take the applicant into partnership*

I am a chartered accountant and sole practitioner. I confirm that the applicant for general affiliate status will, subject to his/her application being approved, become my partner. I confirm that the information provided by him/her in this form is true to the best of my knowledge and belief and that he/she is a fit and proper person to become a general affiliate of the Institute.

I confirm that, in accordance with regulation 4, more than 50% of the rights to vote on all or substantially all matters at meetings of the partnership are held by myself.

Signature

Full name

Date

Firm name

Firm address

Confirmation by another member

As a sole practitioner or sole director taking a non-member into partnership, you will need to obtain confirmation from another member that the prospective general affiliate is 'fit and proper'. The person giving this confirmation should sign below.

If you do not know another chartered accountant, please ask another qualified accountant (for example, an ACCA or CTA member) to give this confirmation.

I am a chartered accountant and confirm that the applicant is known to me and that, to the best of my knowledge and belief, the information provided by him/her in this form is true and that he/she is a fit and proper person to become a general affiliate of the Institute.

Signature

Full name

Member number

Date

Address

6 Other firms or companies – *please complete this section if you are not a sole practitioner and intend to take the applicant into partnership*

We are chartered accountants and are partners in, or members/directors of, the firm/limited liability partnership/company referred to in this application. We confirm that the applicant for general affiliate status is a partner in, or member/director of the above limited liability partnership/company or, subject to the successful grant of general affiliate status, will be admitted to partnership or become a member/director.

We confirm that, to the best of our knowledge and belief, the information given in this form is true and that the applicant is a fit and proper person to become a general affiliate of the Institute.

We confirm that:

- (in the case of a corporate body) 50% or more of the directors are chartered accountants and more than 50% of the aggregate in nominal value of the voting and non-voting shares are held by chartered accountants; or
- (in the case of a partnership) 50% or more of the partners are chartered accountants and more than 50% of the rights to vote on all or substantially all matters of the partnership are held by chartered accountants; or
- (in the case of a limited liability partnership) more than 50% of the rights to vote on all or substantially all matters at meetings of the limited liability partnership are held by chartered accountants.

Signature of partner/director 1

Full name

Member number

Date

Signature of partner/director 2

Full name

Member number

Date

7 Firm structure – *a senior principal in the applicant's firm should complete this section*

Is your firm a corporate entity (for example, a limited company or limited liability partnership)? Yes ☐ No ☐

Is your firm part of a network or shared branding? Yes ☐ No ☐

If you have attached a copy of the firm's letterhead, you do not need to give details of all the principals below.

*If you have **not** attached a copy of the firm's letterhead, please give details below of all the principals of the firm (ie, statutory directors of limited companies, members of LLPs, partners in partnerships). Please attach a separate sheet if there are more than five principals.*

Principal's name	Chartered accountant?	Body (eg, ACCA, ICAS, ICAI)	% shares (including type) and % voting rights
	Yes ☐ No ☐		
	Yes ☐ No ☐		
	Yes ☐ No ☐		
	Yes ☐ No ☐		
	Yes ☐ No ☐		

Please give the name and relationship of any associated practice.

Name of associated company	Nature of relationship

A senior principal in the applicant's firm should read and sign the declaration below.

I confirm that the information given above is, to the best of my knowledge, true and discloses all information relevant to the application for general affiliate status. I understand that the Institute will not accept any liability for loss arising out of the processing of this application.

Signature

Full name

Member number

Date

The Institute of Chartered Accountants in England and Wales takes data protection very seriously. The personal data is being collected to process your application to become a general affiliate. Information may be passed within the Institute of Chartered Accountants in England and Wales but will not be passed to third parties outside the Institute.

If you require further information about the Institute's data protection arrangements, please contact the Data Protection Co-ordinator, The Institute of Chartered Accountants in England and Wales, Metropolitan House, 321 Avebury Boulevard, Milton Keynes, MK9 2FZ.

Checklist:

If you are an ACCA member, do you hold an ACCA practising certificate?	Yes / No
Please provide a letter from the ACCA to confirm that you hold a current ACCA practising certificate or an ACCA practising certificate and audit qualification.	
Application form completed and signed	☐
Copy of proposed letterhead	☐
Cheque for payable to Chartac (call +44 (0)1908 248 392 for fee details)	☐
Do you require a receipt for fees paid?	Yes / No

Please return this form to:
General Affiliates
Finance Department
The Institute of Chartered Accountants in England and Wales
Metropolitan House
321 Avebury Boulevard
Milton Keynes
MK9 2FZ

For office use only

Firm number		
Office number		
General affiliate number		
Practising certificate	Yes ☐	No ☐
Membership check with parent body	Yes ☐	No ☐

Date payment received

Checked by

Batch number

Copy to PSD for addition as non-member Yes ☐ No ☐

Use of the description 'Chartered Accountants'
To be read in conjunction with *Members' Handbook,* Sections 2.1, 6.3 and 9.3, and helpsheet 11, *Use of the description chartered accountants,* which explains the conditions and restrictions governing the use of the title.

Introduction
The regulations governing the use of the description 'Chartered Accountants' are published in the *Members' Handbook*, Section 6.3. The regulations prescribe the conditions which firms that are not wholly comprised of chartered accountants must fulfil if they want to use the description 'Chartered Accountants'.

Practice descriptions
Both unincorporated and corporate practices may use the description 'Chartered Accountants' if, on a head count, at least 50% of the principals (partners or directors) are members of this Institute or of the other bodies specified below and more than 50% of the management/voting control of the practice is in their hands eg in a 4-partner mixed firm, 2 of the partners must be chartered accountants and they must control more than 50% of the management votes of the practice.

The term 'Chartered Accountant' means a member of this Institute or one of the following bodies:

The Institute of Chartered Accountants of Scotland
The Institute of Chartered Accountants in Ireland
The Institute of Chartered Accountants in Australia
The Canadian Institute of Chartered Accountants
The South African Institute of Chartered Accountants
The Institute of Chartered Accountants of Zimbabwe
The Institute of Chartered Accountants of New Zealand.

Non-members
Non-member principals who are not already affiliates under the Institute's DPB arrangements, *Audit Regulations* or *Insolvency Licensing Regulations* have to submit an application for general affiliate status and provide an undertaking (attached) binding themselves to observe the Institute's bye-laws, ethical code, and regulations. Responsibility for filling in this application and form of undertaking rests with the practice. The practice should notify the Institute of any subsequent changes to its structure.

The committee responsible for considering the application for general affiliate status will need to be satisfied that:

(a) the applicant is or has been offered the position of a principal in a practice.
(b) the applicant is a fit and proper person and is certified by at least two members.
(c) the applicant has completed a form of undertaking.
(d) the applicant is able to demonstrate appropriate and relevant experience of accountancy or of a related discipline or holds one or more qualifications as specified in regulation 16(v).

A person recognised as a general affiliate does not have any right to use the designatory letters ACA or FCA.

Fit and proper

In brief, under regulation 16(ii), the non-member seeking affiliate status will be presumed not to be a fit and proper person if he/she:

(a) is or has been formally insolvent, individually or as a partner;
(b) is a partner in a firm which is or has been formally insolvent;
(c) is a director of a body corporate engaged in public practice which is or has been formally insolvent;
(d) has been subject to an adverse disciplinary finding by a professional or regulatory body;
(e) has been removed from an insolvency appointment on the grounds of misconduct;
(f) has been disqualified as a company director;
(g) has intentionally infringed legislation in relation to the conduct of an insolvency as (or as proposed as) an office holder; or
(h) has pleaded guilty to or been found guilty of any indictable offence.

General affiliates under previous regulations

Non-members who were affiliates by virtue of the 1991 regulations (and subsequent amendments) do not need to reapply and will continue to be regarded as affiliates as long as they are subject to the regulations.

Letterheads

Any practice which is not wholly comprised of chartered accountants must ensure that its letterhead is not misleading. In particular, chartered accountants should be distinguished from non-chartered accountants by the use of designatory letters or otherwise. For full details on the names and letterheads of practising firms, please refer to the *Members' Handbook,* Section 9.3 and helpsheet No 6, *Practice Names and Letterheads.*

Members of overseas chartered accountancy bodies should state in full the country of origin of their qualification, for example, CA (South Africa), ACA (Australia).

*An applicant for general affiliate status who is a director in a member firm comprising of only two directors and incorporated in the Isle of Man does not have to demonstrate appropriate and relevant accountancy (or other related discipline) experience or qualifications.

Professional indemnity insurance regulations and guidance

(This edition includes all amendments made up to 1 January 2008 and none have been made since.)

CONTENTS

Introduction

Changes to the professional indemnity insurance regulations
The PII regulations were originally issued in August 1991. These have now been revised to improve the clarity of the wording and to make other improvements and changes.

In deciding the format for the revised regulations an aim was to make them 'user-friendly'. This has been dealt with in a number of ways. The regulations are now divided into chapters and each covers a specific area. Within the limits of regulations which have a legal standing, the wording is in 'plain English'.

Guidance is now included with the regulations, or if too long, it is in chapter 6. The regulations are in **bold** print to distinguish them from the guidance. Where defined terms are used in the regulations they are printed in *italics*. The guidance is printed in plain type throughout.

The following gives a brief outline of the major revisions to the regulations.

- The period of retroactive cover is increased from five to six years. This is more in keeping with current practice. Most insurance policies already provide for a period of six years or more already. However, firms do not have to amend their policies in this respect until the first renewal after 1 January 1999.
- A new regulation has been added to define the period for the gross fee income to be used in calculating the amount of insurance.
- For those who need to enter the assigned risks pool (see chapter 4) the process is now easier.

Members and others who need to comply with the regulations
Professional indemnity insurance is compulsory for all members of the Institute who have a practising certificate and are engaged in public practice, regardless of the amount of practice income.

Council's statement on public practice is in section 6.1 in the *Members' Handbook*. This sets out a definition of public practice. If a member remains in doubt as to whether his activities amount to engaging in public practice, he should contact the Ethics Advisory Services on +44 (0)1908 248 258 and give all the facts of his circumstances.

Similarly the regulations for audit, investment business and insolvency require those so regulated to meet the requirements of the PII regulations.

Responsibility of members
The PII regulations apply to individual members but in practical terms professional indemnity insurance usually covers their practising entity – for example their partnership or their sole practice. For those members in practice with non-members these PII regulations effectively apply to the entire mixed practice. For example, in a mixed partnership, the principle of joint and several liability will make the member partner jointly liable for the actions of his non-member partners. Therefore the insurance should cover the whole practice, not just the member partner.

Members who are responsible for making their own or their firm's professional indemnity insurance arrangements should be sure that those arrangements comply with the PII regulations. Many members are in firms and the

professional indemnity insurance arrangements are handled by someone else on their behalf. This does not affect the responsibility of individual members to ensure they meet the PII regulations.

Level of insurance cover
Chapter 3 details the requirements for the minimum level of cover you must obtain. When deciding on how to achieve that level of cover you should consider the following:

- professional indemnity insurance – your broker will be able to help you to obtain cover; and
- the amount of excess to be borne by the insured – this level should only be decided after consideration of both the firm's and the principals' resources, including the borrowing capacity of each. Consider the past incidence of claims and your ability to meet multiple losses.

This is only the minimum amount of cover and you should always consider if this is adequate for your firm.

Inability to obtain insurance
If you cannot obtain cover which satisfies the PII regulations you may be able to enter the assigned risks pool for a period of time until cover is obtained in the market. Chapter 4 provides details.

Who can provide insurance
You must obtain the minimum level of cover, subject to any allowable excess, from a participating insurer and Appendix A explains who these are.

Certificate of compliance
Each year the Institute requires confirmation of compliance with the PII regulations. All those covered by these regulations are asked to complete and return a certificate of compliance, which is part of the Practice Assurance annual return. The Institute may check with brokers or insurers that the information is correct.

For many members the confirmation will be sent to their firm, and will cover all the members who are principals in the firm.

Further advice
It is possible that the minimum level of cover, while complying with the PII regulations, will not be high enough to ensure that all claims made against you will be covered. You should consider carefully the level of cover which is right for you or your firm. To assist you in this, chapter 6 includes answers to the queries which are most often raised by members and some general guidance notes.

Your broker will be able to help you if you have any further queries. If you would like to talk to someone at the Institute please telephone:

PII section	+44 (0)1908 546 365

Other useful telephone numbers are:

Advisory Services	+44 (0)1908 248 032
Assigned risk pool manager	+44 (0)1603 207 652*

* Members should refer to chapter 4 before contacting the Assigned risk pool manager.

Non-practising members
Some members hold a practising certificate even though they are not engaged in public practice. There is no requirement for these members to have professional indemnity insurance. Such members are required to confirm annually that they are still not practising. If any practice activity is contemplated, then such members should obtain professional indemnity insurance, in accordance with these regulations, before the work commences. The Members' Registrar should also be informed that practice has commenced, together with the name of the firm that the member intends to practice under. The special situation of employees who hold practising certificates under the *Audit Regulations and Guidance* or *Insolvency Licensing Regulations* is dealt with at regulation 5.3.

CHAPTER 1

General

Authority and Commencement
1.1 These *regulations* are issued by the authority of *Council.*

1.2 The *regulations* come into effect on 1 November 1998.

1.3 The Professional Indemnity Insurance Regulations which came into effect on 1 August 1991 cease to have effect on 1 November 1998. Except that any insurance held under regulation 12 of those regulations shall be deemed to meet the requirements of *regulation* 3.1b of these *regulations* until the date of its next renewal after 1 January 1999.

The definition of qualifying insurance in the previous regulations had a period of retroactive cover of five years. These regulations have a period of six years.

Interpretation
1.4 Words and expressions have the meaning given by the Interpretation Act 1978 unless defined in these *regulations.* The definitions in these *regulations* take precedence.

1.5 In these *regulations*, words importing the singular number include the plural number and vice versa. Words importing the neuter gender include both the masculine and feminine. Headings do not affect the interpretation of these *regulations.* The *regulations* will be governed by, and interpreted according to, English law.

1.6 Any reference to legislation, bye-laws, regulations, schemes or other documents will apply to any re-enactment, re-issue or amendment.

Definition of terms
1.7 In these *regulations* the following words have the following meanings.

assigned risks pool	**The arrangements by which firms who are otherwise unable to obtain professional indemnity insurance may do so for a limited period and to which all *participating insurers* subscribe.**
assigned risks pool manager	**The broking firm which advises the *Institute* and which manages the *assigned risks pool.***
authorised firm	**A sole practitioner, a partnership or a body corporate authorised under the Institute's Investment Business Regulations.**
authorised insurer	**An insurer regulated by the Financial Services Authority in the *United Kingdom,* or by the Irish Financial Regulatory Authority in the Republic of Ireland, to carry on general insurance business in the *United Kingdom* or the Republic of Ireland respectively.**
Bye-laws	**The Bye-laws of the *Institute.***
certificate of compliance	**The certificate used by the *Committee* to monitor compliance with these *regulations.***
Committee	**The Professional Indemnity Insurance Committee of the *Institute.***
Council	**The Council of the *Institute.***
firm	**a a *member* engaged in public practice as a sole practitioner or with others in a partnership or a body corporate;** **b an *authorised firm*;** **c a *licensed firm*;** **d a *registered auditor*;**

	e an *insolvency practitioner*; or **f an *insolvency affiliate.***
gross fee income	**All income in respect of work carried on in public practice, including:** **a income for personal appointments in respect of work covered by professional indemnity insurance;** **b income from third parties as commissions or brokerage (whether or not offset against charges to a client); and** **c income received in respect of work sub-contracted to others.** **It does not include:** **a the recovery of disbursements and expenses which do not form part of the chargeable fee for professional services rendered;** **b value added tax.** Gross fee income must include the fees received in respect of work which the firm has subcontracted to others. This is unless the work is clearly shown as a disbursement and the client knows that the firm is not taking professional responsibility for the work.
insolvency affiliate	**An individual granted affiliate status under the Institute's Insolvency Licensing Regulations.**
insolvency practitioner	**An individual licensed under the Institute's Insolvency Licensing Regulations.**
Institute	**The Institute of Chartered Accountants in England and Wales.**
Institutes	**The *Institute,* the Institute of Chartered Accountants of Scotland and the Institute of Chartered Accountants in Ireland.**
Joint Advisory Panel	**The *Joint Advisory Panel* appointed under regulation 5.10.**
Investigation and Discipline Scheme	**The scheme, or any predecessor or successor scheme, established under clause 1b(vii A) or clause 1b(viii A) of the Supplemental Royal Charter of 21 December 1948.**

licensed firm	**a sole practitioner, a partnership or a body corporate licensed under the Institute's Designated Professional Body arrangements.**
member	**A member of the *Institute.***
minimum limit of indemnity	**The amount of insurance required each year under these *regulations.***
participating insurer	**An *authorised insurer* who has agreed to the terms and conditions described in Appendix A of these *regulations.***
principal	**A sole practitioner, partner, director or member of a limited liability partnership, of a *firm.***
practising certificate	**The certificate issued to a *member* by the *Institute* authorising the *member* to engage in public practice.**
qualifying insurance	**Insurance which:** **a is underwritten by *participating insurers* (see Appendix A);** **b includes retroactive cover for liabilities arising from work carried out in the previous six years, except for claims or potential claims known about at the time the insurance was first taken out; and** **c is underwritten in terms of the minimum wording approved by the *Institute.*** A policy which does not use the exact approved minimum wording must contain a difference in conditions endorsement in a form approved by the Institute. The required cover may be provided by more than one insurance policy. Retroactive cover may be for a shorter period than six years if the member has only just started in practice. The guidance notes in chapter 6 explain this further.
registered auditor	**A sole practitioner, a partnership or a body corporate registered under the *Institute's* Audit Regulations.**
regulations	**These regulations as modified or amended.**
secretariat	**The people employed by the *Institute* to carry out its functions.**
United Kingdom	**Includes the Channel Islands and the Isle of Man.**

CHAPTER 2

Scope and Monitoring

This chapter explains who needs to take out professional indemnity insurance and how this is monitored. If you are about to start practising you should contact the Institute, which will be able to provide any further information you need.

Scope

2.1 These *regulations* apply to:

a a *member* holding a *practising certificate* and resident in the *United Kingdom* or the Republic of Ireland;
b a *member* in public practice in the *United Kingdom* or the Republic of Ireland;
c an *authorised firm*;
d a *licensed firm*;
e a *registered auditor*;
f an *insolvency practitioner*; and
g an *insolvency affiliate*.

The regulations governing post-qualification education and training require a member who has a practising certificate to meet the requirements of these PII regulations. This is regardless of the form of practice (that is as a sole practitioner, or as a principal in a partnership or a body corporate) or the amount of practice income. Similarly those regulated by the regulations for audit, investment business or insolvency have to meet the requirements of the PII regulations.

Members who hold a practising certificate, but who do not engage in public practice, do not need to have professional indemnity insurance.

A practising certificate is evidence of being in public practice but these PII regulations only apply to those members who are also resident, or in practice, in the United Kingdom or the Republic of Ireland. Other members who hold a practising certificate but who are resident elsewhere do not need insurance that meets the requirements of these regulations. If a member is in practice in another country then some form of insurance is recommended, but it is not mandatory. Under the regulations governing post-qualification education and training the Institute has reserved the right to inspect the work of overseas members.

However, there is no geographical limit in the regulations for audit, investment business and insolvency.

Firms that are licensed by the Institute under the Designated Professional Body arrangements and those authorised by the Financial Services Authority will need to consider the insurance requirements specified in the EU's Insurance Mediation Directive. This applies only if such firms undertake

regulated activities relating to those contracts of insurance covered by the Directive. Further information is provided in the Designated Professional Body Handbook (see note 3 at the end of part 2 of the Handbook).

2.2 These *regulations* also apply to a *member* for a period of two years after ceasing to hold a practising certificate.

2.3 Those *members* who do not make their own professional indemnity insurance arrangements should ensure that the arrangements of their *firm* comply with these *regulations.*

All members with practising certificates should satisfy themselves that they or their firm have suitable arrangements in place to comply with these regulations.

2.4 In deciding whether these *regulations* have been complied with the *Committee* will take into account any guidance issued from time-to-time, by or on behalf of *Council.* In the event of any actual or apparent conflict between these *regulations* and such guidance, the wording of these *regulations* will apply.

Monitoring
2.5 Every *firm* is required to return a completed *certificate of compliance* with the *regulations* to the *Institute* each year.

2.6 The *Committee* can require such further information and evidence as it may reasonably need from *members, firms* and *participating insurers.*

The Institute sends a reminder letter and blank certificate to all those covered by these regulations before the date on which the insurance is due for renewal. Individual principals in a firm will not receive separate certificates unless they are also in another firm on their own account. Members who hold a practising certificate but who are not engaged in public practice will not receive a certificate but will be required to declare annually that they are not engaged in public practice.

As soon as you have negotiated your new cover you should complete the certificate and return it to the Institute. It is important that you comply with this requirement. If you have any problems completing the certificate, or if you experience any delay in renewing your cover, you will receive reminders from the Institute and you should contact the practice insurance section to explain the reasons for the delay.

If you fail to complete the certificate, or to explain to the Institute why you are unable to do so, the consequences may be serious. You may be in danger of losing your registered auditor status, investment business authorisation and/or insolvency practitioner status. Your eligibility to hold a practising certificate could also be in danger and you may also be liable to disciplinary action.

Cessation of practice

2.7 A *member* who ceases to be engaged in public practice in the *United Kingdom* or the Republic of Ireland must use his best endeavours to ensure that he is covered by arrangements which satisfies these *regulations* for at least two years from the date he ceased in public practice. The terms and extent of any cover must be equivalent to that provided by his *firm's* previous *qualifying insurance.*

2.8 When a *firm* ceases the *members* in practice in that *firm* at the date of cessation shall ensure that there is in place appropriate cover to meet requirements of *regulation* 2.7 for at least 24 months following the cessation of the practice. Thereafter the *members* in practice in that *firm* shall use their best endeavours to ensure cover is in place to meet requirements of *regulation* 2.7 for a further four years. The terms and extent of the cover must be equivalent to that provided by the *firm's* previous qualifying insurance.

(Regulation 2.8 is effective from 1 October 2002.)

It is extremely important that you secure 'run off' cover for your previous practice after you cease to practice. This is to cover you for claims for work done while in practice but arising after the practice ceased. Such cover is a requirement of these regulations and it is in your own interests, whether or not you think you might have a claim in future. If your practice has been taken over by someone else this cover may be effected by the new practice or by you.

You should maintain this cover for at least two years and at the end of that period you should carefully consider whether you need to continue cover. This will depend on whether you have had, or expect to have, any claims since you ceased practice. It is the Institute's recommendation that you should maintain run off cover for at least six years.

A member who keeps a practising certificate after ceasing in public practice is required by these regulations to have run off cover in accordance with regulation 2.7.

There is further guidance in chapter 6 about what to do in the case of other practice changes.

CHAPTER 3

Terms of cover

This chapter explains the Institute's scheme of insurance and the level of cover you should have in place. Professional indemnity insurance works on a claims made basis. This means that the insurance will provide cover for claims first made or circumstances arising and notified to the insurers during the term of the current policy. This is irrespective of when the work concerned

was carried out. It is therefore important that insurance remains in force to provide protection against any claims which may arise in the future for work done in the past.

It is most important that you check carefully the wording of your policy. This is so you understand:

- exactly how the insurance works;
- what is covered;
- on what terms; and
- subject to what terms, conditions and exclusions.

Remember that the terms of any additional policies that you obtain for levels of cover over and above the minimum levels required by these regulations may not necessarily be the same as the terms of the qualifying insurance offered by participating insurers.

Ability to meet claims

3.1 A *firm* must:

a take reasonable steps to meet claims arising from being in public practice; and

b arrange *qualifying insurance* which meets the limits in *regulation* 3.2.

As well as taking reasonable steps to meet any claims that do arise, a priority is to limit the risk of claims against you. The guidance in chapter 6 gives some examples of the matters you should consider. Regulation 2.1 details who is subject to these regulations.

Qualifying insurance

Qualifying insurance is a special type of insurance for those in public practice. This insurance can only be obtained from certain insurers who are known as 'participating insurers' for the purpose of these regulations. Further details of these insurers are in Appendix A.

All participating insurers have agreed to provide cover under terms which match those of the Institute's approved minimum wording. Those members taking out cover with a participating insurer can be certain that their policy meets the minimum requirements. These terms may be amended by insurers in an individual policy to include extensions of cover beyond the requirement of the approved minimum wording.

As an extra safeguard, the Institute has asked those participating insurers which use a slightly different wording to include a 'difference in conditions' endorsement in their wording. In the event of a dispute between a policy holder and his insurer, the endorsement will ensure that the Institute's minimum wording overrides that of the insurer where the insurer's wording is less favourable.

A current policy will primarily provide cover for past acts, whether or not cover was in place at the time of the act. Sometimes insurers may put a 'retroactive

date' on the policy, limiting the period of cover for past acts. The date must be at least six years before the date of the current policy, or when the practice started if sooner.

The current text of the minimum policy wording and the difference in conditions endorsement may be obtained from your broker, insurer or the Institute.

Firms that are licensed by the Institute under the Designated Professional Body arrangements and those authorised by the Financial Services Authority will need to consider the insurance requirements specified in the EU's Insurance Mediation Directive. This applies only if such firms undertake regulated activities relating to those contracts of insurance covered by the Directive. Further information is provided in the Designated Professional Body Handbook (see note 3 at the end of part 2 of the Handbook).

Minimum limit of indemnity

3.2 Except where *regulation* 3.3 applies the *minimum limit of indemnity* must be £1.5 million for any one claim and in total.

This means that the insurance must pay a maximum of at least £1.5 million for a single claim or a number of claims totaling £1.5 million. It may be possible to obtain cover of £1.5 million for each and every claim, regardless of the number of claims made. Your cover up to the minimum limit of £1.5 million must be taken out with a participating insurer. Cover above that limit does not have to be with a participating insurer, nor does it need to comply with the minimum approved wording.

3.3 If the *gross fee income* of a *firm* is less than £600,000, the *minimum limit of indemnity* for any one claim and in total must be equal to two and a half times its *gross fee income*, with a minimum of £100,000.

Once a firm's gross fee income exceeds £600,000, the two and a half times multiplier gives an answer of £1.5 million which is the maximum required by these regulations. However, firms should always consider if this is sufficient for their situation.

The values in regulations 3.2 and 3.3 were changed with effect from 1 January 2008. They are effective for individual firms at the first commencement or renewal of insurance cover after 1 January 2008.

3.4 *Gross fee income* should be based on the accounting year of the *firm* which immediately precedes the start of the policy.

Gross fee income must include the fees received in respect of work which the firm has subcontracted to others. This is unless the work is clearly shown as a disbursement and the client knows that the firm is not taking professional responsibility for the work.

The figure of gross fee income should be based on the most recently completed accounting year. If this is your first year in practice, you should give your broker an estimate of your gross fee income. However, if the most recently completed accounts are not for a year or are for a period ending some time previously to the policy renewal date then you may need to estimate the gross fee income figure to use. It is advisable not to decrease the amount of cover from that previously held until a completed set of accounts shows a decrease in gross fee income. This is because although the insurance is on a claims made basis, regardless of when the work was done, claims do arise from previous years and if turnover was greater in the past the possibility of claims may be higher.

3.5 The *minimum limit of indemnity* can include an excess provided that:

a for a sole practitioner the excess is not more than £30,000;
b for a partnership, the excess is not more than £30,000 multiplied by the number of *principals*;
c for a body corporate, the excess is not more than the greater of:
  1 £30,000; or
  2 the total of the amounts accepted by the *principals* as a legally binding personal obligation (but excluding any amount over £30,000 accepted by any *principal*).

Although there is a minimum amount of insurance needed, part of this can be borne as an excess as in any other form of insurance. However, the above regulation sets a limit to the amount of the excess.

The minimum limit of indemnity may include a self insured element so long as it does not exceed the limits in these regulations. The limits are set out in full in the above regulation although the Committee does have the power (see regulation 5.3) to vary these in specific situations. However, the general rule is that the maximum should be £30,000 per principal.

(Regulation 3.5 was amended with effect from 1 January 2004, the previous limit was £20,000.)

3.6 If the *Committee* is satisfied that a group (however composed) of *firms* has shown that together they comply with these *regulations,* it is at the *Committee's* discretion to allow that group to be treated as a single entity (compound firm) for the purposes of these *regulations.*

The Committee can treat a 'group' of separate firms as a compound firm. Such a firm will usually comprise a number of associated firms which appoint one of their number to arrange insurance under one policy.

CHAPTER 4

Inability to obtain cover

It is possible, for example if you have had a number of claims, that you may not be able to obtain cover. This chapter explains the provisions which will help you and what you need to do if you are refused cover in the insurance market with a participating insurer. The assigned risks pool is effectively an insurer of last resort and was set up to ensure that members are almost always able to comply with these regulations whatever their circumstances.

Every participating insurer has agreed to subscribe to the assigned risks pool. This can provide cover in an emergency and for up to two years, although premium levels are considerably higher than charged outside the assigned risks pool. The assigned risks pool manager (see introduction for telephone number) acts as coordinator between firms, participating insurers and the Institute. If you wish to apply to enter the assigned risks pool you should telephone the assigned risks pool manager who will be able to help you and will provide the documents you need.

If you establish to the satisfaction of the Joint Advisory Panel (regulation 5.10) that you cannot obtain the professional indemnity insurance cover required by these regulations then you are eligible for admission to the assigned risks pool.

Reasons for entering the Assigned Risks Pool

4.1 The *Joint Advisory Panel* will permit an applicant to be insured in the a*ssigned risks pool* if:

a the applicant has evidence of declinature from *participating insurers* in a form satisfactory to the *Joint Advisory Panel;*

b the applicant is unable to obtain a quotation from any *participating insurer* other than a quotation which (in the opinion of the *Joint Advisory Panel*) amounts to constructive declinature. Prima facie evidence of constructive declinature will be:

1 the quotation of a premium which the applicant is unable to pay within six months from the commencement of the policy; or

2 the quotation of a premium which has such an effect on the applicant's financial security that it jeopardises its ability to carry on its business.

or

c where cover following cessation of public practice (see *regulation* 2.7) is not available from any *participating insurer.*

You may apply for entry into the assigned risks pool if you or your firm cannot obtain cover to comply with these regulations from any participating insurer. Declinature and constructive declinature are insurance terms. Declinature means that you have been refused cover. Constructive declinature means that you have been offered cover but only at a premium which you cannot pay or which, if you did pay it, would put your practice at risk

financially. If you wish to plead constructive declinature you must satisfy the Joint Advisory Panel, producing such evidence as the Panel requires that the premium quoted meets one or more of the conditions of regulation 4.1b.

Procedure for entering the assigned risks pool

4.2 Application for admission into the a*ssigned risks pool* must be made to the *assigned risks pool manager.* Any application must include:

a evidence of declinature satisfactory to the *Joint Advisory Panel*, or

b a declaration by the applicant of the circumstances it considers to be evidence of constructive declinature. The *assigned risks pool manager* will refer the matter to the *Joint Advisory Panel*, which will decide whether particular cases constitute constructive declinature and whether the firm can enter the *assigned risks pool.*

4.3 An applicant will be given a short term admission to the *assigned risks pool* provided the applicant has signed the contract for entry, while other *participating insurers* are approached or while the *Joint Advisory Panel* decides whether there has been constructive declinature.

The Joint Advisory Panel has delegated the authority to approve evidence of declinature to the assigned risks pool manager.

It is possible to enter the assigned risks pool on a short term basis if your current insurers have declined to provide renewal terms and have not agreed to an extension of cover. Temporary cover for up to thirty days may be granted in the assigned risks pool and should provide sufficient time for all participating insurers to be approached.

The assigned risks pool manager will explain that anyone attempting to gain entry to the assigned risks pool must approach other participating insurers to seek insurance. For details of participating insurers and how they should be approached you should refer to the assigned risks pool manager.

4.4 Before admission to the *assigned risks pool* the applicant must:

a supply the *assigned risks pool manager* with any information it may reasonably require;

b agree to pay to the a*ssigned risks pool manager* within thirty days any required deposit and agree to pay within six months the balance to meet the full premium as eventually assessed;

c agree to submit, at the applicant's own expense, to investigations as required by *regulation* 4.5; and

d consent to the *assigned risks pool manager* notifying the *Committee* of the application for admission to the *assigned risks pool* and whether or not it was granted.

The cover provided in the assigned risks pool will not include claims made or circumstances reported or known to you before you entered the assigned risks pool. Before entry into the assigned risks pool it is therefore essential to notify

existing insurers, before the existing policy expires, of all known claims or circumstances which might give rise to a claim.

4.5 Once in the *assigned risks pool* the person, *member* or *firm* must submit, at its own expense, to an investigation by the *Committee* or its appointed agent and, if the *Committee* so decides, a further investigation at a later date. A deposit for the costs of the investigation may be required at the *Committee's* discretion. The investigation will:

a determine the reasons why cover could not be obtained; and
b ascertain what steps, if any, should be taken to enable cover to be obtained outside the *assigned risks pool.*

4.6 The *Committee* will notify the person, *member* or *firm* of any action it should take following the investigation. If, as part of the investigation, the *Committee* considers that the interests of any clients of the person, *member* or *firm*, or of the public, may be adversely affected, the *Committee* will refer the matter to any regulatory, disciplinary or other committee of the *Institute* for that committee to take appropriate action.

Before you can enter the assigned risks pool you must sign a contract which requires you to pay the premium determined by the Joint Advisory Panel and have a review of your practice. A significant premium deposit is payable immediately. A final adjustment will be made once your position has been reviewed. You must also pay the cost of the investigation and any follow-up investigation which is necessary.

The Institute will arrange for an investigation of your firm. This report will be used by the Joint Advisory Panel when deciding whether you are in a position to be able to leave the assigned risks pool and, if not, what steps should be taken by you to satisfy insurers. It is also to enable the committee to assess whether it should report any matters for possible regulatory or disciplinary action.

Leaving the assigned risks pool

4.7 The written approval of the *Joint Advisory Panel* is required before a person, *member* or *firm* can remain in the *assigned risks pool* for more than twenty four consecutive months.

4.8 Applications for extensions of time in the *assigned risks pool* must be made, through the *assigned risks pool manager,* to the *Joint Advisory Panel* which has absolute discretion to grant the application for continuation in the *assigned risks pool.* The decision of the *Joint Advisory Panel* in respect of the continuation will be final. Any such extension may be granted subject to the requirements of *regulation* 4.4.

4.9 The written approval of the *Joint Advisory Panel* for a person, *member* or *firm* to remain in the *assigned risks pool* must be submitted to the *Committee.* If the *Committee* considers that the interests of any clients of the person, *member* or *firm*, or of the public, may be adversely affected by the person, *member* or

***firm* remaining in the *assigned risks pool*, the *Committee* will refer the matter to any regulatory, disciplinary or other committee of the *Institute* for that committee to take appropriate action.**

It is a requirement that a member who holds a practising certificate must comply with these regulations. A member will therefore lose the right to a practising certificate at the end of the expiry of the maximum two year period (or any extension) allowed in the assigned risks pool if no other arrangements are made to meet the requirement of these regulations.

If a member ceases to be eligible to hold a practising certificate then the bye-laws require that the practising certificate must be returned to the Institute immediately.

You can leave the assigned risks pool at any time if you obtain cover in the general insurance market. You must normally leave the assigned risks pool after two years and, if it is not possible to obtain cover at the end of those two years, you will no longer be eligible to hold a practising certificate. It may be possible to obtain an extension of time within the assigned risks pool but this is at the discretion of the Joint Advisory Panel. Further, such an extension must be acceptable to the committee.

It is essential to advise the assigned risks pool manager of any claim or circumstance which might give rise to a claim before you leave the assigned risks pool. It is also essential, when seeking cover outside the assigned risks pool, to make any potential insurer aware of your time in the assigned risks pool, otherwise this could jeopardise your cover and your new insurers might refuse a claim on the grounds of material non-disclosure.

CHAPTER 5

The Committees

Professional Indemnity Insurance Committee

Composition
5.1 *Council* will appoint the *Committee*, which must consist of at least four *members,* and its quorum is three.

Responsibilities
5.2 The *Committee* is responsible for:

a reviewing the *qualifying insurance* criteria;
b monitoring compliance with these *regulations* and reporting non-compliance to any regulatory, disciplinary or other committee of the *Institute*;
c deciding the content of the annual *certificate of compliance* with these *regulations* (*regulation* 2.5);

d approving the form and content of the contract for entry into the *assigned risks pool*;
e ensuring the commissioning of investigations into *firms* applying to be admitted to the *assigned risks pool* (*regulation* 4.5);
f making a referral to any regulatory, disciplinary or other committee of the *Institute* for that committee to take appropriate action following an investigation under *regulation* 4.5;
g designating *authorised insurers* as *participating insurers*; and
h granting, at its absolute discretion, an exemption under *regulation* 5.3.

5.3 The *Committee* may, at its absolute discretion, and in such terms as it decides:

a grant an exemption from the requirements of these *regulations* to a *member* who is a *principal* in a practice which is regulated by another professional body and has in place the professional indemnity insurance required by that body;
b waive or relax the requirements of *regulation* 3.5 (level of excess);
c allow a *firm* subject to these *regulations* to combine with others to comply with these *regulations*;
d waive or relax the requirements of these *regulations* concerning *participating insurers*;
e grant an exemption from the requirements of these *regulations* to a *member* who is an employee in a *firm* and who is holding a practising certificate only to meet the requirement of the audit or insolvency regulations and who is not engaged in public practice in another *firm* or on their own account;
f grant an exemption from the requirements of these regulations to a *member* who holds a practising certificate but who is not engaged in public practice; and
g grant an exemption from the requirements of *regulation* 3.1b (arranging *qualifying insurance*) to an entity or individual if that entity is owned or the individual is employed by an entity that is not subject to these *regulations* provided that other entity (the owner/employer) has, and agrees to maintain, other appropriate professional indemnity insurance[1].

This regulation allows the committee to exempt members and firms from the requirements of particular regulations. These are the only exemptions allowed.

You may be in a firm which is regulated and insured under the requirements of another professional body. The Institute can advise you if your cover meets the requirements of these regulations and whether you may apply to the committee for an exemption from them.

In exercising its discretion, the committee will take account of whether the cover is at least equivalent to that required by these regulations, and whether the insurer in question is a participating insurer in the Institute's scheme.

[1] Regulation 5.3g is effective from 1 January 2008.

The minimum requirements may include a self insured element so long as it does not exceed the limits in these regulations. The limits are set out in full in regulation 3.5. The committee can vary these in specific situations although the general rule is that the maximum self insured element should be £30,000 per principal.

The committee can permit a group of firms to arrange the insurance required by these regulations jointly. Regulation 3.6 details exactly how this can happen.

The committee can relax the requirements relating to participating insurers.

The Audit Regulations and Guidance allow an employee to be designated as a responsible individual and the Insolvency Regulations allow an employee to hold an insolvency licence. Both sets of regulations require such an employee to hold a practising certificate. However, there is no need for such an employee to have his own professional indemnity insurance.

Some members hold a practising certificate even though not engaged in public practice. There is no need for such members to have their own professional indemnity insurance.

If the individual is also engaged in public practice in another firm or otherwise on his own account, insurance must be obtained to meet the requirements of these regulations.

You may be subject to these regulations but employed or owned by another entity which is not. In this case the committee may exempt you from having 'qualifying insurance' but only if the other entity has other appropriate professional indemnity insurance arrangements in place.

In all cases, any relaxation of the regulations is at the absolute discretion of the committee which may attach conditions to the relaxation.

5.4 The *Committee* may publish its decisions or advice as and where it considers appropriate.

5.5 Except where *regulation* 5.6 applies, the *Committee* may delegate its duties to sub-committees or to the *secretariat*.

5.6 The *Committee* may not delegate the following decisions:

a a relaxation from these *regulations* for *members* insured under the requirements of another body; and
b a relaxation under *regulation* 3.5 (level of self-insured excess).

Provision of information to the Committee
5.7 In carrying out its functions under these *regulations,* the *Committee* has the power to require a person, *member* or *firm* subject to these *regulations* to

provide any information (including books, papers and records) about it or its clients. This power also applies to any of the *Committee's* sub-committees, the *secretariat,* or any duly appointed agent.

5.8 Information provided to the *Committee* under these *regulations* will be treated as confidential but may be disclosed if the *Committee* considers it appropriate in the following circumstances:

a in connection with the procedures set out in these *regulations*;
b in connection with disciplinary proceedings by the *Institute* or the *Investigation and Discipline Scheme*;
c in connection with the discharge by the *Institute* of its function as a regulatory body; or
d as required by law or regulations.

5.9 A person, *member* or *firm* which was subject to these *regulations* will nevertheless continue to be subject to *regulation* 5.7 in so far as the enquiries or information required relate to any period up to and including the date when compliance with these regulations was no longer required.

It is important that confidentiality is maintained so as to avoid prejudicing the terms of members' insurance cover. Except for the circumstances described in regulation 5.8 neither the committee, nor any member of the Institute or secretariat, may disclose the insurance details of any member to any person other than that member.

Joint Advisory Panel
5.10 The *Joint Advisory Panel* will:

a consist of two representatives from each of the *Institutes,* one of whom shall be nominated Chairman by joint agreement of the Presidents of the *Institutes,* and four representatives from the *participating insurers*;
b have a quorum for meetings of four members, two of whom must be representatives of the *Institutes* and two of the *participating insurers*; and
c meet as required and at least twice a year.

5.11 The *participating insurers'* membership of the *Joint Advisory Panel* will be reviewed annually by the *assigned risks pool manager* by reference to the *participating insurers'* level of participation in the *assigned risks pool.*

5.12 The *Joint Advisory Panel* is responsible for:

a reviewing the progress, effectiveness and viability of the *participating insurers* scheme including the *assigned risks pool*;
b reviewing insurance matters referred to the *Institute*;
c determining applications for admission to the *assigned risks pool*;
d determining applications for extensions in particular cases to the maximum of twenty four months in the *assigned risks pool*; and
e dealing with any other matters referred to the *Joint Advisory Panel.*

The Joint Advisory Panel ensures that there is a regular exchange of information between the Institutes and insurers and that the regulations are

suitable to meet current market conditions. The Joint Advisory Panel also provides technical expertise and, in particular, monitors firms in the assigned risks pool.

CHAPTER 6

Additional Guidance

6.1 This chapter has been compiled from questions asked by members and should answer most of your queries. If you are unable to find the answer to your particular problem, you should contact your broker, or the professional indemnity insurance section of Professional Standards.

6.2 This section, together with the guidance included with the regulations, also provides guidance on the 'reasonable steps' that regulation 3.1 requires firms to take.

Certificate of compliance

6.3 The certificate of compliance is the document used by the Institute to collect information on the amount of insurance each firm has. It is sent to all those who have professional indemnity insurance in a reminder pack just before cover needs to be renewed each year.

6.4 Individual principals in a firm will not receive separate certificates unless they are also in another firm on their own account. Members who hold a practising certificate but who are not engaged in public practice will not also receive a certificate.

Claims handling

6.5 All principals, together with their employees, should be made aware of the importance of notifying insurers promptly of claims or circumstances which may give rise to a claim. Everyone in the firm should know that failure to comply with underwriters' requirements in this regard could seriously prejudice the firm's rights and entitlement to indemnity under the policy.

6.6 One person, at the level of principal, should be given the task of recording and coordinating information about claims or circumstances and of notifying brokers/underwriters accordingly. That person should regard the prompt notification to brokers/underwriters as a first priority and should not wait until there have been developments or until a detailed report of the matter has been prepared.

6.7 All staff should be encouraged to report promptly to the individual designated in the above paragraph any matters of which they become aware.

6.8 Claims or circumstances should be regarded objectively. If there are circumstances which might reasonably give rise to a claim then insurers

should be notified immediately. This is regardless of the fact that currently allegations may be vague or not specified and regardless of whether the member personally thinks liability is unlikely. (In this latter regard the question of liability is a legal one which only lawyers and, ultimately, the courts are competent to decide.)

6.9 There should be a regular item on the agenda of principals' meetings to discuss any matter that might lead to a claim and also to monitor any claims that have been made.

6.10 Prior to renewal and the completion of the proposal form, a circular should be sent to all principals requiring confirmation that they are not aware (after enquiry of staff who report to them if applicable) of any claim or circumstance which may give rise to a claim. The circular should remind principals and staff of the importance of the declaration and that failure could prejudice the firm's rights under the policy. In addition, it should make clear that the period between the completion of the proposal form and renewal is a critical one and that any matter or circumstance arising in that period must be notified as a matter of great urgency.

Cost of cover

6.11 This is a matter between you and your insurer and the Institute will not become involved in these discussions unless you are offered a quotation which you are unable to pay within six months from the commencement of the policy, or which has such an effect on your financial security that it jeopardises your ability to carry on your business (regulation 4.1).

Level of cover

6.12 Having carried out your risk assessment procedures (see paragraphs 6.16 to 6.23) you should decide the level of cover required, considering:

- the minimum level required by these regulations;
- the likely level of exposure of the firm to claims;
- whether current cover is consistent with that of similar firms, using available resources such as interfirm comparison, information held by your broker, and information held jointly with other firms in a mutual arrangement;
- the advice from experts on what cover is available and its cost. This should include consideration of whether the cover offered includes legal costs within, rather than in addition to, the limit of indemnity. Your broker will be able to assist you;
- the level of the firm's own resources to meet claims. This includes the availability of both firm and personal assets and reserves held to meet known claims.

Practice mergers etc

6.13 You must plan in advance if your firm's structure changes. For example, if you are about to merge with another firm, you and your fellow principals must ensure that the new firm has sufficient qualifying insurance

in order for you to comply with the regulations. If your firm is dividing, each new firm must have sufficient qualifying insurance in its own right. Further guidance is in paragraph 6.24 onwards.

Recommended level of insurance cover (limit of indemnity)
6.14 The minimum required level is set out in chapter 3. No firm is currently required to have more than £1.5 million insurance cover but for many firms this limit may not be adequate. It is important to note that all firms are required to take reasonable steps to be able to meet claims arising from professional business.

Reminder letter from the Institute
6.15 This, together with a blank certificate of compliance (part of the Practice Assurance annual return), is sent out as a reminder to every firm and member, (resident in the United Kingdom or the Republic of Ireland) and holding a practising certificate but not engaged in public practice before cover is due for renewal. If you have not already started to negotiate your cover for next year you should do so immediately you receive the reminder.

Risk assessment
6.16 Your first priority is to limit the risk of claims against your firm.

6.17 The Institute produces a helpsheet 'Managing Professional Liability Risk', which sets out in detail the steps you should take to limit the risk of claims and what you should consider before accepting new clients, or new work from existing clients.

6.18 A firm should carry out a risk assessment and take any appropriate action. This would normally be at least annually, in the context of an impending renewal of PII cover, and at any other time when the composition of the firm or its client base changes significantly. The assessment should give consideration to the possibility of being sued should anything go wrong and the possible amount of such a claim:

- client by client, having regard to whether the work is ongoing or one-off;
- client by client, having regard to the maximum potential exposure of those interested in the client, for example shareholders and creditors.

6.19 External information such as the general economic climate and the types of business experiencing difficulties should also be considered as part of the assessment.

6.20 As part of the assessment of each client (and new clients before they are taken on) the following should be considered:

- instructions received, and nature of work to be carried out and the resources necessary in time and staff to complete tasks in a timely and accurate manner;
- credibility of management;
- quality of accounting, financial and management controls;

- type of business;
- continued viability of company;
- the effect of the fee on the quality of the work.

6.21 If you decide that work done for any client creates a potentially higher than average risk, whether or not you are charging a fee, you should:

- evaluate your ability to mitigate the risk in terms of procedures;
- initiate safety procedures, for example a review by another principal;
- reconsider your quality control and assurance procedures;
- decide whether to retain the client.

6.22 Remember the need to cover:

- all of your firm's current staff, including sub-contractors and consultants;
- all of your firm's activities including, for example, joint audit appointments;
- past and new principals and predecessors in business.

6.23 After taking any limiting action you must then assess the remaining risk before deciding upon the level of professional indemnity insurance. Bear in mind the firm's claims history and the need for regular analysis of prime causes of any failures experienced by the firm.

Retroactive cover

6.24 When a practitioner ceases in public practice (and assuming he does not keep his practising certificate) then 'run-off' cover should be arranged. This is explained below.

6.25 The position can be more complicated when a practitioner moves between practices. The obligation is on individual members to have 'qualifying insurance'. An important part of what constitutes qualifying insurance is retroactive cover. Although the insurance is on a claims made basis, which means the relevant time is when a claim is made, not when the work was done, insurers will frequently put a retroactive date on the policy. This cannot be less than six years and may well be much longer. The practical effect is that the insurers will not accept a claim if the original work was done before the retroactive period started.

6.26 When a practitioner changes practice, either by moving between firms or leaving a partnership to become a sole practitioner, it is very important that this retroactive part of the cover is maintained. This can be achieved in a number of ways:

- as retroactive cover in the new practice;
- as a former principal in the old practice;
- as a special policy;
- as a last resort, in the assigned risks pool (see chapter 4).

6.27 It is the member's responsibility to ensure that this element of the cover is in place. If the cover is provided by the insurance policy of a practice the member has just left, then the provision of such insurance, and confirmation of its continued existence, should form part of any 'leaving' agreement.

6.28 Similar consideration applies when practices merge or break-up into smaller firms. Each member should ensure, through one route or another, that retroactive cover is in place. It may be necessary to take advice form a specialist insurance broker. As with all such matters, advance planning is essential.

Run off cover

6.29 Members are expected to use their best endeavours to ensure they are covered by arrangements which comply with the Institute's regulations for at least twenty four months after they cease to practice. The terms and extent of any cover should be equivalent to any previous qualifying insurance. It is to cover the practitioner for claims received after ceasing in practice for work done while in practice.

6.30 Run off cover may be provided under the policy of a continuing practice or you may need to take out an individual policy. If your former practice has undertaken to include run off cover for you in its current cover, you must remember to check that it continues to cover you for at least two years. At the end of that time you should consider whether you need continued cover.

6.31 You should continue to assess your need for such cover each year until you are satisfied that there is no possibility of a claim being made. It is recommended that you consider maintaining run-off cover for six years after you cease to practice.

Terms used in policy documents

Aggregate

6.32 The total limit of indemnity available. The policy may describe this as 'any one claim and in all' or 'each and every claim and in the aggregate'.

Claims made basis

6.33 This means that the insurance will provide cover for claims first made or circumstances arising and notified to the insurers during the term of the current policy only. This is irrespective of when the work concerned was carried out. It is therefore important that insurance remains in force to provide protection against any claims which may arise in the future for work done in the past.

Each and every claim

6.34 The limit of indemnity specified in the policy schedule available to meet 'each and every' claim. This may also be written as 'any one claim'. In this case, there is no overall limit and multiple claims, each up to the limit, could be made.

Limit of indemnity

6.35 The maximum amount that an insurer is obliged to pay out, either in aggregate or each and every claim, to meet valid claims against the firm while the insurance is in force.

APPENDIX A

Participating Insurers

The Financial Services Authority (or the Department of Enterprise, Trade and Employment in the Republic of Ireland) is responsible for authorising insurers to carry on general insurance business in the United Kingdom or the Republic of Ireland. Any such authorised insurer prepared to agree to the conditions of the Institute's scheme may apply to the assigned risk pool manager to be designated as a participating insurer.

To be a participating insurer, an authorised insurer has to agree to:

- provide insurance in accordance with these regulations;
- subscribe to the assigned risks pool, as described in chapter 4;
- supply the Institute or its appointed agent such information as it may reasonably require;
- refer to arbitration all disputes with insured firms involving disagreement about:
  1 which of two or more participating insurers should indemnify a firm; or
  2 how two or more participating insurers should indemnify a firm.

The Institute has a list of participating insurers which is updated every year and is included with the reminder letter and certificate of compliance. Further copies can be obtained from the Institute's website at icaew.com/pii.

Most insurers underwrite in groups (facilities) with a lead underwriter and several following underwriters. On the list provided by the Institute, those insurers which accept business direct are indicated. The other insurers must be approached through a broker, preferably a Lloyd's broker, with access to all participating insurers.

Practice Assurance regulations

(This edition includes all amendments made up to 1 January 2008 and none have been made since.)

These regulations were made by Council on 6 October 2004 and came into force on 1 November 2004 and are applicable wherever members are required under the Principal bye-laws to hold a practising certificate.

1 PC holders and member firms shall act in accordance with the PA standards.

2 Payment of the PA scheme fee is due on the same date, and under the same conditions, as apply to the practising certificate fee.

2A A member who has been granted an exemption from the requirement to pay the practising certificate fee will be exempt from the requirement to pay the PA scheme fee for the same period.

3 Failure to pay the PA scheme fee or a charge levied under regulation 16 will have the same consequences in relation to a PC holder's eligibility to hold a practising certificate as failure to pay the practising certificate fee.

4 Members and member firms shall co-operate with the Institute, its staff and any committee carrying out functions under the PA scheme.

5 If any functions or responsibilities of the Institute under the PA scheme are undertaken by another person or body with the agreement of the Institute, members and member firms shall co-operate with such other person or body as if it were the Institute.

6 The Institute's logo or the legend, '*A member of the ICAEW Practice Assurance scheme*', or both may be used by member firms. Firms subject to the PA scheme which are not member firms as defined in the Disciplinary Bye-laws may not use the Institute logo but may use the legend. Any use of the logo or legend shall follow Institute guidance.

7 All member firms shall:

(a) appoint from that member firm a PA contact principal who shall be:
  (i) in the case of a sole practice, the practitioner;
  (ii) in the case of a partnership, a partner;
  (iii) in the case of a limited liability partnership (LLP), a member of the LLP; or
  (iv) in the case of a corporate body, a director; and
(b) except in the case of (a)(i) notify the Institute forthwith of the appointment and any changes of appointment.

8 Member firms and PC holders shall supply any information requested by the Institute under the PA scheme (whether in the annual return or otherwise) promptly and in accordance with the terms specified.

9 Member firms shall notify the members registrar of:

(a) any changes to information provided relating to the composition of the firm within 10 business days of the change taking effect, and
(b) any changes to:
  (i) the name or trading name;
  (ii) the registered address;
  (iii) the main telephone number; and
  (iv) the e-mail address
  of the member firm within 20 business days of the change taking effect.

Provision of this information under the Institute's *Audit Regulations and Guidance* or *Designated Professional Body Handbook* shall satisfy this regulation.

10 The Institute will notify a member firm or a PC member not less than 30 business days in advance of a visit.

11 (a) If, on the receipt of the visit notice, the member firm or PC member is of the opinion that it will not be convenient to comply with regulations 13 and 14 on the visit date, the member firm or PC member shall, not more than 10 business days after receipt of the visit notice, inform the Institute in writing of three further dates (being business days) on which regulations 13 and 14 can be met.
(b) The 'further dates' referred to in paragraph (a) shall not be later than 45 business days after the visit date.

12 Regulations 10 and 11 will not apply where the chairman of the committee is of the opinion that it is in the public interest for a visit to be conducted with less than 30 business days notice. Where he is of that opinion, the chairman will authorise the issue of a visit notice to a member firm or PC member.

13 A member firm or PC member shall provide appropriate facilities to the PA reviewer to enable him to carry out his functions during a visit.

14 The member firm or the PC member shall use best endeavours to ensure that the following are available during a visit:

(a) in the case of a member firm, the PA contact principal and all relevant staff;
(b) in the case of a PC member, the PC member; and
(c) in the case of a member firm and a PC member all information, books, records and documents whether in hard copy or electronic form (including those specified in the visit notice) which the Institute considers necessary to enable it and the PA reviewer to perform their functions under the PA scheme.

15 Following a visit, any issues or concerns will be notified by the Institute in writing to the member firm or PC member. The member firm or PC member shall, within 15 business days of receipt of such notification (or such longer period as may be allowed), provide a response in writing to the Institute addressing such issues or concerns.

16 If after considering any response received from a member firm or a PC member under regulation 15 the Institute considers that a further visit is necessary or desirable it shall notify the member firm or PC member in writing. The member firm or PC member shall be responsible for the Institute's charge for the further visit.

17 The Institute shall keep confidential all material and information provided by member firms or members in connection with the PA scheme, whether oral or in writing, except that such material or information may be disclosed (directly or indirectly) to any body undertaking regulatory or law enforcement responsibilities.

18 Where a member firm or member makes a complaint about the handling of a visit or the conduct of Institute staff administering the PA scheme and remains dissatisfied notwithstanding an explanation, the Committee shall appoint one of its members to review the complaint. The appointed member shall consider written or oral representations from those concerned and all documents he considers relevant. He may make such enquiries as he deems appropriate and shall then report to the Committee.

19 Any breach of these regulations by a PA contact principal shall be deemed also to be a breach by the member firm.

Interpretation

In these regulations unless the context otherwise requires or express reference is made, words and phrases in these regulations have the same meaning as in the Principal and Disciplinary Bye-laws. Furthermore:

'annual return' means the return sent to member firms and PC holders by the Institute requesting information for the purposes of the PA scheme;

'business days' means normal working days excluding Saturdays, Sundays, Public and Bank holidays;

'committee' means the committee appointed by Council in connection with the PA scheme;

'PA contact principal' means a person appointed by the member firm to be the main point of contact with the Institute for the purposes of the PA scheme and in connection with these regulations;

'PA reviewer' means the person or persons appointed by the Institute to visit member firms and PC members;

'PA scheme' means the scheme, system or arrangements for the inspection, monitoring and review of the efficiency and competence of member firms and PC holders made under sub-clause 1(b) (viiiB) of the Supplemental Charter;

'PA standards' means the principles-based standards issued in conjunction with the PA scheme;

'PC holder' means a member holding a practising certificate;

'PC member' means a PC holder engaged in public practice in a firm which is not a member firm;

'visit' means the visit to a member firm or PC member by a PA reviewer;

'visit date' means the date or dates specified in the visit notice;

'visit notice' means a notice specifying a date or dates for a visit served on the member firm or PC member; such notice may include a description (whether in specific or general terms) of the information and records required during the visit.

Clients' money regulations

1 These regulations are made by the Council of the Institute of Chartered Accountants in England and Wales, pursuant to Clause 16 of the Supplemental Royal Charter of 1948. They come into force on 1 January 2004. The regulations dated 1 April 1992 remain applicable after this date only in respect of actions or omissions or acts prior to the coming into force of these regulations.

Scope
2 These regulations apply in relation to all United Kingdom and Ireland offices of Firms and, subject to regulation 29, to the Principals of such Firms. A Firm must receive or hold Clients' Money only in accordance with these regulations.

Where a Firm is authorised by the Financial Services Authority, any monies received or held which are Investment Business Clients' Money as defined by the Financial Services Authority's Handbook must be dealt with in accordance with that Handbook, which takes precedence over the requirements of these regulations.

Clients' Money
3 **'Clients' Money'** means money of any currency (whether in the form of cash, cheque, draft or electronic transfer) which a Firm holds or receives for or from a client, including money held by a Firm as stakeholder, and which is not immediately due and payable on demand to the Firm for its own account. Clients' Money must be held in the currency in which it was received unless the client instructs otherwise in writing.

4 Where a Firm has a power or control over the client's own account, though not meeting the definition of Clients' Money, it must ensure that it has the specific written authority of the client acknowledged by the Bank before exercising that authority, and it must maintain adequate records of the transactions it undertakes.

5 Fees paid in advance for professional work agreed to be performed and clearly identifiable as such shall not be regarded as Clients' Money for the purposes of these regulations. A cheque or draft received by a Firm, which is drawn in favour of a client or third party, does not constitute Clients' Money.

Interpretation
6 The words listed below shall have the meanings indicated:

'Bank' means:

(a) a branch in the United Kingdom or Ireland of:
    (i) the Bank of England;

(ii) the Central Bank of Ireland;
(iii) the Central Bank of another member State of the European Union;
(iv) a person who has permission under part 4 of the Financial Services and Markets Act to accept deposits; or
(v) a building society within the meaning of the Building Societies Act 1986 which has adopted the power to provide money transmission services and has not assumed any restriction on the extent of that power.

(b) a branch outside the United Kingdom or Ireland of:
(i) a bank within the meaning of paragraph (a) above;
(ii) a bank which is a subsidiary or parent company of such a bank;
(iii) a credit institution, as defined in the First EU Banking Coordination Directive number 77/780 (EEC), established in a member State of the European Union other than the United Kingdom or Ireland and duly authorised by the relevant supervisory authority in that member State; and

(c) (i) a bank on the Island of Guernsey that is registered as a Deposit Taker under the Banking Supervision (Bailiwick of Guernsey) Law 1994;
(ii) a bank on the Island of Jersey including a registered person under the Banking Business (Jersey) Law 1991;
(iii) a bank on the Isle of Man including a bank which is licensed under the Isle of Man Banking Act 1998.

'Client Bank Account' is an account at a Bank in the name of the Firm separate from other accounts of the Firm which may be either a general account or an account designated by the name of a specific client or by a number or letters allocated to that account and which, in all cases, includes the word 'client' in its title.

'Council' means the Council of the Institute, or any Committee, entity or individual delegated by Council to exercise any powers or discharge any functions on its behalf.

'Firm' means a sole practitioner who is a Member, or a partnership, or a body corporate or a limited liability partnership comprised in whole or in part of Members, the business of whom or of which includes carrying on the profession of accountancy.

'Independent Accountant's Report' is a report, (in such form as the Council shall from time-to-time determine) covering such period as the Council or its nominee may require, to the Chief Executive or his nominee, required in terms of regulation 28(b) and commissioned by the Firm which the Firm must ensure states whether, in the view of the Independent Accountant:

(a) it has adequate systems so that it can comply with the regulations and make the confirmations necessary in terms of regulation 27;
(b) it has complied with the Clients' Money Regulations as at the reporting date; and

(c) while carrying out the work in support of the Report, anything has come to the Independent Accountant's attention which caused him or her to believe that the Firm has failed to comply with the regulations.

'Independent Accountant' means a firm which is a registered auditor under the Companies Act 2006 or the Companies Act 1990 in the Republic of Ireland and which has satisfied itself that it is independent of the Firm on which the Independent Accountant is reporting, in the terms referred to on 'Independence – assurance engagements' in Section 290 in the Code of Ethics.

'Mixed Monies' means monies received (whether in the form of cash, cheque, draft or electronic transfer) or held by a Firm or Principal in terms of regulation 9 which comprises or includes Clients' Money and money due to the Firm.

(Note: for any Firms authorised by the Financial Services Authority, any monies so received or held which include an element of Investment Business Clients' Money, as defined by the Financial Services Authority's Handbook, must be dealt with in accordance with the Handbook.)

'Notice' means written notice sent by first-class pre-paid recorded delivery to a Firm's place of business or given in person by the Council (or its nominee) to any Principal.

'Principal' means a Member who is a sole practitioner or who is a partner in a Firm which is a partnership or who is a director of a Firm which is a body corporate or who is a member of a limited liability partnership.

7 References in these regulations to any statutory provision or European legislation shall include any statutory modification or re-enactment thereof and any amendment thereto.

Client identification

8 Before holding any Clients' Money on behalf of a Client the Firm must first verify the identity of the Client. (See Explanatory Note 8 below.)

Opening a Client Bank Account

9 (a) Subject to regulation 11 hereof, a Firm which receives or holds Clients' Money or Mixed Monies or money which under regulation 11 hereof the Firm is required to pay into a client account, must immediately open one or more Client Bank Accounts. Any Firm may maintain one or more Client Bank Accounts as appropriate. All money which is Clients' Money must be held in a Client Bank Account.

(b) On opening a Client Bank Account, a Firm must notify the Bank in writing that:

(i) all money standing to the credit of that account is held by the Firm as Clients' Money and that the Bank is not entitled to combine the account with any other account or exercise any right to set off or

counterclaim against money in that account in respect of any money owed to it on any other account of the Firm;
(ii) interest payable on the money in the account must be credited to that account;
(iii) the Bank must describe the account in its records to make it clear that the money in the account does not belong to the Firm; and
(iv) the Bank must acknowledge in writing that it accepts these terms.
(NB. Sub-paragraph (i) was changed with effect from 1 July 2004. Any Firm that has opened a clients' money bank account using the former wording, that referred to an agent, has until 31 December 2005 to obtain a revised confirmation from the bank.)

(c) For a Client Bank Account in the United Kingdom or Ireland, if the Bank does not provide the acknowledgement required under sub-paragraph (b) above within 20 business days of the Firm sending the notice, the Firm must:
(i) withdraw all money from the account;
(ii) close the account; and
(iii) deposit the money with another Bank in a Client Bank Account; or
(iv) as a last resort, return the money to the client.

(d) A Firm may only hold Clients' Money in a Bank outside the United Kingdom or Ireland if the client is informed in writing:
(i) of the country or territory where the account will be held; and
(ii) either that the Bank has given the acknowledgement required under regulation 9(b)(iv), or where the Bank's acknowledgement has not been received, the Firm has advised the client that the Clients' Money held in that account may not be protected as effectively as it would if held in a Bank in the United Kingdom or Ireland; and
(iii) the client has agreed in writing to the money being paid into, or remaining in, that Bank.

(e) A Firm may not hold Clients' Money (or money which would, if held in a Bank (see regulation 6) be Clients' Money) outside the European Union unless:
(i) the client is informed in writing of the country or territory where the account will be held; and
(ii) the client has agreed in writing to the money being paid into, or remaining in, the institution where the money is held; and
(iii) the client accepts in writing that where money is so held it will not have the protection afforded by these regulations.

Payment into a Client Bank Account

10 Clients' Money or Mixed Monies received by a Firm or by any Principal must be paid immediately into a Client Bank Account, or to the client.

11 A Firm must only pay money into a Client Bank Account, if:

(a) the Firm is required to make such payment under these regulations; or
(b) the money is the Firm's own money and:

(i) it is required to be so paid for the purpose of opening and maintaining the account and the amount is the minimum amount required for that purpose; or
(ii) it is so paid in order to restore in whole or in part any money paid out of the account in contravention of these regulations.

12 A Firm shall not be regarded as having breached regulations 10 and 11 simply because it transpires that money which the Firm paid into a Client Bank Account in the reasonable belief that it was required so to do under these regulations should not have been paid into such an account, provided that immediately upon discovering the error the Firm takes the necessary steps to withdraw the money which has been paid into such account in error.

13 Where money of any one client in excess of £10,000 is held or is expected to be held by the Firm for more than 30 days, the money must be paid into a Client Bank Account designated by the name of the client or by a number or letters allocated to that account.

(Note: The Client Bank Account in this regulation must be a separate account, rather than a memorandum account in the Firm's books. In other words, the account will be for that client (or clients acting jointly) only.)

Interest

14 Subject to regulations 15 and 16, a Firm must:

(a) place Clients' Money in an interest-bearing account unless the interest earned would not be material (see Explanatory Note 5 below); and
(b) ensure that a fair rate of interest (see Explanatory Note 5 below) on the money is earned; and
(c) ensure that all interest earned is paid or credited to the client, or as the client instructs in writing.

15 Regulation 14 shall not apply to Clients' Money held by a Firm as stakeholder though a Firm may not itself earn interest on it unless regulation 16 applies.

16 The Firm and the client may agree in writing different arrangements for the payment of interest on Clients' Money held. This agreement may be in the engagement letter with the client.

17 It shall be a breach of these regulations if a Firm fails to comply with any of the terms of any such agreement as is referred to in regulation 16.

18 For the purposes of regulations 14 to 17 Clients' Money held by a Firm for two or more clients acting together in one or more transaction must be treated as though held for a single client.

Withdrawal from a Client Bank Account

19 When a cheque or draft including money which is not Clients' Money is

paid into a Client Bank Account, the money which is not Clients' Money must be withdrawn as soon as the cheque or draft is cleared.

20 A Firm may withdraw from a Client Bank Account:

(a) (i) money, not being Clients' Money, paid into a Client Bank Account for the purpose of opening or maintaining the account; or
(ii) the element of Mixed Monies which are not Clients' Money;
(b) money paid into a Client Bank Account contrary to these regulations or which would have been so but for regulation 12;
(c) money required to be withdrawn under regulation 19;
(d) interest which the client has agreed in writing should not be paid to him (see regulation 16);
(e) money properly required for a payment to a client;
(f) money properly required for or towards payment of a debt due to the Firm from a client otherwise than in respect of fees earned by the Firm;
(g) money withdrawn in accordance with regulation 22, for or towards payment of fees payable to the Firm by the client;
(h) money drawn on a client's written authority or in conformity with any written contract between the Firm and the client;
(i) money which may be properly transferred into another Client Bank Account or into a bank account in the name of an individual client or clients acting jointly (see regulation 18).

Any withdrawal from a Client Bank Account may only be made where an authority in respect of that withdrawal has been signed by a Principal of the Firm or by an employee of the Firm to whom authority in writing has been delegated from the Principals of the Firm. (See explanatory Note 12 below.)

21 The Firm must ensure that at all times the sum of the credit balances held for all clients is at least equal to the total balance held in all Client Bank Accounts and that no amount may be withdrawn from the bank account for any client which is greater than the credit balance held for that client.

22 Money may only be withdrawn from a Client Bank Account for or towards payment of fees payable by the client to the Firm if:

(a) the precise amount thereof has been agreed by the client or has been finally determined by a court or arbiter; or
(b) the fees have been accurately calculated in accordance with a formula agreed in writing by the client on the basis of which the amount thereof can be determined; or
(c) thirty days have elapsed since the date of delivery to the client of a statement of fees and the client has not questioned the amount therein specified as due.

23 Monies which, in terms of regulation 20, are payable to the Firm, shall be withdrawn as soon as reasonably practicable.

Records and Reconciliation

24 A Firm must keep Clients' Money records (including the notice and acknowledgement under Regulation 9(b)(iv)) which show:

(a) details of all money paid into and out of all Client Bank Accounts;
(b) entries of all Clients' Money paid direct to the client, or, on the client's instructions, paid to a third party, identifying that person;
(c) entries of all cheques received and endorsed over by the Firm to the client or, on the client's instruction, endorsed over to a third party, identifying that person;
(d) entries of all electronic transfers received or made of money and transferred direct to the client or, on the client's instructions, transferred to a third party, identifying that person; and
(e) details of all transactions on each client's ledger account which will easily identify the balance held for each client and which will reconcile to the total of Clients' Money held in the Client Bank Accounts.

25 A Firm must:

(a) at least once every five weeks, reconcile the total balances on all its Client Bank Accounts with the total corresponding credit balances in respect of its Clients, as recorded by it, and where any difference arises, correct it immediately; and
(b) at the same time as carrying out the reconciliation under sub-paragraph (a) above, reconcile the balance on each Client Bank Account, as recorded by it, with the balance on that account as set out in the statement issued by the Bank and, where any difference arises, correct it immediately, unless the difference arises solely as a result of timing differences.

26 Records kept in accordance with regulations 24, 25 and 27(a) shall be preserved for at least 6 years from the date on which they were made and the Firm shall hold them available for inspection.

Returns and Reports

27 Principals must:

(a) confirm that their Firm meets the requirements of these regulations and shall supply such evidence as these regulations and/or Council may require to support such confirmation; and
(b) ensure that their Firm conducts a review at least annually, to consider whether systems it has maintained have been adequate to enable it:
  (i) to comply with these regulations;
  (ii) to carry out the reconciliations in accordance with regulation 25; and
  (iii) to prepare any return required under regulation 27(a) and to confirm its compliance with these regulations.

Where possible the review should be conducted by a Principal who is not involved in the handling of Clients' Money.

Significant breaches of these regulations require to be reported by the Firm to the Institute or its nominee.

28 To enable Council to ascertain whether or not these regulations are being complied with it:

(a) may appoint a person or persons to inspect the books and records of the Firm or any of its Principals. Notice given by Council or on behalf of Council, the Firm or any of its Principals shall be signed by the Chief Executive, or his nominee; or
(b) may require the Firm to provide an Independent Accountant's Report;

and it shall be the responsibility of the Firm and its Principals to make books and records available for inspection in accordance with such a Notice and to provide an Independent Accountant's Report in accordance with such a requirement.

The Responsibility of a Principal

29 Every Principal shall be responsible for any breach of these regulations on the part of his Firm unless he proves that responsibility for the breach was entirely that of another Principal or Principals.

30 Where as a result of any disciplinary proceedings which may arise out of a breach of these regulations a Firm is ordered to pay a fine, monetary penalty or costs all Principals of the Firm shall be jointly and severally liable for the payment thereof and regulation 29 shall have no application to such liability.

31 A Firm which is a sole practitioner may not receive or hold Clients' Money unless it has arrangements with another appropriately qualified firm or person to enable the proper distribution or processing of Clients' Money held by the Firm in the event of the incapacity or death of the sole practitioner. All such Firms holding Clients' Money at the date of coming into force of these regulations (see regulation 1) must inform Council or its nominee in writing of these arrangements within three months. Otherwise, notification of such arrangements must be made in writing before or immediately following the first receipt of Clients' Money by the Firm, and immediately following any change (including cancellation) in the arrangement. (See Explanatory Note 10 below.)

Unidentified and Untraced Clients

32 Where the ownership of Clients' Monies cannot, for whatever reason, be attributed to identifiable clients or their representatives, or cannot be sent to them because their whereabouts are unknown the money must be retained on deposit for the benefit of those clients.

EXPLANATORY NOTES

(These notes do not form part of the regulations)

1 For convenience only, these regulations have been drafted in terms of the duties imposed on firms. However, disciplinary proceedings can be brought against members, affiliates or firms under regulation 29 and attention is drawn to that regulation.

2 A cheque or draft which is not clients' money shall be forwarded to the payee or dealt with in accordance with the client's written instructions. (See definition of clients' money.)

3 Money held by a firm as stakeholder is governed by these regulations (regulation 3) but the payment of interest provisions do not apply (regulation 15).

4 Unless the firm agrees otherwise with a client (regulation 16) a client bank account must be an interest bearing account if 'material interest' would be likely to be earned within the meaning of regulation 14 and any interest thereby received, or which ought to have been received, shall in the absence of such agreement be paid to the client in accordance with regulation 14.

5 Interest would be material under regulation 14 if the money is likely to be held for at least the number of weeks shown in the left hand column of the following table and the minimum credit balance of the client equals or is more than the sum in the right hand column (see regulation 18 for 'aggregated' clients' money).

Number of Weeks	Minimum Balance
8	£1,000
4	£2,000
2	£10,000
1	£20,000

This is merely a guide. The obligation of the firm is to take reasonable steps to ensure that the client does not lose material sums of interest because the money remains in low or non-interest bearing accounts. There may be circumstances, for example, where money should be placed on overnight deposit.

The fair rate of interest earned must be at least the minimum deposit rate offered publicly by a bank for small deposits.

6 Interest on clients' money received by way of cheque should be calculated either from the day it is received or cleared. Both payments and withdrawals must be treated in the same way. If the firm chooses to credit interest from the date the cheque is cleared, and wants to include interest in a payment to a

client, it should assume that the cheque will clear on the fifth business day after the cheque is sent to the client.

7 Whereas these regulations govern the treatment and withdrawal of fees from monies held in a client bank account, they do not relate to commissions received by the firm. In this respect, the attention of members is drawn to *Conflicts of interest and confidential information* in Section 220 in the *Code of Ethics* in the *Members' Handbook*.

8 The Fédération des Experts Comptables Européens, of which the Institute is a member, is a signatory to the EU's 'Charter for the European Professional Associations in support of the fight against organised crime'. To comply with the obligations under the charter, firms should verify the identity of a client before any money is held on behalf of that client.

To avoid potential embarrassment, it is suggested that firms verify a client's identity when a professional relationship is first established, rather than later when any client's money may be first received. Guidance on suitable procedures to verify a client's identity can be found in the *Members' Handbook* statement 9.5 on anti-money laundering guidance.

Members are advised that converting or concealing criminal property or terrorist funds, for example by allowing them to be passed through the clients' money account, is a criminal offence under the money laundering legislation. However, the offence is not committed if a prompt report is made to the law enforcement authorities and their permission obtained to continue the transaction. More guidance on the recognition of when this might be the case, and advice on reporting money laundering suspicions, is contained in *Members' Handbook* statement 9.5.

Where client money is held for the first time after the implementation date of these regulations on behalf of an entity who was already a client at that date, the firm should consider carefully if it has sufficient evidence of the client's identity through the course of past dealings.

It is now a requirement of the Money Laundering Regulations that firms should verify the identity of all new clients which would then deal with the identification requirements outlined above.

9 Members are reminded to consider any income tax implications relating to interest received and paid on client bank accounts.

10 Sole practitioners are required by regulation 31 to have an arrangement with another person to provide the clients with access to their money held by the firm in the event of the incapacity or death of the sole practitioner. The regulation details when these arrangements have to be in place by. The arrangement could most easily be with another firm where the sole practitioner already has an alternate or consultation arrangement.

There is no requirement that this arrangement has to be with another chartered accountant, but when selecting an alternate, the practitioner should consider:

- If the alternate is to be a firm, whether that firm is itself subject to similar client money requirements, such as a solicitor, or is otherwise capable of undertaking the task.
- If the alternate is to be an individual, whether he or she has the appropriate experience to deal with these responsibilities.

In either case, the sole practitioner needs to be convinced of the integrity of the proposed alternate and that the alternate understands the Client Money Regulations and what the alternate may be required to do. If you are unsure about the suitability of a particular person for this role, contact the Ethics Advisory Services' helpline for assistance.

Whoever is chosen, it would be best practice to inform clients of the identity of this person.

The Advisory Service has a help sheet on general alternate arrangements that can be adapted for the purposes of these regulations. Visit www.icaew.com/helpsheets and click on 'Practice helpsheets' for the helpsheet on alternate arrangements; click on 'Ethics helpsheets' for the helpsheet on clients' monies.

Details of the arrangements, and any changes, should be sent to the Professional Conduct Department, ICAEW, Metropolitan House, 321 Avebury Boulevard, Milton Keynes, MK9 2FZ. Although there is no requirement to use it, there is a standard form on the Institute's website which can be obtained as noted in the previous paragraph.

11 Insolvency practitioners are reminded that these regulations apply when they receive money in pre-insolvency situations. If, subsequent to an insolvency appointment, monies are received as payable to the firm, it should either be endorsed over to the insolvency appointment or banked in a clients' money account and withdrawn as soon as the cheque clears.

12 Regulation 20 sets out the various circumstances in which money can be withdrawn from a firm's client bank account. It requires such withdrawals to be authorised by a Principal or an employee of the firm provided that in the latter case the extent of the delegation from the principals is recorded in writing. The written delegation should also detail any restrictions on the use of this delegated authority.

In deciding who can have this authority, the principals should consider the trust that is being placed in the individual and their ability to carry out this function with due care and integrity.

The principals should note that they are responsible for the firm's compliance with the Clients' Money Regulations, regardless of any delegation that may have been made. Regulation 27 requires the principals to review the firm's compliance with the regulations and this review should include the operation of any delegated powers.

Section 7

Guidance for all members

Professional conduct and disclosure in relation to defaults or unlawful acts

(Approved by Council, 4th May 2005[1]*)*

The guidance is intended to be of general application to all members and refers to a number of specific areas of law and regulations, for example, 'Anti-money laundering guidance for the accountancy sector' in the Members' Handbook. A list of additional sources can be found in the Appendix. Members are strongly advised to consult additional sources of guidance as appropriate.

CONTENTS

1. Introduction

Purpose

1.1 This guidance is intended to provide advice to members on their responsibilities relating to defaults and unlawful acts encountered in the

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course of professional work and to their position where disclosure is made. This statement covers:

a) circumstances where a member is required or, may be permitted to, disclose confidential information to a third party relating to defaults or unlawful acts without the consent of the party to whom the duty of confidentiality is owed;
b) practical guidance on liaising with authorities seeking disclosure of confidential information.

1.2 For the purposes of this guidance, a default or unlawful act stems from civil or criminal law. A default can be broadly defined as a failure to perform a task or fulfill an obligation required by law. An unlawful act is an act which is contrary to the law. The most common offences members are likely to encounter in their professional work include:

a) fraud or theft which may involve falsification or alteration of accounting records or other documents, misappropriation of assets, suppression or omission of the effects of transactions from documents and other records, recording of transactions without substance, intentional misapplication of accounting policies or wilful misrepresentations of transactions or of the entity's state of affairs;
b) insider dealing, market abuse and other acts of dishonesty which may include payment and receipt of bribes, conspiracy, soliciting or inciting to commit a crime and attempting to commit a crime or operating an anti-competitive cartel;
c) money laundering offences resulting from acquiring, using, possessing, arranging or concealing 'criminal property', failure by a person working in the regulated sector to report known or suspected money laundering to the organisation's Money Laundering Reporting Officer (MLRO) or Serious Organised Crime Agency (SOCA) or 'tipping off' offences;
d) offences in relation to taxation;
e) health and safety offences which may include corporate manslaughter;
f) breaches of employment legislation including, for example, unlawful discrimination;
g) environmental offences;
h) criminal damage which may include arson with intent to endanger life;
i) perjury and contempt offences;
j) bankruptcy or insolvency offences.

1.3 Where this guidance refers to an organisation, this includes any entity in which a member is a principal, employee or to which the member is a contractor.

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Scope

1.4 This guidance applies to:

a) all members, provisional members and affiliates, including when acting as contractors or in a self-employed capacity;
b) member firms and regulated firms;
c) current and previous clients and employers. A member may be required or permitted to disclose confidential information relating to defaults or unlawful acts relating to previous clients or employers.

1.5 The guidance is of general application and does not cover:

a) specific duties and responsibilities relating to directors and the reserved areas of audit, investment and insolvency which are dealt with elsewhere (see Appendix for further references);
b) client's taxation affairs which are dealt with in Section 7.3, 'Professional conduct in relation to taxation' in the Members' Handbook;
c) information subject to Legal Professional Privilege. If a member believes or knows that the information relating to the default or unlawful act is subject to legal professional privilege, the member is encouraged to seek further advice. Guidance on money laundering reporting requirements in privileged circumstances can be found in Section 9.5 'Anti-money laundering guidance for the accountancy sector'.

1.6 The guidance is not intended to deal with requests for disclosure under provisions for general access to information held by public authorities, such as under the Freedom of Information Act 2000, or in respect of subject access requests under the Data Protection Act 1998. Requirements under these Acts, including requirements for disclosure, are not aimed specifically at defaults and unlawful acts, but may be much more general. Further guidance on these requirements can be found elsewhere (see Appendix).

Overseas Members

1.7 Paragraph 1.9 in the Code of Ethics in the Members' Handbook (www.icaew.com/membershandbook) states that members working overseas should comply with the Code of Ethics unless to do so would breach local laws and regulations.

Key Considerations in relation to Defaults or Unlawful Acts

Institute's Code of Ethics

1.8 The Code of Ethics sets out the five fundamental principles and reference should be made to Section 3.2, 'General application (Part A)' of the Code of Ethics available in the Members' Handbook (www.icaew.com/members handbook).

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1.9 The fundamental principle of confidentiality is particularly relevant to the disclosure of defaults or unlawful acts to third parties. A member acquiring or receiving information in the course of professional work should not disclose this information outside the employing organisation without the informed consent from the party to whom the duty of confidentiality is owed (preferably in writing) unless there is a right or obligation to do so (see Section 140, 'Confidentiality' in the General application (Part A) of the Code of Ethics in the Members' Handbook).

1.10 Members must preserve the confidentiality of information of their clients and employer except where disclosure is justified:

a) by legal authority (see paragraphs 2.11–2.23);
b) in the public interest (see paragraphs 2.24–2.32); or
c) to protect a member's own interests (see paragraph 2.33).

Laws and Regulations
1.11 Laws and regulations are added to, amended, and/or replaced over time. In order to identify and, if appropriate, disclose a default or unlawful act members have responsibility to keep up-to-date with key changes in the laws and regulations that affect the role, business sector and country in which they operate (see Appendix for further references).

Sources of Advice

Institute
1.12 Members who are in doubt as to their ethical position may seek advice from the Institute's Ethics Advisory Services by e-mail ethics@icaew.com or telephone +44 (0)1908 248258. The Ethics Advisory Service is available to all members including their representatives and is a confidential service free from the duty to report professional misconduct within the Institute. Further information on the Ethics Advisory Service can be found at http://www.icaew.com/ethicsadvice.

1.13 Seeking advice from the Ethics Advisory Services does not discharge a member's duty to report misconduct, including their own misconduct. (See Section 2.7, 'The duty to report misconduct' in the Members' Handbook (www.icaew.com/membershandbook).)

1.14 A member requiring specific money laundering advice should contact the Institute's money laundering helpline by e-mail mlenquiries@icaew.com or telephone +44 (0)1908 248320. The money laundering helpline provides advice on general issues concerning the regulations or specific issues, which can be discussed anonymously.

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Other

1.15 A member should also consider taking legal advice to resolve issues arising from the application of laws and regulations to particular situations relating to confidentiality, disclosure, privilege, self-incrimination and other areas.

1.16 From time-to-time it may be necessary to seek legal advice at short notice. Therefore, it may be in a member's interest to have in mind suitably qualified individuals from whom legal advice can be sought.

1.17 If a member is considering taking advice from sources other than the Institute regarding disclosure in relation to defaults or unlawful acts, the member should consider, amongst other factors, whether the qualifications, experience and background of the individual or organization providing the advice are appropriate to the circumstances.

2. Defaults or Unlawful Acts

Discovering a Default or Unlawful Act

2.1 A member is expected to apply appropriate levels of knowledge, judgement and expertise when considering whether an act is a default or unlawful act but is not expected to have detailed knowledge of laws and regulations beyond that which is required for the role or task being undertaken. Experience in a particular role, business, or country may result in a member having greater knowledge in relation to defaults or unlawful acts than a lay person's knowledge. If so, a member is expected to use that greater knowledge or expertise. For example, a tax adviser is expected to have greater knowledge and expertise in what constitutes a default or unlawful act in relation to taxation.

2.2 If a member suspects that a client or employer or someone acting for a client or employer is committing or has committed a default or unlawful act, a member should, where appropriate, investigate the matter to obtain an understanding of the nature of the act and the circumstances in which it has occurred. Not all suspicions turn out to be well founded. Unless otherwise required, disclosure of suspected defaults or unlawful acts prematurely can be detrimental to the member, employer and/or clients. A member should not disclose suspicions of defaults or unlawful acts unless required to do so by law, the process of law or after careful thought and having taken appropriate advice.

2.3 A member will have to exercise professional judgement in deciding who to discuss the matter with, since this may depend on the nature of the act, the

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circumstances and individuals involved. A member should refer to the internal policies and procedures of the employing organisation for guidance as to whom to discuss known or suspected defaults or unlawful acts with.

2.4 In general, unless there is a good reason not to, a member should first discuss known or suspected defaults or unlawful acts within reporting lines in the employing organisation and/or the client, if appropriate, before disclosing the matter to third parties. Reporting lines may include, but are not limited to, the member's immediate superior, the next level of management, the organisation's Money Laundering Reporting Officer (MLRO) and a corporate governance body, for example, the Audit Committee. Some individuals may also have obligations to report direct to a regulator in certain circumstances, such as those involving matters of material regulatory concern. For example, Health and Safety officers may have obligations to report to the Health and Safety Executive, or approved persons under the Financial Services and Markets Act 2000 to the Financial Services Authority.

2.5 If a member suspects that a superior and/or management are involved in the default or unlawful act, the member is encouraged to discuss the matter with a higher level of authority in the organisation, for example, the Audit Committee or formal whistleblowing helplines.

2.6 Any discussions with individuals regarding defaults or unlawful acts should be subject to compliance with the money laundering regulations regarding reporting requirements and 'tipping off' offences. Reports of known or suspected money laundering offences (whether voluntary or required by law) should normally be made to the MLRO without delay or, if the organisation does not have a MLRO, to the Serious Organised Crime Agency (SOCA). The MLRO, if there is one, will determine whether or not a report should be made to SOCA (see Section 9.5 'Anti-money laundering guidance for the accountancy sector' in the Members' Handbook (www.icaew.com/members handbook)).

2.7 Wherever possible, a member should advise individuals or the organisation to disclose the default or unlawful act to the proper authorities (see paragraph 2.12) and/or take corrective action.

2.8 A member may wish to consider taking legal advice in the following situations:

a) where no higher authority exists within the organisation with whom that matter can be discussed;
b) if the member believes that no corrective action will be taken by the relevant individuals and/or organisation;

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c) if a member believes that the appropriate disclosures to the proper authorities will not be made in a reasonable period of time;
d) where otherwise uncertain how to proceed.

Disclosure to Third Parties

2.9 Disclosing information to third parties without a client or employer's consent may be justified, despite the duty of confidentiality. A member may be required or permitted to make a disclosure to a third party if justified:

a) by legal authority (see paragraphs 2.11–2.23);
b) in the public interest (see paragraphs 2.24–2.32); or
c) to protect a member's own interests (see paragraph 2.33).

2.10 When making a disclosure to a third party without consent based on 2.9 b) or 2.9 c), a member must act reasonably and in good faith when dealing with the proper authorities and exercise caution when making statements and assertions.

Disclosure authorised or required by legal authority

2.11 The law or process of law may require or permit disclosure of information to the proper authorities without the employer's or client's consent. Failure to comply with disclosure requirements required by law or the process of law may result in a member breaching the law and committing an unlawful act or default.

2.12 Proper authorities[2] are defined by the courts as those third parties who have a proper interest in receiving such information, for example, law enforcement agencies and regulators. The proper authorities in the United Kingdom may include, but are not limited to, the Serious Fraud Office, the Crown Prosecution Service, police forces, the Financial Services Authority, the Department for Business, Enterprise & Regulatory Reform, Designated Professional Bodies, Recognised Supervisory Bodies, Recognised Professional Bodies, the Panel on Takeovers and Mergers, the Society of Lloyd's, the Bank of England, local authorities, the Charity Commission for England and Wales, the Office of the Scottish Charity Regulator and HM Revenue & Customs.

2.13 Before disclosing information to an organisation, committee or agency, a member should check its legal authority. For example, whether disclosure to a Parliamentary Committee or Ombudsman is required may need to be checked.

2.14 In the absence of consent, a member should consider the following before deciding to disclose confidential information:

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[2] Proper authorities per Denning LJ in *Initial Services v Putterrill*, 1968.

a) refer to the organisation's internal procedures for liaising with authorities;
b) identify the authority, agency or regulator making the disclosure request;
c) clarify under what authority disclosure is sought;
d) ensure the extent of the request does not exceed the authority or contravene the law;
e) establish whether the relevant individuals or organisation may be informed of the request or disclosure;
f) keep records of decisions and actions taken (paragraphs 2.34–2.35).

The above points are discussed in greater detail in section 3 'Liaising with authorities seeking disclosures of this guidance'.

2.15 Some situations where a member is required to provide confidential information proactively to the proper authorities without the client's or employer's consent and without a request from the proper authorities or process of law, include but are not limited to:

a) knowledge or belief that information would be material in preventing an act of terrorism, or apprehending, prosecuting or convicting a terrorist which must be disclosed as soon as reasonably practicable to the police;
b) knowledge or suspicion of money laundering, formed by an individual in the regulated sector which must be disclosed to the organisation's MLRO or the SOCA (paragraphs 2.17–2.19);
c) information of regulatory significance, when acting as an auditor or examiner of a charity which must be disclosed to the Charity Commission.

2.16 Some situations where a member may be required to disclose information, if requested, to the proper authorities without a client's or employer's consent, include, but are not limited to circumstances surrounding:

a) knowledge or belief that an employer or client has committed fraud, disclosure to the police may be required;
b) certain information when acting as a liquidator to the Department for Business, Enterprise & Regulatory Reform;
c) information given on oath to an inspector appointed by the Secretary of State to investigate the affairs of a company;
d) specified information to the liquidator, administrative receiver or administrator of the client or employer (see Section 9.4, 'Documents and Records: Ownership, Lien and Rights of Access' in the Members' Handbook (www.icaew.com/membershandbook)); or
e) information required by the process of law, for example, pursuant to a Court Order.

2.17 There are reporting requirements in relation to money laundering which override the duty of confidentiality and these are set out in the Proceeds of Crime Act 2002, the Terrorism Act 2000, the Terrorism Act 2006 and the

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Money Laundering Regulations 2007. These often require difficult judgments to be made as to whether or not a situation has arisen which would require a member to report information to the employing organisation's Money Laundering Reporting Officer (MLRO) or the Serious Organised Crime Agency (SOCA).

2.18 A member should take care when communicating relevant facts to others relating to known or suspected money laundering or terrorist activities. Under the Proceeds of Crime Act 2002 and the Terrorism Act 2000, it is a criminal offence to 'tip off' a money launderer or terrorist, or prejudice an investigation. For further discussion, refer to the Institute's money laundering guidance (http://www.icaew.com/moneylaundering).

2.19 A member requiring specific advice on the Money Laundering Regulations 2007 should contact the Institute (paragraph 1.15).

2.20 If a member receives notice that a Court order will be sought requiring the member to make a disclosure then, unless it is inappropriate to do so, the member should inform the client or employer that such a request has been made, to give them an opportunity to consent to the member making a disclosure.

2.21 A member may be required to disclose information as part of the legal disclosure process or following the service on the member of a witness summons, including a summons to produce documents (see Section 9.4, 'Documents and records: ownership, lien and rights of access' in the Members' Handbook (www.icaew.com/membershandbook)).

2.22 If a summons or other similar type of demand is addressed specifically to the member, that member has a legal obligation to comply with the request.

2.23 If a member considers the above points regarding disclosure of confidential information due to legal authority and is still uncertain as to whether or not disclosure is appropriate, it may be appropriate to seek legal advice.

Disclosure in the public interest

2.24 A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. Hence, a member should disclose confidential information, when not obliged to do so by law or regulation, if the disclosure can be justified in the 'public interest' and is not contrary to laws or regulations.

2.25 Section 100, 'Introduction and Fundamental Principles', paragraph 100.1 in the Code of Ethics defines acting in the public interest as 'having

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regard to the legitimate interests of clients, government, financial institutions, employers, employees, investors, the business and financial community and others who rely upon the objectivity and integrity of the accounting profession to support the propriety and orderly functioning of commerce'.

2.26 Examples of situations which may be regarded as being in the public interest, as set out in the Public Interest Disclosure Act 1998 (PIDA) include but are not limited to the disclosure of information where there has been:

a) a criminal offence;
b) a failure or likely failure to adhere to legal obligations;
c) a miscarriage of justice;
d) matters where the health and safety of individuals is endangered or likely to be endangered;
e) damage or possible damage to the environment.

2.27 Whilst the public interest is a concept recognised by the courts, the absence of a legal definition of public interest places members in a difficult position as to whether or not matters should be disclosed on this ground. Hence, a member must consider each situation on its own merits and take advice if unsure how to proceed.

2.28 When considering whether or not a disclosure is justified in the public interest, a member should take one or more of the following into account:

a) reliability and quality of information available and degree of suspicion;
b) whether members of the public are likely to be affected;
c) the possibility or likelihood of repetition;
d) whether the individuals or organisation will be willing to disclose the matter and remedy the situation;
e) the gravity of the matter, for example, the size of the amounts involved and the extent of the likely damage;
f) legal or regulatory obligations;
g) legal protection for breach of duty of confidentiality;
h) any legal advice obtained.

2.29 If a member believes a matter should be disclosed in the public interest, the member should first consider whether it is appropriate to disclose the matter (and if so, in what manner) to the relevant individuals or organisation to give them an opportunity to address it, before making disclosure of it to the appropriate authority.

2.30 A member should consider carefully the approach to be taken to disclosure and to whom it should be made. A member may have a defence to the Institute's disciplinary proceedings relating to breach of duty of confidentiality if:

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[1] Amended:
- 18 August 2008
- 1 September 2006

a) the member had an honest and reasonable belief that the disclosure is made in the public interest; and
b) such disclosure is made to a proper authority (paragraphs 2.11–2.12).

2.31 PIDA may provide statutory protection to a member making public interest disclosures. PIDA provides protection to 'workers' (as defined in the Act) making disclosures in the public interest and allows such workers to claim compensation for discrimination, dismissal or victimisation following such disclosures.

2.32 In order for a 'worker' to be provided with protection under PIDA a 'worker' must make a 'protected disclosure' in 'good faith' to an employer, legal adviser, prescribed person or other appropriate person. In order for a disclosure to qualify as a 'protected disclosure', a 'worker' must have a reasonable belief that the 'protected disclosure' is substantially true. Further information on PIDA is available in the ICAEW's Technical Release 17/99.

Disclosure for the protection of the Member's own interest
2.33 A member may disclose to the proper authorities information concerning a client or employer where the member's own interests require disclosure of that information. In general, members should only disclose information which is adequate, relevant and necessary in order to allow the protection of their own interests. Examples of such situations include, but are not limited to, the following:

a) to enable the member to defend himself against a criminal charge or to clear himself of suspicion;
b) to resist proceedings for a penalty or civil proceedings in respect of a taxation offence, for example in a case where it is suggested that the member assisted or induced a client or employer to make or deliver incorrect returns or accounts (see Section 7.3, 'Professional conduct in relation to taxation' in the Members' Handbook (www.icaew.com/membershandbook));
c) to resist a legal action brought against him;
d) to enable the member to defend himself in disciplinary proceedings (see Section 2.7, 'The duty to report misconduct' in the Members' Handbook (www.icaew.com/membershandbook)); or
e) to enable the member to sue for unpaid fees.

Documentation
2.34 When disclosing confidential information, a member must bear in mind that any decision to disclose may be called into question at a future date. Thus, a member is advised to keep detailed contemporaneous notes of meetings and telephone conversations relating to the matter.

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2.35 In situations where a member discloses confidential information to a third party, a member is encouraged to keep a record of:

a) any consent given;
b) discussions held or decisions taken concerning the disclosure of confidential information;
c) a schedule summarizing disclosures and to whom they were made;
d) copies of relevant documentation; and
e) any legal or other advice obtained.

3. Liaising with authorities seeking disclosure

3.1 It is in the interests of the profession and the public that members and law enforcement agencies, regulatory authorities and other authorities cooperate with each other in order to enable them to carry out their functions.

3.2 When liaising with law enforcement agencies, authorities and regulators, it is important that members communicate their position effectively by emphasizing that although they have to comply with laws and regulations and the process of law, they must also consider their duty of confidentiality to their employer and clients. Those charged with enforcing the law and regulations include, but are not limited to, police officers, investigating officers or representatives from organisations such as the Financial Services Authority and the Child Support Agency.

3.3 Whilst those requesting information may come from diverse organisations and may approach a member via telephone, written communications or during a visit, the principles which underpin a member's approach to liaising with the law enforcement agencies, regulatory authorities and other authorities are the same.

3.4 A member should consider, as appropriate, the following when liaising with law enforcement agencies, regulatory bodies and other authorities:

a) Refer to the organisation's internal procedures for liaising with authorities. A member should refer to the organisation's internal policies and procedures for disclosure of confidential information to authorities.
b) Identify the authority, agency or regulator making the disclosure request. A member should identify which authority, agency or regulator the person is purporting to represent. A member should not be afraid to ask for proof of identity and other verification of credentials. If in any doubt, it would be reasonable for a member to ask for time to check the identity of the individual and the organisation, perhaps by telephoning the office of the agency or regulatory authority allegedly being represented. A member

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must not disclose confidential information to individuals without being satisfied as to the identity of these individuals.

A member who is approached by an insolvency practitioner or official receiver to disclose confidential information should also establish in what capacity the insolvency practitioner or official receiver is acting. The powers and rights of such individuals vary slightly between roles (see Section 9.4, 'Documents and records: ownership, lien and rights of access' in the Members' Handbook (www.icaew.com/membershandbook)).

c) Clarify under what authority disclosure is being sought.

Some powers are statutory, for example an Act of Parliament may give authority to a particular agency to demand information without further action. Other statutory provisions require the official to take further steps before being able to demand disclosure, for example a court order may be needed.

A member should check with the individual requesting the disclosure under what powers they are seeking it, preferably obtaining the full reference for the power (for example the Act and Section). If acting under a court order a member should be provided with a copy. Disclosure should not be made without assurance that due process of law has been followed, for example, checking that the order has an official court seal and refers to the relevant party.

d) Ensure the extent of the request does not exceed the authority or contravene the law.

Although it would not be unreasonable to assume that a properly identified individual is ordinarily acting within their power, if a member is in doubt the member should not hesitate to ask for time to check that such powers exist. A member should be careful not to disclose information which is not covered by the authority and its powers. For example, a right to access specific documents under a Court order does not equate to unfettered access to all files.

A member must also consider whether the information being requested is covered by Legal Professional Privilege. If so, a member is encouraged to seek further advice.

e) Establish whether the relevant individuals or organisation may be informed of the request or disclosure.

Wherever possible, consent should be sought from the client or employer, to respond openly to a request for information from law enforcement agencies and authorities acting within their legal powers. However, it should be noted that representatives from law enforcement agencies may approach the member before the client or employer is aware of investigations into their affairs. The matters subject to disclosure may be extremely sensitive. Disclosing the request for information might prejudice an investigation or represent an offence for example, 'tipping off' a money launderer. It is therefore, important that a member establishes if the request and/or disclosure may be discussed with the employer or client.

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f) Keep records of decision and actions taken.
Disclosure without a client's or employer's consent represents a departure from generally accepted principles of confidentiality. It is therefore important, for their own benefit, that a member records details of any disclosures made. In most cases, it will be necessary to keep such records confidential (see paragraphs 2.34–2.35).

If in doubt as to any of the matters referred to above, a member should seek legal advice before disclosing information.

4. Appendix – Websites

Additional sources of guidance and useful websites, include, but are not limited to:

a) Members Handbook (http://www.icaew.com/membershandbook/), in particular:
- Section 2.7, 'The duty to report misconduct'
- Section 3.2, 'General application of this code (Part A)'
- Section 7.3, 'Professional conduct in relation to taxation'
- Section 8.1, 'Financial and accounting duties and responsibilities of directors'
- Section 9.4, 'Documents and records: ownership, lien and rights of access'
- Section 9.5, 'Anti-money laundering guidance for the accountancy sector'

b) Technical Releases
(http://www.icaew.com/technicalreleases), in particular:
- 16/99 Receipt of Information in Confidence by Auditors
- 17/99 Public Interest Disclosure Act 1998
- 07/04 Data Protection Act 1998 and its application to the major practice streams of accountancy practices
- 49/05 The Proceeds of Crime Act 2002 (POCA) as amended by the Serious Organised Crime and Police Act 2005
- 02/06 Guidance on Changes to the Money laundering reporting requirements: the exemption from reporting knowledge or suspicion of money laundering formed in privileged circumstances
- 07/06 The Confidentiality of Money Laundering Suspicious Activity Reports (SARs) in the UK

c) Statements of Auditing Standards
(http://www.frc.org.uk/apb/publications/isa.cfm), in particular:
- ISA 240 (UK and Ireland) – The Auditor's Responsibility to consider Fraud in an Audit of Financial Statements

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- ISA 250 (UK and Ireland) – Consideration of Laws and Regulations in an Audit of financial Statements

d) Audit Technical Releases (http://www.icaew.com/technicalreleases), in particular:
   - Audit 02/05 Guidance on the implications of the Freedom of Information Act 2000

e) APB Practice Notes (http://www.frc.org.uk/apb/publications/practice.cfm), in particular:
   - PN12 – Money Laundering – Interim guidance for Auditors in the UK (Revised)

f) Legislation and Regulations (http://www.opsi.gov.uk/), in particular:
   - Theft Act 1968
   - Data Protection Act 1998
   - Public Interest Disclosure Act 1998
   - Terrorism Act 2000
   - Freedom of Information Act 2000
   - Proceeds of Crime Act 2002
   - Serious Organised Crime and Police Act 2005
   - Terrorism Act 2006
   - Money Laundering Regulations 2007

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Professional conduct in relation to taxation

Amended Section 7.3 (formerly section 1.308) of the Members' Handbook of the Institute of Chartered Accountants in England and Wales effective from 1 September 2006

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FOREWORD TO THIS EDITION

The previous edition of Section 7.3 (formerly Section 1.308) of the ICAEW Members' Handbook was published as TAXGUIDE 1/04 on 30 April 2004 jointly with other tax-interested professional bodies.

Effective from 1 September 2006, ICAEW published a new Guide to Professional Ethics as Section 3 of the Members' Handbook to replace the former Section 1.2, and the contents of the Handbook were reorganised.

The text of this edition of Section 7.3, effective from 1 September 2006, is the same as the April 2004 version save that the cross references to other ICAEW Members' Handbook Statements have been amended following the reorganisation of all its contents and some secretarial amendments and annotations made, shown generally in *italics*. As all the changes are minor, HMRC have not been asked to review this edition.

We also include in this edition fifty questions which are intended to help members find the answers to queries and which were originally published in June 2004 in TAXline Tax Practice No.7 with the text of the previous version of this Handbook Statement.

Please be aware that there have been changes since 2004 to legislation and to the way in which HMRC carry out inquiry work, and HMRC are carrying out a major review of their powers. These developments are not reflected in the explanations in this Section.

The Institute is currently undertaking a major rewrite of this Section and the revised guidelines will take account of developments since April 2004.

In these guidelines HMRC, in some contexts, refers to its former constituent bodies (Inland Revenue and HM Customs & Excise). We have endeavoured to reflect the current structure of the institution, and therefore use 'HMRC' throughout. However, where still relevant, the terms 'the Revenue', 'Inland Revenue', 'Customs' and 'tax authorities' can be taken to mean HMRC.

AIMS AND OBJECTIVES

The purpose of these guidelines is to assist and advise members, whether in practice or employment, about their duties and responsibilities when dealing with:

- those whom they advise;
- the tax authorities; and
- other professional advisers.

SUMMARY

- These guidelines represent the joint views of the bodies involved in their preparation (see paragraph 1.3). They are intended to assist members both generally in dealing with clients and the tax authorities and specifically in relation to irregularities and errors.
- A member's primary duty is to ensure that his actions comply with the law. He owes a contractual duty to the client to act for him with the requisite degree of skill and care, and the contractual relationship should be governed by a letter of engagement. The member also has duties to the tax authorities, notably of compliance with the law and the honest presentation of his client's circumstances.
- It is the taxpayer's responsibility to ensure that returns made to the tax authorities are correct and complete. It is for the member to assist him to decide on the extent and manner of disclosure of facts in relation to his tax affairs.
- Where a member becomes aware that irregularities have occurred in relation to a client's tax affairs, he should advise the client of the consequences, and the manner of disclosure. If necessary, appropriate specialist advice should be taken.
- Where a client refuses to follow the advice of a member in relation to issues involving disclosure, the member should consider whether he should continue to act. If appropriate, specialist advice should be taken.
- If mistakes are made by the tax authorities there may be a need, and in some cases a duty, on the part of the client and sometimes the member, to put matters right.
- Members may have statutory duties of disclosure where they have suspicions of criminal activity.
- When approached for information on a client's affairs by another adviser the member should ensure that he has his client's authority before making any disclosure.
- These guidelines apply equally to members in employment.

FIFTY QUESTIONS

Answers to the following 50 questions are all contained in this guidance note. The relevant paragraph numbers are provided in each case. However, members are advised to review Sections 1 and 2 of these guidelines and the opening comments to each Section in addition to the highlighted paragraphs when considering the answers to particular questions.

1 What is your most important duty as a tax adviser? (paragraphs 2.1 and 2.2)

2 What is your duty towards the UK tax authorities? (paragraphs 2.4 and 2.5)

3 What is your duty to overseas tax authorities? (paragraph 2.6)

4 How should the terms of your contractual relationship with clients be established? (paragraphs 2.7–2.9)

5 What should you do if a client refuses to make full disclosure to you? (paragraphs 2.10, and 2.11)

6 What should you do if you can foresee the imminent cessation of a client relationship? (paragraph 2.12)

7 Should you keep notes of meetings and telephone conversations regarding clients' tax affairs? (paragraph 2.13)

8 Should you record all oral advice given to clients? (paragraph 2.14)

9 What should you do if asked to advise on matters that go beyond your own level of competence? (paragraph 2.15)

10 What is the difference between tax avoidance and tax evasion? (paragraphs 2.17–2.19)

11 Why should you keep some working papers separate from others? (paragraph 2.21)

12 What general obligations are you under when you receive requests for client information from HMRC authorities? (paragraphs 2.22–2.27)

13 What should you do if you receive official requests for information concerning an ex-client? (paragraph 2.28)

14 What should you do if faced with a situation in which the tax authorities are seeking to remove documents from your office? (paragraph 2.31)

15 What should you do if consulted about or if you receive an official request for the disclosure of material that you or your client believes qualifies for legal professional privilege? (paragraphs 2.34 and 2.49)

16 What should you do if consulted about or if you receive an official request to disclose material that you or your client believes to be privileged at common law? (paragraphs 2.38 and 2.49)

17 What should you do if you become aware of irregularities or errors in a client's tax affairs? (paragraphs 2.39, 2.43, 4.5, 4.9–4.11)

18 If a client refuses to make or permit a disclosure to the tax authorities, can you consider the materiality of the amount involved? (paragraph 2.42)

19 Why should clients be encouraged to make adequate disclosure to HMRC? (paragraph 3.2)

20 What are HMRC's powers of discovery? (paragraph 3.3)

21 What reasons are there for encouraging clients to make fuller disclosure than is strictly necessary? (paragraphs 3.6 and 3.9–3.17)

22 Should you provide the same level of disclosure when seeking a statutory clearance? (paragraph 3.19)

23 For what categories of offence can HMRC seek penalties? (paragraph 4.2)

24 What should you do when HMRC allege that an irregularity may have occurred? (paragraphs 4.12–4.14)

25 What should you do when HMRC's Special Compliance Office (SCO) takes an interest in a client's tax affairs? (paragraphs 4.15–4.23)

26 What should you do if your client is unwilling or refuses to make a full and prompt disclosure? (paragraphs 4.24–4.43 and 4.47)

27 Should you volunteer information about a former client to their new adviser? (paragraph 4.44)

28 What should you do when you receive a request for information from a new adviser? (paragraphs 4.45–4.46)

29 To what extent should you consider indirect taxes when preparing accounts (paragraphs 4.48–4.50)

30 What should you do if you become aware that HMRC have made an error in dealing with the affairs of a client? (paragraphs 5.5, 5.6 and 5.17)

31 Why should you consider taking legal advice if a client does not give permission for you to inform HMRC that an excessive tax refund has been made? (paragraphs 5.8 and 5.11)

32 Why should you keep a written record of all advise given to clients in connection with HMRC errors? (paragraph 5.9)

33 What are the offences for which you might be at risk of prosecution in connection with excessive tax refunds? (paragraph 5.13)

34 Do you have a legal obligation to press HMRC to issue an assessment before the limit for so doing expires? (paragraph 5.19)

35 What will HMRC investigator consider if you (as a chartered accountant) are personally investigated? (paragraphs 6.3 and 6.5)

36 What should you do if HMRC indicate that they intend to investigate you (a chartered accountant)? (paragraph 6.4)

37 What do HMRC have to prove before they can impose a penalty on you (a chartered accountant)? (paragraph 6.7)

38 What should you do if asked by HMRC to disclose information or to provide access to certain working papers? (paragraphs 6.12–6.13)

39 What should you do if you believe that HMRC may investigate criminal proceedings against you? (paragraphs 6.14–6.21)

40 To whom are you responsible for the accuracy of VAT refunds prepared on behalf of a client? (paragraph 7.1)

41 Why should you seek indemnities from overseas clients for whom you act as a 'tax representative' for VAT purposes? (paragraph 7.2)

42 How much information do you need to supply to HMRC in order to be able to rely on any unequivocal ruling received in writing? (paragraph 7.5)

43 In what circumstances can you rely on the 'Sheldon Statement' (VAT ESC 3.5 in Notice 48, March 2002)? (paragraphs 7.6–7.10 and 7.17)

44 What should you do if a written ruling from HMRC appears to be incorrect? (paragraph 7.13)

45 What are the limits as to the extent to which HMRC are bound by undertakings and statements of policy which they have given or issued? (paragraphs 7.15 and 7.16)

46 What can you do if you obtain a ruling from HMRC with which you disagree? (paragraph 7.18)

47 How extensive are HMRC's powers to seek information? (paragraphs 7.19 and 7.22–7.24)

48 What should you do if unsure as to the implications of any question posed by HMRC? (paragraph 7.21)

49 What should you do if you suspect a client may have defrauded the Crown of tax or have been negligent with regard to VAT matters? (paragraphs 8.1–8.8 and 8.37–8.39)

50 What should you do if a client admits an irregularity in connection with his VAT affairs? (paragraphs 8.9–8.36)

INTRODUCTION

1 PRELIMINARY

Purpose of Guidelines

1.1 These guidelines have been prepared for the assistance of members and include practical advice about a range of legal and ethical issues. In some instances the guidance put forward goes beyond strict rights and duties. In following the guidelines, it should be particularly borne in mind that each case depends upon its own circumstances and that a member who is in doubt about his position or responsibilities should seek advice from his professional body and, where appropriate, his legal advisers.

1.2 The guidelines are of general application and are intended as guidance in a range of circumstances. Chapters 3 onwards are primarily directed towards direct taxes and VAT. However, the principles are equally applicable to other taxes.

1.3 The guidelines have been prepared in conjunction with the Chartered Institute of Taxation, the Association of Taxation Technicians, the Institute of Indirect Taxation, the Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants.

1.4 HMRC have reviewed Chapters 2 to 8. Whilst not necessarily agreeing with all the views expressed, the body acknowledged that the parts reviewed are an acceptable basis for dealings between members and the tax authorities.

1.5 The guidelines supersede all previous editions, the last of which was issued in 2000. They should be read in conjunction with the introduction and general principles set out in Members' Handbook Section 7.1 'Professional conduct and disclosure in relation to defaults or unlawful acts' (see www.icaew.com/membershandbook/). (*Note: Members whether in practice or business should also refer to the Code of Ethics effective from 1 September 2006 at Section 3 of the Members' Handbook*).

Interpretation

1.6 In these guidelines, 'client' includes, where the context requires, 'former client'. 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof. 'The Revenue', 'Inland Revenue', 'Customs' and 'tax authorities' mean HM Revenue & Customs. The masculine gender imports the feminine gender throughout this document.

Abbreviations

1.7 The following abbreviations have been used:

CEMA 1979	Customs and Excise Management Act 1979
CoP	Code of Practice
FA	Finance Act

GAAP	Generally Accepted Accounting Principles
HRA 1998	Human Rights Act 1998
LPP	Legal Professional Privilege
NCIS	National Criminal Intelligence Service (*now absorbed into Serious Organised Crime Agency* ('SOCA'))
PACE 1984	Police and Criminal Evidence Act 1984
POCA 2002	Proceeds of Crime Act 2002
SCO	HMRC Special Compliance Office
SP	Statement of Practice
STC	Simons Tax Cases
TA 1988	Income and Corporation Taxes Act 1988
TMA 1970	Taxes Management Act 1970
VATA 1994	Value Added Tax Act 1994

2 PRINCIPLES APPLICABLE TO ALL TAXES

Generally

2.1 A member's most important duty is to ensure that his actions comply with the law. This requires that he complies with any direct obligation imposed upon him by statute or common law to do or refrain from particular actions (for example compliance with a TMA 1970 s.20(3) notice) and that he does not assist his client in the commission of any act which breaches the client's legal obligations (for example the provision of inaccurate accounts or misleading representations on transactions). Subject to that overriding duty, he owes a contractual duty to carry out the tasks that he has agreed to do with the requisite skill and care.

2.2 The discharge of this duty will often require the member to advise the client of the client's obligations under the relevant tax legislation and the consequences of non-compliance. Whether the client follows the member's advice is ultimately the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, then the member must ensure that he does not take any steps which assist the client in that non-compliance because that would be in breach of the member's duty not to assist in what is likely to be an unlawful act and would in itself be an unlawful act; see for example TMA 1970 s.99.

2.3 Subject to the foregoing, the member owes his client a duty to act in his best interests in carrying out his client's instructions. In so doing a member has 'one client at a time' and he should not feel precluded from acting for a client in a particular manner which is lawful simply because such a practice, if it became widespread, might make the tax authorities' job more difficult or would not be a manner in which other clients would wish to act.

2.4 A member's duty towards the tax authorities is to comply with the appropriate legislation and the common law when dealing on behalf of a client with a matter which is governed by tax law. In all dealings relating to

the tax authorities, a member must act honestly and do nothing that might mislead the authorities.

2.5 A member may disclose information to the tax authorities without his client's consent only when required to do so by law. It would only be where the member would render himself liable to civil penalty or criminal sanction that the member is under a legal duty to disclose to the authorities. Such obligations, which are mainly imposed by statute, override the contractual duty of confidentiality and loyalty which a member owes to his client. Otherwise a member does not have an obligation, as a matter of law, to disclose to the tax authorities information which has been given to him in confidence even though it may be potentially relevant to some tax issue. See also paragraphs 2.43–2.47: 'Fiscal offences and money laundering'.

Overseas taxes

2.6 A person who is acting as a tax agent for a principal who is subject to the tax jurisdiction of another country could well be subject to different obligations in relation to confidentiality or disclosure depending on the tax law and general law of that country. Subject to that caveat, members should apply the principles set out in these guidelines in dealing with issues relating to overseas taxes. See also paragraphs 2.43–2.47.

Relationship with the client

2.7 In dealing with a client's taxation affairs, a member's role is often that of agent but he may be acting as principal in an advisory capacity. The contractual relationship should be governed by an appropriate letter of engagement in order that the scope of both the member's and the client's responsibilities are made clear: see Section 9.1: 'Managing the professional liability of accountants' (www.icaew.com/membershandbook/). For reasons explained elsewhere in these guidelines (see in particular paragraph 4.32), members are strongly urged to include in the letter of engagement a statement to the following effect:

> 'We will observe the professional rules and practice guidelines of our professional Institute and accept instructions to act for you on the basis that we will act in accordance with those guidelines. In particular you give us authority to correct HM Revenue & Customs errors.'

Note: this wording has been superseded. Members should refer to the updated engagement letters guidance for tax practitioners published in August 2008 as TAXGUIDE 6/08 – see http://www.icaew.com/index.cfm?route=159891. *The recommended wording now states: 'We will observe and act in accordance with the bye-laws, regulations and ethical guidelines of the Institute of Chartered Accountants in England and Wales and will accept instructions to act for you on this basis. In particular you give us the authority to correct errors made by HMRC where we become aware of them.'* Members should bear in mind that an engagement letter once agreed with a client is a contract and should be aware and make a note of any variations that have subsequently been made whether orally or in writing.

2.8 Every contractual relationship should be covered; if the member acts for a partnership and also for one or more of the partners, then the partnership and each partner acted for are separate clients for the purposes of these guidelines. Likewise, if the member acts for a husband and wife, each is a separate client.

2.9 If the client is a body corporate, the client is the company and not the directors. Where a default of any kind is discovered, the matter should be raised at the appropriate level in the client organisation. Where the directors' actions have resulted in the company's defrauding the Crown, references in these guidelines to the 'client' should be regarded in the first instance as referring to the directors. For example, where the member has to advise a client to make a full disclosure to the tax authorities, the advice should be addressed to the directors. If it is believed that this advice will not be brought to the attention of the board as a whole, it should be given to each director, and then, if appropriate, to shareholders.

2.10 A member should deal with taxation work only on the basis that the client is prepared to make full disclosure to him. Such disclosures are governed by confidentiality as an implied contractual term.

2.11 These guidelines explain the position of members if a client refuses to act in accordance with the member's advice, for example where the client has unreasonably delayed either the production of information needed for the preparation of returns or accounts or full disclosure of irregularities. The member should consider whether to continue to act for the client but should note the recommendations contained in Chapters 4 and 8 of these guidelines regarding termination of relationships with the client.

2.12 If a member believes that a relationship with a client has been or is likely to be terminated, whether by the client or by the member, the member needs to take extra care to make clear to the client in writing what matters within the terms of the engagement have been dealt with and what remains to be done, and by what date it should be done, and also what further action the member will, or will not, take.

2.13 A member is advised to keep detailed notes (preferably typed) of meetings and telephone conversations with his clients, the tax authorities and any other third parties regarding his clients' affairs. By this means the member may protect himself in the event of a subsequent dispute over what was said at the time and, in the case of what the member perceives to be important meetings and conversations, he should consider ensuring that such notes are signed and dated by the originator.

2.14 It would be prudent for a member either to write to the client confirming oral advice as a matter of course or at least to make a note on file of advice given and he should consider sending a copy of that note to the client for his information and comment. This will allow the client a chance to correct any mistaken assumptions set out in the note and to have a written

record of the advice given. Exceptionally, where it is felt that the note is of particular importance, it may be sensible to have the creation of the file note witnessed.

2.15 Members will from time to time find themselves having to advise on matters which require specialist knowledge. In such circumstances, they should be careful not to go beyond their own level of competence and, if necessary, should seek help from a specialist in the field.

2.16 Members may also find it helpful to refer to Section 7.1 'Professional conduct in relation to defaults or unlawful acts' (see www.icaew.com/membershandbook/).

Tax avoidance

2.17 Tax avoidance is legal and is to be distinguished from evasion which is illegal. All taxpayers have the right to arrange their affairs under the law to minimise their liability to tax. The member should consider carefully the merits of arrangements which may be considered artificial by the tax authority concerned. Such schemes should be considered in the light of the client's wider interests because of the risk that they may be challenged by the tax authorities. A scheme which depends fundamentally on concealment from the tax authorities may very well amount to tax evasion, or at least may be viewed in that light by the tax authorities.

2.18 The tax authorities say that they object to arrangements set up for no purpose other than to avoid tax. They see such artificial arrangements as fundamentally different from choosing one commercial approach which generates a lower tax bill than another, or the mere organisation of a taxpayer's affairs in such a way as to minimise the tax bill. This is a difficult and controversial area, where the approach of the Courts has changed over time. Members may find it helpful to bear in mind the dicta of Lord Hoffman in *MacNiven v Westmoreland Investment* [2001] STC 237 at page 257:

> 'If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (*Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1) or they do not (*Furniss v. Dawson* [1984] A.C. 474). If they do not work, the reason, as my noble and learned friend, Lord Steyn, pointed out in *Inland Revenue Commissioners v. McGuckian* [1997] 1 W.L.R. 991, 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.'

2.19 For a helpful exploration of HMRC attitudes, members may like to refer to an article in Tax Bulletin Issue 49 issued in October 2000. The article is concerned with FA 2000 section 144 which introduced a new criminal offence aimed at tax fraud and includes the following passage:

> 'The borderline between avoidance and evasion
>
> 'In the same [parliamentary] debate at least one member raised the subject of the impact of the new offence on tax advisers, especially those involved in advising on arrangements which could be characterised as tax avoidance. We do not consider that the new offence has led to any change in the law in this area.
>
> 'Where a scheme labelled as "avoidance" by its participants and their advisers admittedly fails, the key issue as a matter of criminal law would be whether they have been dishonest in the unsuccessful effort to reduce the relevant tax liability. It would be for the courts to decide as a question of fact whether that is the case.
>
> 'Concern has been expressed in some quarters that as a result the decision will not normally be taken by those with professional experience of tax matters and, given the highly technical nature of much tax law, that state of affairs may lead to injustice. That is an issue well beyond the scope of this article, but it may be helpful to remember that possible dishonesty becomes a consideration in this context only in certain circumstances. That is where there is some suggestion that the participants in an avoidance scheme are not merely relying on the intrinsic technical soundness of the arrangements actually put in place to reduce the liability but also on concealment of the facts from the inspector. If so, then, if the scheme fails, it is perfectly possible that the criminal courts may find there has been an offence. But conversely, where there is no trace of any concealment of the true facts of arrangements for which there is a respectable technical case, it is hard to imagine how a criminal offence can have been committed.'

Disclosure

2.20 In all tax matters, the member must act in good faith in dealings with the tax authorities: in particular the member must take reasonable care when making statements or asserting facts on behalf of a client. However, the member's duty to try to ensure that the information provided is accurate and that relevant facts are not withheld is not always simple to achieve, especially if the client does not cooperate. See Chapters 3 (direct tax) and 7 (indirect tax).

Files and working papers

2.21 Members should keep copies of returns etc. and organise their working papers to separate matters such as the preparation of accounts and tax returns from those on which audit and other opinions may be expressed, because the latter are normally protected from disclosure.

Responses to official requests

2.22 The starting point is that a member owes his client a contractual duty of confidentiality. Although the client's consent to the disclosure of relevant information is normally implied, if there is a real doubt about the information which the member proposes to disclose, it is wise to obtain the client's consent expressly. When doing so, the member will normally be able to advise the client whether it is in the client's best interests to disclose such information. This Section deals with the circumstances in which the member or the client can be compelled to provide further information.

2.23 A distinction must be made between a request for information informally ('informal requests') and those requests for information which are made in exercise of a power to require the provision of the information requested ('statutory requests'). In general, only the latter form of request is capable of overriding the member's contractual duty of confidentiality to his client. Informal requests may be merely forerunners of statutory requests compelling the disclosure of such information. Consequently, it will normally be sensible for the client to comply with such requests or persuade the tax authority that a more limited request would be appropriate. The member should advise the client as to the reasonableness of the informal request and likely consequences of non-compliance and let the client make his decision. As regards, statutory requests addressed to the client the member should advise the client about rights of appeal.

2.24 In relation to statutory requests, a distinction should be drawn between requests addressed to the client and those addressed to the member. Again, only the latter type of request is capable of overriding the member's contractual duty of confidentiality because the former type of request imposes duties on the client and not on the member. In relation to the former category of request, the member should provide the client with advice concerning the validity of the request, appropriate methods of complying with the request and the serious consequences of non-compliance. Normally, the client in receipt of such advice will consent to the member providing such information on his behalf.

2.25 A statutory request addressed to the member, if valid, imposes a set of legal obligations directly upon the member. Failure to comply with such obligations can expose the member to serious civil and criminal penalties. Save in relation to limited categories of information (for example information covered by legal professional privilege), a member can and should decide how he complies with a valid information request without requiring the consent of his client. Normally, he will be able to discuss such matters with the client, although certain powers may preclude communication between the member and the client; for example, TMA 1970 s.20BA & Sch.1AA and POCA 2002 s.333.

2.26 Whether the statutory request is addressed to the client or the member, it will normally be helpful to answer the following questions:

(a) Was the notice validly issued; for example did the officer making the request have the necessary authority to issue the notice and did he act in accordance with the various procedural safeguards?
(b) Do one or more of the pieces of information requested qualify as information which are either expressly or impliedly excluded from the ambit of the power authorising the request? For example, a client who receives a notice under TMA 1970 s.20(1) is not obliged to disclose otherwise relevant information if it is covered by LPP and a barrister, solicitor or advocate who receives a notice under TMA 1970 s.20B(3) is not obliged and, therefore, not authorised, to disclose LPP material without his client's consent.

Given the complexity of the some of the rules relating to the scope of particular information powers, it may be appropriate to take specialist legal advice.

2.27 Where a category of documents falls outside the scope of the statutory request, the member remains under a duty to preserve the confidentiality of his client.

2.28 Where the member has ceased to act for a client, he remains subject to the duty of confidentiality. In relation to general and statutory requests which are addressed to the former client, the member should refer the enquirer either to the former client or his new agent. In relation to statutory requests addressed to the member, the termination of his professional relationship with the client does not affect his duty to comply with that request.

2.29 Advice given by a member to his client is not normally disclosable by the member to the tax authorities because it is normally not relevant to the tax treatment of the underlying transaction. But this may not always be the case: for example, where the tax treatment depends upon whether the client had a tax avoidance purpose, the advice the client was receiving at the time about the alternatives open to him might be relevant. Subject to particular common law and statutory exceptions, the member might be compelled to disclose such advice although this is a difficult and contentious area.

2.30 As regards former Inland Revenue taxes only, an inspector may, under certain conditions, obtain access to documents in a member's possession or power relevant to tax liabilities: TMA 1970 s.20(3). However, this excludes documents which are the property of a member and were either created in relation to certain audit functions or relate to tax advice: TMA 1970 s.20B(9) and (10). The powers included in TMA 1970 s.20BA and Sch.1AA need also to be borne in mind. As regards the powers of HMRC in relation to former Customs taxes, see paragraph 7.19. As to ownership of documents, when in doubt the member should consider taking legal advice.

2.31 A member should be aware of the powers of the tax authorities in relation to the removal of documents; he may also find it helpful to have identified a lawyer or other practitioner with relevant specialist knowledge of

both civil and criminal law from whom he can obtain advice. If a member is faced with a situation in which the tax authorities are seeking to enforce disclosure by the removal of documents, he should consider seeking immediate advice from such a source before permitting such removal. Since there may be little time to take advice, the member should consider putting in place a protocol giving guidance to his colleagues and staff as to what preliminary steps should be taken in the event that the member's premises are subject to a raid.

Legal professional privilege

2.32 LPP is related to but not quite the same as the general duty of confidentiality owed to a client. LPP, a part of the common law, was originally developed in the context of court proceedings, whether civil or criminal. In court or tribunal proceedings, the rule operates to exclude privileged material from having to be disclosed to the other party or, if known to the other party, being brought into evidence by him. Until recently, it was thought that the rule might not apply outside court or tribunal proceedings. However, the English Courts have recognised that the public policy behind LPP can be achieved only if the confidentiality of such material is protected from information-gathering powers which are exercisable even when no court or tribunal proceedings are pending. Consequently, the protection given to LPP material potentially applies to limit the scope of the tax authorities' investigation powers.

2.33 Until the House of Lords' decision in *R (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2002] STC 786, HMRC contended that TMA 1970 s.20(1) impliedly overrode the right to confidentiality conferred on LPP material. The House of Lords held that the right to communicate in confidence with a legal adviser was a fundamental constitutional right. It could be overridden by Parliament but only if the statute did so expressly or by necessary implication. General words of wide meaning are not enough to found such an inference. None of the statutory language relied upon by HMRC was considered by the House of Lords to be sufficiently compelling to justify the conclusion that Parliament had decided to override such an important right. Since the terms of the other information powers offer less support for an implied override argument, it is considered that this decision is of general application and all HMRC investigatory powers take effect subject to the client's right to confidentiality in respect of the LPP material.

2.34 It is, therefore, of critical importance to ascertain whether the documents requested qualify as LPP material because the protection given to such material is more extensive than that conferred by the statutory exceptions. Due to the complexity of the common law rules on what qualifies as LPP material, specialist legal advice is likely to be required, particularly if the member or the client is minded not to disclose a document on the ground that it is privileged.

2.35 At common law, the concept of LPP is complex. The protection it provides has significant limitations. It is not the case that every

communication, of whatever nature, by or to a lawyer (barrister, Scottish advocate or solicitor) is privileged. At common law, the two significant situations in which privilege arises are as follows:

(a) *Litigation privilege*
Documents created for the dominant purpose of litigation are privileged. The privilege covers not only documents prepared by the lawyer, but also documents brought into existence by third persons for the predominant purpose of litigation. The existence of a second significant purpose will prevent the document from being privileged. Therefore, once litigation has started or is contemplated, documents prepared by non-lawyer advisers (including tax advisers) may be privileged. It is considered that litigation for this purpose includes a tax appeal, although there appears to be no case in which this point has been expressly confirmed.

Scots law similarly provides for the privilege of communications post litem motem. Though there is doubt as to when the privilege begins to attach to a communication prepared in advance of litigation, which would include a tax appeal, there is a strong argument that the protection arises as soon as anything occurs to indicate that HMRC are querying the tax liability of the taxpayer. For example, where HMRC challenge the completeness of a return or the correctness, in fact or law, of the basis upon which a self-assessment has proceeded.

(b) *Advice privilege*
Documents passing between a client and his legal advisers are privileged if they are written for the purpose of obtaining or giving legal advice. Who is a legal adviser for this purpose is not entirely clear. The description is not restricted to lawyers in private practice and can include employed lawyers. On the present state of the authorities (many of which date from an era where the range of services offered by non-lawyers was much more limited), this type of privilege does not normally extend to documents recording communications to or from non-lawyers, even though such advisers may regularly advise on a particular area of the law and have professional qualifications to do so. So tax advice (not obtained for purposes of litigation) from a non-lawyer adviser is not privileged at common law. Nor are commissioned reports or investigations of companies. If a member is in any doubt in this very complex area he should seek legal advice.

2.36 LPP should not be confused with the protections from disclosure to HMRC given to tax advisers by some subsections of TMA 1970 s.20B. These latter protections arise from express statutory provisions and are protections of the adviser restricting the powers of HMRC to require information or documents from him. LPP, on the other hand, exists under the common law and is the privilege, not of the lawyer, but of the lawyer's client. The general common law rule is that the client, unless he waives the privilege, cannot be required to produce documents or answer questions where the subject matter is protected by privilege; nor can the lawyer produce the documents or answer the questions without the client's consent. There are exceptions, one of which is where a document came into existence as a step in criminal or illegal activity

in which case the document is not privileged. (*Note: Whilst common law LPP applies only to clients of lawyers, with effect from 21 February 2006 a form of statutory privilege in relation to the reporting of money laundering applies also to clients of other 'relevant professional advisers'*.)

2.37 Members should bear in mind that, even if material is not protected by LPP or a statutory exemption, there may be recourse to the HRA 1998, although the position is uncertain and controversial.

2.38 If a member is consulted about, or receives himself, a request from the tax authorities, in the form of a statutory notice, which calls for the disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, it is suggested that the member should consider seeking specific legal advice. There is little guidance on these questions in reported cases. It is, however, not uncommon for members, or their clients, when asked for some particular document or item of information by the tax authorities, to reply to the effect that, because the document or information is privileged, it is not being disclosed. If a member is consulted about, or receives himself, a request from the tax authorities (whether in the form of statutory notice or not) which calls for disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, it is suggested that in the first instance the member should reply along the lines mentioned, briefly setting out the grounds on which privilege is claimed. The tax authorities may not pursue the matter: frequently they do not. If they press the request for the documents or information, it may be appropriate for either the member or client to commence proceedings to determine the status of the material in advance of any penalty proceedings for non-compliance.

Irregularities and errors

2.39 In the course of a member's relationship with the client, whether as agent or principal, he may become aware of irregularities or errors in the client's tax affairs. The client should be informed at once, normally in writing. Tact may be required and immediate corrective action may be difficult but the member should be seen to have acted correctly at the outset (see also Chapters 4 and 8). See also paragraphs 2.43–2.47.

Materiality

2.40 Counsel has advised that the concept of a 'true and fair view' incorporates the concept of materiality. Accordingly the effect of FA 1998 s.42(1) (which requires profits to be computed in accordance with GAAP) is to permit a trading entity to disregard non-material adjustments in computing its profits for tax purposes; s.42 is extended to the profits of a Schedule A business by TA 1988 s.21A. However, members should bear in mind that in other contexts tax law does not explicitly recognise the concept of materiality.

2.41 Whether an amount is to be regarded as material depends upon the facts and circumstances in each case. An amount which is not regarded as material for audit purposes may still be material for tax purposes. The tax authorities are not prepared to indicate whether there is an absolute minimum

which they are prepared to disregard as not material. In the context of direct tax a figure of £100 or less might reasonably be seen as not material in the majority of circumstances.

2.42 In considering whether or not he must cease to act because a client refuses to make or permit a disclosure to the tax authorities, a member may reasonably have regard to the materiality of the amount involved. See also paragraph 5.2 regarding HMRC errors and Chapters 4 and 8 as regards a situation in which a member must cease to act.

Fiscal offences and money laundering

2.43 Where members become aware of tax irregularities, they should also bear in mind that under the money laundering legislation, fiscal offences can amount to money laundering.

2.44 Tax-related offences involve evasion and not avoidance and are not in a special category. Tax evasion is a crime, the proceeds of which have to be treated in exactly the same way as those from drug trafficking, terrorist activity, theft, fraud, etc. Offences may relate to direct tax such as income tax or corporation tax, or they may relate to indirect tax such as VAT. Whilst not all tax-related offences are indictable, most are, including frauds against HMRC. (*Note: there can be no money laundering until there are proceeds of crime, in other words, in respect of tax evasion, until the tax has become due and has not been paid.*)

2.45 A member who has knowledge of or reasonable grounds for suspecting money laundering should consider whether he has an obligation to make a report to the appropriate authorities (the Money Laundering Reporting Officer in his organisation or the Serious Organised Crime Agency). (*Note: formerly reports were made to the National Criminal Intelligence Service; NCIS has been absorbed into SOCA.*)

2.46 Where a report has been made to SOCA, the client should not be informed where this would be considered tipping off under the terms of the Money Laundering legislation. (*Note: advice on tax matters to a client to persuade him to stop breaking the law by evading tax is not tipping off.*) Members should also note that a report made to NCIS is not a substitute for a proper disclosure to the tax authorities.

2.47 This is an important subject and can involve the member in criminal penalties. There have been recent changes in EU and UK law. Members should familiarise themselves with the required rules and procedures in Part 7 of POCA 2002 and the Money Laundering Regulations 2003 (SI 2003/3075) (*Note: both as amended, for example, with effect from 21st February 2006, s.330(6) POCA 2002 was amended by The Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006 (SI 2006/308) so as to extend exemption from reporting knowledge or suspicion of money laundering formed in privileged circumstances to a new but limited category of 'other relevant professional advisers'*) and should read carefully the current

professional guidance on the avoidance, recognition and reporting of money laundering (see Section 9.5 of the Members' Handbook 'Anti-money laundering guidance for the accountancy sector' at www.icaew.co.uk/membershandbook and CCAB and ICAEW Advisory Service and Tax Faculty guidance at www.icaew.co.uk/moneylaundering). Members who are in any doubt about their responsibilities in this area should seek appropriate advice (for example from the Institute's money laundering helpline).

Members in employment
2.48 Whilst these guidelines are addressed primarily to members in practice, they apply equally to members employed in professional practice and in business. Additional assistance for such members will be found in Section 7.1 'Professional conduct and disclosure in relation to defaults and unlawful acts'; see www.icaew.com/membershandbook/.

Human Rights
2.49 The tax authorities are constrained by HRA 1998. UK legislation should be construed if possible in a manner which is consistent with the European Convention on Human Rights. Similarly, public authorities are, subject to limited exceptions, obliged to act consistently with Convention rights, in particular in the exercise of their discretionary powers. Under Article 8 of the European Convention, everyone, including legal persons, has the right to respect for his private life and is entitled to privacy in relation to both his personal and business correspondence. A breach of that confidentiality is permitted only if and to the extent that it is authorised by law or it is in pursuit of a legitimate aim which must constitute a pressing social need, and the breach is no more than is proportionate to the social need which is sought to be advanced. See *Foxley v United Kingdom* (2000) 31 EHRR 637, 647, paragraph 44 in relation to a breach of the right to confidentiality sought to be advanced. Against this background, all requests for access to information held by a professional adviser should be considered carefully. In cases where doubts arise, members should seek guidance from a suitably-qualified adviser.

FORMER INLAND REVENUE TAXES

Chapters 3 to 6 should be read in conjunction with Chapters 1 and 2.

3 DISCLOSURE

Generally
3.1 The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief.

3.2 In general, it is likely to be in a taxpayer's own interest to ensure that factors relevant to his tax liability are adequately disclosed to HMRC. The reasons for this are twofold:

(a) his relationship with HMRC is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and
(b) he is likely thereby to be protected from the raising of a discovery assessment under TMA 1970 s.29.

Disclosure and discovery

3.3 Under TMA 1970 s.29(1), an officer of the Board is given powers to make an assessment to make good a loss of tax if he discovers that income has not been assessed, or has been under-assessed, or that excessive relief has been given. However, no such assessment may be made unless:

(a) the loss of tax is attributable to fraudulent or negligent conduct on the part of the taxpayer or his agent; or
(b) at the expiry of the period during which the officer is entitled to enquire into the taxpayer's return (normally 12 months from the filing date) the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation giving rise to the loss of tax.

3.4 Information under TMA 1970 s.29(6) is to be regarded as made available to the officer if:

(a) it is contained in the return for the relevant year, or in any accounts, statements or documents accompanying the return or produced in the course of an enquiry into the return; or
(b) it is contained in any claim for the relevant year, or in any accounts, statements or documents accompanying the claim or produced in the course of an enquiry into the claim; or
(c) it is information the existence of which, and the relevance of which, could reasonably be expected to be inferred by the officer from the foregoing, or which is notified in writing to the officer.

3.5 Under TMA 1970 s.29(7), in determining the extent of the information that is to be regarded as available to the officer in considering a return or claim for a particular year, there is to be included information made available to the officer in respect of returns for the two preceding years.

3.6 For the most part, HMRC do not anticipate that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. The view expressed in the notes accompanying the return is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided with the return. However, HMRC do recognise that the taxpayer may wish to supply further details of a particular computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time (see in particular the Revenue Press Release dated 31 May 1996 reproduced in Tax Bulletin 23 in June 1996: see http://www.hmrc.gov.uk/bulletins/tb23.htm#discovery%20and). The member's duty is therefore not only to assist his client to make a return that is correct and complete but also to ensure that the client is aware of the factors involved in making a fuller disclosure than is strictly

necessary, in order to minimise the risk of a subsequent discovery assessment. Among those factors are:

(a) the terms of the applicable law;
(b) the view taken by the member;
(c) the extent of any doubt that exists;
(d) the manner in which disclosure is to be made; and
(e) the materiality of the item in question.

3.7 In dealing with the tax authorities or other third parties in relation to a client's tax affairs, a member should bear in mind that he is acting as the agent of his client. He has a duty to present his client's case to the best of his ability and in the best possible light. Although a member is not required to verify information provided by a client, he should take reasonable care to ensure that the facts presented are correct and that no attempt has been made to mislead.

3.8 A member owes a duty of confidentiality to the client. Thus, in general, a member should not disclose any information received in a professional capacity without the consent of the client whether in the engagement letter or elsewhere (see paragraph 2.7).

3.9 In their Press Release dated 31 May 1996, HMRC indicated their views as to the manner in which taxpayers should make their own disclosures. While this guidance may be adequate for taxpayers with straightforward affairs it is not considered that it can be regarded as satisfactory for more complex cases, which probably encompass the majority of taxpayers who are represented by agents.

Accompanying documents

3.10 In the preparation of a tax return, there is no duty to provide more information to the tax authorities than the return requires simply because some pieces of information known to the member might support a different tax treatment from that which the member, after due consideration of all the information available to him, honestly considers to be the tax treatment. On the other hand it may be in the client's best interest to furnish more information than he is strictly required to do because this is likely to lead to a more reasonable approach by the tax authorities, thereby saving money and time in the long run and giving greater certainty.

3.11 The member should discuss with the client the extent to which documents are to be submitted to accompany the return. For companies, accounts are required in almost all cases. For traders there is no such requirement but it is likely to be good practice to send them in all but the simplest cases, because they supplement the self-assessment information contained in the tax return. In such cases it is also likely to be desirable to:

(a) supply computations linking the accounts to the figures in the tax return;
(b) supply analyses of major items contained in the accounts, with explanations of disallowances; and
(c) refer to these on the face of the return.

3.12 In non-trading cases it is likely to be desirable to supply further information where the identity of figures is not readily apparent, for example:

(a) computations of chargeable gains including valuations where appropriate; and
(b) lists of investment income.

3.13 Where the taxpayer has undertaken a significant transaction in the year, it may be desirable to provide documentation, for example a sale agreement. However, in so doing the member should consider whether the relevance of the document could 'reasonably be expected to be inferred' without further amplification, particularly in the context of a lengthy document. It would be sensible, therefore, to indicate why the taxpayer considers it relevant to the return.

3.14 In considering the extent to which the relevance of accompanying documents needs to be explained, the member is entitled to assume that HMRC are broadly familiar with, but not expert in:

(a) normal accountancy terminology;
(b) generally-accepted accounting principles and financial reporting standards;
(c) generally-accepted auditing principles and auditing standards;
(d) the requirements of the Companies Acts; and
(e) the background to, and the relevance of, the usual wording of auditors' reports and accountants' reports.

3.15 HMRC have indicated that they will regard documents as accompanying the return if they are sent in support of the return and within one month of its submission.

Additional disclosure

3.16 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases the member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered:

(a) where HMRC have published their interpretation or have indicated their practice on a point, but the taxpayer proposes to adopt a different view, whether or not supported by legal opinion; and
(b) where there is inherent doubt as to the correct treatment of an item, for example expenditure on repairs which might be regarded as capital in whole or part.

3.17 A member who is uncertain whether his client should disclose a particular item or its treatment should consider taking further advice before reaching a decision and should ensure that the client understands the issues and implications and the proposed course of action. Such decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client or with other advisers, copies of any second opinion obtained and the client's final decision.

Requests to HMRC for guidance including clearance applications

3.18 HMRC have made it clear that they require a high standard of disclosure if a taxpayer is to be able to rely on a HMRC clearance or on guidance provided in response to a request from a taxpayer or his agent. In their own words, the taxpayer 'must put all his cards face upwards on the table' in such circumstances and indicate the use which it is intended to make of the guidance. It is implicit that in so doing the taxpayer would need to indicate those areas where he is doubtful about the correct interpretation of the law or the application of HMRC practice.

3.19 It is, however, considered that a distinction should be drawn between situations where the client is seeking the ruling of HMRC pursuant to a statutory clearance procedure and those situations where the client is asking HMRC for a ruling on the tax treatment of a particular transaction. In the former case, the relevant information for an effective clearance will normally be prescribed by the statute creating the clearance procedure. In the latter case, the client is seeking to attach to a ruling by an officer which he is not obliged to give a finality normally accorded to the decisions of the tax tribunals and the Courts in relation to a category of transactions about which the officer may not have the same specialist knowledge as the specialists dealing with statutory clearances. Although it will normally be prudent for a member to err on the side of fuller disclosure in relation to both types of clearances, in the case of statutory clearances it may not be necessary to go into the same detail concerning the law.

4 ACQUIRING KNOWLEDGE OF DIRECT TAX IRREGULARITIES

For the purposes of this Chapter, the term 'irregularity' is intended to cover innocent errors, negligent conduct (by either the client or an adviser) and also matters which could be treated as civil or criminal fraud for direct tax purposes.

Generally

4.1 A member must do nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed. A member must exercise great care to avoid the commission of an offence by knowingly or recklessly making false statements or false representations when assisting a client whom the member suspects may have defrauded the Crown of tax or of having been negligent in regard to tax matters.

4.2 The offences for which HMRC seek penalties fall into two categories:

- failures (in which can be included payment failures leading to surcharges), where the penalty applies unless the taxpayer can demonstrate reasonable excuse and remedial action without unreasonable delay, as for example, in TMA 1970 s.118(2); and
- errors, where the penalty will apply only if the error was made fraudulently

or negligently. The phrase 'innocent error' needs some care: an error that is innocent even of neglect is not culpable, but there is no implication of deliberate intention in neglect.

HMRC take the prima facie view that any error may be due at least to negligence, but will seek to establish the facts of the case.

4.3 Counsel has advised that if a taxpayer in good faith receives advice from a person who he reasonably believes has appropriate and relevant experience and knowledge, and to whom he has given full and accurate particulars of the matter, to the effect that, say, a particular receipt is not taxable, then he is not negligent if he submits his return relying on that advice. Counsel has advised that this remains correct even if the adviser on whom the taxpayer reasonably relied was himself acting negligently or even fraudulently.

4.4 A taxpayer might make a return unaware that it contained a wholly-innocent error. If that error subsequently comes to his notice he must then act without unreasonable delay to remedy it. If he does not, TMA 1970 s.97 will treat the incorrect return as having been made negligently for TMA 1970 s.95 penalty purposes.

4.5 A member who, as a result of any work undertaken on behalf of a client, has reason to believe that a tax irregularity or error has occurred should discuss with the client the matter which gave rise to that belief and consider whether in the circumstances it is appropriate for him to act. Where the member has not acted in relation to that question, he should take into account the fact that he may not be party to all the facts and circumstances and may not therefore be able to reach a conclusion on this issue. It is not the duty of the member to pursue to a conclusion a matter in respect of which he has not been engaged, unless it affects work in respect of which he has been engaged. Members should be aware that Statement of Auditing Standards 110 'Fraud and Error' gives guidance to auditors which may have relevance in a fiscal context. Members are particularly referred to paragraphs 50–64 of that publication. (*Note: superseded for audits of financial statements for periods commencing on or after 15 December 2004 by International Standard on Auditing (UK and Ireland) 240 ('ISA 240'): 'The Auditor's Responsibility to Consider Fraud in an Audit of Financial Statements' – see* www.frc.org.uk/images/uploaded/documents/ACFAA4.pdf.)

4.6 If there is doubt as to whether or not an irregularity has occurred, the member should consider protecting his position by obtaining advice from a specialist in this field. Furthermore, if the member has any doubt about his competence to provide advice to his client in these circumstances he should seek specialist help.

Money laundering

4.7 Where appropriate, members should bear in mind the legislation on money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

Human rights
4.8 Wherever appropriate, in particular if there is a risk of prosecution or tax-geared penalties, the provisions of the HRA 1998, in particular the protection given by Articles 6 and 8 of the European Convention on Human Rights, should be considered, and in obtaining advice on behalf of their clients members should ensure that the Act is taken into account.

Materiality
4.9 In considering the action which he should take in the circumstances outlined in this Chapter, the member may take account of materiality (save in relation to money laundering issues) but reference should be made to paragraphs 2.40–2.42.

Advice to be given where an irregularity is admitted
4.10 A member whose client has admitted an irregularity should advise the client in writing to disclose it to HMRC. One of the factors the member must take into account is whether his client will have the benefit of LPP in relation to confidential discussions between the client and the adviser concerning the client's knowledge of the irregularity. As indicated in paragraphs 2.32–2.38 above, the present position at common law is that communications for the purpose of the obtaining legal advice from non-lawyers do not qualify for LPP unless the dominant purpose behind such communications is to assist in litigation which is either pending or contemplated. In many circumstances, the dominant purpose in seeking such advice will be to ascertain the extent of the tax liability, rather than to assist in contemplated litigation. If legal advice is not appropriate, the member should advise the client to disclose the irregularity to HMRC and make an internal note of having given such advice. The member should explain the consequences of not making a disclosure, in particular that:

(a) should HMRC discover the irregularity later there might be no defence against the imposition of penalties;
(b) having knowledge of the irregularity but suppressing it may be construed as a criminal offence or a civil fraud;
(c) disclosure and cooperation will generally lead to discounted penalties being imposed; and
(d) it would be improper to allow HMRC to agree a settlement without putting them in possession of all the facts.

When HMRC are not aware of an irregularity
4.11 Where there is an irregularity which HMRC have not discovered, voluntary disclosure and full cooperation will usually reduce the level of a penalty, although interest will remain due. HMRC do not regard interest as penal, but merely commercial restitution for use of the money that was in fact due to the Exchequer. Prompt disclosure of an error may avoid suspicion by HMRC that it was deliberate, thus reducing the risk of a civil fraud penalty.

When HMRC allege that irregularities may have occurred

4.12 When HMRC allege that an irregularity may have occurred, but it has not been identified by the member or his client, the member should establish from HMRC such details as he can of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting between the member and HMRC officer or in the course of correspondence, depending on the circumstances.

4.13 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. The member should evaluate HMRC allegations in the light of the facts as they have been explained by the client. Where appropriate he should advise his client to make a full disclosure to HMRC and to offer them all facilities for investigation. In the course of his evaluation the member should consider whether to recommend to his client to take specialist advice prior to making a disclosure. In particular, where there is a real possibility that the tax authorities may still bring criminal proceedings against the client even if he provided full disclosure, the client needs to have legal advice concerning his right to silence and the privilege against self-incrimination before deciding which course to take: see paragraph 4.18 below.

4.14 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to HMRC. In so doing the member should bear in mind the advice in paragraphs 2.32–2.38 about LPP, which would probably apply to the drafts of the report, although not to the report itself once delivered.

When HMRC are aware of an irregularity

4.15 In cases where Special Compliance Office ('SCO') is involved, the adviser should establish whether Code of Practice ('CoP') 8 or 9 will be used. CoP 9 deals with cases of suspected serious fraud, while CoP 8 deals with all other cases. (*Note: SCO has been renamed Special Civil Investigations Office and CoP 9 (2005) has replaced CoP 9 for inquiries commencing on or after 1 September 2005; see* www.hmrc.gov.uk/practitioners/civil-investigations.htm. *The following explanation of HMRC's procedures refers to the pre-1 September 2005 position*.)

4.16 When HMRC are aware that an irregularity has occurred, an interview under caution may be conducted. If the member is made aware of such an interview, he should notify his client of the seriousness of the proposed HMRC action and advise him to take advice from an appropriate specialist. It must be apparent to all that an interview under caution is an indication of the possibility of a criminal prosecution.

4.17 Interviews conducted by members of the SCO are frequently carried out within the terms of the revised Hansard practice as set out in CoP 9. Following *Regina v Gill & Gill* [2003] STC 1229, CoP 9 enquiry interviews are

being conducted under PACE 1984 Code C. The Hansard statement makes it clear that provided the taxpayer makes a full disclosure he can be assured that HMRC will not pursue a criminal prosecution. Nevertheless, TMA 1970 s.105 provides that statements made or documents produced by a taxpayer in response to a Hansard warning remain admissible in criminal or penalty proceedings. There is no express saving for situations where the taxpayer has cooperated fully or where the statements or documents are relied upon as being accurate, and so as evidence of wrongdoing by the taxpayer. It is doubtful whether reliance by HMRC on s.105 in those circumstances would be consistent with the taxpayer's privilege against self-incrimination under Article 6 of the European Convention on Human Rights. Subject to the above points and to paragraph 4.18 below, a member should advise his client to make a full disclosure to HMRC and ensure that at each meeting with HMRC, the client is represented by a professional adviser experienced in that type of investigation.

4.18 Until it has become clear that criminal proceedings are not being considered, the member should bear in mind that the client has a right to silence. Even in cases where criminal proceedings are not in point but tax-geared penalties are likely to be imposed, the taxpayer may have a right to silence under the HRA 1998, although whether the client should seek to rely upon that will depend on the circumstances. The member should exercise careful judgement in giving his advice and, if appropriate, tell the client to obtain specialist advice, which may include specialist legal advice.

4.19 SCO have been instructed not to hold 'neutral' interviews (namely ones where neither the Hansard statement nor a CoP is quoted). Accordingly, in any case in which neither the Hansard statement nor a CoP is offered, it should be assumed that criminal proceedings are being contemplated, and specialist advice, including if appropriate specialist legal advice, should be sought as soon as possible.

4.20 Equal care must be exercised in cases handled by the local district. An assurance that any disclosure will be dealt with along civil procedures before any admissions are made is unlikely to be obtained and districts are not authorised to administer Hansard or CoP 9. However, before advising on a disclosure to a local inspector, the member should seek to establish whether any of the following circumstances apply:

(a) false accounts have been deliberately compiled;
(b) documents affecting the accounts or the tax liability (for example invoices) have been materially altered or falsified;
(c) there are grounds for doubting the honesty of a solicitor, accountant or any tax adviser;
(d) the taxpayer or directors have conspired with a third party to defraud HMRC;
(e) a certificate of disclosure or statement of assets signed during the current or earlier investigations turns out to be false;
(f) further offences have occurred immediately or shortly after the conclusion of an investigation;

(g) the potentially fraudulent taxpayer is a member of either House of Parliament or has a special status in the administration of justice or tax;
(h) there is suspected fraud or evasion using the vehicle of an off-shore company or other foreign entity, for example involving false invoices or monies diverted off-shore;
(i) informers have valuable information about a suspected fraud or substantial evasion;
(j) it is a case of phoenixism;
(k) it is a case of failure to notify chargeability or very late filing; or
(l) it is a case of serious PAYE irregularities.

If any of the above applies, then the member should consider carefully whether he is competent to deal with the matter or whether it might be sensible to obtain specialist advice.

The importance of confirming admissions of irregularities by clients

4.21 Misunderstandings can arise, especially when the client is under investigation by HMRC. Before a member makes any disclosure to HMRC on behalf of a client, he must be absolutely clear that an irregularity has occurred and that he has the client's agreement to the manner of disclosure.

Instructions to disclose

4.22 If the client accepts the member's advice and instructs him to make a full and immediate disclosure, the member should write to HMRC (in terms approved by the client) and either give full details or explain the position in general terms and say that the client has directed that a complete disclosure will be made as soon as possible. This letter should be provided to HMRC as soon as possible. It would be improper to allow HMRC to agree a settlement without putting them in possession of the full facts. HMRC usually require a certificate of full disclosure to be signed by the client and it is vital that the client appreciates the importance of such a certificate.

Disclosure to other tax authorities of an admitted irregularity

4.23 The member should also consider the need to make a similar disclosure to HMRC.

Unwillingness or refusal to disclose an admitted irregularity

4.24 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. A member should allow a reasonable period for the client to make a decision. Thereafter, the member must decide whether continuing 'unwillingness' is in fact 'refusal' for this purpose.

4.25 If the client refuses to accept the member's advice to make a full and prompt disclosure to HMRC, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore, to advise the client in writing properly and fully of the consequences of the failure to disclose.

4.26 The member should explain to the client HMRC's wide-ranging powers to obtain information from taxpayers and their agents. The client should be told that there is a considerably greater likelihood of a criminal prosecution (with the likelihood of imprisonment) where HMRC 'discover' a fraud than where the client makes a voluntary disclosure and offers a suitable monetary settlement, and that voluntary disclosure normally results in a lower scale of penalty.

4.27 If the client refuses to accept the member's advice to make a full and prompt disclosure to HMRC, the member should take such steps as are necessary to disassociate himself from the client's conduct. The member should write to the client setting out the facts understood by the member or agreed, and advising the client of his advice to disclose. He should also make it clear that he, the member, may have an obligation formally to disassociate himself from any work done, should disclosure not be made.

4.28 If the client refuses to disclose or to take other steps (for example, seeking Counsel's opinion on the member's view) to regularise the situation, the member should consider taking steps formally to disassociate himself from the relevant work taking account of all relevant issues. In certain cases it may be necessary to cease to act in relation to the client's direct tax affairs, or indeed all his affairs.

4.29 If HMRC realised that the member had continued to act after becoming aware of such undisclosed errors, they might consider the member to be 'knowingly concerned' in the commission of an offence. At the very least HMRC might cease to trust the member. Furthermore, the relationship of trust which must exist between member and client will have been impaired.

Where the member has acted in relation to the irregularity

4.30 A member who has acted in relation to the irregularity should make it plain that if the client refuses to authorise disclosure, the member must cease to act for the client in all matters, not just those related to direct tax, save that the member is entitled to take the view that he is not obliged to cease to act where the amounts are not material. The member should also explain that if the client refuses to disclose, the member must act in accordance with paragraph 4.32. The client should be left in no doubt that this step could result in HMRC commencing enquiries which might lead to the discovery of the non-disclosure and possible offence.

4.31 The member should explain the practical implications relating to the appointment of a new adviser in that it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.

4.32 If, despite fully advising the client of the consequences, the client still refuses to disclose to HMRC, the member should forthwith:

(a) cease to act for the client in all respects and inform the client in writing accordingly; and
(b) inform HMRC that he has ceased to act for the client.

If the matters in question affect accounts or statements which carry a report signed by the member as to their accuracy, he should inform HMRC that he has information indicating that the accounts or statements cannot be relied upon, provided that the member has included in his engagement letter with the client wording such as that set out at paragraph 2.7. If he has not, and does not have his client's consent to the disclosure of errors generally, he should take specialist advice as to what action he should take.

4.33 A member has no legal obligation to provide HMRC with an explanation as to the reasons for ceasing to act. Whether the member has a duty to correct a report carrying his opinion as to the accuracy of the accounts will, in Counsel's opinion, depend upon its terms. Where it is qualified as being based on information supplied then ceasing to act for the client should suffice. If the member is uncertain as to how to proceed he should consider taking legal advice.

4.34 A member who follows paragraphs 4.30–4.33 is under no legal duty to explain to HMRC the reasons why the returns, accounts, etc. are defective, and should do so only with the former client's permission. See also paragraphs 2.43–2.47.

Where the member has not acted in relation to the irregularity but has acted in relation to other tax matters

4.35 The member may discover a material irregularity which occurred either before the engagement began or in relation to matters dealt with by another adviser or by the client himself, for example PAYE, NIC and returns on forms P11D. In such cases, the member should advise the client to make full disclosure to HMRC. If the client refuses to disclose, the member should cease to act because the relationship of trust which must exist between a member and the client would have been impaired and, just as important, the member's relationship with HMRC would be prejudiced.

4.36 However, as the member has not acted in those tax matters to which the irregularities relate, the member's duty is merely to inform HMRC that he has ceased to act.

Where the member has not acted in relation to tax matters

4.37 A member who has not acted in relation to tax matters, but discovers or suspects that a client has committed a tax irregularity, should discuss the position with the client. If the client confirms the discovery or suspicion, the member should ask the client to discuss the situation with the tax adviser with a view to making full disclosure to HMRC. If the client refuses, paragraph 4.25 applies.

4.38 The member's duty is limited to encouraging disclosure to HMRC. Thereafter, it is for the client to decide how to proceed. The member is not required to take the steps referred to in paragraphs 4.30–4.33. However, in the event that the client fails to make the disclosure, the member should consider whether the relationship with the client, which is based on trust, has been

impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to disclosure to HMRC.

Where the client refuses to admit an irregularity

4.39 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given. It may be appropriate also to send a copy of the file note to the client.

4.40 Where the client denies any irregularity and the member rejects outright that denial, the member must cease to act for the client, at least in relation to his direct tax affairs, and very possibly in relation to all his affairs. The member should inform HMRC that he is no longer acting on behalf of the client and should consider whether the course of action outlined in paragraphs 4.30–4.33 should be followed. He should also make it clear to the client that he may have an obligation formally to disassociate himself from the work done.

4.41 Where, despite the client's denial of any irregularity, the member still has reservations, but does not consider that he is justified in rejecting the denial outright the member must give careful consideration as to whether he can continue to act on behalf of the client. If the member decides to continue to act his file notes should set out clearly the client's explanation and/or assurance that there have been no such irregularities.

Suspicious circumstances

4.42 A member who acts in relation to tax matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and these guidelines should be followed. The member should also bear in mind the guidance on money laundering (see paragraphs 2.43–2.47) and his possible obligations.

4.43 If the member finds no confirmation but remains suspicious such that the relationship of trust which must exist between the member and the client may have been impaired, the member should consider whether he should continue to act. If a new adviser then approaches the member, the member should consider his position in the light of paragraphs 4.45 and 4.46.

Request for information from a new adviser

4.44 On changes in a professional appointment, the initiative to request information lies with the new adviser who should obtain the proposed client's authorisation to communicate with the member. The member should not

volunteer information to a new adviser in the absence of any such request from the new adviser or his former client.

4.45 When the member receives a request for information from a new adviser, he should:

(a) seek authorisation from the former client to disclose all relevant information to the new adviser;
(b) on receipt of such authorisation, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and
(c) to the extent that he is authorised to do so, discuss freely with the new adviser all matters of which he should be aware.

4.46 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

4.47 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the former adviser will have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the former adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider whether or not he comes to the same conclusion as the former adviser. *See also Members' Handbook Section 3.3 'Code of Ethics' Part B, paragraph 210 'Professional Appointment' at* www.icaew.com/members handbook.

Interaction with indirect taxes

4.48 A member who prepares accounts should ensure that they reflect all material liabilities for indirect taxes whether or not they have been declared. If a material liability for indirect taxes is omitted an auditor cannot, without qualification, report on the accounts as showing a true and fair view. HMRC often request the accounts in the course of a control visit in an attempt to reconcile turnover with the VAT returns.

4.49 If an assessment based upon alleged undisclosed takings is accepted by the client or a settlement at a reduced figure is agreed with HMRC, and the member has already submitted accounts information for the period in question to the Revenue, the member must consider whether the accounts show a true and fair view and, if not, follow the guidelines set out above.

4.50 In such circumstances it may be wise to inform HMRC before a final settlement is agreed with HMRC in order that the self-assessment for direct tax purposes can be amended as well. This may help to avoid a second investigation.

5. HM REVENUE AND CUSTOMS ERRORS

Notes:

1. HMRC have explained that this Chapter presents them with major difficulties and in particular they do not see how 'special circumstances' as in paragraph 5.5 could exist. They ask that members should take all possible steps to ensure that their clients pay the correct amount of tax due in law, even where following an error by HMRC insufficient tax is demanded.
2. Members should be aware that the law in Scotland differs.

Generally

5.1 Throughout this Chapter references to HMRC errors are to the position which may arise from the raising of an inadequate assessment, an under collection of tax or interest or an over repayment of tax or interest, in circumstances where it is apparent to the member that a mistake has been made by HMRC. The mistake may be one of law or may be a calculation error or a clerical error; equally it may arise from a misunderstanding on the part of HMRC of the facts as presented. Reference should also be made to HMRC publication *'Complaints and putting things right'* (see www.hmrc.gov.uk/incometax/complain.htm).

5.2 The HMRC position is that any error, however trivial, ought strictly to be corrected. In practice they do not insist upon this where the amount involved is de minimis, but they do not give any guidance in this area. It is reasonable for members to weigh the cost to the client of correcting minor errors against the amount of tax at stake. See also paragraphs 2.40–2.42.

5.3 As noted in paragraph 2.7, members are advised to include in their letters of engagement authority to advise HMRC of errors, so that reference to the client is not needed. Where no such authority has been obtained, the procedure in paragraph 5.8 should be followed.

5.4 When advising clients of possible action in the light of an error made by HMRC, members should in the first instance consider whether in making his return, the taxpayer adequately disclosed information bearing on his tax liability, and in particular on the aspects which gave rise to the error.

5.5 Where the member becomes aware that HMRC, in full possession of the facts, have made an error in dealing with the affairs of a client, the member should seek the client's authority to advise HMRC of the error. If the client refuses to give that authority, the member should consider whether there are any special circumstances which might render the refusal reasonable. If there are not, then, unless the amount of tax or interest at stake is de minimis, he should consider whether he should continue to act. In determining whether any such refusal would be reasonable, the member should consider whether TMA 1970 s.97 would apply if the error subsequently came to light. If it would, it is highly unlikely that the client's refusal could be considered

reasonable for this purpose. If the client is under a duty (see paragraphs 5.10 et seq) to bring innocent errors to the attention of HMRC but refuses to do so notwithstanding the member's advice to the contrary, there is a substantial risk that if the member continued to act whilst remaining silent, he would be assisting the client in a breach of the client's duty.

5.6 If, however, a member is specifically asked by HMRC to agree a figure, he must agree what he believes to be the correct figure; this may be a figure negotiated in the course of discussions following full disclosure of the facts and circumstances. He is not at liberty to accept a figure he knows to be incorrect, and he does not need to seek his client's authority to disclose to HMRC their errors.

5.7 Counsel has advised that, in all other cases of excessive repayment or inadequate demand, unless the tax at stake is de minimis, the member should take the client's instructions. The client should be asked to authorise the member to advise HMRC of the error, and warned of the possible legal consequences if he is reluctant to give the authority sought; such consequences might additionally include interest and penalties.

5.8 Because the member may himself commit a criminal offence (see paragraph 5.11) through his involvement in obtaining an excessive refund, he should seek his client's authority to inform HMRC of the error. If this is not forthcoming he should consider taking independent legal advice with a view to:

(a) notifying HMRC in any event, and notifying the client of his action; and
(b) ceasing to act for the client.

5.9 A member should ensure that a written record is kept of all advice given to clients in connection with HMRC errors, and of any reassessment of his relationship with his clients. The member should also consider taking independent legal advice where he has any doubts as to the proper course of conduct to be followed. HMRC errors may cause expense to members, and thereby to their clients. Members should bear in mind that in some circumstances clients may be able to claim compensation. (*See HMRC leaflet 'complaints and putting things right' at* www.hmrc.gov.uk/incometax/complain.htm.)

Legal considerations

Offences under the Theft Act 1968 (not applicable in Scotland)
5.10 Theft Act offences might apply when a repayment results from the error. The most likely offence is that of theft contrary to the Theft Act 1968 s.1. Such an offence is committed when a person dishonestly retains, intending to keep or use, money which he knows does not belong to him. Dishonesty is the core of this offence. If the defendant were to raise the defence that he did not consider what he was doing to be dishonest, the prosecution would have to prove:

(a) that what was done was dishonest by the ordinary standards of reasonable and honest people; and
(b) that the defendant himself must have realised (or would have, had he stopped to think about the matter) that what he was doing was by those standards dishonest.

It is no defence that the defendant did not himself regard his conduct as dishonest.

5.11 If, before a client receives an excessive repayment, a member knows that it is to be made and that it is excessive, where the member was in any way concerned, however innocently, in obtaining it (for example, by submitting the repayment claim) but does nothing to draw HMRC's attention to the error, the member is at risk of prosecution. This is a very difficult area for the member. If he was unaware at the time he did the act he committed (for example, sign accounts or submit a repayment claim) that the claim was excessive, and he only obtained that knowledge later, and if he does not himself receive the repayment, as a matter of law he is not guilty of any offence. The problem that the member faces, however, is the risk of it being alleged against him that his knowledge of the client's dishonesty was earlier than in fact it was. Hence he would be vulnerable to prosecution either alone or together with the client.

5.12 If HMRC send the excessive repayment to the member, and if he is aware that it is excessive, he should simply return it to HMRC and inform the client that he has done so.

5.13 The offences for which the member would be at risk of prosecution are:

(a) obtaining a money transfer by deception;
(b) procuring the execution of a valuable security (for example, the repayment warrant) by deception;
(c) dishonestly retaining a wrongful credit; and
(d) conspiracy to commit any of those offences.

5.14 Members should also bear in mind that it is a serious criminal offence to tell HMRC an untruth (whether oral or in writing) if this is done with intent to 'prejudice' HMRC, that is to deceive an officer into not doing his duty, namely further to investigate the taxpayer's affairs and raise any tax assessments that might be appropriate, whether or not any additional tax is in fact due from the taxpayer.

The offence of cheat (not applicable in Scotland)
5.15 HMRC prosecutions for the common law offence of cheat are not uncommon. This is an ancient offence which requires proof of an intent to defraud or to prejudice HMRC. HMRC need to prove dishonesty, the test of which is effectively the same as that set out above.

5.16 The offence of cheat is certainly applicable to the dishonest obtaining or retention of over-repayments of tax.

5.17 Counsel has advised that mere failure to advise HMRC that they have demanded insufficient tax, particularly if the amount is significant, may in strict law be sufficient grounds for a successful prosecution. Members are therefore warned that their clients have no valid defence to a charge of cheating in cases where they refuse to authorise the member to disclose to HMRC an error of fact which results in such an underpayment.

5.18 The reality of the risk of such a prosecution being instituted, of course, depends on the facts of each case.

Other matters
5.19 Counsel has also advised that there is no legal obligation on a taxpayer, or a member, to press HMRC to issue an assessment, even if by reason of the delay HMRC's ability to start an enquiry or raise an assessment goes out of time, provided that the full facts and information have been supplied.

Offences under Scots law
5.20 TMA 1970 s.107 applies only in Scotland. It carries a maximum sentence of six months on summary conviction. It applies to any person knowingly making a false statement or false representation in any return or claim.

5.21 Under common law theft is committed by taking the goods or property of another. In this context 'taking' means the 'taking away'. Proving the intention to steal is sometimes a difficult matter in cases of theft; but the question comes down to the inference which may properly be drawn from the acts proved. It may be theft for someone to appropriate to his own use funds which are in his possession. Thus a taxpayer who retains a tax repayment which he knows is not due to him might be guilty of theft.

Money laundering
5.22 Where appropriate, members should bear in mind the legislation on money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

6. INVESTIGATION OF TAX ACCOUNTANTS

Background
6.1 HMRC have specialist units, part of whose brief is to monitor and investigate the standards of practising accountants and tax practitioners. HMRC employ accountants to advise officers on GAAP and the concept of 'True and Fair'.

6.2 Generally the investigator will seek a meeting with the member perhaps following a series of instances in which accounts or returns have been found to be incorrect. In the first instance, it may be that the investigator only outlines to the member the reasons for seeking a meeting. There is no legal obligation

on a member to acquiesce. In order to enable the member to consider whether to agree to the request, he should request full details of the matters giving rise to the investigator's concerns. If a meeting is held, it is likely that the investigator will ask to examine one or more sets of working papers relating to clients of the member either immediately or shortly after the meeting. There is no legal obligation on the member to comply at that stage.

6.3 On the evidence available before, during, or after a meeting with the member the investigator will consider whether:

(a) the member may have committed a criminal offence such as false accounting, or conspiring with a client to defraud HMRC; or
(b) the member may have committed an offence within TMA 1970 s.99 or s.107 or FA 2000 s.144; or
(c) the member's standards may be otherwise unsatisfactory in that he has been negligent or incompetent in preparing accounts and returns for submission to HMRC.

6.4 Any approach to a member by an investigator should be regarded as a serious matter, as should any request for access to working papers. A member who receives such an approach should consider taking the advice of a suitably-experienced specialist in tax investigations at an early stage. A member who believes at any stage that criminal proceedings may be taken against him and who is not entirely confident of the legal position should take legal advice, especially in view of the conflict between refusal to cooperate and his obligation of confidentiality.

6.5 HMRC have extensive powers to obtain information. It should be noted that TMA 1970 s.20A enables an HMRC investigator to obtain access to a member's working papers, and that its operation is clearly restricted to those circumstances where a 'tax accountant' has been convicted of a tax offence by a UK court or had a penalty imposed under TMA 1970 s.99. HMRC can also obtain access to working papers for specific clients under TMA 1970 s.20(3) subject to the override in TMA 1970 s.20B(11), and a warrant for entry and seizure under TMA 1970 s.20C would in practice give access to the working papers of all clients. Both statutory powers are subject to an implied exception in favour of documents or communications which qualify for LPP. See paragraphs 2.32–2.38.

6.6 A negotiated civil settlement resulting in no penalty actually being imposed on the member does not enable HMRC to use TMA 1970 s.20A.

6.7 Before HMRC are able to impose a penalty on any person under TMA 1970 s.99 they have to prove that the person:

(a) had assisted in or induced the preparation or delivery of any information, return, accounts or documents; and
(b) knew, at the time of the preparation or delivery, that the items would be, or would be likely to be, used for some purpose of tax, and knew that they were incorrect.

HMRC have confirmed that auditors who correctly ignored small errors because they were not material would not fall within TMA 1970 s.99.

6.8 Following the case of *Inland Revenue v Ruffle* [1979] STC 371 and observations made by HMRC in 1989, it is clear that because TMA 1970 s.99 is a penalty section a very high standard of proof is imposed on HMRC. In relation to TMA 1970 s.99 'Assisting in preparation of incorrect return, etc.', the changes then proposed by clause 161 of the Finance Bill 1989 were discussed at a meeting with HMRC, the agreed notes of which were issued by the Institute of Chartered Accountants in England and Wales as TR759. These notes include the following:

(a) 'The Institute of Chartered Accountants in England and Wales considered that the provisions should be qualified to make it clear that auditors who correctly ignored small errors because they were not material did not fall within the ambit of s.99.'
(b) 'HMRC explained that the revised wording corrected two lacunas in the wording of the present section, so that it applied generally to persons involved in the preparation of returns, accounts or other information to be used for tax purposes. These had come to light in the case of *Inland Revenue v Ruffle* [1979] STC 371 and the amended wording was as recommended by Lord Jauncey in that case and endorsed by the Keith Committee. They added that, unlike other penalty provisions in the tax code where there were comparatively weak tests of culpability, s.99 applied only where a person had assisted in the preparation of a return or accounts which he "knew" to be incorrect. This requirement of "guilty knowledge" was the equivalent of "civil fraud" and required a correspondingly high level of proof. It followed that there could be no question of the situations which were of concern to the Institute of Chartered Accountants in England and Wales – an auditor who noticed a small error but decided it was not material, or a person whose responsibility for an error was small – being caught by s.99.'

6.9 HMRC normally act against an individual practitioner, and not against a firm as a whole. It is questionable whether there is any power to proceed under TMA 1970 s.20A in respect of a firm's working papers where the individual penalised under TMA 1970 s.99 no longer has the firm's papers in his power or possession (see TMA 1970 s.20A(1)). If therefore, a partner in the firm is at risk of being convicted of a tax offence or having a s.99 penalty imposed, it may be prudent for the other partners in the firm, in the interests of other clients, to take steps to limit the documents over which that partner has possession or power.

6.10 SP5/90 'Accountants' working papers' explains how HMRC in practice use the powers available to them. (See Section G of Statements of Practice leaflet at www.hmrc.gov.uk/ practitioners/sop.pdf.)

6.11 Even without reliance on any an HMRC official can simply request a member to give access to a wide range of working papers. Members should consider the matters referred to below before agreeing to do so.

Confidentiality and freedom to disclose

6.12 There should be no disclosure of confidential client information without the prior consent of the client unless there is a legal right or duty to disclose. See also paragraphs 2.22–2.31.

Further considerations

6.13 Members should bear in mind that:

(a) the papers to which access is given may contain prima facie evidence of criminal offences by the member or a client, which may lead to prosecution;
(b) the papers may contain prima facie evidence of an offence within TMA 1970 s.99, leading to an award of penalties under which HMRC could legally seek access to the member's working papers for all clients;
(c) if the member gives access to client working papers without the prior knowledge and consent of the client, he may be liable for breach of at least an implied term of the contract between the member and the client;
(d) other factors may deter the member from disclosing client working papers, such as a possible restriction on access included in the terms of professional indemnity insurance contracts;
(e) if access on a voluntary basis is refused HMRC may exercise their statutory powers. Alternatively, tax districts may be advised that the investigator has misgivings as to the member's standards, and that clients' returns and accounts submitted by the member should be viewed in that light; and
(f) the imposition of a TMA 1970 s.99 penalty, or an agreement to enter into a civil settlement with HMRC, may prejudice the status of the member as a fit and proper person for audit and other regulatory purposes.

Advice in practice

6.14 As stated in paragraph 6.4, a member who believes at any stage that criminal proceedings may be taken against him should take legal advice.

6.15 In particular, where HMRC have alleged that the member may have committed an offence within TMA 1970 s.99, and it is clear that formal proceedings under TMA 1970 s.99 may be taken against him, the member should consider disclosure of working papers in the light of paragraphs 2.22–2.31.

6.16 It may be appropriate, after discussions with the investigator, to suggest the appointment of an independent practitioner to review and report on a sample of the member's working papers; this still represents disclosure of confidential information. It is, however, likely that the investigator will still wish to have direct access to a sample of the member's working papers.

6.17 An independent practitioner may be able to negotiate a settlement on behalf of the member. A member is not always the best advocate in his own cause.

6.18 Where it is alleged by the HMRC investigator that the member's standards are unsatisfactory, but in circumstances falling short of the possibility of criminal proceedings or a penalty being imposed under TMA 1970 s.99, then generally the member should not give access to client working papers without the prior knowledge and consent of the client. Any member contemplating giving access to an HMRC investigator where paragraph 6.14 is not in point should consider the matters at paragraphs 6.12 and 6.13. The advisability of appointing an independent practitioner to represent the member, as discussed at 6.17, should be considered.

6.19 HMRC have powers to obtain information and documents (VATA 1994 Sch.11, para 7). In addition the VAT and Duties Tribunals have extensive powers to obtain information and documents under VATA 1994 Sch.12, para 9.

6.20 In Scotland any person knowingly making a false statement may be prosecuted and on conviction may be imprisoned for a term of up to six months (TMA 1970 s.107).

6.21 The member may also wish to seek guidance from the Institute's Advisory Services in any of the above circumstances.

VALUE ADDED TAX

Chapters 7 and 8 deal with Value Added Tax but apply mutatis mutandis to other indirect taxes. They should be read in conjunction with Chapters 1 and 2.

7. Disclosure

Relevant responsibilities in preparing VAT returns

7.1 The client has the primary responsibility to submit a true and complete VAT return to HMRC. It follows that the final decision as to whether to disclose is the client's. A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

7.2 Where a member is acting as a 'tax representative' for an overseas principal, the obligations and liabilities of the VAT legislation are imposed jointly and severally on the client and the member. A member who acts in this way as a tax representative should seek indemnity from the client against failure by the client to provide information required. The member should also make clear in writing his obligation to disclose any irregularity to HMRC (see Chapter 8).

7.3 A member is not required to audit the figures in the books and records provided by the client but should exercise normal care and judgement in preparing the return and should record detailed figures in working papers.

Disclosure of specific transactions to HMRC

7.4 Normally, specific transactions need not be disclosed to HMRC. Nevertheless, a member may recommend to a client that a particular matter be disclosed in order to avoid uncertainty.

7.5 In such a case the full facts concerning it, including the reasons for doubt, should be disclosed to HMRC. The client can then generally rely on any unequivocal ruling in writing received from them on the point.

7.6 If a transaction is found to have been treated incorrectly but it can be shown that full information about it was disclosed to HMRC, the client will be able to claim the benefit of the concession concerning misdirection given in the Ministerial undertaking known as the 'Sheldon Statement' and reproduced as VAT Extra-statutory concession 3.5 in Notice 48 (March 2002): 'Extra Statutory Concessions' (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_PROD_011540). The undertaking says 'If a Customs and Excise officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing or, knowing the full facts, has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person's attention.'

7.7 The meaning of full disclosure was considered in *Matrix Securities Limited v IRC* [1994] STC 272 albeit in the context of direct tax. HMRC have stated that the Sheldon statement will not be honoured in cases where HMRC have been misled to obtain a specific ruling.

7.8 When disclosing transactions on which the member has previously advised, extra care may be needed to ensure that the full facts are disclosed. The advice given must not be allowed to affect the member's objectivity.

7.9 HMRC consider that they are entitled to override their general guidance by a specific ruling relating to the affairs of a particular taxpayer. Whether a specific ruling is applied retrospectively will depend on whether the general guidance could reasonably have been read as covering the particular case.

Known HMRC practices

7.10 Particular care is needed if HMRC have published their interpretation or have indicated their practice on a point and the client proposes to take a different view. Disclosure will probably be prudent in the interests of the client. Even where a taxpayer has Counsel's opinion that HMRC's interpretation is wrong, it is advisable to disclose the facts in writing to HMRC's Written Enquiries Team making it clear that HMRC's interpretation is not accepted. However, the final decision on what, if any, disclosure is to be made rests with the client.

Requests for rulings from HMRC

7.11 Once the member is satisfied that it is appropriate to apply for a ruling he should ensure that the client understands the issues and implications of the proposed course of action. This advice to the client should normally be confirmed in writing.

7.12 HMRC Notice 700/6 of April 2008 (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000874) provides guidance on how rulings should be sought. Rulings should normally be confirmed by HMRC in writing. If necessary the client, or the member, should write to HMRC confirming the facts and the ruling that is understood to have been given.

7.13 If a written ruling appears to the member to be incorrect, he should consider whether it is clear that full facts were disclosed (the amount of VAT involved may be a material fact) and whether it is clear from the wording of the ruling that the officer of HMRC has understood the question.

Effect of rulings and official practice

7.14 Members are entitled to rely on official HMRC practices and rulings where these are favourable to their clients.

7.15 However, there are limits to the extent to which HMRC are bound by undertakings and statements of policy which they have given or issued. Examples of restrictions on a taxpayer's entitlement to rely on HMRC's rulings are:

(a) the VAT and Duties Tribunals will have regard to the strict terms of the law in their decisions and may ignore any HMRC advice or extra-statutory concessions which the taxpayer may have relied on even if they have been published in an official HMRC Notice or leaflet; and
(b) failure by HMRC to comply with the Sheldon Statement cannot, of itself, constitute a ground for appealing to the tribunals.

7.16 If HMRC refuse to stand by a ruling given, whether generally or specifically to the client, there may be a remedy in judicial review before the High Court, and, in Scotland, the Court of Session. In this event, the member should seek legal advice as soon as possible as to the applicable time limits for such procedures. An application may also be made to the Adjudicator or to the Ombudsman.

7.17 If an error was obvious in the records available when a control officer visited, this should prevent any suggestion of fraudulent evasion or recklessly negligent conduct entailing a criminal penalty; and may also obviate the risk of an accusation of conduct involving dishonesty which could lead to a civil penalty. However, the concession on misdirection explained in paragraph 7.6 will not apply unless it can be shown that the officer saw the specific records in question and failed to point out the error. By its very nature, this is difficult to prove.

7.18 If a member obtains a ruling with which he disagrees, he may advise the client to consider an appeal to the VAT and Duties Tribunal (having regard to the applicable time limits). The member should be aware that an appeal can only be made against a ruling which has been given in respect of an actual transaction. It is not possible to appeal against a ruling given in respect of a proposed transaction.

Demands by HMRC for information

7.19 HMRC's powers to demand information and their policy on access to working papers etc. are outlined in Leaflet 700/47/93: 'Confidentiality in VAT matters (tax advisers) – Statement of Practice' dated February 1993 (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000100). However, Notice 700/47/93 was published before the decisions in *R (on the application of Morgan Grenfell & Co Limited) v Special Commissioners* [2002] STC 786 and *R v Customs and Excise Commissioners, ex parte Popely and Harris* [1999] STC 1016 and members should be aware of the possible implications of these decisions. In particular, Counsel advises that HMRC have no statutory powers to compel the disclosure of LPP material. Furthermore, the information powers must be interpreted by the Courts and applied by the HMRC officers in a manner which is consistent with the client's and the member's rights under Article 8 of the European Convention on Human Rights.

7.20 Enquiries from HMRC are often unexpected and informal and usually arise from a visit to the client. The member should consider whether authorisation to reveal the information requested is needed from the client. The nature of the enquiry may not be immediately apparent and the position may need reviewing as it progresses.

7.21 A member who is in doubt about the implications of a question should consider asking for it to be put in writing so that a response may be agreed with the client.

7.22 Although there are no equivalent provisions of TMA 1970, ss.20–20D in the HMRC legislation, HMRC's powers to require disclosure of documents and information are contained in various statutes, including, in the context of VAT, VATA 1994, Sch.11, paras 7(2) and (3).

7.23 These provisions permit HMRC to require production of documentation by every person concerned in the supply of goods and services or the acquisition or importation of goods, or from any other person 'who appears to the authorised person to be in possession of them.'. This provision may be wide enough to entitle HMRC to demand recovery of documents from a tax adviser. Although the Statement of Practice in Notice 700/47 recognises the client's common law privilege, both in relation to legal professional privilege and litigation privilege, disputes may arise as to whether or not a particular document is protected by privilege.

8. ACQUIRING KNOWLEDGE OF VAT ERRORS AND IRREGULARITIES

For the purposes of this Chapter, 'irregularity' means conduct which could give rise to prosecution or an evasion penalty. Some errors may constitute or become irregularities.

Generally

8.1 A member must do nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed. A member must exercise great care to avoid commission of an offence by knowingly or recklessly making false statements or false representations when assisting a client whom the member suspects may have defrauded the Crown of tax or of having been negligent in regard to VAT matters.

8.2 Subject to the terms of his engagement, a member who assists a client to prepare any return or advises a client on a VAT matter has no responsibility to carry out an audit of the client's accounts or to investigate any matter not directly affecting the assignment he has agreed to undertake or to seek or to detect any error or irregularity. In general, his duty is limited to carrying out the assigned work, and he need only deal with errors or irregularities in respect of that assignment which came to his attention in performing it.

8.3 A member who, as a result of any work undertaken on behalf of a client, has reason to believe that a VAT error or irregularity has occurred should discuss with the client the matter which gave rise to that belief and consider whether in the circumstances it is appropriate for him to act. Where the member has not acted in relation to that question, he should take into account the fact that he may not be party to all the facts and circumstances and may not therefore be able to reach a conclusion on the issue. It is not the duty of a member to pursue to a conclusion a matter in respect of which he has not been engaged, unless it affects work in respect of which he has been engaged.

8.4 If there is a VAT error, the member should normally advise the client to follow the procedure set out in HMRC Notice 700/45/02: 'How to correct VAT errors and make adjustments or claims' (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000077).

8.5 If there is doubt as to whether or not an irregularity has occurred, the member should consider protecting his position by obtaining advice from a specialist in this field. Furthermore, if the member has any doubt about his competence to provide advice to his client in these circumstances he should seek to obtain specialist help as appropriate.

Money laundering

8.6 Where appropriate, members should bear in mind the legislation on

money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

Human rights

8.7 Wherever appropriate, in particular if there is a risk of prosecution or tax-geared penalties, the provisions of the HRA 1998, in particular the protection given by Articles 6 and 8 of the European Convention on Human Rights, should be considered, and in obtaining advice on behalf of their clients members should ensure that the Act is taken into account.

Materiality

8.8 In considering the action which he should take in the circumstances outlined in this Section, the member may take account of materiality but reference should be made to paragraphs 2.40–2.42. However, HMRC's position is that any error ought to be corrected.

VAT errors

8.9 Correction of errors up to a prescribed amount can be made on the current VAT return as part of the entries for that period. If this is done, neither penalties nor interest is due. If the net value of the errors is greater than the specified level this procedure is not available, and separate disclosure of the error must be made. Form VAT 652 is provided for the purpose of making a voluntary disclosure separate from the VAT return, although its use is not mandatory and in most circumstances it may be more appropriate to make the disclosure by letter.

8.10 HMRC have stated that disclosure of errors after a visit date has been arranged will be rejected where there is reason to believe that:

(a) the errors were disclosed only because of the visit; or
(b) disclosure made during or after a visit was prompted only by HMRC's enquiries.

Other voluntary disclosures made after the visit date has been arranged may, however, be accepted by HMRC.

Advice to be given where an irregularity is admitted

8.11 A member whose client has admitted an irregularity should consider whether to recommend to his client to take legal advice. One of the factors the member must take into account is whether his client will have the benefit of LPP in relation to confidential discussions between the client and the adviser concerning the client's knowledge of the irregularity. As indicated in paragraphs 2.32–2.38 above, the present position at common law is that communications for the purpose of obtaining legal advice from non-lawyers do not qualify for LPP unless the dominant purpose behind such communication is to assist in litigation which is either pending or contemplated. In many circumstances, the dominant purpose in seeking such advice will be to ascertain the extent of the tax liability, rather than to assist in contemplated litigation. If legal advice is not appropriate the member should

advise the client to disclose the irregularity to HMRC and make an internal note of having given such advice. The member should explain the consequences of not making a disclosure, in particular that:

(a) should HMRC discover the irregularity later there might be no defence against a misdeclaration penalty;
(b) having knowledge of the irregularity without acting upon it may be construed as a criminal offence or a civil fraud;
(c) interest may accrue up to the time the VAT is paid: the policy of HMRC not to assess interest in 'no loss to the Revenue' cases may not be relevant; and
(d) it would be improper to allow HMRC to agree a settlement without putting them in possession of all the facts.

If the client declines to disclose the irregularity, the member should confirm his earlier advice in writing and consider whether it is appropriate to carry on acting.

When HMRC are not aware of an irregularity

8.12 Where there is an irregularity which HMRC have not discovered, voluntary disclosure and payment of the under-declared or over-reclaimed tax will usually remove the risk of a penalty, although interest may remain due. Prompt disclosure of an error may avoid suspicion by HMRC that it was deliberate thus reducing the risk of a civil fraud penalty.

When HMRC allege that irregularities may have occurred

8.13 When HMRC allege that an irregularity may have occurred, but it has not been identified by the member or his client, the member should establish from HMRC such details as he can of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting between the member and the HMRC officer or in the course of correspondence, depending on the circumstances.

8.14 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. The member should evaluate HMRC's allegations in the light of the facts as they have been explained by the client. Where appropriate, he should advise his client to make a full disclosure to HMRC and to offer them all facilities for investigation. In the course of his evaluation the member should consider whether to recommend to his client to take legal advice prior to making a disclosure. In particular, where there is a real possibility that the tax authorities may still bring criminal proceedings against the client even if he provided full disclosure, the client needs to have proper legal advice concerning his right to silence and the privilege against self-incrimination before deciding which course to take.

8.15 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to HMRC.

When HMRC are aware of an irregularity

8.16 If HMRC intend to prosecute a person for evading tax, they should administer a caution to that person. Therefore, when HMRC are aware that a serious irregularity has occurred, an interview under caution may be sought. If the member is made aware of such an interview, he should attempt to ascertain HMRC's reasons for the interview and then notify his client of the seriousness and the potential implications of the allegations. If the interview under caution is already taking place, and no legal advice has been sought, the member should repeat the need to take legal advice which HMRC should in any case have indicated at the outset as the client's legal right. The member should also advise the client of his right to silence and his privilege against self-incrimination. If the member does not feel competent to advise on these matters, he should seek to arrange legal advice on these matters for the client as soon as possible.

8.17 A tax adviser who is not a lawyer has no right to attend his client's interview under caution. HMRC have indicated that when a client is being interviewed in a criminal investigation, that client may already be under arrest and there is no obligation to allow a tax adviser to be present during such an interview unless that adviser is also a lawyer. It is therefore unlikely, in most instances, that tax advisers will have access to their clients in such circumstances.

8.18 The benefit of full cooperation and complete disclosure in civil fraud cases is set out in HMRC's 'Civil evasion penalty investigations: Statement of Practice' (VAT Notice 730 – see http://www.hmce.gov.uk/forms/notices/730.htm – which should be read together with the addendum thereto issued in April 2002 – http://www.hmce.gov.uk/forms/notices/730add.htm) and VAT Information Sheet 1/02 (http://www.hmce.gov.uk/forms/notices/info0102.htm). (*Note: CoP 9 (2005) applies for inquiries commencing on or after 1 September 2005; see http://www.hmrc.gov.uk/practitioners/civil-investigations.htm. The following explanation of HMRC's procedures refers to the pre-1 September 2005 position.*) The Addendum and the Information Sheet explain HMRC's equivalent procedure to Hansard effective from April 2002. If this approach is offered, they will prosecute only if a fraud is likely to continue or the trader refuses to answer four standard questions. In criminal cases cooperation can facilitate the agreement of offers to compound criminal offences (under CEMA 1979 s.152) and the mitigation of penalties, although it will not always prevent prosecution. If HMRC seek to rely in criminal or tax-geared penalty proceedings upon statements or documents produced by the client following such procedure as comprising accurate evidence of the client's involvement in the irregularity, then it is possible that such reliance would be a breach of the client's privilege against self-incrimination under Article 6 of the European Convention on Human Rights. It should be noted that tax-geared penalty proceedings will normally be regarded as criminal proceedings for the purposes of Article 6 of the European Convention. Again, this is a matter on which specialist legal advice should be sought as soon as possible.

8.19 An interview under caution is an early indication of the possibility of a criminal prosecution. If it appears likely that criminal charges will be brought, the member should advise the client to take advice from a criminal law specialist. Even if HMRC are prepared to compound proceedings it may still be appropriate to take legal advice.

8.20 If the advice is to cooperate, the member should advise his client to make a full disclosure to HMRC and, when under investigation for civil evasion, cooperate within the terms of VAT Notice 730 or the Statement of Practice in VAT Information Sheet 1/02. In the case of a criminal investigation under caution, the advice of a specialist professional should be taken throughout in respect of full disclosure and production of documents etc.

8.21 HMRC will advise the client at the outset if they are considering an investigation under the civil regime by issuing VAT Notice 730 or the statement of practice in VAT Information Sheet 1/02: this is not a caution. In the event of a criminal investigation a caution will be issued. In most cases, full cooperation under the civil regime affords a maximum discounted penalty of 25 per cent of the tax concerned.

8.22 Members should be aware that HMRC's policy is not to offer the civil regime to professional advisers in respect of their own affairs.

The importance of confirming admissions of irregularities by clients
8.23 Misunderstandings can arise, especially when the client is under investigation by HMRC. Before a member makes any disclosure to HMRC on behalf of a client he must be absolutely clear that an irregularity has occurred and that he has the client's agreement to the manner of disclosure.

Instructions to disclose
8.24 Provided the member has the client's written permission (or a note of oral instructions which he has confirmed in writing to the client) to disclose an error too large to be corrected on the next return, he should write to HMRC giving as much detail of the inaccuracy in the return(s) as is available.

8.25 It may be more appropriate for the letter of disclosure to be sent by the client. In this case the member may either draft the letter for the client or review the client's draft to ensure that adequate disclosure has been made.

8.26 The disclosure should be made to HMRC as soon as possible in order to minimise the risk of them becoming aware of the problem before they are told. Care should be taken to ensure that the disclosure is as full as practicable concerning the number and the amount of irregularities which have been detected.

Disclosure to other tax authorities of an admitted irregularity
8.27 The member should also consider the need to make a similar disclosure to HMRC.

Unwillingness or refusal to disclose an admitted irregularity

8.28 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. A member should allow a reasonable period for the client to make a decision. Thereafter, the member must decide whether continuing 'unwillingness' is in fact 'refusal' for these purposes.

8.29 If the client refuses to accept the member's advice to make a full and prompt disclosure to HMRC, the member should ensure that his conduct and advice are such to prevent his own probity being called into question. It is essential therefore to advise the client in writing properly and fully of the consequences of the failure to disclose.

8.30 The member should take such steps as are necessary to disassociate himself from the client's conduct. The member should write to the client setting out the facts understood by the member or agreed, and advising the client of the latter's duty to disclose. He should also make it clear that he, the member, may have an obligation formally to disassociate himself from any work done, should disclosure not be made.

8.31 If the client refuses to disclose or to take other steps (for example, seeking Counsel's opinion on the member's view) to regularise the situation, the member should consider taking steps formally to disassociate himself from the relevant work taking account of all relevant issues. In certain cases it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

8.32 If HMRC realised that the member had continued to act after becoming aware of such undisclosed errors, they might consider the member to be 'knowingly concerned' in the commission of an offence. At the very least HMRC might cease to trust the member. Furthermore, the relationship of trust which must exist between member and client will have been impaired.

The member prepares or assists in the preparation of the VAT return

8.33 Where the member either prepares or assists in the preparation of VAT returns, and the client refuses to disclose errors which occurred during or before the period in respect of which the member has acted, it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

8.34 If HMRC are aware that the member has been acting for a particular client, the member should, when appropriate, notify them that he has ceased to act for that client.

The member prepares or assists in the production of accounts

8.35 A member may prepare or assist in the production of accounts, without advising on VAT. If the client refuses to disclose a VAT error, the member should consider whether the relationship with the client, which is based on

trust, has been impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to full disclosure.

The member is engaged to provide VAT advice

8.36 If required to deal with HMRC on the client's behalf, the member might not be in a position to do so in good faith whilst aware of an undisclosed error and the member should consider ceasing to act. This does not apply where the member has advised on VAT matters, or otherwise, without dealing with HMRC, but the member should consider his position carefully.

Where the client refuses to admit an irregularity

8.37 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given. It may be appropriate also to send a copy of the file note to the client.

8.38 Where the client denies any irregularity and the member rejects outright that denial, the member must cease to act for the client at least in relation to his VAT affairs, and very possibly in relation to all his affairs. The decision depends on the nature and scope of the member's relationship with the client having regard to the various circumstances. See also paragraphs 2.43–2.47.

8.39 Where, despite the client's denial of any irregularity, the member still has reservations, but does not consider that he is justified in rejecting the denial outright, the member must give careful consideration as to whether he can continue to act on behalf of the client. If the member decides to continue to act, his file notes should set out clearly the client's explanation and/or assurances that there have been no such irregularities.

Consequences of ceasing to act

8.40 The member need not inform HMRC of the termination of his instructions unless the member is at the time dealing with HMRC on the client's behalf.

Suspicious circumstances

8.41 A member who acts in relation to VAT matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and these guidelines should be followed.

8.42 If the member finds no confirmation but remains suspicious such that the relationship of trust which must exist between the member and the client may have been impaired, the member should consider whether he should continue to act. If a new adviser then approaches the member, the member should consider his position in the light of paragraphs 8.45 and 8.46.

Request for information from a new adviser

8.43 On changes in a professional appointment, the initiative to request information lies with the new adviser who should obtain the proposed client's authorisation to communicate with the member. The member should not volunteer information to a new adviser in the absence of any such request by the new adviser or his former client.

8.44 When the member receives a request for information from a new adviser, he should:

(a) seek authorisation from the former client to disclose all relevant information to the new adviser;
(b) on receipt of such authorisation, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and
(c) to the extent that he is authorised to do so, discuss freely with the new adviser all matters of which he should be aware.

8.45 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

8.46 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the former adviser would have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the former adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider whether or not he comes to the same conclusion as the former adviser. See also Section 3.3 'Code of Ethics' Part B, paragraph 210 'Professional appointment' at www.icaew.com/membershandbook/.

Accountants and legal services

This Handbook Section was issued on 1 September 2006, and was updated to reflect the references in the Legal Services Act as far as possible, in August 2008. However, as the Legal Services Act was not fully enacted at that time this Section makes reference to both law in force at that time and, where appropriate, relevant sections of the Legal Services Act. Members should be aware that the provision of legal services will continue to change as the Legal Services Act is fully enacted.

The Section applies to law in England & Wales. Members should be aware that the provision of legal services is subject to reform by the Legal Services Act as noted above. Members in other jurisdictions will need to take into consideration local laws and regulations (including any local restrictions that may govern who can provide legal services) but might find the general principles, set out in this statement, useful.

In this Section the masculine gender imports the feminine gender throughout. This Section is not intended to be an exhaustive guide to all areas of law in which accountants might offer services. The following aims to be a guide to the principles that members (and in particular practitioners) need to consider before acting in respect of matters of law commonly encountered by accountants.

1. Introduction

1.1 It is part of the ordinary function of the services a chartered accountant provides to their clients that advice is given on business issues. Such business advice may extend to advising the client on their legal rights and obligations. This is particularly true when advising, for example, on corporate reporting requirements, contractual requirements impacting on corporate accounting and other general obligations in relation to employees or trading partners, as well as advice on obligations under tax law. Members will need to identify those areas within their competence in respect of which they can responsibly give advice and those areas which require specialist input (for example from a lawyer). The following guidance sets out those areas which may, by legislation, require a lawyer to be engaged, and points out a member's ethical obligations when seeking to provide services which may extend to legal matters. Members are reminded to ensure that the work they undertake is both within their competence and covered by professional indemnity insurance.

1.2 Legal services fall into two categories: those that can be undertaken by non-lawyers (known as legal activities) and those which may only be provided

by a specific group of authorised individuals due to legislative restrictions (known as reserved legal activities).[1]

1.3 Reserved legal activities are:

- exercising a 'right of audience' (see '*Tax advice*' below);
- the conduct of litigation;[2]
- reserved instrument activities, that is work relating to various types of legal documents in respect of real and personal property and legal proceedings (see '*Property, trusts and court documents*' below);
- probate activities (see '*Probate/acting as an executor*' below);
- notarial activities;
- the administration of oaths.

1.4 Members should be aware that performing reserved legal activities (without the specified qualifications) can constitute a criminal offence.[3]

1.5 Other legal activities include any other advice or assistance which includes the provision of advice on the resolution of legal disputes or which provides advice in relation to legal rights, duties or responsibilities.

1.6 This Section contains guidance on and summarises aspects of the law but it should not be treated as an exhaustive explanation of relevant provisions.

2. Fundamental principle of professional competence and due care[4]

2.1 Members have a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice and legislation. Members should also act diligently and in accordance with applicable technical and professional standards when providing professional

[1] The terms used to distinguish between these two categories were 'reserved' and 'unreserved' legal services. The Legal Services Act identifies the two areas of legal service as 'reserved legal activity' and 'legal activity' and sets out the meaning in s. 12 of the Act. Section 12 was partially brought into force by a statutory instrument (SI 2008/222) in March 2008.

[2] Section 20, Solicitors Act 1974, prohibits anyone from acting as a solicitor, or as such issuing any writ or process, or commencing, prosecuting or defending any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or acting as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's Revenue and Customs.

[3] Members' attention is also drawn to the Immigration Asylum Act 1999, which prohibits the provisions of immigration advice and immigration services except by certain persons – see also s. 13(4) of the Legal Services Act 2007 which is not in force as at August 2008.

[4] See Section 3, 'Code of Ethics'.

services. Thus a member should not undertake work simply because he is not prohibited from doing so but rather he should only undertake work which he is both entitled to carry out and sufficiently competent so to do.

2.2 Members are reminded that some non-legal services are reserved to individuals or firms holding specific authority to act (such as insolvency work requiring a licence and authorised investment business activities). Members should always seek advice if unsure as to whether the work intended to be undertaken is restricted, regulated or licensed.

2.3 Where appropriate, a member should make clients, employers or other users of the professional services aware of limitations inherent in the services provided to avoid the misinterpretation of an expression of opinion as an assertion of fact. Furthermore members should be aware that holding oneself out as authorised, where one is not, can constitute a criminal offence (for example pretending or implying that one is a solicitor).

2.4 Members should be aware that if they provide advice that would normally be given by a solicitor or other lawyer they may increase the scope of the duty of care they owe to their clients. Accordingly, if a member falls short in the service provided, and the client suffers loss, the courts may judge the conduct of that member against the standard expected of a solicitor rather than that of an accountant.

2.5 Members may have an entitlement to undertake work, which is otherwise the preserve of lawyers, by virtue of other qualifications, for example members who are dual qualified as barristers or registered patent agents. Such activities may be subject to practising restrictions and members holding dual qualifications should ensure they hold the relevant authorities from the relevant professional body.

3. Formation of companies

3.1 Members are entitled to prepare memorandum and articles of association including clauses relating to accounts. Members should ensure that sufficient expert input to the drafting process has been obtained before such documents are settled.

4. Probate/acting as executor

4.1 Under the Solicitors Act 1974 ('the Act')[5] it is an offence for anyone without the specified qualifications to, directly or indirectly, draw or prepare

[5] Section 23 as amended. (When in force, it will be an offence under s.14, Legal Services Act 2007 to carry out such an activity without being entitled under that Act.) Under the Courts and Legal Services Act 1990 certain entities other than the Law Society have been permitted to license their members to undertake probate activities.

any papers on which to 'found or oppose a grant of probate or letters of administration', unless he proves that the act was not done for or in expectation of any fee, gain or reward.

4.2 With regard to the expression 'papers on which to found or oppose a grant of probate' such papers consist of writs, notices of and cases on motion, pleadings and affidavits and their exhibits.

4.3 Members may be employed to undertake such work by someone entitled to provide these services under the Act. Therefore accountants employed by solicitors can, for reward, be involved in such work. In many cases the papers will be the tax returns and supporting schedules required by HMRC and others.

4.4 Work for no fee, gain or reward in a personal capacity would be permissible. Members should not seek to recover the cost of such work in other fees and are reminded that reward can be widely interpreted. A practising accountant who is appointed as executor with power to charge can, whether instructing a solicitor or applying in person, charge for the accountancy work entailed in the collection of material for the purposes of obtaining probate. However, members are reminded that they cannot charge, notwithstanding a charging clause, for actually drawing or preparing any of the documents necessary to the grant irrespective of whether they consider the appointment to be personal rather than professional.

4.5 Where there is no power to charge, the executor must not charge. It is immaterial whether the work done falls within his professional competence, or not, or whether a solicitor is instructed.

5. Property, trusts and court documents

5.1 Under the Act, section 22 (as amended)[6], it is an offence for a member, who is not also a solicitor, to:

- draft documents intended to transfer or create a charge in relation to the Land Registration Act 2002;
- make any application or lodge any document for registration under that Act at the Land Registry;
- draw or prepare any other instrument relating to real or personal estate including the contract, conveyance and mortgage in a land transaction; or
- draw or prepare instruments relating to legal proceedings

unless either he can prove the work was not undertaken for or in expectation of any fee, gain or reward or else that it was at the direction and under the

[6] When in force, it will be an offence under s.14, Legal Services Act 2007, to carry on a reserved legal activity if not entitled under that Act.

supervision of a solicitor or other legally qualified employer or fellow employee who is authorised to perform such services. In the latter case, the instructing solicitor or legally qualified individual will be able to give reassurances. Members in any doubt should seek advice.

5.2 A member, who is not also a solicitor, cannot draft a trust deed for fee, gain, or reward. However, a member can draft a document which gives rise to a trust as part of a testamentary instrument, for example as part of a will or codicil to a will[7]. Members are reminded to undertake only work if they are sufficiently competent.

5.3 The Act also includes various other exceptions to the rule which allow non-solicitors to draft stock transfer forms (where there is no trust), powers of attorney and general agreements (to the extent that they are not specifically excluded). Details are not provided in this statement and members should refer to the Act and seek advice as appropriate.

6. Will writing

6.1 Will writing is not a reserved legal activity. It is therefore permissible for members to offer will writing services and to charge for them. However, members are reminded that drafting wills can be a complicated and specialised area and should therefore only be undertaken where the member has sufficient knowledge and competence. Members should also establish whether such work is covered by their professional indemnity insurance.

7. Tax advice

7.1 The provision of advice relating to compliance with taxation law is a normal part of the practice of accountancy for those with the necessary competence. Representing clients in relation to appeals to tax tribunals is permissible at the General/Special Commissioners and the VAT & Duties Tribunal. However, members should bear in mind that the processes involved in listing appeal hearings and the manner in which appeals are conducted could be outside of the member's area of competence (see also paragraph 2.3 above). Members should consider whether the client's best interests would be served by appointing someone who has appropriate legal training and the necessary experience of appearing before tax tribunals. Members in any doubt as to their position should seek advice. Furthermore, members should be aware that no costs in respect of anything done by a person, who does not

[7] Section 22 of the Solicitors Act 1974 excludes from the definition of 'instrument' a will or other testamentary instrument and an agreement not intended to be executed as a deed. The Legal Services Act 2007 does not alter this position; wills and other testamentary instruments remain unreserved activities.

hold the relevant qualification, acting as a solicitor are recoverable in any court proceedings[8] (see also 9.3 – Direct access to the Bar).

8 Working with solicitors

8.1 Members are entitled to accept instructions from solicitors and to provide assistance to lawyers in relation to litigation or to provide advice on matters within their competence. Members should ensure that instructions received are clear and seek clarity if in any doubt as to their entitlement to undertake specific engagements.

8.2 Acting as a forensic accountant is a specialised area and members are reminded to provide services only in matters in which they have sufficient competence. Members may be interested in the Institute's Forensic Accounting Special Interest Group.

8.3 Under current Solicitors' Regulation Authority (the Law Society's regulatory arm) rules members are prohibited from becoming partners in solicitors' practices. However, the Legal Services Act 2007 will permit non-lawyer managers, initially in 'legal disciplinary practices' where lawyers make up at least 75% of the managers, and in due course (under Part 5 of the Legal Services Act 2007) as managers in Alternative Business Structures (ABS). ABS are not anticipated to be available until at least 2011. The details of these developments and new business vehicles is presently beyond the scope of this Section.

8.4 Institute regulations allow solicitors to become principals in accountancy practices. However, such principals cannot, under current Solicitors' Regulations Authority rules, offer legal services to clients, whether they are reserved or unreserved, in the capacity of a solicitor. Members who employ solicitors within their practices should ensure that both the solicitor and they are familiar with the appropriate rules regarding 'in house' practice and the provisions of legal activities to the public/clients. Similar consideration will apply to other types of lawyers.

9. Direct access to the Bar[9]

9.1 Members are entitled to instruct Counsel direct, rather than via a solicitor, under the 'Licensed Access Scheme'. Further information on the operation of this scheme is available from the Bar Council's website (www.barcouncil.org.uk).

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[8] Section 28, Solicitors Act 1974.

[9] The Bar Standards Board (the Bar Council's regulatory arm) is currently in the process of reviewing the ways in which barristers may be instructed other than by other members of the legal profession. Members are recommended to familiarise themselves with the relevant rules before seeking to instruct counsel.

9.2 In addition, the Tax Faculty has made special arrangements under which their members can obtain advice and advocacy direct from barristers with a recognised specialism in tax law, for a fixed fee, in certain cases. Further information is available on these schemes from the Tax Faculty website.

9.3 Prior to incurring costs for engagement under the Licensed Access Scheme, members are advised to consider their ability to recover such costs at law and seek legal advice where appropriate.[10]

10. General

10.1 Members offering services which require an element of or total independence from the client should consider the impact of providing other services to that client. For example, representing an audit client before a tax tribunal creates an advocacy threat which guidance for auditors, contained in the APB ethical standard 5, may prohibit. Members who are concerned as to matters of independence may seek advice from the Institute's Ethics Advisory Services (01908 248258).

[10] The Court of Appeal has ruled that a litigant whose tax case had been conducted by tax advisers (and not by solicitors) was not entitled to recover the costs incurred by those advisers in respect of work which would normally have been done by a solicitor who had been instructed to conduct the case. That means that fees for the cost of providing general assistance to counsel in the conduct of litigation are likely to be irrecoverable. However, it might be appropriate to recover at least part of a tax adviser's fees in such cases as a disbursement on the basis that their specialist services are those of an expert. See *Agassi v Robinson* [2005] EWCA Civ 1507.

Acting as a trustee

(First published in December 2007)

CONTENTS

Scope

This Members' Handbook Section applies to members, provisional members, affiliates and member firms whenever acting as a trustee[1], whether or not on a remunerated basis.

This Section illustrates the basic principles that members are expected to follow, in addition to any more specialist guidance that may be available. This is not a statement of trust law but deals with ethical obligations and guidance for appropriate trustee behaviour generally. Some of the principles and content of this guidance may be of relevance to other fiduciary roles, such as executors, attorneys and receivers, where a member acts in a position of trust.

The additional rules which are applicable to trustees of pension funds, charitable trusts, charitable companies or collective investment schemes are not covered. Trustee positions held by a licensed insolvency practitioner in that capacity are also beyond the scope of this Section. Members who are invited to act as a trustee in such circumstances may obtain relevant information from The Pensions Regulator, the Charity Commission, the Financial Services Authority, or from relevant professional or trade bodies[2].

This Section does not deal with the monitoring requirements for trust services providers, introduced by the 3rd Money Laundering directive. Members are referred to the Money Laundering Regulations 2007 and the Anti-money Laundering Guidance for the Accountancy Sector issued by the CCAB member bodies for further information.

This guidance is written from the perspective of members acting as trustees for trusts pursuant to the law of England and Wales but it is recommended that the principles laid out in this Section are observed by members acting as trustees or in equivalent roles or subject to other law, unless to do so is contrary to such local law or regulations.

1. Introduction: what is a trust?

1.1 A trust involves the separation of legal and beneficial interests in property. In a trust situation the legal ownership vests in one or more persons or entities (the trustee(s)) for the benefit of ('in trust for') another or others (the beneficiaries). The trustee has a legal obligation to carry out the duties conferred upon him[3] by the trust. The relationship between the trustee and the beneficiaries is a 'fiduciary' relationship, such that the trustee must always place the interests of the beneficiaries above his own.

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[1] A director of a trust company will have similar considerations.
[2] See Appendix A – Useful Resources.
[3] In this Section the masculine gender imports the feminine gender throughout and the singular imports the plural.

1.2 Trusts can arise in a range of circumstances without any documentation but normally there is a formal trust document[4] appointing the trustees and setting out the nature of the trust and its beneficiaries, the property subject to the trust and the trustees' powers and responsibilities.

1.3 Trusts are highly diverse and can be constituted for a wide number of purposes which can extend from, for example, private or family issues, and Court of Protection matters, to investments, pensions and charities. The theme common to all trusts is that the trustee acts in a fiduciary capacity, acting in the best interests of the beneficiaries, in whose sole interests and for whose exclusive benefit the trustee must act. It is an onerous responsibility, not to be taken on lightly.

1.4 Duties of a trustee in respect of areas such as confidentiality and acting in best interests of beneficiaries have a synergy with membership of the profession and therefore members are often ideally suited to appointment in these roles.

2. Fundamental principle – professional competence and due care

2.1 Members are reminded of the fundamental principle of professional competence and due care[5]. A continuing duty exists to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. There is also a duty to act diligently and in accordance with applicable technical and professional standards when providing professional services.

2.2 On being appointed, a trustee needs to:

- satisfy himself as to the identity and nature of the trust assets and ensure that they are safe and under his control;
- satisfy himself as to the terms of the trust and the extent of the beneficial class. If a trustee has any doubts as to the provisions of the trust, it is recommended that appropriate legal or other professional advice is taken; and
- review the accounting and other records of the trust to ensure that its affairs are in order and that no breaches of trust have been committed in the past which need to be remedied, and take appropriate legal or other professional advice as necessary.

[4] This is sometimes called the 'trust deed' or the 'governing instrument'. The generic term 'trust document' is used in this Section.
[5] See Section 3, Members' Handbook, '*Code of Ethics*', Section 100.4(c).

Drafting trust documents
2.3 The drafting of trust documents is an activity reserved to particular persons. Information regarding such activities or legal services generally is covered in Section 7.4[6].

3. Independence

3.1 A member in practice holding the position of trustee needs to consider whether the trust holds any investments in the assurance[7] clients of his firm. Further information on independence is set out in the APB Ethical Standards (for audits), in particular Ethical Standards 2 (*Financial, business, employment and personal relationships*) and 5 (*Non audit services provided to audit clients*) or Section 290 of the Code of Ethics[8].

4. Appointment and retirement as a trustee

4.1 The Trustee Acts legislation[9] contains rules covering both the appointment and retirement of trustees. There may also be express provisions in the trust document. Those acting in other areas, for example charitable trusts, will note that specific restrictions may apply. Appointment of trustees is not covered by this Section and members with any questions about their potential/proposed appointment as a trustee are recommended to seek appropriate legal or other professional advice.

Retirement
4.2 The trust document may contain express conditions setting out when a trustee may retire which may or may not be linked to the appointment of a successor. The trust document may prescribe the number of trustees required, the steps to be taken on retirement of a trustee and for actions on retirement; generally it is not a simple matter of just resigning the position. Members are recommended to take appropriate legal advice on how to retire to ensure a valid discharge of their trusteeship. In particular a member who considers retirement in favour of an overseas trustee needs to be aware that this is an

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[6] See Section 7.4, Members' Handbook, '*Accountants and legal services*'.
[7] Assurance refers to engagements in which a practitioner expresses a conclusion designed to enhance the degree of confidence of the intended users. The conclusion is based on the evaluation or measurement of the subject matter against criteria. An audit is a type of assurance engagement where the subject matter is information within the financial statements for which, specifically, the APB Ethical Standards apply.
[8] See Section 3, Members' Handbook, '*Code of Ethics*', Section 290, '*Independence – Assurance engagements*'.
[9] In this Section, the 'Trustee Acts' denotes the Trustee Act 1925, the Variation of Trusts Act 1958, the Trusts of Land and Appointment of Trustees Act 1996, the Trustee Delegation Act 1999, and the Trustee Act 2000. There is other legislation affecting trustees.

area which warrants appropriate legal or other professional advice from a specialist.

Trustee's lien and indemnity

4.3 Trustees are entitled to be indemnified, out of the trust assets, against liabilities which they incur or take on as trustees. In this context the law does not require trustees to disregard their own interests but trustees must act fairly as between beneficiaries and their own interests.

4.4 There may be circumstances in which it may be appropriate to exercise a lien over the assets of a trust[10]. This may particularly be the case on retirement or on conclusion of the trust. A member seeking to exercise a lien as trustee may find it useful to consider the general principles of Section 9.4[11]. If a member is entitled to incur expenses, to charge fees for work undertaken or has other justifiable grounds, a lien may be exercised[12].

4.5 Members are reminded that the Institute's view of the ethical purpose of a lien exercised in respect of fees is to prompt payment and not to exact payment where there is a genuine dispute[13].

Grounds for removal

4.6 Grounds for replacement of a trustee may arise under statutory provisions[14]. The trust document may set out grounds for the removal of trustees. In some circumstances retirement may be requested or ordered. In addition a member's ethical obligations will dictate that there are circumstances in which a need for retirement will arise. Examples of such circumstances may be where a member:

- is convicted of any offence which triggers the duty to report misconduct[15] or which would otherwise compromise the integrity of that member in the role; or
- is declared bankrupt[16]; or
- has made formal arrangements with his creditors[17].

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[10] See for example *X v A* [2000] 1 All ER 490.

[11] See also Section 9.4, Members' Handbook, '*Documents and records: ownership, lien and rights of access*'.

[12] See Section 9.4, Members' Handbook '*Documents and records: ownership, lien and rights of access*', paragraph 15.

[13] See para 14, Section 2.8, Members' Handbook; '*The duty on firms to investigate complaints – guidance on how to handle or avoid them*'.

[14] See s.36, Trustee Act 1925.

[15] See Section 2.7, Members' Handbook, '*The duty to report misconduct*'.

[16] Membership will automatically cease under the ICAEW Bye-Laws upon the successful petition for bankruptcy of a member.

[17] Entering into an IVA or similar arrangement with creditors will give rise to a disciplinary offence under the Bye-Laws but will not automatically cease membership of the Institute. Members who are subject to such arrangements and who have not notified the Institute are reminded of their obligation under para 6(viii), Section 2.7, Members' Handbook, '*The duty to report misconduct*'.

5. Capacity in which trusteeship held

5.1 Trusteeships may be undertaken without remuneration or as a 'professional trustee' for reward, subject to the appropriate provisions in the trust document. Members are reminded that a duty of care exists even if the role is undertaken for no reward and that undertaking a role professionally may increase the standard of care expected[18]. If a member is uncertain of his duties with regard to any particular function as a trustee, it is recommended that appropriate legal or other professional advice is obtained.

5.2 There is no specific requirement to hold a practising certificate (PC) solely to become a trustee (although a PC may be required for other roles the member may undertake).

5.3 Section 1(1), Trustee Act 2000 provides that the trustee:

> '. . .must exercise such care and skill as is reasonable in the circumstances, having regard in particular: –
>
> - to any special knowledge or experience that he has or holds himself out as having, and
> - if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.'

5.4 Since this Act has given particular emphasis to the level of skill and care which a professional person is expected to show in his performance of the services, it is possible that this higher standard will be applied not just to those acting in the course of a business or profession, but also to members acting as a trustee in a private capacity.

5.5 Members who act as directors of corporate trustees need to apply the same rules and standards of care.

6. The roles and responsibilities of trustees

Principal duties

6.1 In addition to the express obligations of a trustee, as stated in legislation and the trust instrument, the principal fiduciary duties are:

- to act in good faith;
- not to make a profit out of his trust[19];
- not to place himself in a position where his duty and his interest may conflict;

[18] Trustee Act 2000, ss.1 & 2 and common law decisions including *Speight v Gaunt [1883] (9 App Cas 1,19)* and *Bartlett v Barclays Bank [1980] Ch 515.*

[19] See Part V, Trustee Act 2000 and para 11 of this Section.

- not to act for his own benefit or the benefit of a third person unless properly authorised to do so;
- to be accountable to the beneficiaries or co-trustees;
- not to misuse confidential information[20].

Duty to invest

6.2 Members must have due regard both to the law and to the content of the trust document in respect of investments. In general trustees must act prudently in preserving the capital of the trust and in balancing the interests of different beneficiaries. Without specific investment powers, a trustee can invest in the same range of investments '[as] if he were absolutely entitled to the assets of the fund'[21]. A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they need to be varied[22].

6.3 In this respect, the standard investment criteria[23] are:

- the suitability to the trust of the investments (both in relation to the suitability of the kind of investment, and the suitability of the particular investment); and
- the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

6.4 Under the Trustee Act 2000 a trustee has a duty to seek 'proper'[24] advice unless he concludes that in all the circumstances it is unnecessary to do so[25].

6.5 Persons (including trustees) providing investment advice to the trust by way of business will also require authorisation by the Financial Services Authority or under the Designated Professional Body arrangements[26]. Trustees (including members who are trustees) may seek investment advice from an entity or individual authorised or licensed (which can include the member's own firm) without requiring authorisation or a licence themselves. There are limited circumstances in which the provision of advice as a trustee would not be caught by the Financial Services and Markets Act[27]. Advice not given by way of business is unlikely to require a licence or authorisation but members need to be very careful about using this exemption and are recommended to obtain appropriate legal or other professional advice. Where

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[20] See Section 3, Members' Handbook, '*Code of Ethics*', section 140, '*Confidentiality*'.
[21] Section 3(1), Trustee Act 2000.
[22] Section 4(2), Trustee Act 2000.
[23] Section 4(3), Trustee Act 2000.
[24] Section 5(4), Trustee Act 2000 states: 'Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment'.
[25] Section 5(3), Trustee Act 2000.
[26] For further information please see the ICAEW DPB Handbook or visit the Financial Services Authority's website at www.fsa.gov.uk.
[27] See art. 66(3)–(6), Regulated Activities Order (SI 2001/544) as amended.

trusts are not subject to the law of England and Wales members are reminded that similar provisions are likely to apply.

Duty to maintain and prepare accounts
6.6 Trustees have a fundamental duty to maintain and prepare accounts and to attend to compliance obligations such as completion of tax returns. Members are reminded that they have a particular responsibility, in view of their professional expertise, to ensure such accounts or other relevant returns are completed and/or maintained to appropriate standards.

7. General powers of a trustee

7.1 Trustees derive their powers from the trust document and, in the absence of express provision in the trust document, from statute and common law. Some of these powers are discussed below, in the context of the duties and other functions of trustees. Delegation by the trustee must be within the terms of relevant powers (statutory or as set out in the trust document).

7.2 Sections 11–15, Trustee Act 2000 empower trustees to delegate certain of their functions. Some of these powers apply to their collective ability to delegate and not to delegation by any individual trustee and only operate in the absence of express provision in the trust document.

7.3 Under the Trustee Act 2000, functions which cannot be delegated (unless expressly provided for in the trust document) are set out in s.11(2) as follows:

- any function relating to whether or in what way any assets of the trust should be distributed,
- any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,
- any power to appoint a person to be a trustee of the trust, or
- any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian (sub-delegation).

7.4 Delegation by an individual trustee by power of attorney is covered by s.25, Trustee Act 1925, as amended by the Trustee Delegation Act 1999.

7.5 Any delegation of trustee functions (other than in respect of land in which the donor has a beneficial interest) must comply with the provisions of s.25, Trustee Act 1925, which contains safeguards to protect the beneficiaries. These safeguards provide that a trustee:

- may, by a power of attorney, delegate his or her functions as trustee for a period of 12 months or any shorter period;
- must, either before or within seven days after giving the power of attorney, give notice to the co-trustee(s) and any person entitled to appoint a new trustee; and
- is liable for the acts/defaults of the attorney.

7.6 Section 1(1), Trustee Delegation Act 1999 provides an exception to this obligation to comply with s.25, Trustee Act 1925 and states that an attorney can exercise a trustee function of the donor if it relates to land, or the capital proceeds or income from land, in which the donor has a beneficial interest[28].

7.7 Section 7, Trustee Delegation Act 1999 contains the following 'two-trustee' rules:

- capital monies arising from land must be paid to at least two trustees;
- a valid receipt for such capital monies must be given otherwise than by a sole trustee;
- a conveyance or deed must be made by at least two trustees to overreach any powers or interests affecting a legal estate in land.

7.8 Members are reminded that it is good practice to make appropriate provisions (including the granting of a power of attorney covering trustee functions) to facilitate the administration of the trust or to respond to emergency situations during short periods of absence.

Power to insure

7.9 Sections 19 and 20, Trustee Act 1925, as amended by s.34, Trustee Act 2000, or their general powers under the Trustee Act 2000 allow a trustee to insure against all risks and obtain insurance cover for all property which is subject to the trust, whether land or chattels. The premium may be taken from either capital or income. The statutory duty of care applies to the trustee's choice of insurer and the terms of the insurance. These powers do not impose a duty on the trustee to insure but it is likely that a failure to insure in circumstances where a reasonable person would have insured trust property will constitute a breach of the trustee's paramount duty to act in the best interests of the present and future beneficiaries of the trust.

8. Conflicts of interest

8.1 Section 220 and Section 310 of the Code of Ethics[29] set out the ethical position in relation to conflicts of interest. Members requiring more detailed guidance on conflicts of interest generally are referred to the Code of Ethics and Ethics Advisory Services[30].

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[28] Section 3(3), Enduring Powers of Attorney Act 1985 provided that an attorney under an enduring power was able to exercise all or any of the trust's powers or discretions vested in the donor as trustee. There were a number of problems with this section, however, including that it provided none of the safeguards for beneficiaries that are required under s.25, Trustee Act 1925. The delegation also remained in force after the donor of the power had become mentally incapacitated.

[29] See Section 3, Members' Handbook, '*Code of Ethics*', sections 220 and 310.

[30] Ethics Advisory Services can be contacted on 01908 248258.

Commission
8.2 Members may not retain commission[31] arising from activities undertaken in the capacity of a trustee, unless expressly permitted by the trust document, or where appropriate, with the agreement of all the beneficiaries or with the agreement of co-trustees[32], as part of their remuneration as a trustee.

Dealing in trust property
8.3 The dealing in trust property by the trustee in a personal or other trustee capacity (unless specifically permitted by the trust document) will be voidable and prevent the trustee from acquiring good title. If there are good trust reasons for such a transaction a member will need to seek the direction of the court unless self dealing is authorised by the trust document.

9. Trustee liability

9.1 Members need to be aware that where they take on the role of a trustee, they are taking on personal responsibilities. Accordingly, if they act outside their powers or do not fulfil their duties, they may be held liable for breach of trust and will have to make good personally the loss thereby incurred by the trust. Some implications arising from personal liability are set out below.

Trustee's ability to limit liability
9.2 Some trust documents contain clauses which seek to limit or exclude the trustee's liability for loss arising from breach of trust[33]. These are generically known as 'trustee exemption clauses' [34].

9.3 All members are obliged to adhere to the fundamental principles set out in the Code of Ethics[35]. Of particular relevance is the fundamental principle of integrity. In this context integrity requires compliance with the terms of para 9.4 below.

Informing clients of the existence and impact of trustee exemption clauses
9.4 A member acting as or for an original trustee, who

- assists in drafting,
- instructs another to draft,
- provides or prepares, or who
- arranges the provision or preparation of

[31] See also the general obligations regarding commission retention covered in Section 3 Members Handbook, '*Code of Ethics*', sections 240.5–240.8.
[32] Section 29, Trustee Act 2000.
[33] Breach of trust arises when a trustee fails to carry out his duties or exceeds the powers conferred upon him.
[34] The term is used interchangeably with 'trustee exoneration clause' and 'trustee exculpation clause'.
[35] See Section 3, Members' Handbook, '*Code of Ethics*', in particular section 110.

a trust document or a testamentary document (including a standard form trust), which includes any clause which has the effect of limiting or excluding liability[36], has this duty[37]:

to take reasonable steps before the creation of the trust to ensure that the settlor has given full and informed consent to the inclusion of any such clause.

9.5 It may be appropriate to suggest that the settlor seeks independent legal advice.

9.6 It is recommended that members retain a written record of any steps taken under these paragraphs.

9.7 Similar steps may be appropriate where the duties normally incumbent upon a trustee are specifically or unusually modified by the trust document or the testamentary document, particularly where the effect of the modification is to limit or exclude liability.

Entering into contracts as a trustee
9.8 Members are reminded that trustees of an unincorporated trust, contract in their personal capacity and will be personally liable but will be entitled to an indemnity, from and to the extent of the trust fund (subject to the limitations in the contract), provided the contractual obligations are authorised by the trust document or by the law.

Managing personal liability – considerations for members
9.9 Members in practice[38] who take on a trusteeship, are advised to establish whether their firm's professional indemnity insurance provides cover for such activities (see also paragraph 7.9 above). The absence of cover may be a breach of the Professional Indemnity Insurance Regulations[39] and/or exposure to personal liability in the case of a claim against the trustees.

9.10 Members who take on a trusteeship whilst in practice and who continue with the role after ceasing to be in practice (for example, on retirement) need to consider whether:

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[36] See para 2.3 (of this Section) regarding legal restrictions on drafting.
[37] For information members' attention is drawn to the Law Commission's report into trustee exemption clauses (including the rule of practice adopted by the Society of Trust and Estate Practitioners) and the Law Commission's recommended 'Rule', which is available at www.lawcom.gov.uk. The content of this Section represents the ICAEW's incorporation of the 'Rule' into member guidance and reflects the ethical obligation for a member to ensure those with whom he deals are not misled.
[38] Members in any doubt as to what constitutes 'practice' are referred to Section 6.1, Members' Handbook, '*Council statement on public practice*' and to the Ethics Advisory Services webcontent (www.icaew.com/ethics) and helpline (01908 248258).
[39] See Section 6.4, Members' Handbook, '*Professional Indemnity Insurance Regulations and Guidance*'.

- they hold (through their previous firm) indemnity insurance that provides cover for such activities;
- they hold separately sufficient indemnity insurance to protect against a claim which could exhaust personal resources.

9.11 Members are reminded that personal bankruptcy (which could arise from a claim that exhausted the member's personal resources) will result in automatic termination of membership.

9.12 Members who are not in practice or who act in a capacity entirely separate to their practice may also wish to consider insuring against personal liability. Insurance products exist which are specifically designed to deal with liability arising from acting as a trustee.

10. Trustees and Powers of Attorney (POA)

10.1 A POA[40] creates a fiduciary relationship between the donor and donee of the POA. As such, the guidance set out above needs to be given due consideration. Before considering whether to accept a POA in respect of a client or colleague, members need to consider the consistency of such a role with existing services provided to the client (see paras 2, 3 and 8 of this Section).

10.2 Where a member finds that he is regularly or permanently unable to perform his trustee functions it would be prudent to consider retiring as a trustee rather than appointing an attorney.

11. Remuneration

11.1 As set out in para 6.1 above, trustees have a general duty not to profit from being a trustee. However, members may charge for their services in a number of circumstances: –

- where there is an express charging clause in the trust instrument; or
- in certain circumstances with the written agreement of the other trustees[41]; or
- where appropriate, with the prior agreement of all the beneficiaries.

Charging clauses
11.2 Charging clauses are construed strictly and may prohibit the trustee from being remunerated for acts which a lay trustee could perform. Where a member witnesses a testamentary document in which a charging clause is contained he will lose the benefit of the charging clause.

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[40] Members are reminded that the law regarding enduring powers of attorney changed on 1 October 2007 (now known as 'lasting powers of attorney'). Notably lasting powers of attorney need to be registered from the outset unlike enduring powers of attorney which were only required to be registered upon the incapacity of the donor.
[41] Section 29(2), Trustee Act 2000.

11.3 Members' attention is drawn to the principles set out in paras 9.4–9.7 and are asked to note that these can apply equally to charging clauses[42].

Trustees' written agreement
11.4 A trustee who acts in a professional capacity, but who is not a trust corporation, a trustee of a charitable trust or a sole trustee, is also entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust, if each of the other trustees has agreed in writing that he may be remunerated for the services. A sole trustee is excluded because the safeguard of collective scrutiny would be absent[43].

Agreement of the beneficiaries
11.5 In the absence of a charging clause or written agreement, prior agreement of all the beneficiaries will permit the trustees to charge.

Fee disputes
11.6 Whilst there is no legal obligation to do so, members wishing to rely on a charging clause to recover professional fees may wish to agree the basis for charging with the beneficiaries. This can help avoid disputes over fees at a later date and can assist in demonstrating adherence to ethical standards, particularly integrity.

11.7 There is no legal obligation to provide fee breakdown information to beneficiaries, for fees recovered under a charging clause. However, members are reminded of the fundamental principles, in particular professional care and due diligence and integrity. Further, members are referred to Section 240, Code of Ethics[44].

Out-of-pocket expenses
11.8 A trustee can recover reasonable out-of-pocket expenses[45]. Where expenses are properly incurred a member may be entitled to exercise a lien[46] over the trust property.

11.9 Trustees who instigate, defend or participate in litigation need to consider seeking protection, under what is known as the *Re Beddoe*[47] procedure, against personal liability arising from adverse cost orders. However, this is a complicated area and members are strongly recommended to seek legal advice.

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[42] See also Section 3, Members' Handbook, '*Code of Ethics*', section 240, '*Fees and Other Types of Remuneration*'.
[43] Section 29(2), Trustee Act 2000.
[44] See Section 3, Members' Handbook, '*Code of Ethics*', section 240, '*Fees and Other Types of Remuneration*'.
[45] See s.31 (Trustees' expenses) and s.11 (Power to employ agents), Trustee Act 2000.
[46] For general guidance on liens see Section 9.4, Members' Handbook, '*Documents and records: ownership, lien and rights of access*'.
[47] *Re Beddoe* [1893] 1 Ch 547.

4. Appendix A – Useful Resources

Society of Trust and Estate Practitioners – www.step.org

HMRC re AML compliance guidance where relevant – www.hmrc.gov.uk

Office for Public Sector Information (formerly HMSO) – www.opsi.gov.uk

Trustee Act 1925
Trusts of Land, Appointment of Trustees Act 1996
Trustee Delegation Act 1999
Trustee Act 2000
Variation of Trusts Act 1958

ICAEW Code of Ethics – www.icaew.com/membershandbook

Law Commission's report (LAW COM 301) into Trustee Exemption Clauses – www.lawcom.gov.uk

Charities
Charity Commission – www.charity-commission.gov.uk

Pensions
Trustee toolkit (tPR) – www.trusteetoolkit.com
tPR website generally – www.pensionregulator.gov.uk

Investment vehicles
FSA – www.fsa.gov.uk

Insolvency
The Association of Business Recovery Professionals (R3) – www.r3.org.uk
Insolvency Practitioners Association (IPA) – www.insolvency-practitioners.org.uk

Section 8

Guidance principally for members in business

Financial and accounting duties and responsibilities of directors

Contents

Part 3: Other Financial Responsibilities of Directors

This statement was issued in October 2008 by the Institute of Chartered Accountants in England and Wales, principally concerning the main duties and responsibilities of a financial or accounting nature owed by directors to their company and its shareholders and others, but also including an overview of more general duties and responsibilities. It sets out, where appropriate, what is considered to be good practice rather than what may be acceptable as the legal minimum required. It is hoped that the statement will be useful to members acting as directors and to members generally in conveying to directors the extent of these responsibilities. It is stressed, however, that the statement is not intended to cover other aspects, however important, of a director's position.

The statement is concerned with companies in the United Kingdom subject to the provisions of the Companies Act 2006. It has, with one exception (see below), been prepared on the basis of the complete implementation of that Act, in relation to a company formed under that Act, whereas at the time of issue some provisions of the Act have not yet commenced and readers should be aware that certain 1985 Act provisions and transitional adaptations remain in force until 1 October 2009 (see Appendix B for a list of commencement dates, extracted from the Final Implementation Timetable published by BERR in December 2007).

The exception is in relation to the model articles. Under section 20 a company formed under the 2006 Act will, unless it adopts articles that provide otherwise, have as its articles the model articles prescribed by secondary legislation under section 19. At the time of issue no model articles are yet prescribed. Accordingly references to typical articles herein are to the 1985 Act Table A (modified in 2007) that apply to companies formed under the 1985 Act (on or after 1 October 2007). Where Table A articles apply by default to a company – i.e. by statutory provision in lieu of specific provision by the company – it is the version of Table A in force at the time of the company's formation that is relevant.

References to legislation should be taken to mean legislation as amended up to 1 October 2008. The meaning of terms printed in italics can be found in the Glossary at the end of the statement.

This statement replaces its predecessor issued in 1996 as revised in 2000, which was itself an updated version of that originally issued in 1970.

English counsel have confirmed that this statement is consistent with the English law as at 1 October 2008 had the 2006 Act been fully implemented as at that date. Counsel accept no responsibility (other than to the Institute) in relation to advice ascribed to them in this statement.

Scope and purpose

1 Directors of companies, whether public or private, have various responsibilities towards their companies, breach of which may not only be detrimental to those companies and their shareholders, but also may lead to civil and criminal liability of the individual director concerned. The aim of this statement is to provide guidance to members who are directors as to their responsibilities, principally in relation to financial and accounting matters, but also including an overview of their general duties. The responsibilities of shadow directors (see paragraph 7 below) are not the subject matter of this guidance although they are referred to from time to time.

2 In discussing these responsibilities, companies which are subject to the *2006 Act* are considered, differentiating between public and private companies as appropriate. Special categories of entities such as those incorporated by Royal Charter, special *Act* or pursuant to other legislation, for example, building societies or friendly societies, are not dealt with but the responsibilities discussed may usefully be borne in mind in the context of incorporated entities not within the *Act*. However, the guidance in this statement does not apply to members of a Limited Liability Partnership, whether they be designated members or otherwise. Certain specialised areas, including special rules for charitable companies and banks are not covered.

3 It is to be stressed that the aim is to guide directors and not to provide them with a detailed analysis of the law on the topic under discussion. Interpretation of the law often depends upon the particular circumstances and if directors are in difficulty over interpretation of their duties they should seek independent legal or other professional advice, or contact the Institute's Technical Enquiries helpline or Ethics helpline services. Reference to Section 7.1 'Professional conduct and disclosure in relation to defaults or unlawful acts', Section 9.5 'Anti-money laundering guidance for the accountancy sector' and to the Code of Ethics 3.4 'Professional accountants in business (Part C)' may also be useful.

Part 1: General Duties and Responsibilities of Directors

Directors' status, powers and duties

Who is a director?

4 A director, by whatever title, is one who is in practice responsible for the management of a company's affairs. There is no comprehensive definition of a director in statute, the only guidance given being that the term 'director' includes any person occupying the position of director, by whatever name called (Companies Act 2006, section 250). For example, in some companies management may be entrusted to 'Governors' or 'Council Members'. They will be directors. Further, and separately, the word director in some statutory provisions includes a de facto director, that is a person who acts as a director without having been appointed.[1] A definition of 'director' for certain taxation purposes is given in the Income Tax (Earnings and Pensions) Act 2003, section 67.

5 A company must have a minimum of two directors if public, and a minimum of one if private (Companies Act 2006, section 154). At least one director must be a natural person (Companies Act 2006, section 155). The method of appointment of directors will generally be governed by the *Articles*. Normally the first directors are chosen by the subscribers to the company's *Memorandum* and thereafter by procedures as provided by the *Articles*, eg by the members in general meeting or by written resolution. At a general meeting of a public company, the appointment of each director must be voted on individually, unless a resolution that a single resolution will suffice has first been agreed by the meeting without opposition (Companies Act 2006, section 160(1)).

6 Certain particulars need to be filed with the Registrar of Companies. The Companies Act 2006 permits directors to file a service address with the Registrar of Companies for the public record. However, their home addresses must still be provided to the Registrar on a confidential basis (which are only accessible by certain government departments, and by credit reference agencies unless the director benefits from a Confidentiality Order). The conditions for service addresses are set out in The Companies Act 2006 (Annual Return and Service Addresses) Regulations[2].

Shadow directors

7 Certain legislative provisions concerning directors extend to 'shadow directors'. A shadow director is a class of director distinct from actual directors of the company, whether de jure/appointed directors or de facto directors (see paragraph 4 above). A 'shadow director' is defined as 'a

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[1] *Re Lo-Line Electric Motors Ltd* [1988] Ch 477; *Secretary of State for Trade & Industry v. Tjolle* [1998] 1 BCLC 333, 343.

[2] At the time of writing these are draft Regulations expected to be made under section 857 of the *Act* in 2008 and to come into force from 1 October 2009.

person in accordance with whose directions or instructions the directors of a company are accustomed to act' (Companies Act 2006, section 251; *CDDA86*, section 22; and *IA86*, section 251), although it is provided that 'a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity'. It should be stressed, however, that what is necessary is that the whole board of directors acts under the direction of the shadow director. Depending on the facts, it is possible for a bank or a 'company doctor' to be a shadow director. Where a shadow director is itself a company, it does not necessarily follow that directors of the corporate shadow director are themselves shadow directors. Instead each such person's own actions are looked at separately. Further analysis of the term shadow director is to be found in case law.[3]

Non-executive directors

8 'Executive' and 'non-executive' directors have the same duties in law. An 'executive director' is merely a director who has specific delegated responsibilities within the company, as an executive. Directors are not required to give continuous attention to company affairs unless their exective position so requires. However, all directors, including non-executive directors, should familiarise themselves with the company's affairs, including its financial position, and should attend meetings of the board, and of any committee of the board of which they are members, whenever they are reasonably able to do so[4]. The role of the non-executive director is discussed further in paragraphs 13 to 15 below.

Who cannot be a director?

9 Normally, the company's *Articles* will deal with the appointment of the directors (*Table A*, regulations 73 to 80), but there are certain statutory restrictions:

- a person may not be appointed a director of a company unless he has attained the age of 16 years subject to any exceptions granted by the Secretary of State (Companies Act 2006, sections 157 and 158);
- an undischarged bankrupt or a person subject to a bankruptcy restrictions order may not, without leave of the court, act as a director (*CDDA86*, section 11);
- a person subject to a disqualification order from the court, or who has given a disqualification undertaking, may not act as a director (*CDDA86*, sections 1 and 1A);
- a person cannot be a company's auditor and a director at the same time (Companies Act 2006, section 1214).

Status of directors

10 A director is an officer of the company but is not necessarily an employee. The status of an employee is governed by the contract under which he serves

[3] *Secretary of State for Trade & Industry v. Deverell* [2001] Ch 340.
[4] *Daniels v. Anderson* [1995] 16 ACSR 607 (NSW Court of Appeal).

the company. An executive director is normally both a director and an employee.

11 A director is entrusted with powers by the *Articles*. In some ways he is treated as an agent of his company and in others as a trustee of its assets, but strictly speaking he is neither one nor the other.

12 A director owes to his company seven statutory general duties (Companies Act 2006, sections 170 to 177), which might conveniently be divided into those of loyalty and good faith, analogous to those owed by a trustee, and those of care and skill, differing fundamentally from those owed by a trustee (see paragraphs 19 *et seq* below).

13 A director may have executive status or operate in a non-executive capacity. The non-executive director has a positive contribution to make in ensuring that the board fulfils its main objectives. He can exercise an impartial influence and bring to bear experience gained from other fields; executive directors would therefore be well advised to consider the appointment of such directors to serve alongside them. The *Combined Code* emphasises the importance of non-executive directors (see paragraphs 231 *et seq*). The *Combined Code* is applicable to *listed companies* and operates on a 'comply or explain' basis.

14 The *Combined Code* provides that a board of directors should establish an audit committee of at least 3 non-executive directors, all of whom should be independent non-executive directors,. In the case of smaller *quoted companies*, the audit committee may have two members, and the committee may include (but not be chaired by) the company chairman. A smaller *quoted company* is, for this purpose, one that is below the FTSE 350 throughout the year immediately prior to the reporting year. At least one member of the audit committee should have recent and relevant financial experience.

15 Institute members are well qualified for appointment as non-executive directors because of the special skills and experience which they have to offer. It is important that, before accepting a board appointment, prospective non-executive directors should be aware that, other than as indicated in paragraph 8 above, their responsibilities in law are no different from those of directors holding executive status, and that they will be held to a standard of care and skill reflecting their professional expertise. They should also ensure that, in applying their skills, they do not act as professional advisers to the board – a director does not advise his fellow directors but has collective responsibility with them – and should satisfy themselves that the company has access to and gets all the outside professional advice that it needs.

Powers of directors

16 Directors are under a statutory duty to act within their powers (Companies Act 2006, section 171). They derive their powers from the *Articles* and they should study carefully the *articles* of their particular company. Directors also should have regard to the powers given to the company by its

constitution (athough a company need not have an objects clause – see Companies Act 2006, section 31). These powers must be exercised in a manner which is lawful under the Companies Acts. Acts which are beyond the company's powers or in contravention of the Companies Acts are likely to be ultra vires.

17 The company in general meeting may in certain circumstances exercise powers normally vested in directors, for example where there is deadlock on the board[5] or where there are no directors[6], but these circumstances will be rare.

18 Directors must exercise their powers collectively and the majority decision will usually prevail. The *Articles* will govern how the directors are to proceed (*Table A*, regulations 88 to 98) and will often authorise directors to delegate the exercise of their powers to a committee consisting of one or more directors, or to a managing, or other executive, director (*Table A*, regulation 72).

Duties of directors

19 The duties of directors are owed to the company as a whole. Their duties and responsibilities arise out of common law and have been partly codified into statute (Companies Act 2006, sections 170 to 177). In codifying directors' duties, the Government's intention was for the most part not to change them but to 'make the law clearer and more accessible', which reflects 'the modern view that it is good business sense for companies to embrace wider social responsibilities'[7]. Therefore, interpretation of the general duties should take place within the previous structure of common law, which is acknowledged in section 170(4)of the *2006 Act*.

20 A director of a company owes seven general statutory duties to the company (Companies Act 2006, sections 171 to 177). These seven duties are set out below:

- to act within powers;
- to promote the success of the company for the benefit of its members as a whole (see paragraphs 21 to 24);
- to exercise independent judgment;
- to exercise reasonable care, skill and diligence (see paragraph 25);
- to avoid conflicts of interest (see paragraphs 30 to 36);
- not to accept benefits from third parties; and
- to declare interest in proposed transaction or arrangement (see paragraphs 32 to 36).

[5] *Barron v. Potter* [1914] 1 Ch 895.
[6] *Alexander Ward & Co v. Samyang-Navigation Co* [1975] 1 WLR 673.
[7] BERR Press release dated 28 September 2007.

The Government has issued[8] the following high-level guidance as to how directors should act to ensure compliance with their duties:

- 'Act in the company's best interests, taking everything you think relevant into account.
- Obey the company's constitution and decisions taken under it.
- Be honest, and remember that the company's property belongs to it and not to you or to its shareholders.
- Be diligent, careful and well informed about the company's affairs. If you have any special skills or experience, use them.
- Make sure the company keeps records of your decisions.
- Remember that you remain responsible for the work you give to others.
- Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.
- Seek external advice where necessary, particularly if the company is in financial difficulty.'

21 In promoting the success of the company for the benefit of its members as a whole, directors must have regard to, amongst other matters, six ancillary factors (Companies Act 2006, section 172). These factors are:

- the likely consequences of any decision in the long term;
- the interests of the company's employees (see below);
- the need to foster the company's business relationships with suppliers, customers and others;
- the impact of the company's operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standard business conduct; and
- the need to act fairly as between members of the company.

22 This duty to promote the success of the company for the benefit of the members as a whole is often referred to as the 'enlightened shareholder value' duty and is related to the business review requirement in the directors' report discussed at paragraph 119. At the time of passage of the legislation, this caused concern that directors would need to document the considerations behind every decision so as to protect themselves from liability for breach of this duty in actions brought by the company itself (perhaps following a change of management) or by minority shareholders suing either in the name of the company (a derivative action – see Companies Act 2006, sections 260 to 269) or on the basis that they have been 'unfairly prejudiced' within the meaning of section 994. However, it is important to remember that this is a single duty owed solely to the company. Each factor should be taken into account in the context of its implications for the success of the company, and thus its members as a whole. Frequently some of the listed factors will be irrelevant to the particular decision.

[8] http://www.berr.gov.uk/files/file40139.pdf.

23 The courts are likely to be reluctant to interfere with business decisions unless there is clear evidence of bad faith. The derivative claims provisions of the *Act* clarify the criteria and procedure for minority shareholders to bring a claim in the name of the company, but include protections to ensure that unmeritorious suits are quickly dismissed. Further, the directors will only be liable for breaches of duty that cause the company to suffer loss, or as a result of which they make a profit.

24 Directors should not therefore feel obliged automatically to create documentation showing they have considered all of the listed factors in making every decision; they should instead encourage a culture amongst themselves, and among those charged with briefing them and preparing board papers, where the wider consequences of decisions, on the success of the company, are routinely considered. As was the case before the Companies Act 2006, minutes should be produced so as to record decisions taken.

25 In performing their duties, directors must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (sometimes called the objective test) and the general knowledge, skill and experience that the director has (sometimes called the subjective test) (Companies Act 2006, section 174). Under the objective test, in general more would be expected of a director with an executive function (particularly a specific function such as finance director), whereas under the subjective test more would also be expected of a director having specifically relevant knowledge, skills and experience (such as a member of the Institute in respect of financial matters). The *Combined Code*, Schedule B gives guidance as to the care, skill and diligence expected of a non-executive director. Even in the case of a small company certain minimum standards should be attained[9].

26 The statutory general duties do not include a duty to the company's creditors but the common law rules in this area continue to apply. The extent to which, for a company in a deteriorating financial condition, creditors' interests need to be taken into account, before they become overriding, cannot be stated with precision. The issue was succinctly summarised by the Company Law Review (Modern Company Law for a Competitive Economy – Final Report, Volume II, paragraph 3.17), when discussing whether a statutory rule could be formulated in this area, as follows: 'Arguably directors should also be bound to take a balanced view of the risks to creditors at an earlier stage in the onset of insolvency. Such a principle has been recognised in . . . one case in [the] Court of Appeal [*West Mercia Safety Wear Ltd v Dodds* [1988] BCLC 250 CA]. It would require directors, where they know or ought to recognise that there is a substantial probability of an insolvent liquidation, to take such steps as they believe, in their good faith judgement, appropriate

[9] *Re Produce Marketing Consortium Ltd* [1989] 5 BCC 569.

to reduce the risk, without undue caution and thus continuing also to have in mind the interests of members. The greater the risk of insolvency in terms of probability and extent, the more directors should take account of creditors' needs and the less those of members. At the point where there is no reasonable prospect of avoiding insolvent liquidation the interests of creditors become overriding under ... section 214 [of the *IA86*]'.[10] Where there is a real possibility of insolvent liquidation, the directors should seek appropriate professional advice (see paragraphs 296, 288 and 309 to 312 regarding wrongful and fraudulent trading).

27 Directors should bear in mind that breach of these duties, inter alia, may result in them being judged unfit to be concerned in the management of a company (*CDDA86*, section 9) and lead to disqualification (*CDDA86*, sections 6 and 8).

Specific statutory duties
28 Company law imposes a number of specific duties on directors, such as the preparation of *annual accounts*, and these are dealt with in later sections. However, one specific duty is examined in paragraphs 144 to 151, namely, the duty in relation to auditors.

Duties falling upon the company
29 The above are duties that under companies legislation fall directly upon the directors. Company law places other duties upon the company itself, as does other law, eg tax law in relation to the preparation of tax computations. The company can, however, act only through its directors, who in this regard are its agents.[11] Thus it will fall upon the directors to ensure that the company complies with such obligations, although it is of course customary that the directors delegate such tasks to others. The fact that a task may be delegated will not, however, relieve a director of all responsibility; if a task is delegated the director must ensure that the person concerned is suitable for the task and the director should take reasonable steps to monitor the work. However, a director may, depending on the circumstances, rely on his co-directors and the officers of the company although such reliance should not be wholly unquestioning.[12]

Directors' relationship with company

30 A director of a company must avoid any situation in which he has, or can have, a direct or indirect interest that conflicts or may conflict with the interests of the company. This applies in particular to the exploitation of any

[10] The *West Mercia* principle has been applied in *Colin Gwyer & Associates Ltd v. London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153.
[11] *Ferguson v. Wilson* [1866] LR 2 Ch 77.
[12] *Re City Equitable Fire Insurance Company* [1925] Ch 407; *Secretary of State for Trade & Industry v. Bairstow [No.2]* [2005] 1 BCLC 136.

property, information or opportunity. It does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company or if the matter has been authorised by the directors. Authorisation may be given by the directors of a private company if it does not conflict with the constitution of the company.[13] For a public company, the constitution may enable the directors to give such authority. Any such meeting must be quorate without counting the director in question (Companies Act 2006, section 175). Directors are advised to study the constitution of the company, which is normally the *Articles*, with care.

31 A director of a company must not accept any benefit from a third party by reason of his being a director. For these purposes, a third party is any person other than the company or *associated body corporate* or person acting on behalf of the company (Companies Act 2006, section 176). This does not prevent, for example, a firm contracting with a company to provide the company with a person's services as director and that firm paying that person.

32 If a director is in any way directly or indirectly interested in a proposed transaction or arrangement with the company he must declare the nature and extent of the interest to the other directors and this declaration must be made before the company enters into the contract or arrangement (Companies Act 2006, section 177). This declaration may (but need not) be made at a meeting of the directors or by notice in writing (Companies Act 2006, section 184) or by a general notice (Companies Act 2006, section 185). Where the declaration is required of a sole director of a company that should have more than one director, it must be in writing (Companies Act 2006, section 186). A director need not declare an interest if it cannot reasonably be expected to give rise to a conflict of interest or the other directors are, or ought to be, aware of the interest or it concerns terms of his service contract (Companies Act 2006, section 177).

33 A declaration by a notice is one sent to each other director in writing and may be in hard copy or in an electronic form agreed by the recipient and will be deemed to form part of the proceedings of the next meeting of the directors (Companies Act 2006, section 184).

34 General notice that the director has an interest in a specified body corporate or firm or is connected with a specified indvidual and that, after the date of the notice, the director is to be recognised as having an interest in any transaction or arrangement with such body corporate or firm or individual is a sufficient declaration. Such general notice may be given to the directors of the company at a meeting of the directors or brought up and read at the next such meeting. The notice must state the nature and extent of the director's interest in the body corporate, firm or person (Companies Act 2006, section 185).

[13] This only applies to companies which are incorporated after 1 October 2008. For companies incorporated before 1 October 2008 a shareholder resolution is required to give the board the power to authorise (Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495) article 47(3).

35 Where a director becomes aware of an interest arising after the company has entered into a transaction or arrangement he must declare it in the same manner and with the same provisos as set out in paragraphs 32 and 33 above as soon as is reasonably practicable (Companies Act 2006, section 182).

36 If an unauthorised conflict or a failure to make a required declaration of interest does arise, the director will be personally liable for any loss suffered by the company and will have to account for any benefit which accrued to him. Under common law, if notice has not been given to the company, it may in certain circumstances avoid the contract (Companies Act 2006, section 178). Furthermore, failure to declare an interest in an existing transaction or arrangement is a criminal offence (Companies Act 2006, section 183).

Directors' contracts

37 Where there is any contract of service with the director, the contract or a written *memorandum* of its terms must be kept by the company and be open to inspection by its members who are also entitled to copies subject to payment (Companies Act 2006, sections 227 and 228). These rules also apply to contracts with the subsidiaries of the company. Members carrying out executive functions would be well advised to ensure that they have a written contract with the company. A contract should address, inter alia, duties, pay, sickness, holidays, pension, notice and dismissal procedures, confidentiality, proportion of time spent on company duties and competition. Best practice in the area of remuneration and contracts is addressed in the *Combined Code*.

38 Where the guaranteed term of a director's employment with the company or a subsidiary is or may be longer than two years, approval has to be given by a resolution of the members of the company and of the company's holding company of which he is also a director (Companies Act 2006, section 188). If a company agrees to a long-term provision in contravention of the requirement for such approval, the provision is void to the extent of the contravention and the company is entitled to terminate the contract at any time by giving reasonable notice (Companies Act 2006, sections 188 and 189).

39 The resolutions in paragraphs 38 41 and 42 below must not be passed unless, for a written resolution, a *memorandum* setting out the proposed contract is sent to every member at the same time as they are sent the resolution and, in the case of a meeting, it is available at the registered office of the company at least 15 days before the meeting and at that meeting. Where a memorandum is not sent to or submitted to a member by accident, the requirement is disregarded for the purpose of determining whether the requirement has been met but the *Articles* may override this (Companies Act 2006, section 224).

Substantial property transactions

40 An arrangement under which a director of a company or its holding company or a person connected with such a director acquires or disposes of a substantial non-cash asset from or to the company is voidable at the instance of the company unless it is first approved by a resolution of the members of the company or is conditional upon such a resolution being received. For this purpose substantial non-cash assets are those which either

(a) exceed 10% of the company's asset value and are more than £5,000 or
(b) exceed £100,000.

If the transaction or arrangement is subsequently approved within a reasonable time by the members of the company or the holding company as appropriate it can no longer be avoided. Whether or not the transaction has been avoided the director or the connected person is liable to the company for any gain he may have made and to indemnify the company for any loss or damage resulting from the arrangement or transaction. The *Act* should be consulted for further details (Companies Act 2006, sections 190 to 196).

Arrangements of a financial nature

41 Subject to the exceptions noted in paragraph 43, a company may not make a loan to a director of the company or of its holding company or give a guarantee or provide security in connection with a loan made by any person to such a director without the approval by a resolution of the members of the company. If the director is a director of the company's holding company then the transaction must also be approved by a resolution of the members of the holding company. The resolution must be accompanied by a *memorandum*, the requirements for which are set out in paragraph 39 and, in addition, the *memorandum* must disclose the nature of the transaction, the amount of the loan and its purpose and the extent of the company's liability under any transaction connected with the loan (Companies Act 2006, section 197). If the company is a public company, or is a *company associated with a public company*, the foregoing also applies to a person connected with a director of the company or of its holding company, if any.

42 Subject to the exceptions noted in paragraph 43, if the company is a public company or a *company associated with a public company,* it may not make a quasi-loan to, or enter into a credit transaction with, a director of the company or of its holding company or a person connected with such a director or give a guarantee or provide security in connection with a quasi-loan or credit transaction made by a person to such a director or connected person unless the transaction has been approved by a resolution of the members of the company. A *memorandum* is required to accompany the resolution, the requirements for which are equivalent to those specified in paragraph 41 above. A quasi-loan is one in which the company indirectly advances a sum to a person by paying that person's liability such as by paying that person's credit card or personal bills (Companies Act 2006, sections 198 to 203). A credit transaction is one under which a creditor disposes of land or supplies goods or services on the understanding that payment is to be deferred (Companies Act 2006, sections 198 to 203).

43 Various transactions are excepted from the above requirements for shareholder approval as follows:

(a) Expenditure on company business if the value of the transaction and other relevant transactions or arrangements does not exceed £50,000 (Companies Act 2006, section 204).
(b) The cost of defending proceedings (Companies Act 2006, section 205).
(c) Expenditure in connection with a director defending himself in an investigation or proposed investigation by a regulatory authority or in order to avoid such expenditure (Companies Act 2006, section 206).
(d) Loans, quasi-loans, or the provision of a guarantee or security for a loan or quasi-loan not exceeding £10,000, and a credit transaction (or the provision of a guarantee or security in respect a credit transaction) not exceeding £15,000 (Companies Act 2006, section 207). The value of the transaction includes the value of any other relevant transactions or arrangements as defined by the *2006 Act*, sections 210 and 211.
(e) A credit transaction, or a guarantee or provision of security in connection with a credit transaction, if it is in the ordinary course of business of the company and the value and terms are no more favourable than would have been offered to a person of similar financial standing not connected to the company (Companies Act 2006, section 207).
(f) Intra-group transactions (Companies Act 2006, section 208).
(g) Loans, quasi-loans or the provision of a guarantee or security for a loan or quasi-loan by a money-lending company in the ordinary course of its business that is not more favourable than would have been offered to a person of the same financial standing not connected with the company (Companies Act 2006, section 209).

44 The consequences of contravention of the above requirements in relation to members' approval for loans etc are that the transactions or arrangements are voidable at the instance of the company. In the case of a contravention of the requirement for a members' resolution this can be rectified by a subsequent resolution within a reasonable period, after which the transaction or arrangement is no longer voidable (Companies Act 2006, sections 213 and 214).

Directors' remuneration and compensation for loss of office

45 Company law does not confer on a director any right to remuneration – such a right must come from the company's *Articles* and/or the director's service contract. *Listed companies* are expected to establish remuneration committees to act in setting directors' remuneration. The *Combined Code* addresses best practice provisions relating to remuneration committees and their procedures and also remuneration policy, service contracts and compensation.

46 A company may remove a director by ordinary resolution at a meeting before the expiration of his period in office provided *Special Notice* of such resolution has been given (Companies Act 2006, section 168)[14], or by special

[14] On receipt of notice of a proposed resolution to remove a director the company must forthwith send a copy of such notice to the director who is entitled to be heard on the

resolution (Companies Act 2006, sections 282(5) and 283), in which case *special notice* is not required The board may be able to remove a director if it is given this right by the *Articles* of the company. This does not deprive the director of compensation or damages that may be due to him in respect of the termination.

47 A company may not make a payment to a director for loss of office unless the payment has been approved by a resolution of the members of the company, nor may it make a payment for loss of office to a director of its holding company unless payment has been approved by the members of that company by a resolution (Companies Act 2006, sections 217). This rule does not apply to certain termination payments or liquidated damages set out in an existing legal obligation in an employment contract (see paragraph 50 below). This rule also applies to payments for loss of office in connection with a transfer of the whole or any part of the undertaking or property of the company and to payments in connection with a share transfer resulting from a takeover bid (Companies Act 2006, sections 218 and 219).

48 A *memorandum* must be circulated with the resolution to the members under the same formalities as described in paragraph 39 above. Definitions of 'payments for loss of office' and further conditions relating to the sale of shares and the amounts to be taken for loss of office are set out in sections 215 to 217 of the *Act*.

49 Accounting regulations made under Sections 412 and (for *quoted companies*) 421 of the *Act* specify the disclosure to be made in a company's accounts in respect of a director's remuneration and compensation for loss of office (see paragraphs 111 and 127 below). In addition, UK *listed companies* are required by the *Listing Rules* to make additional disclosures (see paragraph 128 below).

50 Approval by the members is not required for payments made in good faith:

(a) by way of discharge of an existing legal obligation or by way of damages for breach of such an obligation;
(b) by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment;
(c) by way of a pension in respect of past services;
(d) if the amount or value of the payment by the company or any of its subsidiaries together with the amount or value of any other relevant payments does not exceed £200 (Companies Act 2006, section 220 and 221).

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resolution at the meeting. The director may make representations in writing, which must be sent by the company to all members with the notice of the meeting but, if too late for this or by default of the company, the representations must be read out at the meeting. These representations need not be sent out or heard if the court considers that the rights are being abused (Companies Act 2006, sections 168 and 169).

51 If a payment is made without the members' approval it is held in trust for the company making the payment and any director who approves the payment is jointly and severally liable to indemnify that company. If the payment is made in connection with a share transfer it is held on trust for the persons selling the shares and any costs of distributing it to those persons must be covered by the person holding the monies in trust (Companies Act 2006, section 222).

Statutory provisions in relation to directors' liability

52 Any provision that purports to exempt a director of a company, to any extent, from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void. Similarly, any provision by which a company directly or indirectly provides an indemnity, to any extent for a director of the company, or an 'associated company' against any such liability is void. (Both provisions are however subject to exceptions as described below.) An 'associated company' is broadly defined for this purpose as a company in the same group (Companies Act 2006, section 256). Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes. Both prohibitions are however subject to the following exceptions (Companies Act 2006, section 232).

53 A company is permitted to purchase and maintain for a director of the company, or an 'associated company' (see paragraph 52 above), insurance against any such liability (Companies Act 2006, section 233). The existence of such 'Directors and Officers' (D&O) insurance does not exonerate members from their obligations.

54 The other exceptions are qualifying third party indemnity provisions and qualifying pension scheme indemnity provisions (Companies Act 2006, sections 234 and 235). These provisions permit, subject to certain conditions, companies to indemnify directors in respect of proceedings brought by third parties. The indemnity may cover liability incurred by the directors to any person other than the company or an 'associated company' (see paragraph 52 above). This may include legal costs and the costs of an adverse judgment. However, the indemnity must not cover criminal fines, penalties imposed by regulatory bodies (e.g. the *FSA*), the defence costs of criminal proceedings where the director is found guilty, and (for third party indemnity provisions) the defence costs of civil proceedings successfully brought against the director by the company or an 'associated company' and the costs of unsuccessful applications by the director for relief under section 1157 of the *Act* (honest and reasonable conduct). Companies entering into any indemnity provisions should consider obtaining appropriate legal advice. Such qualifying indemnity provisions have to be made available for inspection by members of the company and disclosed in the directors' report of the company whose directors benefit from the provisions and also, where relevant, in the directors' report of the 'associated company' giving the indemnity (Companies Act 2006, sections 236 and 237).

55 A company may ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company. The decision of the company to ratify such conduct must be made by resolution of the members of the company. The director in question and any member 'connected with him' may not vote on the resolution. This provision does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company (Companies Act 2006, section 239).

56 There is a specific 'safe harbour' in the case of the directors' report, the directors' remuneration report and any summary financial statement so far as it is derived from either of those reports. A director is not subject to any liability to a person other than the company resulting from reliance, by that person or another, on information in such a report. It also prevents any third party seeking any other relief (Companies Act 2006, section 463(5)). A director of a company is liable to compensate the company for any loss suffered by it as a result of any untrue or misleading statement in such a report or the omission from such a report of anything required to be included in it. However, the director is liable only if he knew the statement to be untrue or misleading, or was reckless as to whether it was untrue or misleading, or he knew the omission to be dishonest concealment of a material fact (Companies Act 2006, section 463).

57 There are specific provisions concerning liability of the company for false and misleading statements in certain publications made pursuant to the *Transparency Obligations Directive* for companies with securities traded on a *regulated market*. The publications concerned are annual financial reports, half-yearly reports and interim management statements. The provisions also cover material included in a preliminary announcement that will appear in the annual financial report in substantially the same form (*FSMA2000*, section 90A).

58 An issuer of securities to which these provisions apply is liable to pay compensation to a person who has acquired such securities issued by it (but not a person who has sold or held them) and has suffered a loss in respect of them as a result of any untrue or misleading statement in a publication to which the provisions apply or the omission from any such publication of a matter required to be included in it. A person is not considered to have suffered a loss unless he can demonstrate that it was reasonable for him to place reliance on, and had relied on, the information in the relevant publication. Furthermore, the company is so liable only if a director knew the statement to be untrue or misleading, or was reckless as to whether it was untrue or misleading, or was reckless as to whether it was untrue or misleading, or knew the omission to be dishonest concealment of a material fact, and only if the claimant acted in reliance on such statement in circumstances where it was reasonable for the claimant so to rely. A person other than the issuer (e.g. a director) is not subject to any liability, other than to the issuer, in respect of such loss (*FSMA2000*, section 90A).

59 These provisions restrict liability, to pay compensation to a third party, to the company. However, if a director is party to an untrue or misleading statement, he might still be liable (under common law) to compensate the company for any loss suffered as a result of a claim from a third party.

60 HM Treasury is consulting[15] on whether to extend this statutory regime on issuer liability:to issuers with securities admitted to trading on *non-regulated markets* and to cover all disclosures to a Regulatory Information Service. The proposals would also permit sellers (but not holders) of securities to recover losses incurred through reliance on fraudulent misstatements, and impose liability on issuers for dishonest delay.

Share dealing

61 There is nothing in company law to prevent a director, his spouse or minor child entering into any transaction relating to his company's shares, so long as it does not constitute insider dealing (see paragraph 63 below), market abuse (see paragraph 64 below) or infringe the *Articles* (for example, care should be taken to ensure compliance with any restrictions on transfer such as pre-emption rights). However, for a company with shares traded on a *regulated market*, under Chapter 3.1.2R of the *DTRs*, any person with managerial responsibility and their connected persons must notify the company in writing within four business days of all transactions on their own account in the shares of the company or any other derivatives or financial instruments related to the company's shares. *DTR* Chapter 3.1.3R specifies what has to be reported. As soon as possible after receipt of the information and, in any case not later than the end of the next business day following its receipt, the company must inform a Regulated Information Service of any information given to it (*DTR* 3.1.4R).

62 All directors of companies traded on any market (*regulated markets* and *non-regulated markets*) must establish and comply with internal protocols to control share dealings. For example, *listed company* directors must comply with the *Model Code* set out in the Annex to LR9. Such rules provide that no directors (or employees with access to inside information) may deal in shares without first obtaining clearance from a designated director, and clearance to deal must not be given during a period where there exists any matter which constitutes inside information in relation to the company, nor when the company is in a 'close period'[16], broadly speaking, covering its year end and results announcements (including half yearly and quarterly announcements).

[15] For the Government's proposals to extend liability to other types of issuers and other types of publications see the HM Treasury consultation paper available at http://www.hm-treasury.gov.uk/media/2/5/issuerliability_170708.pdf.

[16] For example, 'close period' for companies included on the Official List is defined in paragraph 1(a) of the *Model Code* on directors' dealings in securities set out in LR9 Annex 1 R.

Insider dealing

63 For a company traded on any market (*regulated markets* and *non-regulated markets*), a director must not deal in any of its securities if he is in possession of unpublished price sensitive information in relation to those securities. Part V of the Criminal Justice Act 1993 makes insider dealing a serious criminal offence; contravening the legislation can lead to an unlimited fine or imprisonment. Insider dealing may involve dealing in securities on the basis of inside information, encouraging another on the basis of such information or disclosing inside information otherwise than in the proper performance of a person's duties. A person has information as an insider if it is, and he knows that it is, inside information or he has it, and knows that he has it, from an inside source. Inside information must relate to a specific issue of securities or to a particular issuer or issuers of securities, which is specific or precise and would be likely, if made public, to have a significant effect on the price of the security. Information that relates to securities or issuers of a general nature or has been made public is not inside information.

Market abuse

64 Market abuse is behaviour in relation to qualifying investments admitted (or in respect of which a request has been made for admission) to trading on any market, whether a *regulated market* or *non-regulated market*. Market abuse includes dealing or attempting to deal on the basis of inside information (subject to certain defences), disclosing inside information otherwise than in the proper course of one's employment, profession or duties, and the creation of a false or misleading impression relating to qualifying investments (including artificial prices) through transactions or orders to trade. The market abuse offences are civil rather than criminal offences. They are contained in *FSMA2000,* section 118 and are enforced by the *FSA*, which can publicly censure offenders, and require them to pay unlimited penalties and/or compensation. They sit alongside the criminal insider dealing offences mentioned at paragraph 63 above, so action can be taken against a person under *FSMA2000,* section 118 in addition to prosecution for the criminal offence of insider dealing.

Part 2: Financial Reporting and Accounting Responsibilities

65 In relation to financial and accounting matters, directors have extensive, specific duties. This part 2 of this statement gives an overview of this wide area. Put shortly, directors are required to maintain accounting records and to prepare accounts. There is a choice of accounting standards (ie, UK standards or *EU-adopted IFRS*) to apply and if UK standards are used there are special rules in the *Act* dependant on size. A company must also prepare a directors' report containing a business review (not required of a certain size of company) and *quoted companies* must prepare a detailed directors' remuneration report. Subject (principally) to a size-based exemption, these accounts and reports are subject to audit. The audited accounts and reports must be sent to members and filed on public record; there are however provisions facilitating the sending to members of a summary document and

the filing, for certain sizes of company, of cut-down or abbreviated versions of the accounts. Where these accounts and reports are found to be defective, the *Act* facilitates revision. In addition to these duties under company law, other requirements can arise in relation to accounts and reports by virtue of market or regulatory rules, such as in relation to corporate governance codes or half-yearly reports. All of these matters are discussed in some further detail in paragraphs 66 to 241.

Accounting records

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66 A company is required to keep adequate accounting records, being those that are sufficient to show and explain the company's transactions (Companies Act 2006, section 386).[17] More specifically they must:

(i) disclose with reasonable accuracy, at any time, the financial position of the company at that time;
(ii) enable the directors to ensure that any accounts required to be prepared comply with the requirements of the Companies Act and, where applicable, of Article 4 of the *IAS Regulation*;
(iii) contain entries from day-to-day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place; and
(iv) contain a record of company assets and liabilities.

In the case of a company dealing in goods, the accounting records must also:

(v) contain statements of stock held by the company at the end of each financial year;
(vi) contain statements of stocktakings from which any statement prepared under (v) above is made; and
(vii) except when the sale is an ordinary retail sale, contain statements of all goods sold and purchased showing the goods and the buyers and sellers in sufficient detail to enable the goods and the buyers and sellers to be identified.

67 A *parent company* which has a *subsidiary undertaking* in relation to which the above does not apply (e.g. an overseas subsidiary), must take reasonable steps to ensure that the undertaking keeps such records as are needed to enable the directors of the *parent company* to ensure that any accounts required to be prepared under Part 15 of the Companies Act 2006 (including consolidated accounts) comply with the requirements of that Act and, where applicable, of Article 4 of the *IAS Regulation*.

[17] The technical release 'Accounting records' (FRAG 5/92) gives further guidance on the requirement to keep accounting records. However, this guidance was written in the context of the requirements of the Companies Act 1985 and, although the Institute regards it as continuing to be valid guidance (given that there is no substantive change between the *1985* and *2006 Acts*), is expected to be superseded by guidance to be published by the *FRC* which takes into account the *2006 Act*.

68 Failure to keep accounting records in accordance with the above requirements may render every officer of the company liable to a fine, imprisonment or both (Companies Act 2006, section 387).

69 In addition to the statutory requirement to keep adequate accounting records, the directors have an overriding responsibility to ensure that they have adequate information to enable them to discharge their responsibility to manage the company's business.

70 The duty to promote the success of the company will involve ensuring that adequate control is kept over its records and transactions, for example:

(a) cash;
(b) debtors and creditors;
(c) stock and work in progress;
(d) capital expenditure; and
(e) major contracts.

The nature and extent of the accounting and management information needed to exercise this control will depend upon the nature and extent of the company's business.

71 To restrict the possibility of actions for wrongful trading, directors will need constantly to be aware of the company's financial position and progress, and the accounting records should be sufficient to enable them to be provided with the information required for drawing conclusions on these matters. The directors should also be satisfied that proper systems to provide them with regular and prompt information are in place (see also paragraph 310 *et seq* below).

72 Directors must also be aware of a company's prospects. It may therefore be prudent to prepare a budget in the short term and a business plan in the longer term against which the subsequent performance of the business can be measured. Periodic management accounts assist in enabling the actual operating results and cash position to be compared with the plan. Once again, the need for, extent and frequency of the preparation of such accounts and the level of management to which they are presented, will depend upon the size, scope and nature of the business. However, the directors' report on the financial statements must contain an indication of the likely future developments in the business of the company (and its *subsidiary undertakings* when *group accounts* are prepared) (*Large/Medium Companies Accounts Regulations 2008*, Schedule 7, Paragraph 7(b)), and a business plan is likely to be helpful in this context.[18] It is also likely to be relevant for the preparation of the business review which requires a description of the principal risks and uncertainties facing the company as well as (in the case of a *quoted company*) details of the main trends and factors likely to affect the future development,

[18] An *SCR Company* is not required to make this disclosure – see paragraph 123 below.

performance and position of the company's business (Companies Act 2006, section 417).

Retention of records

73 Accounting records are required to be kept at the company's registered office or at such other place as the directors think fit and such records must be open at all times to inspection by the company's officers (Companies Act 2006, section 388). Special provisions apply where the records are kept outside the United Kingdom.

74 Subject to any directions in respect of the disposal of records in a winding up, the records must be preserved in the case of a private company, for 3 years from the date on which they were made, and in the case of a public company, for 6 years from the date on which they were made (Companies Act 2006, section 388).

75 However, directors may feel that it is wise to keep documents for longer in view of the periods which the law allows for legal actions to be brought. The main minimum limitation periods are:

(a) in the case of simple (i.e. non-specialty) contracts, 6 years from the date on which the cause of action arose (Limitation Act 1980, section 5);
(b) in the case of specialty contracts (i.e. contracts under seal), 12 years from the date on which the cause of action arose (Limitation Act 1980, section 8);
(c) in cases of personal injury, 3 years from (i) the date the cause of action accrued; or (ii) the date of knowledge (if later) of the person injured (Limitation Act 1980, section 11);
(d) in cases of negligence (excluding personal injuries), the time limit for an action for latent damage will be the later of:
    (i) six years from the date on which the cause of action accrued; and
    (ii) where the facts are not known at the date the cause of action accrued, three years from the earliest date on which the plaintiff, or any person in whom the cause of action was vested before him, had the knowledge required to bring an action and a right to bring such action (Limitation Act 1980, section 14A);
(e) an overriding time limit for actions for negligence (excluding personal injuries) of 15 years is imposed from the date on which there occurred any act or omission:
    (i) which is alleged to constitute negligence;
    (ii) to which the damage in respect of which damages are claimed is alleged to be attributable (Limitation Act 1980, section 14B);
(f) in actions to recover trust property, 6 years from the date on which the right of action accrued, save where the claim relates to a fraudulent breach of trust or where the action is to recover trust property from the trustee (Limitation Act 1980, section 21). In this context, directors are treated as trustees[19]; and

[19] *JJ Harrison (Properties) Ltd v. Harrison* [2002] 1 BCLC 162; *Gwembe Valley Development Co Ltd v. Koshy (No 3)* [2004] 1 BCLC 131.

(g) Companies within the scope of the Money Laundering Regulations are required to retain records of the identification of their customers or clients for the duration of the business relationship and for five years after the termination of the business relationship or after an occasional transaction has been completed. Specific transaction records must be retained for five years from the date the transaction was completed, or general transaction records until the business relationship ends.

76 Also to be considered are the various tax and related requirements:

(a) For corporation tax purposes, a company must keep and preserve its records for a period of six years from the end of the period for which a tax return may be required. Records for these purposes includes records of all receipts and expenses and sales and purchases together with any supporting documents which includes accounts, books, deeds, contracts, vouchers and receipts. If a company fails to keep and preserve its records, it is liable to a penalty of up to £3,000. HM Revenue & Customs have the power to require a company to produce documents relating to its tax liability. (Finance Act 1998, Schedule 18, paragraphs 21, 23 and 27.)
(b) For VAT purposes, every taxable person must keep records, including accounts and all related documents, for 6 years (Value Added Tax Act 1994, section 58 and Schedule 11, paragraph 6(3) and paragraph 31 of the Value Added Tax Regulations 1995 (SI 1995/2518)).
(c) For PAYE purposes, employers are under a duty to keep all PAYE records which do not have to be sent to HM Revenue & Customs under the PAYE regulations for not less than 3 years after the end of the year to which they relate (Regulation 97(8) of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682)).
(d) For National Minimum Wage purposes, employers must keep records to establish that an employee is receiving at least the National Minimum Wage. These records must be kept for a minimum period of three years from the end of the pay reference period (Regulation 38 of the National Minimum Wage Regulations 1999 (SI 1999/584)).
(e) For Student Loan purposes, employers must keep a record of all wages sheets, deductions working sheets and other documents and records relating to the calculation and deduction of Student Loan repayments for a period of at least three years after the end of the tax year to which they relate (Regulation 43(5) of the Education (Student Loans) (Repayment) Regulations 2000 (SI 2000/944)).

77 While original records will naturally be the best evidence of the information they contain, copies will be admissible in court, so long as the copies can be regarded as trustworthy. A judge has power to admit copies in evidence and to specify the method of authentication (Civil Evidence Act 1995, section 8). Therefore, if original company documents are to be copied in hard or electronic format, directors should ascertain that the procedures adopted not only ensure that all records are copied but also that they are legible, stored safely and capable of being properly authenticated. If

accounting records are in a non-legible form any software, etc. necessary to retrieve the information in a usable form should also be retained.

Annual Accounts and Reports

78 Directors have a duty to prepare accounts, a directors' report and (for *quoted companies*) a directors' remuneration report, and a number of subsidiary and associated responsibilities in relation to those.

Preparing accounts

79 A company's '*annual accounts*' comprise the *individual accounts* (see paragraphs 96 and 110 below) and any *group accounts* (see paragraphs 102 and 110 below) (Companies Act 2006, section 471). If *group accounts* are prepared, special provisions apply to the profit and loss account of the *parent company* (see paragraph 104 below). Accounts may be prepared in accordance with either UK GAAP ('*Companies Act accounts*') or *EU-adopted IFRS* ('*IAS accounts*') (see paragraph 92). The '*annual accounts and reports*' comprise the *annual accounts* together with the directors' report, the auditor's report and, for *quoted companies*, the directors' remuneration report (Companies Act 2006, section 471). The preparation of the accounts is the responsibility of the directors (Companies Act 2006, sections 394 and 399) and is governed by statute. As noted previously, the directors may delegate such tasks to others. The fact that a task is delegated will not relieve a director of responsibility; if a task is delegated the director must ensure that the person concerned is suitable for the task and the director should take reasonable steps to monitor the work (see paragraph 29 above).

80 The *annual accounts* must be approved by the board and the company balance sheet must be signed on their behalf by a director (Companies Act 2006, section 414). The wording of the section requires a director to sign, that is, a director in office at the time of signing, rather than those in office during the year to which the accounts relate. It is a criminal offence to approve *annual accounts* that do not comply with the *Act* and, where applicable, Article 4 of the *IAS Regulation* (Companies Act 2006, section 414).

Accounting reference periods

81 The period covered by the *annual accounts* (the financial year) must coincide with the company's *accounting reference period* or be within 7 days of that period (Companies Act 2006, section 390). The *accounting reference period* is a period ending with the next occurence (usually) of the company's *accounting reference date*.

82 A company's first *accounting reference date* will normally be the last day of the month in which the anniversary of incorporation falls (Companies Act 2006, section 391).

83 A company may alter its *accounting reference period* if certain conditions are met (Companies Act 2006, section 392):

(a) Notice must be sent to the registrar of Companies. A notice to alter a previous *accounting reference period* may not be given if the period allowed for laying and delivering accounts and reports in relation to that period has already expired.

If the result of the change is that the *accounting reference period* is extended, it may not be extended beyond 18 months unless the company is in administration; and

(b) A company may only extend its *accounting reference period* a second or subsequent time if it complies with the following rules:
(i) there must be a gap of at least 5 years between the end of the earlier extended *accounting reference period* and the subsequent notice; or
(ii) the change is to bring the company's *accounting reference period* into line with that of a parent or *subsidiary undertaking*, though reference should be made to the precise terms of section 392(3)(a) of the *Act*; or
(iii) the company is in administration; or
(iv) the consent of the Secretary of State has been given.

True and fair requirement

84 The directors of a company must not approve accounts, whether they are *Companies Act accounts* or *IAS accounts*, unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit or loss of the company, in the case of *individual accounts*, and of the undertakings included in the consolidation, in the case of the company's *group accounts* (Companies Act 2006, section 393). For companies subject to the *DTR* chapter 4, the directors must also make a statement that the accounts do in fact give a true and fair view.

85 As regards *Companies Act accounts*, the Accounting Standards Board (*ASB*) obtained a legal opinion from Mary Arden QC (now Lady Justice Arden) (following on from earlier joint opinions with Leonard Hoffmann QC (now Lord Hoffmann)) on the relationship between accounting standards and the 'true and fair requirement' in the Companies Act 1985 (now contained in Companies Act 2006, section 396 and 404 in respect of *Companies Act accounts*) in 1993. This opinion is reproduced in the *ASB*'s Foreword to accounting standards and should be considered in full. Some of the key points made are:

- the question of whether accounts satisfy the true and fair requirement is a question of law for the Court;
- the task of interpreting the true and fair requirement cannot be performed by the court without evidence as to the practices and views of accountants;
- the Court will infer that statutory policy favours both the issue of accounting standards (by a body prescribed by regulation (the *ASB*, see paragraph 111)) and compliance with them. These factors increase the likelihood that the Courts will hold that in general compliance with accounting standards is necessary to meet the true and fair requirement; and

- the Court is likely to treat UITF abstracts as of considerable standing even though they are not envisaged by the Companies Acts. This will lead to a readiness on the part of the Court to accept that compliance with abstracts of the UITF is also necessary to meet the true and fair requirement.

86 In 2008 the *FRC* obtained from Martin Moore QC[20] a further opinion which, among other things, found that the central conclusions of the earlier opinions have been endorsed by the courts, which will approach the true and fair requirement in the manner described in those opinions.

87 Since 2005, UK companies have been able to prepare their accounts in accordance with *EU-adopted IFRS* (see paragraph 95 below) in addition to UK GAAP. IAS 1 *Presentation of Financial Statements* requires that financial statements shall present fairly the financial position. The 2008 Moore opinion (mentioned above) confirms that this IAS 1 requirement is not a different requirement to that of showing a true and fair view, but is a different articulation of the same concept. In June 2005 the *FRRP* published a legal opinion on the effect of the *IAS Regulation* on the requirement for accounts to give a True and Fair View in the context of the Companies Act 1985. In addition, pursuant to section 393 of the *Act* (see paragraph 84) both *Companies Act accounts* and *IAS accounts* are now directly required by law to give a true and fair view.

Statement of directors' responsibilities

88 If the financial statements or accompanying information (for example, the directors' report) do not include an adequate description of the responsibilities, in relation to the accounts, of those charged with governance (ie, for a company, the directors), auditors' professional standards require that the auditors' report should include a description of those responsibilities (ISA 700).

89 An example wording is given in the APB Bulletin 2006/06 *Auditor's reports on Financial Statements in the United Kingdom* (Appendix 5) describing the directors' responsibilities for a non-publicly traded company incorporated in the United Kingdom preparing its financial statements under UK GAAP.

90 For *listed companies*, the *Combined Code* (see paragraph 231 below) at code provision C.1.1 provides that the directors should explain in the annual report their responsibility for preparing the accounts.

91 For companies subject to the *DTR* chapter 4, the directors are also required to give a responsibility statement. This statement not only acknowledges their responsibilities but must state that the accounts do in fact give a true and fair view.

[20] Martin Moore QC's opinion is available from the *FRC* website at http://www.frc.org.uk.

Applicable accounting framework

92 Under the *2006 Act* companies, other than charitable companies, may prepare their *individual accounts* and/or *group accounts* in accordance with either UK GAAP (*Companies Act accounts*) or *EU-adopted IFRS* (*IAS accounts*). Charitable companies registered in England and Wales are required to prepare *Companies Act accounts* (Companies Act 2006, sections 395, 396, 403 and 404) and must, therefore, use UK GAAP. A company is not required to produce its *individual accounts* and its *group accounts* under the same accounting framework.

93 After a company has prepared IAS *individual accounts* it must use the same framework in subsequent years unless there is 'a relevant change of circumstances' (Companies Act 2006, section 395). A relevant change of circumstances occurs if:

- the company becomes a *subsidiary undertaking* of another undertaking that does not prepare IAS *individual accounts*; or
- the company ceases to be a *subsidiary undertaking*; or
- the company ceases to be a company with securities admitted to trading on a *regulated market*; or
- a *parent undertaking* of the company ceases to be a company with securities admitted to trading on a *regulated market*.

The same 'relevant change of circumstances' rule applies to IAS *group accounts* (Companies Act 2006, section 403).

94 Directors of a UK *parent company* must secure that the company and any *subsidiary undertaking*s preparing accounts in accordance with the *Act* (e.g. UK subsidiary companies) use the same financial reporting framework subject to certain exemptions (Companies Act 2006, section 407). The exemptions are:

- where the *parent company* does not prepare *group accounts*;
- undertakings that are charitable companies. The requirement to use the Companies Act framework for charitable companies does not preclude the use of international accounting standards for non-charitable *subsidiary undertakings*;
- parent companies that produce IAS *group accounts* may produce IAS *individual accounts* even if the *subsidiary undertakings* prepare *Companies Act accounts*; and
- cases where the directors of the *parent company* believe there are 'good reasons for not doing so'. Guidance notes[21] available from the *BERR* website note that 'This provision is intended to provide a degree of flexibility where there are genuine (including cost/benefit) grounds for using different accounting frameworks within a group of companies.'. The guidance notes also give some examples of 'good reasons'.

[21] Guidance for UK companies on accounting and reporting requirements under the *2006 Act* and the application of the *IAS Regulation,* available at http://www.berr.gov.uk/files/file46791.pdf.

95 Companies with securities admitted to trading on a *regulated market* are required to apply *EU-adopted IFRS* in their *group accounts* (Article 4 of the *IAS Regulation*). UK Parent companies on *AIM* are required to apply *EU-adopted IFRS* in their accounts for periods beginning on or after 1 January 2007 (*AIM* Rule 19). See paragraph 110.

Companies Act individual accounts

96 The 'Companies Act *individual accounts*' required by law are a profit and loss account and a balance sheet. The accounts are required to give a true and fair view of the assets, liabilities, financial position and profit or loss of the company (Companies Act 2006, section 396). This may mean supplying information in addition to that specified or, in special circumstances, even departing from the statutory requirements. However, the need to make such departures will be rare, and while it is for the directors to decide, the question should be discussed with the company's auditors. In the event of any departure, particulars of it, the reasons for it and its effect must be given in a note to the accounts (Companies Act 2006, section 396). The *ASB* has issued FRS 18 *Accounting policies* which specifies the disclosure to be made (FRS 18 paragraphs 62 to 65).

97 Companies preparing Companies Act *individual accounts* must prepare them in accordance with either:

- the *Large/Medium Companies Accounts Regulations 2008*; or
- the *Small Companies Accounts Regulations 2008*, as applicable.

98 An *SCR Company*'s *annual accounts and reports* are prepared under a less onerous disclosure regime, set out in the second mentioned regulation above, and certain *SCR Companies* are exempt from the statutory requirement for audit (see paragraph 130 *et seq* below).

99 The form of the *individual accounts* prepared under the *Large/Medium Companies Accounts Regulations 2008* will vary according to the type of company.

- Most companies will be required to prepare their accounts in accordance with Schedule 1 (Companies Act *individual accounts*: companies which are not banking or insurance companies).
- Banking companies and insurance companies should use Schedules 2 and 3 respectively.

Paragraphs 100 to 101 below deal with the requirements which are of general application and paragraph 108 below refers to banking and insurance companies.

100 Directors of companies, other than companies subject to the small companies regime (see paragraph 180 *et seq*) and medium-sized companies (the *Large/Medium Companies Accounts Regulations 2008*, Regulation 4(2)) (see paragraph 193 *et seq* below), are required to disclose whether or not the accounts comply with applicable accounting standards and to give details of

any non-compliance (*Large/Medium Companies Accounts Regulations 2008* Schedule 1, paragraph 45, Schedule 2 paragraph 54 and Schedule 3, paragraph 62). Except in exceptional cases, a departure from accounting standards will result in the issue of a qualified or adverse opinion on the view given by the financial statements.

Schedule 1 accounts

101 The *Large/Medium Companies Accounts Regulations 2008*, Schedule 1 ('Schedule 1') lays down rules as to the form and content of the balance sheet and profit and loss account as well as in respect of additional information which has been provided by way of notes to the accounts. Reference should be made to these requirements. They include:

(a) In preparing the *annual accounts*, statute requires that certain accounting principles must be used (Schedule 1, paragraphs 11 to 15). If, however, the directors believe that there are special reasons for departing from any of these principles, they may do so, as long as particulars of the departure, the reasons for it and its effects are set out in the notes to the accounts (Schedule 1, paragraph 10). It is advisable that any proposed departure should be discussed with the company's auditors.
(b) A choice of two balance sheet formats and four profit and loss account formats. Once the choice of formats has been made for the balance sheet and profit and loss account, the same formats must be used for subsequent financial years, unless, in the directors' opinion, there are special reasons for a change, in which case particulars of the change and the reasons for it must be disclosed in a note to the accounts (Schedule 1, paragraph 2).

Group accounts

102 Where a company has *subsidiary undertakings* there is an obligation to prepare *group accounts* in the form of consolidated accounts (Companies Act 2006, section 399). This requirement does not apply to a *parent company* that is subject to the small companies regime (see Appendix A below).

103 A *parent company* which does not have any of its securities admitted to trading on a *regulated market*, which is itself a subsidiary and which complies with certain other specified conditions is not required to produce *group accounts* (Companies Act 2006, sections 400 and 401). A *parent company* is also exempt from the requirement to prepare *group accounts* if all of its *subsidiary undertakings* could be excluded from consolidation in Companies Act *group accounts* under the various exemptions contained in section 405 of the Companies Act 2006 (Companies Act 2006, section 402).

104 Where a *parent company* produces *group accounts*, the *parent company* must draw up an individual profit and loss account and the board of directors must approve it, but it need not be published, subject to the auditor's report, sent to members or filed provided that the notes to the company's individual balance sheet show the company's profit or loss for the financial year and that it is disclosed in the company's accounts that this exemption applies (Companies Act 2006, section 408).

105 As noted in paragraph 92 above companies, other than charitible companies, may prepare their *group accounts* under the *Act* in accordance with either UK GAAP (Companies Act *group accounts*) or *EU-adopted IFRS* (IAS *group accounts*).

Companies Act group accounts

106 Companies Act *Group accounts* should be prepared under the *Large/Medium Companies Accounts Regulations 2008*, Schedule 6 which includes general rules together with modifications for banking groups and for insurance groups. Companies Act *Group accounts* must also comply with Schedule 1 as far as practicable (Schedule 6, paragraph 1). These requirements are subject to the overriding requirement that the *group accounts* give a true and fair view (see paragraph 84 *et seq*) of the state of affairs as at the end of the financial year, and the profit or loss for the financial year, of the undertakings included in the consolidation as a whole, so far as concerns the members of the *parent company* (Companies Act 2006, section 404).

107 A *subsidiary undertaking* may be excluded from the Companies Act *group accounts* in certain circumstances, for example, where the information necessary for the preparation of *group accounts* cannot be obtained without disproportionate expense or undue delay (Companies Act 2006, section 405). However, accounting standards may interpret such exemptions in a narrow manner. For example under UK GAAP *FRS 2 Subsidiary undertakings* notes that disproportionate expense or undue delay do not justify excluding from consolidation *subsidiary undertakings* that are individually or collectively material in the context of the group.

Banking and insurance companies and groups

108 Different rules apply to Banking and insurance companies and groups. Reference should be made to sections 396 and 404 of the *2006 Act* and the *Large/Medium Companies Accounts Regulations 2008* (Schedules 2 and 3). The definition of a banking or insurance company and group is contained in section 1164 and 1165 of the Companies Act 2006.

Applicable accounting standards for 'Companies Act accounts'

109 The Accounting Standards Board (*ASB*) is a body authorised to issue accounting standards for the purposes of section 464 of the *Act*. Its standards are known as Financial Reporting Standards (FRSs) and Statements of Standard Accounting Practice (SSAPs). The *ASB* has a committee known as the Urgent Issues Task Force (UITF) to assist it in areas where an accounting standard or Companies Act provision exists, but where unsatisfactory or conflicting interpretations have developed or seem likely to develop. The UITF seeks to obtain a consensus on the issue in question. While a consensus will not have the status of an accounting standard, the *FRRP* may take it into account in considering whether financial statements require revision (see paragraph 223 *et seq* below).

IAS accounts

110 Companies producing IAS *individual accounts* or IAS *group accounts* are required to prepare those accounts in accordance with *EU-adopted IFRS* and to state in a note to the accounts that they have been so prepared (Companies Act 2006, section 397 and 406).

111 Not all of the requirements of the *Large/Medium Companies Accounts Regulations 2008*, or the *Small Companies Accounts Regulations 2008* apply to *IAS accounts*. Companies producing *IAS accounts* still need to consider the following accounts requirements of these Regulations:

- The *Large/Medium Companies Accounts Regulations 2008*
  - Information about related undertakings (Regulation 7 and Schedule 4)
  - Information about directors' remuneration (Regulation 8 and Schedule 5)
- The *Small Companies Accounts Regulations 2008*
  - Information about related undertakings (Regulation 4 and Schedule 2)
  - Information about directors' remuneration (Regulation 5 and Schedule 3)

and other disclosures required pursuant to the Companies Act 2006:

- off-balance sheet arrangements (certain companies under s.410A);
- employee costs and numbers (s.411);
- directors' advances, credit and guarantees (s.413);
- disclosure of auditor remuneration (s.494, SI 2008/489[22] and see also TECH 6/06 (Revised)); and
- principal terms of a liability limitation agreement with the auditor (s.538 and SI 2008/489[23]).

Small companies – less onerous disclosure requirements for accounts prepared for members

112 As noted above, there is a less onerous disclosure regime for *SCR Companies* in relation to the directors' report (see paragraphs 122 to 124 below) and *annual accounts* prepared for members.

113 There is simplified format for the *annual accounts* for a financial year, which is only available for *Companies Act accounts*, which includes a simplified balance sheet with a number of sub-headings being aggregated, and a reduced level of disclosure in the notes to the accounts. The details are found in Regulation 3 and Schedule 1 of the *Small Companies Accounts Regulations 2008*.

[22] The Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008 (SI 2008/489).
[23] The Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008 (SI 2008/489).

114 An *SCR Company* is not subject to the *2006 Act*'s requirement to disclose information about off-balance sheet arrangements (Companies Act 2006, section 410A(1)). This is the case irrespective of the accounting framework used in preparing the *SCR Company*'s *annual accounts*. However, *SCR Companies* should provide any information about off-balance sheet arrangements required by applicable accounting standards.

Medium-sized companies – disclosure exemptions for accounts prepared for members

115 As noted earlier, medium-sized companies are entitled to some exemptions in relation to the statutory disclosures required in the directors' report (see paragraphs 125 and 126 below) and *annual accounts* prepared for members.

116 The exemption in respect of the form and content of a company's *individual accounts* for a financial year is only available for *Companies Act accounts*. The exemption allows the notes to the accounts to omit the statement of compliance with accounting standards and the details required by the regulations of related party transactions (*Large/Medium Companies Accounts Regulations 2008*, Regulation 4(2)). However, medium-sized companies should provide such information if it is required by applicable accounting standards.

117 A medium-sized company is exempt from the *Act*'s requirement to disclose the financial impact of any material off-balance sheet arrangements that it is party to during the financial year (Companies Act 2006, section 410A(4)). This exemption applies irrespective of the accounting framework used in preparing the companies *annual accounts*. However, medium-sized companies must provide the details of the nature and business purpose of any material off-balance sheet arrangements (Companies Act 2006, sections 410A(1) and (2)(a)) and any information required by applicable accounting standards.

Directors' report

118 The directors' report attached to the *annual accounts* must include specified information under sections 415 to 419 of the *2006 Act,* and under Schedule 7 of the the *Large/Medium Companies Accounts Regulations 2008* ('Schedule 7') or Schedule 5 of the *Small Companies Accounts Regulations 2008* for *SCR companies*. Some of the specified information is considered in paragraphs 119 *et seq* below. Companies subject to the small companies regime and medium-sized companies are entitled to certain exemptions in relation to the requirements of section 417 of the *Act* (see paragraphs 122 to 126 below).

119 The directors' report must contain a business review of the company and, if *group accounts* are presented (see paragraph 102), its subsidiaries. This should contain a fair review of the business and a description of the principal risks and uncertainties that it faces (the detailed requirements are set out in Companies Act 2006, section 417 of which should be consulted). The purpose

of the business review is to inform members of the company and help them to assess how the directors have performed their duties to promote the success of the company (see paragraphs 21 to 24 above). *Quoted companies* are required to give additional disclosures including:

(a) the main trends and factors likely to affect the future development, performance and position of the company's business (forward-looking information);
(b) information about environmental matters, employees and social and community issues; and
(c) information about persons with whom the company has contractual or other arrangements which are essential to the company's business (subject to a specific exemption if, in the directors' opinion, disclosure would be seriously prejudicial to the person and contrary to the public interest).

If the review does not contain information of each kind mentioned in (b) and (c) above it must state which of those kinds of information it does not contain. The review is not required to contain information about impending matters in the course of negotiation if to do so would, in the directors' opinion, be seriously prejudicial to the interests of the company.

120 A company with securities carrying voting rights that are admitted to trading on a *regulated market* as at the end of the financial year must disclose in the directors' report specified information about their capital structure that would be pertinent in the event of a takeover bid (*Large/Medium Companies Accounts Regulations 2008,* Schedule 7, Part 6).

121 Unless the company is exempt from the requirement for an audit and has taken advantage of that exemption, the directors' report must contain a statement in relation to the provision of information to auditors as described at paragraph 146 below.

Small companies
122 The contents of a small company's directors' report should comply with section 416 of the *Act* and Regulation 7 and Schedule 5 of the *Small Companies Accounts Regulations 2008*.

123 There is an exemption in respect of the directors' report for a financial year available to *SCR Companies* and also to those small companies that would have qualified for the small companies regime but for being or having been a member of an ineligible group. The exemption allows the omission of, principally, the business review (Companies Act 2006, section 415A).

124 The directors' report exemption mentioned in paragraph 123 above is available to all eligible companies irrespective of the accounting framework chosen for the *annual accounts*.

Medium-sized companies
125 An exemption for the directors' report for a financial year is available to companies that qualify as medium-sized and also to those medium-sized

companies that would have qualified but for being or having been a member of an ineligible group (Companies Act 2006, section 467(4)). The exemption allows for the omission from the business review of the analysis of the company's performance for the financial year by reference to non-financial key performance indicators of the business review as otherwise required by section 417(6)(b) of the *Act* (Companies Act 2006, section 417(7)).

126 The directors' report exemption is available to all eligible companies irrespective of the accounting framework chosen for the *annual accounts*. The contents of a medium-sized company's directors' report should comply with section 416 of the *Act* and Regulation 10 of, and Schedule 7 to, the *Large/ Medium Companies Accounts Regulations*.

Directors' Remuneration Report

Statutory requirements
127 The directors of *quoted companies* are required to prepare a directors' remuneration report (Companies Act 2006, section 420), which must provide certain narrative disclosures about remuneration policy and numerical disclosures concerning the remuneration of individual directors (*Large/ Medium Companies Accounts Regulations 2008,* Schedule 8).

Regulatory requirements
128 In addition to the statutory requirements mentioned above, the *Listing Rules* have their own requirement for a report to shareholders on directors' remuneration (LR 9.8.8). However, for the great part most of the *Listing Rules* requirements are substantially covered by the requirements in the above regulations, although there are some differences that can make compliance with both sets of requirements complicated.

Requirement for audit and relationship with auditor
129 A company's *annual accounts* must be audited unless an exemption is available (Companies Act 2006, section 475).

Small companies – audit exemption
130 A company that meets the following conditions in respect of a financial year is exempt from the requirement to have an audit of its accounts for that year. The conditions are:

(a) that the company qualifies as a small company in relation to that year, as determined under section 382(1) to (6) (see Appendix A below);
(b) that its turnover in that year does not exceed £6.5 million; and
(c) that its balance sheet total (as defined in section 382(5)) for that year is not more than £3.26 million.

(Companies Act 2006, section 477.)

131 Besides the qualifying conditions referred to above, the company must not have received a notice of a requirement to obtain an audit from members

holding in total 10% or more of the nominal value of its issued share capital or 10% of a particular class of share. If the company does not have a share capital, the notice must be given by 10% or more of the members. The notice must be given after the start of the financial year to which it relates but no later than one month before the end of that year (Companies Act 2006, section 476).

132 Furthermore, a company is not entitled to the exemption unless its balance sheet contains a statement above the name and signature required by section 414 of the *Act* to the effect that:

(a) that the company is entitled to the exemption under section 477 (small companies) of the *2006 Act*;
(b) that the members have not required the company to obtain an audit of its accounts for the year in question; and
(c) the directors acknowledge their responsibilities for complying with the requirements of the *Act* with respect to accounting records and the preparation of accounts.

(Companies Act 2006, sections 475(2), (3) and (4)).

133 A company is not entitled to the exemption if, it was at any time within the financial year in question, one of the following:

- a public company (although a public company that is dormant may be entitled to the audit exemption for dormant companies);
- a banking or an authorised insurance company, or an e-money issuer, a MiFID investment firm or a UCITS management company (as defined by *FSMA2000*);
- a company that carries on an insurance market activity;
- a special register body as defined in section 117(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 or an employers' association as defined in section 122 of that Act or Article 4 of the Industrial relations (Northern Ireland) Order 1992 (SI 1992/807) (N.I. 5) (Companies Act 2006, section 478).

134 A company that is a *parent company* or a *subsidiary undertaking* for any part of a financial year is not entitled to the audit exemption unless either:

(a) it was both a *subsidiary undertaking* and dormant throughout the whole the period or periods during the financial year when it was a *subsidiary undertaking*; or
(b) it is a member of a group meeting the conditions set out below throughout that period.

135 Those conditions are that:

(a) the group qualifies as a small group (as determined by section 383 of the *2006 Act*) in relation to the financial year in question (see paragraph A7 below);

(b) the group was not at any time in that year an ineligible group (within the meaning of section 384(2) and (3) of the *2006 Act*) (see paragraph A11 below);
(c) the group's aggregate turnover is not more than £6.5 million net (or £7.8 million gross); and
(d) the group's aggregate balance sheet total for that year is not more than £3.26 million net (or £3.9 million gross).

136 A company may meet any relevant requirement on the basis of either the net or the gross figure. 'Net' and 'gross' have the same meaning as in section 383 of the *2006 Act* (see Appendix A) (Companies Act 2006, section 479). A 'group' means in relation to a *parent company* or a *subsidiary undertaking* the entity together with all of its associated parent, subsidiary and fellow *subsidiary undertakings* (Companies Act 2006, section 479(4)).

Small charitable companies

137 A charitable company that is not required by the *2006 Act* (or by its constitution or other authority) to have an audit may nevertheless require an audit by reference to The Charities (Accounts and Reports) Regulations 2008 (SI 2008/629) and The Charities Act 2006 (Charitable Companies Audit and Group Accounts Provisions) Order 2008 (SI 2008/527) or the Charities Accounts (Scotland) Regulations 2006 (as the case may be).

Dormant companies – audit exemption

138 A company is exempt from the requirements of Part 16 of the Companies Act 2006 relating to the audit of accounts and from the obligation to appoint auditors if:

(a) the company has been dormant since its formation; or
(b) the company has been dormant since the end of the previous financial year and meets all of the following criteria:
- it is entitled to prepare accounts in accordance with the small companies regime (see Appendix A) or would be but for having been a public company or a member of an ineligible group (see paragraph A11 below);
- it is not required to prepare *group accounts* for that year;
- it is not (and was not at any time in the year in question) a banking or authorised insurance company, an e-money, a MiFID investment firm or a UCITS management company (as defined by *FSMA2000*) or carries on insurance market activity;
- no objection to exemption is made by members holding in total more than 10 per cent of the issued share capital or 10 per cent of a particular class of share by depositing a written notice at the company's registered office not later than one month before the year end.

139 If a dormant company takes advantage of the audit exemption, section 480(3) of the Companies Act 2006 requires the directors to make two statements on the balance sheet:

(1) that it is exempt from audit as a dormant company under section 480 of the Companies Act 2006 (Companies Act 2006, section 475(2)); and
(2) that the members have not required the company to obtain an audit of its accounts in accordance with section 476 of the Companies Act 2006; and that the directors acknowledge their responsibility for complying with the requirements of the *2006 Act* with respect to accounting records and the preparation of accounts (Companies Act 2006, section 475(3)).

140 A company that qualifies for audit exemption as a dormant company is also exempt from the obligation in section 485 of the *2006 Act* to appoint auditors. As the directors do not know necessarily in advance whether they will, or will be able to, claim the exemption from audit, the wording in section 485(1) offers a practical solution by allowing the directors of a private company to resolve not to appoint an auditor where they believe that audited accounts are unlikely to be required. Sections 480, 481 and 485 of the *Act* should be consulted for further details.

141 If a dormant company ceases to qualify for the audit exemption during the year, the directors must appoint auditors at any time before the next period for appointing auditors (Companies Act 2006, section 485(3)(b)). The period for appointing auditors is no later than 28 days after the period allowed for sending out copies of the company's *annual accounts* for the previous financial year, or, if earlier, the date on which the *annual accounts* for previous financial year are sent out (Companies Act 2006, section 485(2)).

142 An additional disclosure requirement applies where the directors of a dormant company are taking advantage of the audit exemption and the company has acted as an agent for any person during the financial year. The directors must state that fact in the notes to the accounts and in the abbreviated accounts if such accounts are produced (*Large/Medium Companies Accounts Regulations 2008*, Schedule 1, paragraph 71 and *Small Companies Accounts Regulations 2008*, Schedule 1, paragraph 63; Schedule 4, paragraph 10).

143 A company is dormant during any period in which it has no significant accounting transaction (one that is required to be entered in the company's accounting records by section 386 of the Companies Act 2006) (Companies Act 2006, section 1169(1) and (2)). However, the following transactions are disregarded and do not jeopardize a company's dormant status:

- any transaction arising from a subscriber to the company's *memorandum* taking shares at the formation of the company;
- any payments of fees to the Registrar of Companies relating to a change of name, its re-registration, the filing of its *annual accounts* or annual return or a penalty for failing to deliver its accounts to the Registrar of Companies (Companies Act 2006, section 1169(3)).

Duties in relation to auditors

144 It is the duty of a public company in general meeting to appoint its auditors for each financial year (Companies Act 2006, section 489). Auditors

of a private company are generally deemed to be reappointed each year (Companies Act 2006, section 487). In the case of a public company, the directors may appoint the company's first auditors at any time before a company's first relevant general meeting (Companies Act 2006, section 489). In the case of a private company, the directors may appoint the company's first auditor before the first period for appointing auditors, as defined in section 485 of the *Act*. Directors of both public and private companies may appoint an auditor to fill a casual vacancy. All of the foregoing is subject to the availability of an exemption from audit (see paragraph 130 *et seq* above).

145 The statutory rights of auditors cannot be restricted in any way.[24] Auditors have a statutory right of access, at all times, to the company's books, accounts and vouchers and to require from officers and employees of the company such information as the auditors think necessary for the performance of their duties (Companies Act 2006, section 499). Directors must therefore ensure that the auditors have adequate information for the performance of their duties. However, directors are not required to disclose to auditors any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (Companies Act 2006, section 499) although this might lead to a qualified audit report if the auditor fails to obtain such information and explanations as he thinks necessary for the performance of his duties. Further, the auditors of a holding company may require information and explanations from UK *subsidiary undertaking*s and their auditors. A person who knowingly or recklessly makes a statement to the auditors in the course of their audit which is misleading, false or deceptive in a material particular is guilty of a criminal offence, as is any person who delays in complying with a request for information. (Companies Act 2006, sections 499 to 501). In relation to overseas *subsidiary undertakings,* the auditor can require the company to seek from that undertaking or its officers, employees or auditors, such information as the auditor considers necessary (Companies Act 2006, section 500).

146 Directors are also, in effect, required to volunteer information to auditors. This arises through a requirement (Companies Act 2006, section 418) that the directors' report includes a disclosure to the effect that: so far as each director is aware there is no information, needed by the auditor ('relevant audit information'), of which the auditor is unaware; and that each director has taken all the steps he ought to have taken, as required by his duty to exercise reasonable care, skill and diligence (see paragraph 25 above), to make himself aware of such information and to establish that the auditor is aware of it. If this disclosure contains a statement that is false, a director is guilty of a criminal offence if he knows of or was reckless as to the falsehood and failed to take all reasonable steps to prevent the directors' report from being approved. The legislation specifies that the steps the director ought to have taken include (but are not limited to) making enquiries of his fellow directors and of the auditor. This requirement, in effect to ensure that information is obtained and passed on, is closely related to the requirement upon the

[24] *Newton v. Birmingham Small Arms Co* [1906] 2 Ch 378.

directors to prepare accounts that give a true and fair view and comply with the Companies Act 2006 (see paragraph 84 *et seq* above).

147 The information required for the accounts, and the processes and oversight of its production, would usually form the basis of relevant audit information. The additional challenges for directors are likely to be in relation to the measure of individual responsibility of a director and to the communication of the information to the auditor. On the first point, different standards will be required of different directors in the ususal way under the duty to exercise reasonable care, skill and diligence: under the objective test more would be expected of a director with an executive function; and under the subjective test more would also be expected of a director having specifically relevant knowledge, skills and experience (such as a member of the Institute). However, and as the Explanatory Notes to the predecessor legislation[25] make clear, this is not a requirement that each director should ensure that he and every other director have each disclosed all relevant audit information. Rather, the requirement might be characterised as one relating to the information that the individual has or ought reasonably to have and requiring the directors to communicate with each other so far as necessary to capture all relevant audit information and communicate it to the auditor.

148 In terms of communication, this will involve more than, for example, just the final audit meeting. There should, for example, be consideration of the auditor's plan for the audit and whether there are risks hitherto unknown to the auditor that he has not planned for. It is, however, difficult to generalise on this topic. The arrangements for the identification and communication of relevant audit information will vary according to the size and complexity of any particular company's circumstances. One more point may be added: it will not be sufficient merely to ask the auditor whether he has all the information that he requires; nor would an auditor answer such a question.

149 Directors may be asked by the company's auditors to make written representations to confirm information on which the auditors have placed reliance in forming an opinion. Such confirmations are sought as part of the auditors' duty to obtain audit evidence, and in accordance with auditing standards, when the matter is material to the accounts and other sufficient appropriate audit evidence cannot reasonably be expected to exist. Pursuant to auditing standards, directors will also be asked to include in written representations an acknowledgement of their responsibility for internal controls and a statement that the directors believe that the effect of uncorrected accounts mis-statements, identified by the auditor, are immaterial.

150 It is a requirement of auditing standards that an auditor reports to the directors after an audit, drawing attention to any weakness in internal controls identified during the audit, although this is not a comprehensive list of all weaknesses that may exist. While there are no specific legal requirements relating to such reports, directors should consider them with care, since such a

[25] The requirement was first introduced by the *2004 Act*.

report may contain information which should put the directors on enquiry as to inadequacies in systems or personnel. The auditors may request a reply to the points raised in the management report and, in certain cases, may request that the directors' discussion of the report be recorded in the board minutes. Such reports will be particularly relevant to companies on the *Official List*; for such companies the *Listing Rules* (LR 9.8.6(6)(a)) require the company to state in its annual report that it complies with the *Combined Code* (see paragraph 231 below), which provides that the board, in particular its audit committee, should conduct an annual review of effectiveness of internal controls and report that fact to shareholders (*Combined Code,* provisions C.2.1 and C.3.2).

151 There are also occasions when directors need auditors' reports on matters other than the *annual accounts*, for example when a private company is making a payment out of capital in respect of the purchase of its own shares (Companies Act 2006, section 714) and when a private company is re-registering as a public company (Companies Act 2006, section 92).

Auditor Liability Limitation

152 Companies may enter into Liability Limitation Agreements with their auditor (Companies Act 2006, sections 534 to 538). The Institute has obtained a legal opinion[26] that confirms that directors can recommend auditor liability limitation agreements to the shareholders without breaching their fiduciary duties. The *FRC* has issued guidance[27] that sets out factors for directors to consider when assessing the advantages of entering into a Liability Limitation Agreement and explains which provisions are permitted, and the process for obtaining shareholder approval.

Quoted companies: right of members to raise audit concerns at accounts meetings

153 Members of *quoted companies* (or at least a substantive body of them/ their shareholdings) have the right in relation to questions about the annual audit that they intend to raise at the *accounts meeting* to require the company to publish them on their website (Companies Act 2006, sections 527 to 531).

Resignation and removal of auditor

154 If an outgoing auditor makes a statement of circumstances surrounding their ceasing to hold office, which he must always do in the case of a *quoted company*, the company must circulate such statement to *entitled persons* or apply to court for permission not to do so (Companies Act 2006, section 520). Also, in circumstances where an auditor ceases to hold office before the end of his or its term, the company is required to notify the Professional Oversight

[26] The legal opinion given by Mark Hapgood QC is available at: http://icaew.com/index.cfm/route/149874/.

[27] The *FRC* guidance is available at: http://www.frc.org.uk/images/uploaded/documents/FRC%20ALLA%20Guidance%20June%202008.pdf.

Board or, in some cases, the auditor's Recognised Supervisory Body, that the auditor has ceased to hold office (Companies Act 2006, section 523). Such notification must contain either a copy of the auditor's statement of circumstances, or a statement by the company of the reasons for the auditor ceasing to hold office.

Laying, sending out and delivering (filing) accounts

Private companies

155 There is no statutory requirement for private companies to lay their *annual accounts and reports* before a general meeting of members – however, some companies may have such requirement in their *Articles*. Nevertheless, private companies must send copies of their *annual accounts and reports* to members, debenture holders, and *entitled persons* (Companies Act 2006, section 423) within a specified time period (Companies Act 2006, section 424). The manner in which they are sent out may be in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148).

156 A private company is required to send out its *annual accounts and reports* no later than 9 months after the end of the company's *accounting reference period*, which is when it must have filed its accounts and reports with the Registrar of Companies. If the company delivers its accounts and reports to the Registrar of Companies at an earlier date, it must have sent out its *annual accounts and reports* to its members by that earlier date (Companies Act 2006, section 424).

157 The copy of the accounts and reports delivered to the Registrar of Companies before the end of the 9 month filing period must, as explained more fully at paragraphs 180 *et seq*, be in the form required by sections 444 or 444A of the *Act* (small companies), section 445 of the *Act* (medium-sized companies) or section 446 of the *Act* (unquoted (large) companies) (Companies Act 2006, section 441).

Public companies

158 The directors of public companies are responsible for laying such a company's *annual accounts*, the directors' report, directors' remuneration report (*quoted companies* only) and any auditors' report before the company in general meeting (an '*accounts meeting*') (Companies Act 2006, section 437). For a *quoted company*, the auditors' report must also cover the auditable part of the directors' remuneration report.

159 The *annual accounts and reports* must be sent to *entitled persons* (Companies Act 2006, section 423) at least 21 days before the date of the *accounts meeting* (Companies Act 2006, section 424). For *traded companies*, *entitled persons* include those persons that have been nominated by registered shareholders to enjoy information rights, such as indirect investors whose investments are held through intermediaries (Companies Act 2006, section

146). The manner in which they are sent out may be in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148).

160 The *annual accounts and reports* are normally laid before members at the company's annual general meeting, which is therefore the *accounts meeting*. The *accounts meeting* must be held before the end of the period allowed for delivering the *annual accounts and reports* to the Registrar of Companies (Companies Act 2006, section 437(2)). The *annual accounts and reports* must be delivered to the Registrar of Companies for filing (Companies Act 2006, section 441) within 6 months from the end of a public company's *accounting reference period* (Companies Act 2006, section 442). A *quoted company* that is admitted to trading on a *regulated market* must make public its *annual accounts and reports* within 4 months from the end of each financial year (*DTR* 4.1.3).

Quoted companies and websites
161 A *quoted company* must ensure that its *annual accounts and reports* are available on its website as soon as reasonably practicable and then continuously until the next financial year's *annual accounts and reports* are available on the website (Companies Act 2006, section 430). To comply with the *DTRs,* a *quoted company* must ensure that it keeps its *annual accounts and reports* publicly available for five years (*DTR* 4.1.4).

Exchange-regulated companies
162 Directors of exchange-regulated companies, such as those admitted to trading on the *AIM* or *PLUS-quoted* markets, should be aware of the requirements of their relevant exchange. For example, an *AIM* company must publish *annual accounts,* which must be sent to shareholders without delay and in any event within 6 months after the end of the financial year to which they relate. An electronic copy must be sent by e-mail to the *LSE* (Rules 19 and 20, *AIM* Rules for Companies 2007). An *AIM* company must also make its *annual accounts* available on its website (Rule 26, *AIM* Rules for Companies 2007).

Offences and penalties
163 If a (public or private) company's *annual accounts and reports* are not sent to members and others entitled to receive them within the relevant time period the company and every officer of the company who is in default is liable to a fine (Companies Act 2006, section 425). Failure by any company to file its *annual accounts and reports* with the Registrar of Companies and, for a public company, failure to lay the *annual accounts and reports* before the company in general meeting, before the end of the allowed periods, renders every person who was a director immediately before the end of the relevant time periods liable to a fine and, for continued contravention, to a daily default fine (Companies Act 2006, sections 438(4), 451(4)).

164 Failure by a *quoted company* to comply with the requirement that its *annual accounts and reports* are available on its website (see paragraph 161

above), other than in extenuating circumstances that it would not be reasonable for the company to prevent or avoid, renders every officer of the company liable to a fine (Companies Act 2006, section 430(6) and (7)).

165 If a company has not complied with the filing requirements of section 441 of the *Act* before the end of the relevant period for filing its *annual accounts and reports* with the Registrar of Companies, any member, or any of the company's creditors, or the Registrar may serve notice on the company requiring its compliance with the filing requirements. If the directors of the company fail to make the default good within 14 days after this notice have been served, then the person who served the notice may apply to the court to make an order instructing the directors to comply within a period specified by the court. The court order may also require the directors to bear the cost of the application (Companies Act 2006, section 452).

166 A disqualification order may be made against any person persistently in default in filing *annual accounts and reports* and other statutory returns, or convicted in consequence of a failure to comply with legislation requiring the filing of *annual accounts and reports* and other returns (*CDDA86*, sections 3 and 5).

167 Failure to file the *annual accounts and reports* before the end of the relevant filing period renders the company liable to an automatic civil 'late filing penalty'[28]. This is in addition to any liability of the directors under section 451 of the *Act* (Companies Act 2006, section 453). The penalty is based on a sliding scale depending on the length of time between the date permitted by section 441 of the *Act* for filing and the actual date of delivery to the Registrar. The penalty doubles for any company that also filed late the previous year, and is higher for public companies.

Filing period for a company's first annual accounts and reports

168 Where the *annual accounts* are for the company's first *accounting reference period* after incorporation and that period exceeds 12 months, the time allowed for delivering the *annual accounts and reports* to the Registrar of companies is the later of either 9 months (for a private company) or 6 months (for a public company) from the first anniversary of incorporation of the company or 3 months after the end of the *accounting reference period* (Companies Act 2006, section 442).

Summary financial statements

169 All companies that have their accounts audited, if complying with certain conditions summarised below, may send copies of a summary

[28] The Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008.

financial statement in place of the full *annual accounts and reports* (as required by section 423 of the *2006 Act*) to *entitled persons*. Unless the conditions are met, a company cannot send out a summary financial statement. The enabling provisions of the *2006 Act* are found in sections 426 to 429 of the *Act*. The detail supplementing these provisions is found in the *Summary Financial Statement Regulations 2008*. There are different form and content requirements depending upon whether the company is quoted or unquoted, is a banking or insurance company, and prepares *IAS* or *Companies Act individual* or *group accounts*.

170 A company may exercise its option to send out a summary financial statement if it has duly consulted the *entitled persons* and provided the company's constitution or debenture trust deed or governing instrument do not require the full accounts and reports to be sent to *entitled persons* (*Summary Financial Statement Regulations 2008*, Regs 4 and 5). The *Summary Financial Statement Regulations 2008* should be referred to regarding the method of due consultation and the details of the form and content of the summary financial statement.

171 In addition to the form and content specified for particular types of company in the relevant schedule to the *Summary Financial Statement Regulations 2008*, all companies must include in the summary financial statement the dividend information from the full accounts and reports and the aggregate directors' emoluments information required by paragraph 1 of Schedule 3 to the *Small Companies Accounts Regulations 2008* or paragraph 1 of Schedule 5 to the *Large/Medium Companies Accounts Regulations 2008* as the case may be (*Summary Financial Statement Regulations 2008,* Reg 9(6)).

172 Furthermore, the summary financial statement of a *quoted company* must contain the whole of, or a summary of, its policy on directors' remuneration and the performance graph from its directors' remuneration report (*Summary Financial Statement Regulations 2008*, Reg 10(2)). For companies included in the *Official List*, the *Listing Rules* (LR 9.8.13) require disclosure of the earnings per share information from the full accounts and reports.

173 Where the directors' report contains takeover-related capital structure disclosures (see paragraph 120 above) the company must give certain explanatory material about those disclosures in the summary financial statement. Alternatively, it may send that material to the person receiving the summary financial statement separately at the same time as it sends the statement (*Summary Financial Statement Regulations 2008*, Reg 10(1)). This may interact with the requirements of *DTR* 7.2.6 (see paragraph 234 below).

174 The summary financial statement must state that it is only a summary of information derived from the company's *annual accounts* and in the case of a *quoted company*, the directors' remuneration report. It must also state whether

it contains additional information derived from the directors' report and, if so, that it does not contain the full text of the report. (Companies Act 2006, sections 427(3) and 428(3).) Furthermore, it must state in a prominent position that the summary financial statement does not contain sufficient information to allow as full an understanding either: in the case of company, of the results and state of affairs of the company; or in the case of a group, of the results of the group and state of affairs of the company or of the group, and, in both cases, of their policies and arrangements concerning directors' remuneration (*Summary Financial Statement Regulations 2008*, Regs 9(3) and (4)).

175 For an unquoted company, the company's auditor has to provide an opinion that the summary financial statement is consistent with the company's *annual accounts* and, where information derived from the directors' report is included in the statement, with that report, and complies with the requirements of section 427 of the *2006 Act* and of the *Summary Financial Statement Regulations 2008*.

176 In the case of a *quoted company*, the company's auditor's opinion must also cover the consistency with the directors' remuneration report and the summary financial statement complies with the requirements of section 428 of the *2006 Act* (rather than section 427) and of the *Summary Financial Statement Regulations 2008*.

177 The summary financial statement must state whether the auditor's report on the *annual accounts* and, in the case of a *quoted company*, on the auditable part of the directors' remuneration report, was unqualified or qualified. If it was qualified, the full report must be included together with any further information needed to understand the qualification. Similar requirements apply in respect of the auditor's statement in their reports concerning the consistency of the director's report with the accounts and any statement made about inadequate accounting records or returns, or their non-agreement with the accounts, or any failure to obtain necessary information and explanations (Companies Act 2006, sections 427(4)(d) to (g) and 428(4)(d) to (g)).

178 An *entitled person* retains the right to request a copy of the full accounts and report. To this extent, the summary financial statement must include a clear and conspicuous statement as to how the *entitled person* may obtain the full accounts and reports, free of charge, and also how to apply to receive them in all future years (Companies Act 2006, sections 427(4)(c) and 428(4)(c) and *Summary Financial Statement Regulations 2008*, Reg 9(5)).

179 A summary financial statement may be sent to *eligible persons* in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148). Where summary financial statements are accessible from a website to the general public, the summary financial statement should include the 'non-statutory accounts'

wording required by section 435(1) of the *2006 Act*, as described in paragraph 214 below.

Form of accounts and reports for filing

Small companies regime

Individual accounts

180 The directors of an *SCR Company* that prepare Companies Act *individual accounts* for its members have three options as to the form and content of what must be delivered to the Registrar of Companies for each financial year:

- a copy of the *annual accounts and reports* as sent to members (see paragraph 97); or
- at a minimum, a copy of the balance sheet and its notes from the *annual accounts* sent to members together with, where applicable, a copy of the auditor's report sent to members (Companies Act 2006, sections 444(1)(a) and 472). A copy of the company's profit and loss account and/or its directors' report may be filed with the balance sheet (Companies Act 2006, sections 444(1)(b)); or
- abbreviated accounts (Companies Act 2006, section 444(3), Regulation 6 of, and Schedule 4 to, the *Small Companies Accounts Regulations 2008*) and, if the company is not exempt from audit, the special auditor's report (Companies Act 2006, section 444(4)).

181 The directors of a small private company that prepares IAS *individual accounts* only have two choices for what must be delivered to the Registrar of Companies:

- a copy of the IAS *annual accounts*, the directors' report and, where applicable, the auditor's report as sent to the members; or at a minimum
- a copy of the balance sheet and its notes from those accounts together, where applicable, a copy of the auditor's report sent to members. A copy of the company's profit and loss account and/or its directors' report may be filed with the balance sheet (Companies Act 2006, section 444(1)(b)).

182 Where the directors deliver to the Registrar of Companies *IAS accounts*, or *Companies Act accounts* that are not abbreviated accounts, and do not deliver a copy of the company's profit or loss account or a copy of the directors report, the copy of the balance sheet must contain a prominent statement that the company's *annual accounts and reports* have been delivered in accordance with the provisions of the *2006 Act* applicable to *SCR Companies* (Companies Act 2006, section 444(5)).

183 If the directors choose only to deliver a copy of the balance sheet and its notes, the balance sheet must state the name of the director who signed it on behalf of the board of directors under section 414 of the *Act* and it must be

signed[29] on behalf of the board by a director of the company (Companies Act 2006, section 444(6)).

184 Where a copy of the company's directors' report is delivered to the Registrar of Companies, it must state the name of the director or company secretary who signed it under section 419 of the *Act* and it must be signed[30] on behalf of the board by either a director or the company secretary (Companies Act 2006, section 444(6A)).

185 If the company is not exempt from audit (or has not taken advantage of the exemption), a copy of the auditor's report on the *annual accounts* and directors' report sent to its members must be delivered to the Registrar of Companies (Companies Act 2006, section 444(2)). The copy of the auditor's report must state the name of the auditor and (where the auditor is a firm) the name of the *senior statutory auditor* who signed the report. The copy must also be signed[31] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In circumstances where the auditor's name can be omitted under section 506 of the *2006 Act* it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)) (Companies Act 2006, section 444(7)).

Abbreviated Companies Act individual accounts

186 Where an *SCR Company* delivers to the Registrar of Companies a copy of its abbreviated *Companies Act accounts* under section 444(3) of the *2006 Act*, the copy balance sheet must contain a statement in a prominent position that it has been prepared in accordance with the provisions applicable to *SCR Companies* (*Small Companies Accounts Regulations 2008*, Schedule 4, paragraph 1(2)). As mentioned above, an *SCR Company* that is not exempt from audit (or has not taken advantage of any such exemption) that delivers abbreviated *Companies Act accounts* to the Registrar of Companies must also deliver a copy of the special report of the company's auditor on those abbreviated accounts (Companies Act 2006, sections 444(4) and 449).

187 The auditor's special report must state whether in their opinion the company is entitled to deliver abbreviated accounts and those accounts to be

[29] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[30] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[31] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

delivered are properly prepared in accordance with Regulation 6 of, and Schedule 4 to, the *Small Companies Accounts Regulations 2008* (Companies Act 2006, section 449(2)). If the auditors' report on the company's *annual accounts* for members is qualified, the special report must set out that report in full together with any further material necessary to understand the qualification. Similarly, any statement under section 498(2)(a) or (b) about inadequate accounts, records or returns or accounts not agreeing with the records and returns, or under section 498(3) about a failure to obtain necessary information or explanations included in the audit report must be reproduced in full in the special report (Companies Act 2006, section 449(3)).

188 The copy of the auditor's special report delivered to the Registrar of Companies must be signed[32] by the auditor (or where the auditor is a firm) by a person authorised to sign on its behalf (Companies Act 2006, section 449(4A)(a)). In circumstances where the auditor's name can be omitted under section 506 of the *2006 Act* it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)).

189 Where the directors of an *SCR Company* prepare abbreviated Companies Act *individual accounts* for delivery to the Registrar of Companies, this does not affect the obligation to prepare a full set of accounts for its shareholders. As previously noted, those accounts are subject to less onerous disclosure requirements and, in some instances, may be exempt from a statutory audit.

Small companies exemption in relation to the directors' report

190 The directors of a company that is entitled to the small companies exemption in relation to the directors' report under section 415A of the *Act* (see paragraph 123 above) must deliver to the Registrar of Companies a copy of the company's *annual accounts* (that is, the company's individual profit and loss account and balance sheet with supporting notes to both primary statements) (Companies Act 2006, sections 471 and 472). Unless the company is exempt from audit and advantage has been taken of that exemption, the directors must also deliver a copy of the auditor's report on those accounts (and any directors' report) (Companies Act 2006, section 444A(1)(a) and (2)). They may also deliver a copy of the directors' report (Companies Act 2006, section 444A(1)(b)).

191 The copies of the balance sheet and directors' report delivered to the Registrar of Companies must state the name of the person who signed it on behalf of the board (Companies Act 2006, section 444A(3)).

[32] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

192 The copy of the auditor's report must state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and must be signed[33] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign it on its behalf (Companies Act 2006, section 444A(4)). In circumstances where the auditor's name can be omitted under section 506 of the *Act*, the report must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 444A(5)).

Medium-sized companies

Individual accounts

193 The directors of a private medium-sized company that prepares Companies Act *individual accounts* for its members have two options as to the form and content of what must be delivered to the Registrar of Companies for each financial year:

- A copy of the *annual accounts and reports* as sent to members (see paragraph 97); or
- Abbreviated accounts (Companies Act 2006, section 445(3), Regulation 4(3) of the *Large/Medium Companies Accounts Regulations 2008*) and, if the company is not exempt from audit, the special auditor's report (Companies Act 2006, section 445(4)).

194 The directors of a medium-sized private company that prepare IAS *individual accounts* have no choice and must deliver a copy of the IAS *annual accounts*, the directors' report and, where applicable, the auditor's report as sent to the members (Companies Act 2006, section 445).

Abbreviated Companies Act individual accounts

195 A medium-sized company's abbreviated Companies Act *individual accounts* omit supplementary disclosures in relation to the company's turnover and allow for a modification of the profit and loss account to occlude a gross profit number or the ability to calculate one from the information provided (*Large/Medium Companies Accounts Regulations 2008*, Regulation 4(3)).

196 Unlike a small company, there is no requirement for a medium-sized company to include on the balance sheet a statement that the abbreviated Companies Act *individual accounts* have been prepared in accordance with the provisions applicable to medium-sized companies.

197 However, as mentioned earlier, a medium-sized company that is not exempt from audit (or has not taken advantage of any such exemption) that

[33] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

delivers abbreviated Companies Act *individual accounts* to the Registrar of Companies must also deliver a copy of the special report of the company's auditor on those abbreviated accounts (Companies Act 2006, sections 445(4) and 449).

198 The auditor's special report must state whether in their opinion the company is entitled to deliver abbreviated accounts and those accounts to be delivered are properly prepared in accordance with Regulation 4 of the *Large/Medium Companies Accounts Regulations 2008* (Companies Act 2006, section 449(2)). If the auditors' report on the company's *annual accounts* is qualified, the special report must set out that report in full together with any further material necessary to understand the qualification. Similarly, any statement under section 498(2)(a) or (b) about inadequate accounts, records or returns or accounts not agreeing with the records and returns, or under section 498(3) about a failure to obtain necessary information or explanations included in the audit report must be reproduced in full in the special report (Companies Act 2006, section 449(3)).

199 The copy of the auditor's special report delivered to the Registrar of Companies must be signed[34] by the auditor (or where the auditor is a firm) by a person authorised to sign on its behalf (Companies Act 2006, section 449(4A)(a)). In circumstances where the auditor's name can be omitted under section 506 of the *Act,* the report must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)).

200 Where the directors of a medium-sized company prepare abbreviated Companies Act *individual accounts* for delivery to the Registrar of Companies, this does not affect their obligation to prepare a full set of accounts for its shareholders.

Group accounts

201 A medium-sized company that is the parent of a group must deliver to the Registrar of Companies a copy of its *group accounts* (as part of its *annual accounts*), the directors' report and the auditor's report (Companies Act 2006, sections 446 and 471). Although the *2006 Act* has criteria for determining whether a *parent company* qualifies as medium-sized such status confers no exemption from the preparation of *group accounts*. A medium-sized company's Companies Act *group accounts* benefit from the same exemptions and modifications as described in paragraph 195 *et* seq[35]. There are no disclosure exemptions or modifications for a medium-sized company's IAS *group accounts*. In the case of a medium-sized company preparing either

[34] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[35] Paragraph 1(1) of Schedule 6 to the *Large/Medium Companies Accounts Regulations 2008*.

Companies Act *group accounts or* IAS *group accounts*, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). The only exemptions from preparing and thus delivering *group accounts* are where (subject to conditions) the company is a member of either a larger EEA group or a larger non-EEA group or where all of the company's *subsidiary undertakings* do not need to be included in the consolidation (Companies Act 2006, section 399(2)).

Unquoted companies (other than SCR or medium-sized companies)

202 Private companies that exceed the medium-sized company qualifications (referred to generically as large companies) and private companies that do not qualify for the small companies regime or exemption, or as medium-sized, or are ineligible to do so are caught by the filing obligations of unquoted companies (Companies Act 2006, section 446). The directors of such companies must deliver copies of the company's *annual accounts* and the directors' report (both as prepared for members) and the auditor's report on those accounts (and the directors' report) (Companies Act 2006, section 446 (1) and (2)). The legislation also provides that the copies of the balance sheet and directors' report must state the name of the person who signed it on behalf of the board under sections 414 and 419 of the *Act* respectively. They must also be signed on behalf of the board by a director of the company or, in the case of the directors' report, by the company secretary (Companies Act 2006, section 446(3) and (3A)).

203 Where the company is a parent of a group its *annual accounts* must contain its *group accounts* (Companies Act 2006, sections 446 and 471). In this case, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). This applies irrespective of whether the *group accounts* are *Companies Act accounts* or *IAS accounts*. The only exemptions from preparing and thus delivering *group accounts* are where (subject to conditions) the company is a member of either a larger EEA group or a larger non-EEA group or where all of the company's *subsidiary undertakings* do not need to be included in the consolidation (Companies Act 2006, section 399(2)).

204 The copy of the auditor's report must state the name of the auditor (and where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and be signed[36] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In

[36] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

circumstances where the auditor's name can be omitted under section 506 of the *Act*, it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 446(4)).

Quoted companies

205 The directors of a *quoted company* must deliver to the Registrar of Companies for each financial year a copy of the company's *annual accounts* (that include its *group accounts*, where applicable), the directors' remuneration report and the directors' report (all as prepared for members). Where the *annual accounts* include the company's *group accounts*, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). This applies irrespective of whether the *group accounts* are *Companies Act accounts* or *IAS accounts*.

206 The directors must also deliver a copy of the auditor's report on those accounts (and on the directors' remuneration report and directors' report) (Companies Act 2006, section 447(1) and (2)). The copies of the balance sheet, directors' remuneration report and directors' report must state the name of the person who signed it on behalf of the board under sections 414, 422 and 419 of the *Act* respectively. They must also be signed on behalf of the board by a director of the company or, in the case of the directors' remuneration report and directors' report, by the company secretary Companies Act 2006, section 447(3), (3A) and (3B)).

207 The copy of the auditor's report must state the name of the auditor (and where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and be signed by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In circumstances where the auditor's name can be omitted under section 506 of the *Act*, it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 447(4)).

Document quality

208 Section 1068 of the Companies Act 2006 gives the Registrar of Companies the ability to impose requirements as to the form, authorisation, authentication and manner of delivery of documents (for example, *annual accounts and reports* and the annual return) required to be filed with the Registrar under any enactment. This means the Registrar is able to make rules about, for example, the size and quality of paper to be used in order to facilitate the scanning of documents submitted. The detailed requirements can be obtained from the Companies House website and should be consulted to ensure compliance. Failure to comply with the requirements will mean the document being rejected and consequently may render the company liable to civil penalties and its directors and officers liable to fines and prosecution for late filing.

Publication of statutory accounts

209 If a company publishes any of its statutory accounts, they must be accompanied by the auditor's report on those accounts (unless the company is exempt from audit and the directors have taken advantage of that exemption) (Companies Act 2006, section 434(1)).

210 A company is not allowed to publish its individual statutory accounts without publishing with them its statutory *group accounts*, where relevant (Companies Act 2006, section 434(2)).

211 Statutory accounts are the company's accounts that are required to be delivered to the Registrar of Companies (see paragraph 180 *et seq*). Therefore, they can be the *annual accounts* as prepared for members, which comprise a company's *individual accounts* and any *group accounts*, or other permitted forms such as abbreviated *Companies Act accounts* (Companies Act 2006, sections 434(3), 441 and 471).

212 All companies' balance sheets and directors' reports and *quoted companies*' directors' remuneration reports that are published by or on behalf of the company must state the name of the person who signed them on behalf of the board (Companies Act 2006, section 433). If a copy is published without the required statement of the signatory's name, an offence is committed by the company and every officer of the company who is in default and is liable to fines on summary conviction.

213 For the purposes of sections 433 (statement of name of signatory) and 434 (publication of statutory accounts) discussed above and section 435 (publication of non-statutory accounts) discussed below, a company is regarded as publishing a document if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally or any class of members of the public, to read it (Companies Act 2006, section 436).

Publication of non-statutory accounts

214 If a company publishes any balance sheet or profit and loss account relating to, or purporting to deal with a financial year of the company otherwise than as part of its statutory accounts, it must state that they are not statutory accounts. This statement is also required where an account is published in any form purporting to be the group balance sheet or profit and loss account relating to, or purporting to deal with, a financial year of the company (Companies Act 2006, sections 435(1)(a) and (3)). The statement must also say whether statutory accounts dealing with any financial year with which the non-statutory accounts purport to deal have been delivered to the Registrar of Companies, whether the auditors have reported on the statutory accounts and, if so, whether their report was qualified or unqualified, or contained a matter of emphasis, or any reservations about accounting records or returns or obtaining necessary information (Companies Act 2006, section 435(1)(b) and (c)).

215 Where published non-statutory accounts deal with more than one year the document may contain two (or more) sets of non-statutory accounts (for example, preliminary statements of the annual results of *listed companies* have two years that must be covered – the current year and the comparative previous year). Where this applies, the wording of the statement should be adapted so that it confirms that the statutory accounts for any previous year had been delivered to the Registrar of Companies and those for the current year will be delivered. Half yearly reports issued in compliance with the *DTR* contain a set of non-statutory accounts – the comparative information for the last full financial year.

216 Published non-statutory accounts must not include the auditors' report on the company's *annual accounts* (Companies Act 2006, section 435(2)). A company and any of its officers that does not comply with all the requirements for publishing non-statutory accounts will be guilty of an offence and liable to a fine on summary conviction (Companies Act 2006, sections 435(5) and (6)).

Defective accounts

217 *Annual accounts* or the directors' report or, for *quoted companies*, the directors' remuneration report are defective if they do not comply with the requirements of the Companies Act 2006 or, where applicable, Article 4 of the *IAS Regulation*. In summary, the *Act* provides for:

- the directors voluntarily to revise the *annual accounts* or directors' report or directors' remuneration report or a summary financial statement (Companies Act 2006, section 454);
- the Secretary of State to request directors either to revise the *annual accounts* or directors' report or to explain the apparent non-compliance (Companies Act 2006, section 455); and
- the Secretary of State, or another person authorised for the purpose, to apply for a court order requiring directors to revise the *annual accounts* or directors' report (Companies Act 2006, section 456). The Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008 (SI 2008/623) appoints the *FRRP* as the authorised person under section 456.

218 The *Revised Accounts Regulations 2008* set out how the provisions of the *Act* are to be applied to *annual accounts*, directors' reports, directors' remuneration reports or summary financial statements that are being revised (otherwise than as ordered by the court) because the originals do not comply with statutory requirements.

219 The Regulations also provide for the revision of abbreviated accounts where these are affected by a revision of a small or medium sized company's accounts prepared for members that either means that the company would not have qualified as a small or (as the case may be) medium-sized company or because the accounts have been revised in a manner which affects the content of the abbreviated accounts (*Revised Accounts Regulations 2008*, Reg 15(2)).

Even if the revision of the accounts prepared for members has no consequential effect on the abbreviated accounts, the directors of the company must deliver to the Registrar of Companies:

(a) a note stating that the *annual accounts* of the company for the relevant financial year (specifying it) have been revised in a respect which has no bearing on the abbreviated accounts delivered for that year, together with
(b) a copy of any auditor's report on the revised *annual accounts*.

220 A small or medium-sized company's abbreviated accounts may[37] be revised if they do not comply with requirements of the *2006 Act* (*Revised Accounts Regulations 2008*, Reg 16). The *Act* and the Regulations should be consulted on the detailed procedures relating to the revisions applicable to the various accounts, reports and statements.

221 As soon as the revised accounts (including abbreviated accounts, where applicable), revised directors' report or revised directors' remuneration report (as the case may be) are approved by the directors, they replace the defective originals for all Companies Act purposes. For example, regarding the publication of statutory accounts, the provisions of section 434(3) of the *2006 Act* will apply to the revised accounts.

222 If the original accounts or reports have already been sent to *entitled persons*, the directors must send to those *entitled persons* copies of the revised accounts and/or report(s) together with the auditors' report (where applicable) thereon. These copies of the revised accounts etc. have to be sent out within 28 days of the approval of the revision. In cases where accounts or reports were laid before members, the revised accounts and reports also have to be so laid at the next *accounts meeting* or at an earlier general meeting. Where the original accounts (including abbreviated accounts, where applicable) or reports had been delivered to the Registrar of Companies, the replacements (or in the case of a note stating that a company's abbreviated accounts are unaffected by a revision to the accounts prepared for members) must be filed with the Registrar within 28 days of the date of the revision.

223 The *FRRP*'s authority under the *2006 Act* allows it to mount challenges in the courts to accounts or directors' reports (including business reviews) as defective. For the purposes of facilitating the *FRRP* in discovering whether there are any grounds for, or deciding to make, an application to the courts, section 458 to the *2006 Act* authorises HMRC to disclose pertinent information to the *FRRP*. This authority overrides any other statutory or other restriction on the disclosure of information, other than personal data that is protected from disclosure by the Data Protection Act 1998. Where a

[37] We note that Regulation 16 of the *Revised Accounts Regulations 2008* uses the word 'shall', but this does not override the voluntary nature of the regime under *CA 2006,* s.454, and thus this guidance uses the word 'may'.

case concerns accounts subject to the *DTR*, the *FRRP*, as the supervising body for issuers of listed securities, may report its findings to the *FSA*. See paragraph 225 below.

224 Where it appears to the *FRRP* that there may be a question as to whether a company's *annual accounts* or directors' report is defective, it has powers under section 459 of the *2006 Act* to require any documents, information and explanations that are reasonable and relevant to discovering any grounds for, or deciding to make, an application to the court. The documents, information and explanations can be obtained from the company, any officer, employee or auditor of the company or previous officers, employees or auditors. The *FRRP* can apply to the court if necessary to force such persons to produce the documents or provide the information and explanations. The section gives some comfort to such persons by providing that any statement made by a person under these powers cannot be used in evidence in criminal proceedings. Furthermore, documents or information that are subject to legal professional privilege (or equivalent in Scotland) cannot be compelled to be disclosed.

225 Any information (in whatever form) that relates to the private affairs of an individual or to any particular business may not be disclosed, without consent, by the *FRRP* during the lifetime of that individual or so long as the business continues to be carried on. This prohibition does not extend to information that was available to the public. In addition, section 461 of the *2006 Act* specifies a number of persons with whom the *FRRP* is entitled to share information which would otherwise be confidential under the *Act*. These persons include the Secretary of State, the Treasury, the Bank of England, *FSA* and HMRC. If requested by one of these authorities the *FRRP* is normally prepared to review a set of accounts and to report its findings to the authority concerned[38]. The *FRRP* will draw to the attention of that authority any matters apparent from its review that the *FRRP* believes to be relevant to that authority's regulatory function. Whether the *FRRP* opens a full enquiry itself is a matter decided by the *FRRP* in each case. The *FRRP* is also authorised to assist similar organisations in other countries or territories outside the UK, subject to certain safeguards (Companies Act 2006, section 461(5) and (6)). The *FRRP* is also authorised to assist the auditing and accounting disciplinary bodies in developing a case against an auditor or accountant for failing in their professional duties (Companies Act 2006, section 461(4)(b)).

226 Following an application by the Secretary of State or the *FRRP*, if the court orders the preparation of revised accounts it may give directions as to the auditing of the accounts, the revision of any directors' remuneration report, directors' report or summary financial statement, and the taking of steps by the directors to bring the making of the order to the notice of persons likely to rely on the previous (defective) accounts. Similarly, where the court

[38] http://www.frc.org.uk/frrp/how/

orders the preparation of a revised directors' report it may give directions as to the review of the report by the auditors, the revision of any summary financial statement, and drawing the order to the attention of any person that might rely on the previous (defective) report. The court is also empowered in each case to give directions on such other matters as it thinks fit.

227 If the court finds the *annual accounts* or directors' report do not comply with the requirements of the *Act* or, where applicable, Article 4 of the *IAS Regulation*, it may order that all or part of the costs of the application and any reasonable expenses incurred in connection with or in consequence of the preparation of revised accounts or report shall be borne by the directors who were party to the approval of the defective accounts or report. For this purpose, every director of the company at the time of their approval is taken to have been a party to their approval unless they can show that they took all reasonable steps to prevent them being approved.

FSA and market requirements

228 Companies whose transferable securities are admitted to trading on a *regulated market* are subject to *DTR* disclosure requirements in relation to periodic financial reporting (*DTR* 4 – see paragraph 237 below) and, if incorporated in the UK, also in relation to corporate governance (*DTR* 7 – see paragraph 232 below).

229 Companies included in the *Official List* of the Financial Services Authority are under additional obligations to the *FSA* as regards their *annual accounts and reports*. *Listing Rule* 9.8 sets out the requirements. Similarly, those traded on *exchange-regulated market*s, such as the *AIM* or *PLUS-quoted market*s have obligations in respect of their accounts and reports under the relevant rules of their respective markets.

230 Directors of companies traded on a *regulated market* should therefore be familiar with the obligations set out in the *DTRs*, and directors of *listed companies* should be familiar with the obligations set out in the *Listing Rules*. Some companies will be subject to both of the *DTR* and the *Listing Rules*. Directors of those companies traded on *exchange-regulated market*s should refer to their respective market rule books (these rules should not be confused with the *Listing Rules* or *DTR*s).

Corporate governance requirements

The Combined Code

231 Disclosures on corporate governance in *annual accounts and reports* of *listed companies*, under what is now the *Combined Code*, were originally prompted in 1992 by the recommendations of the Committee on the Financial Aspects of Corporate Governance (the Cadbury Committee). Responsibility for updating the corporate governance requirements and associated guidance on internal controls now rests with the Financial Reporting Council.

232 The *Combined Code* comprises principles and provisions. The *Listing Rules* (LR9.8.6(5)) require a statement in the company's annual report and accounts of how the *listed company* has applied the principles set out in Section 1 of the *Combined Code*, in a manner that would enable shareholders to evaluate how the principles have been applied. In addition, LR9.8.6(6) requires a statement by the directors to confirm compliance throughout the accounting period with all the *Combined Code*'s provisions, or, if there are elements that are not met, state that they did not comply and give the reasons for non-compliance, and say for which period they were not in compliance (and therefore it is referred to as a 'comply or explain' regime). It is then left to market participants to consider and react as to whether the reason for non-compliance is one that affects their appetite to invest in the company.

DTRs

233 Following the implementation of the Statutory Audit Directive (2006/43/EC) and the Company Reporting Directive (2006/46/EC) in 2008, the *DTRs* are amended to include *DTR* 1B and *DTR* 7 on Corporate Governance[39]. These requirements apply to a UK incorporated company that has any of its transferable securities admitted to trading on any *regulated market*. The requirements that relate to financial reporting are:

- a statement that must be available to the public that discloses that the company has an Audit Committee (or equivalent body) and the members of that committee and how it meets the independence and competence in accounting requirements. These may be met by the same or different members of the committee. In the *FSA*'s view, compliance with the relevant provisions of the *Combined Code* will result in compliance with these requirements (*DTR* 7.1.7);
- a Corporate Governance Statement that must be included as a specific section of the directors' report, or in a separate report published together with and in the same manner as *its annual accounts and reports*, or by means of a reference in its directors' report as to where such document is publicly available on the company's website (*DTR* 7.2.1 and 7.2.9).

234 The Corporate Governance Statement must contain the following:

- a reference to the corporate governance code to which the company is subject or which it has voluntarily decided to apply or provide all relevant information about the corporate governance practices applied beyond the requirements of national law (*DTR* 7.2.2). If the company does not apply a corporate governance code, it must explain its reasons for deciding not to do so, and must make a statement of its corporate governance practices publicly available and state in the directors' report where that statement can be found (*DTR* 7.2.3);
- a statement as to where the relevant corporate governance code is publicly available and, to the extent that the company departs from that code,

[39] The amendments to the *DTR* are applicable for financial reporting periods beginning on or after 29 June 2008 (*FSA* Policy Statement 08/6).

explain which parts of the code it departs from and the reasons for doing so. In the *FSA*'s view, a company that complies with LR9.8.6(6) (the comply or explain rule in relation to the *Combined Code*) will satisfy the requirements where a code is followed (*DTR* 7.2.4);

- a description of the main features of the company's and, where applicable, its group's internal control and risk management systems in relation to the financial reporting process (including those in relation to preparing consolidated accounts) (*DTR* 7.2.5 and 7.2.10);
- information about share capital required under the *Takeover Directive* that must be given in the directors' report in accordance with Schedule 7 to the *Large/Medium Companies Accounts Regulations 2008* (where the company is subject to those disclosure requirements – see paragraph 173) (*DTR* 7.2.6); and
- a description of the composition and operation of the company's administrative, management and supervisory bodies and their committees (*DTR* 7.27). In the *FSA*'s view, the information specified in the relevant provisions of the *Combined Code* will satisfy this requirement (*DTR* 7.2.8).

Directors' and their connected persons' interests

235 A *listed company* is required to disclose the total interests of a director and his or her connected persons as at the end of the end of the financial year (including certain information to update it as at a date not more than a month before the date of the notice of the annual general meeting) (LR9.8.6(1)). These interests cover holdings of shares in the company and derivatives or any other financial instruments relating to those shares. These are the same interests in which transactions are required to be notified to the company under *DTR* 3.1.2 (LR9.8.6A).

Annual financial statements, half-yearly reports, interim management statements and preliminary announcements

236 A company with any securities admitted to trading on a *regulated market* is required to prepare an annual financial report, comprising accounts, management report (which has very similar requirements to the directors' report) and a responsibility statement (*DTR* 4.1.5), which must be published within four months of the year end (see *DTR* 6 and List!14 and List!18[40] for requirements and guidance for publication). For *listed companies*, there are some additional minor content requirements in the *Listing Rules*.

237 A company with shares or debt admitted to trading on a *regulated market* is (subject to certain exceptions) required to prepare a half-yearly report which sets out specific information relating to the company's activities and profit and loss during the relevant 6-month period. The half-yearly report must be published within 2 months of the end of the period (*DTR* 4.2, and see *DTR* 6 and List!14 and List!16[41] for requirements and guidance for publication). It should include a condensed set of financial statements (in

[40] Available on the *FSA* website.
[41] Available on the *FSA* website.

accordance with IAS 34[42]) an interim management report and responsibility statements. In addition (where the traded securities are shares), approximately at the end of the first and third quarter there should be an interim management statement. No financial statements are required but some companies, particularly those with US shareholders, provide quarterly interim statements.

238 *Exchange-regulated market*s may have their own disclosure rules. For example, the *AIM* rules require publication of *annual accounts and reports* within 6 months and half-yearly reports within 120 days for companies traded on *AIM*.

False or misleading statements in listed companies' accounts and reports

239 The *FRRP*'s[43] powers to review and investigate for compliance with reporting requirements (see paragraph 217 *et seq* above) extend to the half yearly reports issued pursuant to the *DTR* (*2004 Act*, section 14). In its capacity as the prescribed body, the *FRRP* has to report any findings on those companies that it has investigated to the *FSA* for action by the *FSA* against the offending company.

240 *FSMA2000* provides that UK incorporated public companies that have any of their securities traded on a *regulated market* that make false or misleading statements in their periodic financial information (*FSMA2000*, section 90A(2)), or which omit matters which are required to be included in such information, will be liable to compensate investors who have suffered loss as a result of such default. The periodic financial information concerned is a company's *annual accounts*, half yearly reports or interim management statements required by the *DTR* and any mandatory or voluntary preliminary statements of results made under *Listing Rule* 9.7 or 9.7A respectively.

241 The *listed company* is liable to pay compensation to a person that has acquired any of its securities and has suffered a loss on them as a result of any untrue or misleading statements in the publications noted above, or as a result of an omission of a matter required to be included in the relevant publication (see paragraphs 57 to 59 above).

Part 3: Other Financial Responsibilities

242 As well as directors' general duties discussed in part 1 of this statement and their specific duties in relation to accounts and reports discussed in part 2,

[42] For those companies not preparing consolidated accounts, similar provisions to IAS 34 apply via specific provisions in the *DTR*s that link to *ASB* guidance.

[43] The *FRRP*'s appointment as the prescribed body under section 14(1) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 has been reaffirmed by The Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008 (SI 2008/623).

there are other areas of the law that have a financial aspect for directors. In this part 3 of this statement (paragraphs 243 to 313) there follows an overview in relation to annual returns, matters to do with share capital including its issue to the public, and takeovers, regulated financial services activities, taxation, inspections and investigations and the winding up of a company.

Responsibilities of directors of holding or subsidiary companies

243 A subsidiary company's directors should not act in accordance with the instructions of the directors of the holding company unless they are satisfied that the act that is required to be done is prudent, will promote the success of the subsidiary and is in the interests of the subsidiary. To act blindly in accordance with instructions will expose those directors to liability in respect of breach of duty as well as wrongful trading (see paragraphs 310 *et seq*). In addition, the directors of the holding company, and indeed the holding company itself, may be deemed to be shadow directors of the subsidiary and thus may be liable to an action for wrongful trading if the subsidiary goes into liquidation. Again, it is important that all instructions given by the holding company are fully minuted and that legal advice is sought where appropriate.

Annual return

244 All companies are required to deliver to the Registrar of Companies an annual return (Companies Act 2006, section 854(1)). The return has to be authenticated in a manner required by the Registrar of Companies (Companies Act 2006, section 1068) and depends on whether the return is delivered electronically or in hard copy. If it is delivered electronically, the return has to be authenticated by a means of a password provided by Companies House. In the latter case, it has to be signed by a director or the company secretary. The return must be delivered within 28 days of the return date' and must contain the prescribed information (Companies Act 2006, sections 855, 856, 857 or 858). Reference should also be made to the Companies Act 2006 (Annual Return and Service Addresses) Regulations. In particular, the annual return of companies with share capital must include a statement of capital (Companies Act 2006, section 856(1)).

245 Where a company has taken advantage of the exemption to omit information from its *annual accounts* on certain subsidiaries, joint ventures and associates, the full information (including that disclosed in the notes to the *annual accounts* and the information excluded from those accounts) must be annexed to the company's next annual return. This return is the return delivered to the Registrar after the *annual accounts* in question have been approved under section 414 of the Companies Act 2006. The *annual accounts* must contain a statement that the information is given only in respect of the undertakings whose results or financial position, in the opinion of the directors, principally affected the figures shown in the *annual accounts* (including those undertakings excluded from consolidation) (Companies Act 2006, section 410(2)).

246 A company's 'return date' is the anniversary of the company's incorporation. However, the annual return can be made up to a date earlier

than the return date, which then becomes the annual return date for future returns (Companies Act 2006, section 854).

247 Failure to observe these provisions will make the company and every director, company secretary (where applicable) and every other officer liable to fines and a criminal conviction, unless the relevant director or secretary shows that he took all reasonable steps to avoid the commission or continuation of the offence. Where a public company is late in delivering its annual return, the Registrar may write to its directors at their home addresses (even if overseas) reminding them of their liability to prosecution.

Shares and dividends

Share issues

248 The directors of a private company which has only one class of shares may allot shares of that class (or grant rights to subscribe for, or convert any security into, such shares) except to the extent that they are prohibited by the company's *Articles* (Companies Act 2006, section 550). In other cases (including public companies), the directors may only allot shares (or grant such rights) if they are authorised to do so by the company's *Articles* or by resolution of the company. The authorisation may be general or specific but must state the maximum number of shares that may be allotted under it. It must state the date on which it will expire, which must not be more than five years from the date the resolution was passed (or the date of incorporation where the authorisation was contained in the *Articles* on incorporation) (Companies Act 2006, section 551).

249 If it is proposed to make a new issue of shares for cash the existing shareholders will have certain statutory rights of pre-emption, but these rights can be excluded or disapplied (Companies Act 2006, sections 561 to 577). In exercising their powers to allot shares, as with all fiduciary powers, they must only do so for proper purposes.[44]

250 A company's ability to promote a share issue is restricted under the rules on financial promotion. The restriction takes the form of a bar on communicating an invitation or inducement to engage in investment activity in the course of business, unless either done by an authorised person or approved by an authorised person (*FSMA2000,* section 21). There are many exemptions to this general bar; reference to the Financial Services and Markets Act (Financial Promotion) Order, SI 2005/1529, will give the detailed conditions on making use of these exemptions.

251 Payment for shares may be in cash or non-cash consideration, including goodwill and know-how (Companies Act 2006, section 582). However, a public company may not accept, in payment for its shares, an undertaking by a person to do work or perform services for the company or any other person

[44] *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821.

(Companies Act 2006, section 585). Where a public company accepts non-cash consideration, (subject to certain exceptions) an expert must value the consideration and report on it (Companies Act 2006, sections 593 and 1150). Further, there is a prohibition in relation to all companies on the allotment of shares at a discount to their nominal value (Companies Act 2006, section 580). Shares of a public company may not be allotted except as paid up to at least one quarter of the nominal value and the whole of the premium (Companies Act 2006, section 586). See also paragraph 266 below for minimum capital requirements.

Financial assistance

252 The general rule is that it is not lawful for a public company or its subsidiary (whether public or private) to give financial assistance, directly or indirectly, for the purpose of the acquisition of shares in the public company, or for the purpose of reducing or discharging a liability incurred by any person for the purpose of such an acquisition. Reducing or discharging such a liability is defined to include wholly or partly restoring the person's financial position to what it was before the acquisition took place. Thus the prohibition is on the provision of financial assistance before, at the same time as, or after the acquisition takes place. Financial assistance is widely defined and includes such things as gifts, guarantees and loans (Companies Act 2006, sections 677 and 678).

253 It is also not lawful for a public company to give financial assistance, directly or indirectly, for the purpose of the acquisition of shares in its private holding company (Companies Act 2006, section 679).

254 There are exceptions to these general prohibitions on providing financial assistance by public companies and their subsidiary companies. For example: distributions by way of dividend lawfully made; financial assistance for the purposes of an employees' share scheme; loans to employees other than directors for the purpose of acquiring shares in the company; and money lending where this is in the ordinary course of business of the company (Companies Act 2006, sections 681 and 682). Any company, acting in good faith, may give financial assistance if its principal purpose is not to give financial assistance for the purpose of the acquisition of its own or a holding company's shares or to reduce or discharge such a liability, or if the giving of the financial assistance for that purpose or the reduction or discharge of such liability is only an incidental part of a larger purpose of the company (Companies Act 1985, sections 678 and 679), however it is notoriously difficult to come within these exceptions.[45] Sections 677 to 683 of the *Act* only apply to UK public companies and their UK subsidiary companies, and so they do not prohibit a foreign subsidiary from giving financial assistance for the acquisition of shares in its UK holding company (although the UK holding company will be commiting an offence if it procures the financial

[45] However, note the relatively restrictive interpretation of this provision by the House of Lords in *Brady v. Brady* [1989] 1 AC 755.

assistance by the subsidiary, or if it indirectly provides financial assistance by, for example, hiving down an asset to be used to finance the acquisition of the holding company's shares).[46]

255 A significant change made by the Companies Act 2006 is that it repealed the statutory prohibition on private companies giving financial assistance for the purchase of their own shares. The 'whitewash' procedure for private companies under section 155 to 158 of *the 1985 Act* (which permitted financial assistance to be given subject to safeguards including a statutory declaration by the directors and a report by the auditors) therefore became redundant and was also repealed. However, in some circumstances, it may still be unlawful for a private company to give financial assistance for the acquisition of its own shares under common law. This would be so if, for example, the financial assistance amounted to an unlawful reduction of capital.[47] For example, this might arise if a company makes a gift (or a loan which is unlikely to be repaid) to a shareholder with which to purchase further shares in the company and the company does not have sufficient distributable reserves to cover the payment. [48]

Acquisition of own shares

256 Companies may acquire their own shares provided that they meet certain conditions. The conditions relate to procedure and to the funds out of which the acquisition can be made. A company may acquire its own shares either by redemption or purchase provided this is not restricted by the *Articles* or, for public companies wishing to issue redeemable shares, provided such issue is authorised by its *Articles* (Companies Act 2006, sections 684 and 690).

257 When a company is considering acquiring its own shares, it must follow a detailed timetable of action which depends, in general, on whether or not the shares are to be acquired on a *recognised investment exchange* (Companies Act 2006, sections 693 to 701). The aim of the rules is to ensure that the interests of shareholders and creditors are protected.

258 The funds available for the acquisition must be from distributable profits or the proceeds of a fresh issue of shares made for the purposes of the acquisition. Special rules designed to protect the company's capital relate to the acquisition of shares at a premium (Companies Act 2006, sections 687 and 692).

259 However, a private company may acquire its own shares out of capital unless prohibited by its *Articles* (Companies Act 2006, sections 709 to 723). The provisions are designed to ensure that publicity is given to the payment and that the interests of creditors and shareholders are protected.

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[46] *Arab Bank plc v Mercantile Holdings Ltd* [1994] Ch 71.

[47] See, for example, *Trevor v. Whitworth* [1887] 12 AC 409, HL.

[48] See Schedule 4, paragraph 51 of the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495 and paragraph 7 of the explanatory memorandum to that Order.

260 When a company acquires its own shares they are thereby cancelled except in the case of treasury shares (see paragraph 265 below) (Companies Act 2006, sections 688 and 706).

Capital reductions

261 A company may reduce its share capital, or share premium, capital redemption reserve or share redenomination reserve, in any way by special resolution with the confirmation of the court (Companies Act 2006, sections 283, 641 and 645 to 651).

262 A private company may also reduce its share capital, or share premium, capital redemption reserve or share redenomination reserve, by special resolution supported by a solvency statement. The solvency statement must be made by each of the directors in accordance with prescribed requirements which require consideration of the assets and liabilities of the company at the date of the statement and a forward looking test concerning the company's ability to pay its debt as they fall due within twelve months (Companies Act 2006, sections 642 to 644).

263 An unlimited private company may reduce its share capital in any way without leave of the court provided the necessary power is contained in its *Articles*[49]. However, the directors should have regard to those matters to which under the common law directors of a limited liability company will have to have regard.

264 A capital reduction may involve payment immediately or on deferred terms to shareholders, or may result in a credit to a reserve. (An immediate payment or one made on a deferred terms basis does not fall within the distribution rules of Part 23 of the *Act*.) Regulations made under section 654 of the *2006 Act*[50] provide that, subject to anything to the contrary in the court order, the resolution for the reduction of capital or the company's *Articles,* a reserve arising (including a reserve arising on a reduction that occurred prior to the commencement of the *2006 Act*) is to be treated as a realised profit and therefore, subject to the normal rules on distributions in Part 23 of the *Act* (see paragraphs 269 to 271 below), distributable.

Treasury shares

265 The *Act* allows certain public companies, that purchase their own shares out of distributable profits, the option of holding them as 'treasury shares' for sale at a later date. They may also be transferred for the purposes of, or pursuant to, an employee share scheme. Only 'qualifying shares' may be held in treasury. These are, broadly, shares that are included in the *Official List* or officially listed in another EEA state, or traded on *AIM*. There are detailed provisions that apply to treasury shares. In particular, if they are reissued at

[49] *Re Borough Commercial and Building Society* [1893] 2 Ch 242. For an example article, see regulation 4(e) of *Table E.*

[50] The Companies (Reduction of Share Capital) Order 2008, SI 2008/1915.

more than their purchase price, the excess must be transferred to share premium account (Companies Act 2006. sections 724 to 732).

Capital requirements

266 To do business or exercise any borrowing powers[51], a public company must satisfy various conditions, one of which is that its allotted share capital must be at least £50,000 (or the 'prescribed euro equivalent'[52]) which have to be at least a quarter paid up (Companies Act 2006, sections 586 and 761 to 767). If the nominal value of the company's allotted share capital falls below that minimum amount, the company will have to re-register as private (Companies Act 2006, sections 650 and 662).

267 If a public company's net assets fall to half or less of the amount of its called-up share capital, its directors are under a duty to convene a general meeting of the company. The directors have 28 days, from the earliest day on which the fact is known to one of their number, in which to convene the meeting and the meeting must take place within 56 days of that day (Companies Act 2006, section 656).

268 There are no provisions specifying what action should be taken by the meeting; this will be for the directors to recommend. They should, however, bear in mind the provisions of the *IA86* and the *2006 Act* with regard to fraudulent and wrongful trading (*IA86*, sections 213 and 214, Companies Act 2006, section 993) (see paragraphs 296, 298 and 309 to 312 below).

Dividends

269 A company's *Articles* will usually provide that the members may declare dividends by ordinary resolution. A dividend must not be declared in this way unless the directors have made a recommendation as to its amount. The dividend must not exceed the amount recommended by the directors. The *Articles* will usually also provide that the directors may decide to pay dividends on their own authority (usually called 'interim dividends'). These do not require approval by ordinary resolution (*Table A*, regulations 102 and 103). In paying a dividend, or making any other distribution, only profits available for the purpose may be used. The profits of a company so available are defined as 'its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or re-organisation of capital duly made'. In addition, public companies must ensure that a distribution does not cause their net assets to fall below their share capital plus undistributable reserves (Companies Act 2006, sections 830 and 831).

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[51] There is no model article dealing with restrictions on borrowing capacity, nor any restriction in legislation. However, there is a strong recommendation from the Association of British Insurers (ABI) that listed companies should restrict borrowing by reference to a formula based on a multiple of capital and reserves.

[52] At the time of writing this amount is unknown. It will be prescribed in the Companies (Shares, Share Capital and Authorised Minimum) Regulations 2008, which are draft Regulations expected to be made under section 763(2) of the *Act* in 2008 and to come into force from 1 October 2009.

270 The *Act* preserves existing rules of law restricting the making of distributions (Companies Act 2006, section 851). Thus in recommending or paying a dividend directors must take note of the common law (see paragraph 26 above) which would generally preclude payment of an imprudent dividend as not being in the best interests of the company. There is also a common law rule that dividends may not be paid out of capital which would require directors to consider whether losses incurred since the 'relevant accounts' (usually the last *annual accounts*) had eroded the distributable profits.

271 Companies reporting under *IFRS*s (and UK standards such as FRS 25 and FRS 26 which are converged with *IFRS*s) are likely to find greater differences between profits reported in their accounts and those that are realised profits that are potentially available for distribution.

272 For further guidance on realised and distributable profits, members should refer to the guidance issued by the Institute jointly with ICAS, which has been consolidated and issued as TECH 01/08. An Exposure Draft containing updated draft guidance reflecting the provisions of the Companies Act 2006 was issued during 2008 as TECH 07/08 *Draft Guidance on the Determination of Realised Profits and Losses in the context of Distributions under the Companies Act 2006*[53].

Public issues, takeovers and mergers

Public issues

273 A private company must not offer any securities of the company to the public or allot or agree to allot any securities of the company with a view to their being offered to the public subsequently (Companies Act 2006, section 755). When a public company wishes to make a public issue of shares for the first time or to make a subsequent issue, there are several methods of doing so. The purpose of this statement is, however, to examine the duties placed upon directors with regard to the issue of prospectuses and similar documents, rather than to provide guidance on the methods of issue. It is important that professional advice be taken as soon as an issue is envisaged. It should also be noted that there is a restriction on financial promotion so that generally a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless the person is authorised to do so or the content is approved by someone authorised to do so (*FSMA2000*, section 21). Authorisation is dealt with by Part III of *FSMA2000*.

274 If a company wishes (a) to make a public offer of securities or (b) to apply for admission of securities to trading on a *regulated market*, it must produce a prospectus that complies with the *Prospectus Rules* in the *FSA Handbook*. *Regulated Markets* in the UK include the main market of the *LSE*, the Specialist Fund Market and the *PLUS-listed market*. The *Prospectus*

[53] Available from the ICAEW website at http//www.icaew.com/index.cfm/route/161949

Rules implement the *Prospectus Directive,* the aim of which is to standardise the disclosure requirements for public offers of securities. The *Prospectus Rules* require a prospectus to contain a declaration by the directors of the issuer that to the best of their knowledge the information contained in the prospectus is in accordance with the facts and contains no omission likely to affect its import.

275 A company that is required to produce a prospectus must obtain prior approval of its prospectus from the *FSA* (*FSMA2000*, section 85 and PR 3.1.10R).

276 *Non-regulated markets* in the UK (also known as 'exchange-regulated' markets) include *AIM*, the Professional Securities Market (although see paragraph 278 below regarding admission to this market) and the *PLUS-quoted market*. A prospectus (and *FSA* approval) is not required for admission to trading on a *non-regulated market* where there is no public offer of securities (although such markets may nevertheless still require the preparation of a document in connection with the admission). For example, a company making an application for admission to *AIM*, in circumstances where there is no public offer, will need to prepare an admission document in accordance with the requirements of the *AIM* Rules for companies.

277 Additional rules (the *Listing Rules)* apply to securities admitted to the *Official List* or in respect of which such admission is sought. Companies seeking the admission of their securities to the *Official List* must comply with the *Listing Rules* and, once officially listed, such companies then apply for admission of their securities to trading on one of the UK markets for listed securities. These include some *regulated markets*, for example, the main market of the *LSE* and the *PLUS-listed market*, and some *non-regulated market*s, for example, the Professional Securities Market.

278 When applying for Official Listing on the Professional Securities Market, which is not a *regulated market*, the *Listing Rules* require that if the issuer is not otherwise required to prepare a prospectus it must prepare and publish 'listing particulars', which must be approved by the *FSA* (*FSMA2000*, section 79) in connection with the application. There is a general duty of disclosure requiring such 'listing particulars' to contain all such information as investors may reasonably require or expect for the purposes of making an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer of securities and the rights attaching to the securities (*FSMA2000*, section 80). The *Listing Rules* specify that the listing particulars must be in a format that complies with the requirements for prospectuses as contained in the *Prospectus Rules* as if those requirements applied to the listing particulars. Listing particulars are also required in relation to certain specialist securities for which a prospectus is not required under the *Prospectus Rules.*

279 There are penalties for knowingly being concerned with a contravention of the *Listing Rules* (*FSMA2000*, section 91) and directors have a civil liability

under section 90 of *FSMA2000*. The Misrepresentation Act 1967 provides civil remedies for misrepresentation and there is a common law right to sue for negligent mis-statements where there has been a breach of a duty of care to the plaintiff. In addition, any person who knowingly or recklessly makes a false or misleading statement, promise or forecast or dishonestly conceals any material facts for the purpose of inducing another person to enter into an investment transaction or refrain from doing so, commits an offence (*FSMA2000*, section 397).

280 It is also possible to register securities in the USA and join the New York, American or NASDAQ exchanges. However, there are additional documentational requirements which have to be complied with as well as the *Prospectus Rules* together with detailed review by the SEC which can be a lengthy and detailed process. One other possibility is to offer securities in the USA under Rule 144A of the US Securities Act. Such an offer can only be made to, and shares can only be traded by, professional investors but there are no additional disclosure or registration requirements. In practice, so as to provide information that US investors expect, the prospectus will be formatted and include disclosure similar to a US registration document while complying with the *Prospectus Rules*. There will be no SEC review of a Rule 144A prospectus.

281 The directors of companies traded on markets will also need to ensure compliance with the ongoing obligations of the relevant market. For instance, there are likely to be ongoing disclosure obligations, such as requirements for the timely disclosure of new information relating to, for example, material changes from profit forecasts.

Takeovers and mergers

282 The Panel on Takeovers and Mergers has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers under the *Takeover Directive*. Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006, sections 942 to 965.

283 The Panel's main functions are to issue and administer the *Takeover Code* and to supervise and regulate takeovers and other matters to which the *Takeover Code* applies. The *Takeover Code* is designed principally to ensure that shareholders are treated fairly and equally in the same class and are not denied an opportunity to decide on the merits of a takeover, and it applies to all public companies including unquoted public companies. The Rules of the *Takeover Code* are set out as a series of general principles which directors must follow if they are involved in a takeover or merger whilst being a director of a public company being taken over or a company taking over a public company. Coverage of the *Takeover Code* includes secrecy, timing of announcements, the need for independent advice, share dealings, documents required and conduct during the offer.

284 The *Listing Rules* (LR 10) contain specific provisions relating to acquisitions, disposals and reverse takeovers. Different requirements are

imposed in different situations, depending on the size of the transaction. Transactions are classified by class, each one defined by a percentage test, and the requirements increase as each new class is triggered starting from notification and moving up to a requirement for a circular and shareholder approval.

285 Chapter 3 of Part 28 of the Companies Act 2006 (sections 974 to 991) deals with the right of an offeror to buy out a minority shareholder (a squeeze-out) and the right of a minority shareholder to be bought out by the offeror (a sell-out) once 90% of shares have been acquired. There are additional powers given to offerors that are conditional on the offeree opting in to the provisions of Chapter 2 of Part 28 of The Companies Act 2006.

Regulated activities

286 The conduct of regulated financial services activities is regulated by *FSMA2000*, which makes it an offence for any person to carry on a regulated activity unless he is authorised or exempt under Part III of *FSMA2000*. Regulated activities are extremely widely defined and include, for example, dealing in investments, accepting deposits and providing investment advice (*FSMA2000*, section 22 and Schedule 2). Any agreement in contravention of the regulated activities provisions entered into by an unauthorised person in contravention of the regulated activities provisions is unenforceable, and investors who suffer losses may be able to obtain compensation from him (*FSMA2000*, section 26). There are a number of other areas of regulated activities, pursuant to various other statutes and enforced by various other regulators, and directors need to ensure compliance as required.

Taxation

287 The duties in tax legislation, such as making tax returns and retaining records, fall mainly on the company and rarely specifically upon directors. Nevertheless, it is a director's general obligation to oversee that the company complies with relevant law. Breaches of such obligations can, in limited circumstances, result in the commital of a criminal offence by directors and others involved in such transactions.[54] Note also that in a limited number of circumstances tax and interest which remain unpaid can be assessed upon and collected from other persons, depending upon the circumstances.[55]

288 In this respect, directors are responsible for ensuring compliance with a company's tax obligations including Corporation Tax and VAT set out in the various Taxes Acts. Directors are also ultimately responsible for ensuring

[54] See section 765 of the Taxes Act 1988, which prohibits migration of companies in limited circumstances. A director who is knowingly involved in transactions which happen to breach this prohibition will commit an offence under section 766.

[55] See sections 346(2) and 347(1) of the Taxes Act 1988, sections 137(4), 139(7) and 190 of the Taxation of Chargeable Gains Act 1992, paragraph 75A(2) of Schedule 18 to the Finance Act 1998, Schedule 28 to the Finance Act 2000 and paragraph 69 of Schedule 29 to the Finance Act 2002.

appropriate accounting for Pay As You Earn and National Insurance contributions and for ensuring remittances are made on a timely basis. For those with operations overseas there are local rules that need to be complied with. In particular, the US has stringent rules concerning tax shelters and denying privacy surrounding tax advice, which need to be understood.

Inspections and Investigations

Inspection of a company's documents
289 The Secretary of State may at any time order the production of a company's documents. This power includes the right to take copies of any such documents (recorded, for example, on paper or electronically) and to require an explanation of them from any past or present officer or employee of the company and require answers to questions unrelated to the documents produced. The Secretary of State can authorize a person to start an investigation of a company. That person is known as an investigator who will have the same powers referred to above and can require a person to explain his conduct or give his opinion about something (Companies Act 1985, section 447). Any company or person who fails to comply with a requirement to produce documents or to provide an explanation of them or who impedes the entering of premises is liable to proceedings in a civil court (Companies Act 1985, section 453C). Where there are reasonable grounds for believing that documents not produced are on any premises, the Secretary of State may obtain a warrant for the entry and search of those premises (Companies Act 1985, section 448). This is one of the few parts of the Companies Act, 1985, which remains after implementation of the *2006 Act*.

Investigation of a company's affairs
290 The Secretary of State must appoint inspectors when ordered to do so by the court and may make such an appointment in a number of situations (Companies Act 1985, sections 431 and 432). The situations of particular relevance to directors are if it appears that:

(a) the business of the company is being or has been conducted with the intent of defrauding its own creditors, the creditors of any other person or for another fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members;
(b) the company was formed for a fraudulent or unlawful purpose;
(c) the promoters or officers of the company have been guilty of fraud, misfeasance or other misconduct towards the company or its members; or
(d) the company's members have not been given all the information that they might reasonably expect.

291 It is the duty of all officers and agents of the company to give inspectors all assistance which they are reasonably able to give, including the production of all documents of or relating to the company, and they may be examined on oath by the inspectors. An inspector may also require any person to produce documents relating to a matter relevant to the investigation. Any officer or agent of the company who fails to assist an inspector may be reported to the

High Court and punished as if he had been in contempt of court (Companies Act 1985, sections 434 and 436).

292 The *FSA* may appoint investigators if it appears to them that there are circumstances suggesting that there may have been a breach in the *Listing Rules* or that a person who was at the material time a director of an issuer has been knowingly concerned in a breach of the *Listing Rules* by the issuer (*FSMA2000,* section 97) or there may have been a breach of sections 83, 85 or 98 of *FSMA2000*

- registration of listing particulars (section 83)
- publication of prospectus (section 85)
- advertisements etc. in connection with listings applications (section 98).

Investigation into membership and share dealings
293 The Secretary of State has wide powers to investigate the ownership of a company whenever he thinks there is good reason to do so for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially influence its policy (Companies Act 1985, section 442).

294 If it appears to the Secretary of State that there have been breaches of the requirements concerning directors' share dealings or of the duty of directors to notify interests in shares and debentures (see paragraphs 61 *et seq* above), he may investigate in order to establish whether or not such breaches have occurred (Companies Act 1985, section 446).

FSA enforcement rules
295 The *FSA* is given an enforcement responsibility by Schedule 1 of *FSMA2000* which, amongst other things, gives the *FSA* powers to bring criminal prosecutions for insider dealing (see paragraph 63 above) and misleading statements and practices and to impose financial penalties for market abuse (see paragraph 64 above). The *FSA*'s Enforcement Manual describes the policies and procedures for the exercise of the enforcement powers given to it.

Fraudulent trading
296 Directors, as persons involved in running the company's business, will be responsible should the company trade with intent to defraud creditors if they are knowingly party to such conduct, and may be liable to a fine or imprisonment or both. Responsibility for fraudulent trading will arise whether or not the company is in the course of winding up (Companies Act 2006, section 993). In a winding up, however, the court may impose additional liabilities on those guilty of fraudulent trading (see paragraph 309 below).

Theft and Fraud Acts
297 Criminal liability is imposed for obtaining property or pecuniary advantage by deception and for false accounting. Where such an offence is committed by a company with the consent or connivance of a director or

other officer, that person will be liable as well as the company. Also, an offence will be committed by an officer of a company who, with intention of deceiving members or creditors of the company, publishes, or concurs in publishing any written statement or account which he knows is or may be misleading, false or deceptive in a material particular (including by way of omission) (Fraud Act 2006, sections 1 to 4 and 12; Theft Act 1968, sections 17 to 19; and Theft Act 1978).

Winding up (liquidation) and other forms of insolvency

298 When a company gets into financial difficulties it is important that directors take legal advice concerning their position and duties so that they avoid, amongst other things, fraudulent or wrongful trading under *IA86* sections 213 and 214, which refers to business carried on with intent to defraud creditors (see also paragraph 296 above and 309 below) or continuing to trade where there was no reasonable prospect that the company would avoid going into insolvent liquidation (see also paragraphs 310 to 312 below). Advice when a company gets into financial difficulties can also be sought from restructuring specialists who can provide turnaround advice if applicable.

Duty to co-operate

299 Where a company has entered administration, administrative receivership or liquidation (including provisional liquidation) the past and present directors of the company have a duty to co-operate with the administrator, administrative receiver or liquidator. The duty to co-operate can include providing the office holder with information or attending on him or her, and the obligations can be enforced by the court. The penalty for failure to comply without reasonable excuse is a fine and, for continued contravention, a daily default fine (*IA86*, section 235).

Duty to provide a statement of affairs

300 In a creditors' voluntary liquidation, the directors are required to prepare and verify by affidavit a statement as to the affairs of the company in a prescribed form, and to lay it before a meeting of creditors (*IA86*, section 99). In an administrative receivership the directors (and others) may be given notice requiring them to provide a sworn statement of affairs, which must be submitted within 21 days of that notice (*IA86*, section 47). Similar provisions apply to directors of a company in compulsory liquidation (*IA86*, section 131). Directors of a company in administration may be required to submit a statement of affairs within 11 days of being given notice (*IA86*, paragraphs 47 and 48, Schedule B1). If the directors of a company propose a voluntary arrangement they must provide a statement of affairs to the nominee of the arrangement (Insolvency Rules 1986, rule 1.5). Directors who fail to comply with their statutory obligations to provide a statement of affairs are (with the exception of a breach of rule 1.5) liable to a fine and in some instances, for continued contravention, to a daily default fine.

Duty to provide a declaration of solvency

301 In a members' voluntary winding up (solvent liquidation) all or the majority of the directors of the company are required to prepare and verify by

affidavit a declaration of solvency in a prescribed form. In the declaration of solvency the directors must state that they have made a full enquiry into the company's affairs and that, having done so, they have formed the opinion that the company will be able to pay its debts in full with interest within a specified period not exceeding 12 months from the date of commencement of winding up. A director making a declaration of solvency without reasonable grounds for doing so is liable to imprisonment or a fine or both. If the company is subsequently found to be unable to pay all its debts within the period prescribed, the director is deemed not to have had reasonable grounds for the opinion (*IA86*, section 89).

Duty to attend meetings in insolvency proceedings

302 In a creditors' voluntary liquidation, the directors must appoint one of their number to preside at the first meeting of creditors (*IA86*, section 98). Directors who fail to comply with their obligations under this section are liable to a fine. They may be required to attend other meetings of creditors and members in an insolvent liquidation if the liquidator sees fit (Insolvency Rules 1986, rule 4.58). Directors of a company proposing a voluntary arrangement are required to attend the creditors' and members' meetings convened to consider the proposals and in some instances former directors may also be required to attend (Insolvency Rules 1986, Rule 1.16).

Reports on directors

303 An administrative receiver, administrator or liquidator of an insolvent company has a duty to submit a return or report to the Secretary of State in respect of every person who was a director or shadow director of the company at any time in the three years before the insolvency process started. A report, rather than a return, is submitted if the insolvency practitioner is of the opinion that the conduct of the director or shadow director is such that it makes him or her unfit to be concerned in the management of a company. On receipt of the report the Secretary of State may decide to make an application to the court for a disqualification order (*CDDA86*, sections 6 to 9 and the Insolvent Companies (Reports on Conduct of Directors) Rules 1996). In deciding whether to make a disqualification order, the court will have regard to the matters listed in Schedule 1 of the *CDDA86*.

Additional reporting in an insolvent winding up or voluntary arrangement

304 If during the course of an insolvent winding up it appears that any past or present director has been guilty of any criminal offence in relation to the company, the liquidator has a duty to report the matter to the official receiver or the Secretary of State (*IA86*, section 218). This may lead to an investigation by the Secretary of State, in which case the directors concerned are under the same obligation to produce documents or to provide information as would be the case in a Companies Act investigation (*IA86*, section 219).

305 Similar provisions apply if a moratorium has been obtained for a company under section 1A of the *IA86* or a voluntary arrangement has taken effect under section 4A or paragraph 36 of Schedule A1 to the *Act* (*IA86*, section 7A).

Liability for malpractice before or during winding up
306 Directors or former directors can be held to be criminally liable for certain types of malpractice under the *IA86* if they are found to have committed a criminal offence either before or during the liquidation. The types of malpractice giving rise to criminal penalties are as follows:

a. fraud in anticipation of, or after, winding up (*IA86*, section 206)
b. transactions in fraud of creditors (*IA86*, section 207)
c. misconduct in the course of winding up (*IA86*, section 208)
d. falsification of company books (*IA86*, section 209)
e. material omissions from any statement relating to the company's affairs (*IA86*, section 210)
f. false representations to creditors (*IA86*, section 211)
g. acting as a director or being involved in any way in the promotion, formation or management of any company or business carried on under a prohibited name (*IA86*, section 216). See also the civil penalties at paragraph 313 below.

The *2006 Act* also contains a fraudulent trading criminal offence for knowingly being a party to the carrying on of business with intent to defraud creditors or any other person, or for any fraudulent purpose (Companies Act 2006, section 993).

In each case the penalty is imprisonment or a fine or both.

307 There are also types of malpractice which (unless mentioned at paragraph 306 above) are not criminal offences but give rise to a civil liability to pay compensation. They are described in paragraphs 308 to 313 below.

Misapplication of company money or property or other breach of duty or trust
308 The liquidator, official receiver or any creditor or contributory of a company being wound up may apply to the court for the examination of a director, officer or other person concerned in the management of the company, past or present, if it appears that he or she has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any duty in relation to the company. The court may then order a delinquent director to repay or restore company money or property or contribute such a sum to the company's assets by way of compensation as the court thinks just (*IA86*, section 212).

Fraudulent trading
309 The liquidator can apply to the court for a declaration that persons knowingly party to trading with intent to defraud creditors are to be liable to make such contribution to the company's assets as the court thinks proper (*IA86*, section 213) (see also paragraph 296 above). The court may also make a disqualification order (*CDDA86*, section 4).

Wrongful trading
310 Where the company is in the course of winding up, the provisions of section 214 of the *IA86* regarding wrongful trading may also apply. An action

for wrongful trading may be brought against a director (or a former director) if at some time before the commencement of the winding up of the company that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into an insolvent liquidation. In section 214 of the *IA86*, director includes shadow director. Although an action cannot be commenced until a company is in insolvent liquidation, it is based on events and conclusions drawn prior to the commencement of the winding up. Directors should have regard to the implications of section 214, and ensure that the accounting records kept by the company are sufficient to enable them to draw their own conclusions about the position of the company (see also paragraph 71 above). The liability for wrongful trading is a personal one, and a director or former director may be directed to make such contribution to the company's assets as is felt proper by the court (*IA86*, section 214), and is also liable to disqualification (*CDDA86*, section 10).

311 The only defence available to a director is that, from the time when he knew or should have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, he took every step that he should have taken towards minimising potential losses to creditors. In assessing the conduct of the director, the court must assume that the facts that the director ought to have known or ascertained, the conclusions that he ought to have reached and the steps that he ought to have taken were those that would have been known or ascertained or reached or taken by a reasonably diligent person with both the general knowledge, skill and experience which the director actually has and the general knowledge, skill and experience which could reasonably be expected of a person carrying out the same function as the director carried out in relation to the company (*IA86*, section 214).

312 Where there is a real possibility of an insolvent liquidation the directors should consult a licensed insolvency practitioner and/or take legal advice (see paragraph 26). Further it should be remembered that directors are required to maintain minutes of all proceedings at meetings of the directors (Companies Act 2006, section 248). In these circumstances it is particularly important that a full record is kept of all decisions taken and the reasons for them. If the directors disagree on material questions the dissentients should ensure that their views are clearly recorded as well and they may need to consider taking independent legal advice about their position.

Carrying on a business under a prohibited name

313 Any person who was a director during the period of 12 months prior to commencement of its insolvent liquidation is prohibited, for a period of 5 years from the date of that commencement, from being involved in any way with any company or business carried on with the same name as that by which the company in liquidation was known within that 12-month period, or one so similar as to suggest an association (*IA86*, section 216). There are three exceptions to this general prohibition. The first exception occurs where the new company or business is using the name under arrangements made with the liquidator, administrator, administrative receiver or supervisor of the

insolvent company and the required notice has been given to creditors (Insolvency Rules 1986, rule 4.228). The second exception applies where the director has been granted leave by the Court to use the prohibited name (Insolvency Rules 1986, rule 4.229) and the third occurs if the new company had been known by the name throughout the period of 12 months leading up to the date of liquidation of the insolvent company (Insolvency Rules 1986, rule 4.230). Unless one of the three exceptions applies, contravention of section 216 of the *IA86* will lead to the director being personally liable for the debts of the new company incurred during the period of his or her involvement (*IA86*, section 217).

APPENDIX A

Small and medium-sized companies (Size and Eligibility) Criteria

A1 For a company to be within the small companies regime, or to be able to use the exemption for medium-sized companies, it must meet both the relevant size test (small or medium) (see paragraph A3 *et seq*) and the eligibility test (see paragraph A11 *et seq*).

A2 The small companies exemption in relation to the directors' report (see paragraph 123) requires the company to meet the small size test and to meet the eligibility test only in relation to itself (i.e. not its wider group).

Small and medium-sized companies – size qualifications

A3 A company qualifies as a small company in a financial year if for that year it satisfies two or more of the following conditions:

(a) its turnover does not exceed £6.5 million;
(b) its balance sheet total does not exceed £3.26 million;
(c) the average number of its employees does not exceed 50.

(Companies Act 2006, section 382).

A4 A company qualifies as a medium-sized company in a financial year if for that year two or more of the following conditions are satisfied:

(a) its turnover does not exceed £25.9 million;
(b) its balance sheet total does not exceed £12.9 million;
(c) the average number of its employees does not exceed 250.

(Companies Act 2006, section 465).

A5 A company qualifies as small or medium-sized in relation to a financial year if the qualifying conditions are met:

(a) in the case of the company's first financial year, in that year; and
(b) in the case of any subsequent financial year:

(i) in that year and the preceding year;
(ii) in that year and the company qualified as small in relation to the preceding financial year; or
(iii) were met in the preceding financial year and the company qualified as small in relation to that year.

(Companies Act 2006, sections 382 and 465.)

A6 In practice, this means that a company is small or is medium-sized if it meets the size tests for 2 consecutive years and it is not small or is medium-sized if it fails the size tests in 2 consecutive years.

Small and medium-sized groups – size qualifications

A7 A *parent company* can only qualify as a small company in relation to a financial year if the group headed by it qualifies as a small group, and can only qualify as a medium-sized company in a financial year if the group qualifies as a medium-sized group (Companies Act 2006, sections 383 and 466).

A8 A small group is one which satisfies two or more of the following conditions:

(a) its turnover does not exceed £6.5 million net or £7.8 million gross;
(b) its balance sheet total does not exceed £3.26 million net or £3.9 million gross;
(c) the average number of its employees does not exceed 50.

(Companies Act 2006, section 383(4).)

A9 A medium-sized group is a group that satisfies two or more of the following conditions:

(a) its turnover does not exceed £22.8 million net or £27.36 million gross;
(b) its balance sheet total does not exceed £12.9 million net or £15.5 million gross;
(c) the average number of its employees does not exceed 250.

(Companies Act 2006, section 466(4).)

A10 In the group figures:

(a) 'net' means after any set-offs and other adjustments made to eliminate group transactions (i.e. elimination of intra-group turnover, balances and profit or losses) as required by either in the case of:
(i) *Companies Act accounts* in accordance with Schedule 6 of the *Small Companies Accounts Regulations 2008* or Schedule 6 of the *Large/Medium Companies Accounts Regulations 2008* respectively; or
(ii) *IAS accounts* in accordance with international accounting standards.

(b) 'gross' means without those set offs and other adjustments.

A group may satisfy the relevant requirements on the basis of either the net or the gross figure.

(Companies Act 2006, sections 383(6) and 466(6).)

Small and medium-sized companies – eligibility criteria

A11 Once a company has qualified as small or medium according to the application of the size tests (see paragraph A3), it must address also the eligibility criteria.

A12 The small companies regime is not available to a company that is either:

- itself a public company, banking or authorised insurance company, e-money issuer, MiFID investment firm or UCITS management company (as defined by *FSMA2000*), or carrying on insurance market activity; or
- is a member of a group that includes a public company, a body corporate (other than a company) with shares admitted to trading on a *regulated market*, a small company that is a banking or authorised insurance company, an e-money issuer, a MiFID investment firm or UCITS management company (as defined by *FSMA2000*), a non-small company with a Part 4 permission under *FSMA2000* to carry on regulated activity, or a person carrying on insurance market activity.

A13 Exemptions for medium-sized companies are not available to a company that is either:

- itself a public company, has permission under Part 4 of *FSMA2000* to carry on regulated activity, or carries on insurance market activity; or
- is a member of a group that includes a public company, a body corporate (other than a company) with shares admitted to trading on a *regulated market*, a small company that is a banking or authorised insurance company, an e-money issuer, a MiFID investment firm or UCITS management company (as defined by *FSMA2000*), a non-small company with a Part 4 permission under *FSMA2000* to carry on regulated activity, or a person carrying on insurance market activity.

APPENDIX B

Table of Commencement Dates for Companies Act 2006 taken from the Final Implementation Timetable published by BERR in December 2007

The attached table is intended to provide guidance on the commencement timetable for the Companies Act 2006. It cannot however provide a definitive guide: you may therefore also wish to refer to the relevant commencement order. (The first six commencement orders are published on the OPSI website, with links from this website.)

The Government announced details of the final commencement timetable for the 2006 Act by Written Statement on 13 December 2007. The Statement is available as a link from the BERR website.

Unless otherwise stated in the table, provisions relating to accounts and reports have been commenced for financial years beginning on or after the relevant date (e.g. paragraph 43 in Schedule 3 to the Third Commencement Order provides that 'Section 417 of the Companies Act 2006 (contents of directors' report: business review) applies to directors' reports for financial years beginning on or after 1st October 2007').

The commencement of powers to make orders or regulations by statutory instrument does not necessarily mean that the Government intends to use the powers as part of its implementation of the Act.

Some provisions (e.g. definitions) may initially be brought into force only so far as necessary for the purposes of provisions which are being commenced before October 2009.

Part	Title	Date
1	**General introductory provisions (1–6)**	**1 October 2009**
	Section 2	6 April 2007
2	**Company formation (7–16)**	**1 October 2009**
3	**A company's constitution (17–38)**	**1 October 2007**
	Sections 29 & 30	1 October 2009
4	**A company's capacity and related matters (39–52)**	**1 October 2009**
	Section 44	6 April 2008
5	**A company's name (53–85)**	**1 October 2009**
	Sections 69 to 74	1 October 2008
	Sections 82 to 85	1 October 2008
6	**A company's registered office (86–88)**	**1 October 2009**
7	**Re-registration as a means of altering a company's status (89–111)**	**1 October 2009**
8	**A company's members (112–144)**	**1 October 2009**
	Sections 116 to 119	1 October 2007
	Sections 121 & 128	6 April 2008
9	**Exercise of members' rights (145–153)**	**1 October 2007**
10	**A company's directors (154–259)**	**1 October 2007**
	Sections 155 to 159	1 October 2008
	Sections 162 to 167	1 October 2009
	Sections 175 to 177	1 October 2008
	Sections 180(1), (2)(in part), & (4)(b), and 181(2) & (3)	1 October 2008
	Sections 182 to 187	1 October 2008
	Sections 240 to 247	1 October 2009

11	**Derivative claims and proceedings by members (260–269)**	**1 October 2007**
12	**Company secretaries (270–280)** Section 270(3)(b)(ii) Sections 275 to 279	**6 April 2008** 1 October 2009 1 October 2009
13	**Resolutions and meetings (281–361)** Sections 308 & 309 Section 333 Sections 327(2)(c) & 330(6)(c) are not being commenced for the time being.	**1 October 2007** 20 January 2007 20 January 2007
14	**Control of political donations and expenditure (362–379)** Provisions relating to independent election candidates Part 14 comes into force in Northern Ireland on 1 November 2007, except for provisions relating to independent election candidates.	**1 October 2007** 1 October 2008
15	**Accounts and reports (380–474)** Section 417 Section 463 (for reports and statements first sent to members and others after this date)	**6 April 2008** 1 October 2007 20 January 2007
16	**Audit (475–539)** Sections 485 to 488	**6 April 2008** 1 October 2007
17	**A company's share capital (540–657)** Section 544 Sections 641(1)(a) & (2)–(6), 642–644, 652(1) and (3) & 654	**1 October 2009** 6 April 2008 1 October 2008
18	**Acquisition by limited company of its own shares (658–737)** Repeal of the restrictions under the Companies Act 1985 on financial assistance for acquisition of shares in private companies, including the "whitewash" procedure	**1 October 2009** 1 October 2008
19	**Debentures (738–754)**	**6 April 2008**
20	**Private and public companies (755–767)**	**6 April 2008**
21	**Certification and transfer of securities (768–790)**	**6 April 2008**
22	**Information about interests in a company's shares (791–828)** Sections 811(4), 812, 814	**20 January 2007** 6 April 2008
23	**Distributions (829–853)**	**6 April 2008**
24	**A company's annual return (854–859)**	**1 October 2009**
25	**Company charges (860–894)**	**1 October 2009**
26	**Arrangements and reconstructions (895–901)**	**6 April 2008**
27	**Mergers and divisions of public companies (902–941)**	**6 April 2008**

28	**Takeovers etc (942–992)**	**6 April 2007**
29	**Fraudulent trading (993)**	**1 October 2007**
30	**Protection of members against unfair prejudice (994–999)**	**1 October 2007**
31	**Dissolution and restoration to the register (1000–1034)**	**1 October 2009**
32	**Company investigations: amendments (1035–1039)**	**1 October 2007**
33	**UK companies not formed under the Companies Acts (1040–1043)**	**1 October 2009**
	Section 1043	6 April 2007
34	**Overseas companies (1044–1059)**	**1 October 2009**
35	**The registrar of companies (1060–1120)**	**1 October 2009**
	Section 1063 (in respect of England, Wales and Scotland)	6 April 2007
	Section 1068(5)	1 January 2007
	Sections 1077 to 1080	1 January 2007
	Sections 1085 to 1092	1 January 2007
	Sections 1102 to 1107	1 January 2007
	Section 1111	1 January 2007
36	**Offences under the Companies Acts (1121–1133)**	**With relevant provisions**
	Section 1124	1 October 2007
	Section 1126	6 April 2008
37	**Companies: supplementary provisions (1134–1157)**	**With relevant provisions**
	Section 1137(1), (4), (5)(b) and (6)	30 September 2007
	Sections 1143 to 1148	20 January 2007
	Section 1157	1 October 2008
38	**Companies: interpretation (1158–1174)**	**With relevant provisions**
	Sections 1161, 1162, 1164, 1165, 1169 and 1172	6 April 2008
	Section 1167	30 September 2007
	Section 1170	6 April 2007
39	**Companies: minor amendments (1175–1181)**	**6 April 2007**
	Section 1175 (only for Part 1 of Schedule 9)	1 April 2008
	Sections 1180	1 October 2009
	Section 1181	1 October 2009
40	**Company directors: foreign disqualification etc (1182–1191)**	**1 October 2009**
41	**Business names (1192–1208)**	**1 October 2009**
42	**Statutory auditors (1209–1264)**	**6 April 2008**
	Sections 1242 to 1244	29 June 2008

43	**Transparency obligations and related matters (1265–1273)**	**Royal Assent**
44	**Miscellaneous provisions (1274–1283)**	
	Sections 1274 and 1276	Royal Assent
	Section 1275	1 October 2009
	Sections 1277 to 1280	1 October 2008
	Section 1281	6 April 2007
	Section 1282	6 April 2008
	Section 1283	1 October 2009
45	**Northern Ireland (1284–1287)**	**With relevant provisions**
46	**General supplementary provisions (1288–1297)**	**Royal Assent**
	Section 1295	With relevant provisions
47	**Final provisions (1298–1300)**	**Royal Assent**

Department for Business, Enterprise and Regulatory Reform.
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GLOSSARY

All section numbers are references to the Companies Act 2006 unless otherwise stated. Terms printed in italics in the glossary indicates a separate entry under that heading.

the 1985 Act	the Companies Act 1985
the 2004 Act	the Companies (Audit, Investigation and Community Enterprise) Act 2004
the 2006 Act, CA 2006 or the Act	the Companies Act 2006
accounting reference date	The accounting reference date of a company incorporated in Great Britain on or after 1st April 1996 and before the commencement of this Act, or after the commencement of this Act, is the last day of the month in which the anniversary of its incorporation falls (*CA 2006,* s.191)
accounting reference period	Accounting reference periods are usually successive periods of twelve months beginning immediately after the end of the previous accounting reference period and ending with its *accounting reference date* (*CA 2006,* s.391)
accounts meeting	The general meeting of the company before which the company's *annual accounts* for the financial year are to be laid

AIM	Alternative Investment Market of the London Stock Exchange
annual accounts	(a) company's *individual accounts* for that year subject to the omission of the individual profit and loss account in certain cases (*CA 2006,* ss.394 and 408), and (b) any *group accounts* prepared by the company for that year (*CA 2006,* ss.398 and 399) (*CA 2006,* s.471(1))
annual accounts and reports	the *annual accounts* together with the directors' report, the auditor's report and, for *quoted companies*, the directors' remuneration report (*CA 2006*, s.471)
Articles	Articles of Association
ASB	Accounting Standards Board
associated body corporate	For the purposes of *CA 2006*, Part 10: (a) bodies corporate are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate, and (b) companies are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate. (*CA 2006*, s.256) Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes.
BERR	Department for Business, Enterprise & Regulatory Reform
Combined Code	The Combined Code on Corporate Governance (June 2008)
Companies Act accounts	Accounts prepared in accordance with the form and content requirements of regulations made under the *2006 Act*, which includes compliance with accounting standards and related literature issued by the *ASB* (UK GAAP) by virtue of the analysis summarised at paragraph 85
CDDA86	Company Director Disqualification Act 1986
company associated with a public limited company	A subsidiary or parent company of a public company, or a sister subsidiary of a public company (where both the company and the public company are subsidiaries of a third company). Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes.
DTI	Department of Trade and Industry (since June 2007, replaced by the Department for Business, Enterprise & Regulatory Reform)

DTRs	Disclosure and Transparency Rules
entitled persons	shareholders, debenture holders and other persons entitled to receive notice of general meetings, including • any person nominated by a member under a power in the *Articles* (*CA 2006*, s.145) and • for *traded companies*, those persons that have been nominated by registered shareholders to enjoy information rights, such as indirect investors whose investments are held through intermediaries (*CA 2006*, s.146)
EU-adopted IFRS	the international accounting standards, within the meaning of the *IAS Regulation* (including IFRS, IAS, IFRICs and SICs), adopted from time to time by the European Commission in accordance with that Regulation.
Exchange-regulated (or non-regulated) market	A financial instruments market that is not a *regulated market.*
FRC	Financial Reporting Council
FRRP	Financial Reporting Review Panel
FSA	Financial Services Authority
FSA Handbook	A publication issued by the *FSA*, which sets out all the rules and guidance made by the *FSA* under *FSMA2000*
FSMA2000	Financial Services and Markets Act 2000
Group accounts	Consolidated accounts comprising a consolidated balance sheet and a consolidated profit and loss account, in each case relating to the *parent company* and its *subsidiary undertakings* (*CA 2006*, s.404)
IA86	Insolvency Act 1986
IAS accounts	Accounts prepared in accordance with *EU-adopted IFRS*
IAS Regulation	EC Regulation 1606/2002 of the European Parliament and of the Council on the application of international accounting standards
IFRS	International Financial Reporting Standards
Individual accounts	The accounts that directors of every company are required prepare for the company for each of its financial years (*CA 2006,* s.394)
Large/Medium Companies Accounts Regulations 2008	The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410
Listing Rules	The Listing Rules issued by the *FSA*
Listed company	A company with securities admitted to the *Official List* maintained by the *FSA* in accordance with section 74 of *FSMA2000*

LSE	the London Stock Exchange
Memorandum	Memorandum of Association
Model Code	The Model Code on directors' dealings in securities set out in LR 9 Annex 1 R
Non-regulated market	See *exchange-regulated market*
Official List	the Official List, maintained by the *FSA*, which comprises shares with a primary listing on the main market of the *LSE*, shares listed on the professional securities market and shares listed on the *PLUS-listed market*.
Parent company (or parent undertaking)	An undertaking that, in relation to another undertaking (a 'subsidiary undertaking'): (a) holds a majority of the voting rights in the undertaking, or (b) is a member of the undertaking and has the right to appoint or remove a majority of its board of directors, or (c) has the right to exercise a dominant influence over the undertaking (i) by virtue of provisions contained in the undertaking's *articles* or (ii) by virtue of a control contract, or (d) is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking. For these purposes an undertaking is treated as a member of another undertaking: (a) if any of its subsidiary undertakings is a member of that undertaking, or (b) if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings. An undertaking is also a parent undertaking in relation to another undertaking (a 'subsidiary undertaking'), if– (a) it has the power to exercise, or actually exercises, dominant influence or control over it, or (b) it and the subsidiary undertaking are managed on a unified basis. A parent undertaking is treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings are construed accordingly. (*CA 2006,* s.1162)

PLUS-listed market	The *regulated market* operated by PLUS Markets plc
PLUS-quoted market	The *non-regulated market* operated by PLUS Markets plc
Prospectus Rules	Rules issued by the *FSA* pursuant to *FSMA2000*
Quoted company	a company whose 'equity share capital' has been included in the *Official List* in accordance with the provisions of Part 6 of *FSMA2000* (ie a primary listing on the *LSE* or a listing on the *PLUS-listed market*), or is officially listed in an EEA State, or is admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq (Companies Act 2006, section 385(2)). For these purposes, 'equity share capital' is defined in section 548 of the *Act* and differs from the definition in accounting standards.
Regulated market	A multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in the system and in accordance with its non-discretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of the Markets in Financial Instruments Directive (MiFID) (*Article 4.1(14), MiFID*, reproduced in the *FSA Handbook*). A list of regulated markets within the EEA is maintained on the website of the European Commission. UK regulated markets are listed on the websites of the Takeover Panel and the *FSA*. At the time of writing, UK regulated markets include the *LSE*, SWX Europe Ltd, EDX, LIFFE, London Metal Exchange, ICE Futures Europe and the *PLUS-listed market*
Revised Accounts Regulations 2008	The Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373
SCR Company	A company subject to the small companies regime
Senior statutory auditor	the individual identified by the firm as senior statutory auditor in relation to the audit in accordance with guidance issued by the *FRC* (see 'The Senior Statutory Auditor under the UK Companies Act 2006', APB Bulletin 2008/6). The person identified as senior statutory auditor must be eligible for appointment as auditor of the company in question (see Chapter 2 of Part 42 of the *2006 Act*).

Small Companies Accounts Regulations 2008	The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409
Special Notice	Notice of a resolution that must be given by the proposer to the company at least 28 days before the meeting at which the resolution is to be moved. The company must then, where practicable, give its members notice of any such resolution in the same manner and at the same time as it gives notice of the meeting. (*CA 2006,* s.312)
Subsidiary undertaking	See *parent company* definition above.
Summary Financial Statement Regulations 2008	The Companies (Summary Financial Statement) Regulations 2008, SI 2008/374
Table A	Table A as set out in the Companies (Tables A–F) Regulations 1985
Table E	Table E as set out in the Companies (Tables A–F) Regulations 1985
Takeover Code	The City Code on Takeovers and Mergers
Takeover Directive	EC Directive on Takeover Bids (2004/25/EC)
traded company	a public company whose shares are admitted to trading on at least one *regulated market*
Transparency Obligations Directive	Directive 2004/109/EC of The European Parliament And Of The Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a *regulated market* and amending Directive 2001/34/EC

Section 9

Guidance principally for members in practice

Managing the professional liability of accountants

This Section is currently being reviewed. The text below has not been updated, save for cross references, since it was first issued in October 1994. In particular, the Section does not incorporate guidance on the implications of the introduction of corporate practice, limited liability partnerships and other developments. Members in practice may find the information provided by the Audit and Assurance Faculty, Technical Strategy Department technical releases and the Members' Services Department helpful. Please refer to the Institute's website, www.icaew.com, to access helpsheets, technical releases and other publications and to access details of the various helplines which may assist members seeking information in this area.

Managing the professional liability of accountants

(Issued October 1994)

The Council of the Institute of Chartered Accountants in England and Wales draws the attention of members to the principal areas in which actions for negligence may be brought against them by clients or third parties and suggests steps which they may properly be able to take to reduce the risk of such claims. A discussion of the legal considerations applicable to this subject is included in the Appendix. The expressions of law included in this Section and its Appendix have the approval of Counsel and are stated as at 1 September 1994. This Section does not deal with the position under the law of the Republic of Ireland.

Contents

Introduction

1 In recent years, the incidence of cases where substantial sums have been claimed as damages for negligence against members has increased significantly. Members therefore need to ensure that they manage the extent of their liability when providing professional services. Sometimes claims arise not because of any inherent defect in the professional work performed but due to misunderstandings regarding the scope of or responsibility for that work or parts of it. The purpose of this Section is therefore in part to advise members on ways to reduce misunderstandings as to the extent of the liability which they assume in giving advice or expressing an opinion. It is also aimed at assisting them to identify the nature of their liability in respect of professional work and to give guidance on managing this liability.

2 This Section is concerned only with the potential liability for professional negligence which a member may incur because of an alleged act or default by him or by one of his employees or associates which results in financial loss to a person to whom a duty of care is owed. It does not deal with liability arising from other causes (for example criminal acts, breaches of trust, breaches of statutory duty or breaches of contract other than the negligent performance of its terms).

3 Negligence in this Section therefore means some act or omission which occurs because the member concerned has failed to exercise that degree of reasonable skill and care which is reasonably to be expected in circumstances of the case. The defences to an action for negligence are set out in paragraph 1 of the Appendix.

4 There is a contractual relationship between a member and his client even if the contract is not in writing or is evidenced in writing but has not been signed. The standard of work required by that contract is set out in paragraphs 2 to 3 of the Appendix.

5 A member may and usually will be liable to his client for negligence not only in contract, but also in tort. He will also be liable for negligence to a third party to whom he owed a duty of care and who has suffered loss as a result of the member's negligence. Liability to third parties is dealt with in more detail in paragraphs 4 to 9 of the Appendix.

Summary

6 It is not possible either in law or in fact to guard against every circumstance in which a member may risk incurring liability for professional

negligence. However, as discussed below, there are a number of opportunities available to members to assist them in managing their liability.

7 This Section recommends that members should consider adopting the following measures:

(a) defining the scope and responsibilities of the engagement:
- (i) **to the client**, by agreeing an engagement letter:
  - identifying the terms of the engagement (paragraph 8);
  - **defining the specific tasks to be undertaken** and excluding those which are not to be undertaken (paragraphs 9 and 10);
  - **defining the responsibilities to be undertaken by the client** and making clear the extent to which reliance is to be placed on the client or others (paragraphs 11 and 12);
  - **specifying any limitations on the work to be undertaken** (paragraphs 13 to 16);
- (ii) **to third parties**, by setting out in any report the precise work which has been carried out and, as far as possible, the work which has not been carried out, together with any limitations on the work undertaken (paragraph 17);

(b) defining the purpose of reports:
- (i) by stating in the engagement letter the purpose for which the report has been prepared and that the client may not use it for any other purpose (paragraph 18);
- (ii) by stating in any report which may be seen by a third party the purpose for which it has been prepared and that it may not be relied on for any other purpose (paragraphs 19 and 20);

(c) restricting the use of the member's name:
- (i) by advising clients in the engagement letter of the need to obtain permission to use his name (paragraph 21);
- (ii) by withholding permission to use his name, where appropriate (paragraph 22);

(d) identifying the authorised recipients of reports:
- (i) by a term in the engagement letter; and
- (ii) by a caveat in the report (paragraphs 23 to 25);

(e) limiting or excluding liability:
- (i) **to the client**, by a term in the engagement letter (paragraphs 26 to 28);
- (ii) **to a third party**, by a disclaimer in a report (paragraphs 29 to 34);

(f) obtaining an indemnity:
- (i) **from the client or a third party** (paragraphs 25 to 37);
- (ii) in connection with **receiverships, trust and secretarial work** (paragraphs 38 and 39);

(g) defining scope of professional competence to include only matters within the member's competence (paragraphs 40 and 41).

The references above identify the paragraphs where each of these measures is discussed in more detail in the rest of this Section.

Defining the scope and responsibilities of the engagement

(i) To the client: Identifying the terms of the engagement

8 A member should ensure that at the time he agrees to perform work for the client the terms of his contract with his client are properly defined, preferably in writing. An engagement letter should be prepared setting out in sufficient detail the terms of the engagement, including the actual services to be performed, the sources and nature of any information to be provided and to whom any report should be addressed and supplied. These terms should be accepted by the client by signing and returning a copy of the engagement letter, so as to minimise the risk of disputes regarding the duties assumed (see Auditing Guideline 406 Engagement Letters). Where the appointment has been the result of a successful proposal, unless a separate contract is agreed with the client, the proposal will normally form the contract. Where a separate engagement letter is prepared, it should address any specific services or other contractual terms which have been agreed at the proposal stage. If the client subsequently asks a member to carry out any additional duties, or in any other way varies the terms of the engagement, the changes should also be defined and recorded in writing and ideally agreed in writing by the member and the client.

Defining the specific tasks to be undertaken

9 Besides reporting under the Companies Act 1985 and other statutes, members are called upon to give opinion and advice, including financial advice, in connection with many other matters, for example, profit forecasts, investigation or consultancy assignments, the preparation or audit of the accounts of sole traders, partnerships and charities and in the field of taxation. A member undertaking to carry out work of this nature should make clear in his engagement letter the extent of the responsibilities he agrees to undertake, making particular reference to any information supplied to him and relied on as a basis for his work for which the client or others are responsible, setting out in detail the specific tasks to be undertaken and, where appropriate, excluding those tasks which are not to be undertaken.

10 Members should guard against the situation where they undertake to perform particular tasks, then during the course of the work find that it is impossible or unnecessary to perform all the tasks originally envisaged but do not agree with the client the change in scope of the work. If a member undertakes to perform tasks which he does not then perform, he is prima facie in breach of contract and to be safe from action he should obtain a variation of the contract (evidenced in writing) to cover the change in scope before submitting his report. In any event, he should make clear in his report precisely which tasks have and have not been undertaken. Members should also ensure that the description of work done in any bills sent to clients is consistent with the terms of the engagement letter, any subsequent variation of those terms and the report.

Defining the responsibilities to be undertaken by the client

11 A member should make it clear in the engagement letter where

responsibilities are to be undertaken by the client. For example, a report or statement may be prepared by a member for issue by his client in circumstances where he can reasonably expect his client to check it for completeness or accuracy before any use is made of it involving third parties. Accounts prepared for the purpose of being submitted to HMRC for the assessment of taxation will frequently, although not invariably, fall within this category. Ensuring that the client is aware of his responsibilities should help protect the member from any subsequent dispute with the client. In such cases, the effective cause of any loss suffered by a third party may be reliance on a document which is the responsibility of the person in whose name it was issued and who ought to have checked the document, and not that of the member. If, however, the member considers that some matter particularly requires to be checked by the client he should make this clear.

12 Where the client has directly or indirectly determined the nature and scope of the member's procedures to be undertaken in an engagement ('agreed-upon procedures') the engagement letter should include a statement that the client is assuming responsibility for the sufficiency of the procedures for the client's purposes. If, however, the member considers that the procedures are or are likely to be insufficient for the client's purposes he should make this clear.

Specifying any limitations on the work to be undertaken

13 It may be appropriate to alert the client to limitations in or restrictions on the scope of the member's work in response to risks unique to a particular engagement. The most common example is where the client requires an immediate answer to a complicated problem. In such circumstances, the member should consider whether it is appropriate to accept the engagement at the outset, having regard to the value to the client of the work which it is feasible for the member to carry out. If he does accept the engagement, the member would be well advised to make it clear in the engagement letter (or at the very least in his report) that the problem is a complex one, that he has been given a very limited time in which to study it, that further time is required in order to consider it in depth and that the opinion or advice tendered might well be revised if further time were available to him. He should also state that the client is responsible for the accuracy and completeness of the information supplied to him. In all cases, the client should be warned about the risk of acting on the advice tendered before further investigation has been carried out.

14 Members are sometimes requested to report on information relating not to past (and therefore ascertainable) results but to the expected results of future periods. The specific considerations which arise in one such type of engagement are set out in Handbook Section 3.908 Accountants' Reports on Profit Forecasts[1] to which reference should be made. However, there are many other forms of forecast and projection on which a member may be requested

[1] 3.908 is still available from the Institute Library. Members are also referred to SIR 3000 Investment Reporting Standards Applicable to Public Reporting Engagements on Profit Forecasts (available from www.frc.org.uk/apb/publications).

to report. Because of the significant risk inherent in reporting on any prospective financial information, members should exercise particular care in determining whether, and under what terms, to accept such engagements. The following are examples of warnings which might be included in engagement letters and reports as appropriate:

- *'The directors of [the company] are solely responsible for the projections and assumptions on which they are based. The projections have been prepared to illustrate the consequences of [the project]. Since the projections relate to an extended future period, actual results could be different because events and circumstances frequently do not occur as expected and do not therefore match the assumptions. The financial projections are by their nature not susceptible to audit and we are unable to express an opinion as to the possibility that they will be achieved.'*
- *'The directors of [the company] are solely responsible for the projections and assumptions on which they are based. The financial projections cover an extended future period for a company with no previous history and are based upon the directors' assumptions and estimates. The financial projections do not constitute a forecast and they could be materially affected by changes in economic and other circumstances. For this reason the actual [profits and cash flows] may vary considerably from those shown. The financial projections are by their nature not susceptible to audit and we are unable to express an opinion as to the possibility that they will be achieved.'*

15 The following are further examples of situations in which it may be appropriate to alert the client to limitations or restrictions:

- an engagement undertaken in connection with a financing transaction where additional procedures may be necessary to enable the report user to reach a conclusion;
- a report based on the performance of agreed-upon procedures, not governed by professional standards, particularly when the parties who are acknowledging their responsibility for the sufficiency of the procedures for the purposes may not fully comprehend the limited nature of the work which they have requested;
- a report on financial information in which there are significant uncertainties likely to be resolved in the near future, where it would be appropriate to point out that the member has no responsibility to update his report for subsequent events;
- an engagement to report on a presentation prepared in conformity with the requirements of a contractual agreement or a regulatory provision, particularly when there are indications that third parties may have differing views, where it would be appropriate to state that no representations are being provided with regard to legal interpretation.

16 Properly worded statements and warnings of the kind considered in paragraphs 13 to 15 above are not exclusions or restrictions of liability but definitions of the work undertaken and statements as to the extent to which the client can rely on it. They will help to protect a member from a claim from his client for negligence based on the contention that his enquiries should have

been different from or more extensive than those so defined, provided that they are clearly included in the report and, preferably, incorporated into the contract with the client by being set out in the engagement letter or otherwise agreed (ideally in writing) by the client.

(ii) To third parties

17 Definitions of scope of work or limitations on that work contained in an engagement letter will not be binding on any third party unless he has sight of the engagement letter or they are repeated in any report. Members should therefore ensure that they set out in their report, possibly by including a copy of the engagement letter, details of the precise work which has been carried out and its purpose and, as far as possible, the work which has not been carried out, together with any limitations on the work undertaken. If such matters are clearly set out in any report to which a third party might have access, members will be afforded some protection in relation to both the existence and scope of any duty of care owed to third parties who claim to have relied on the report. Where members are aware that specific third parties will have access to their report, they should also consider requesting them to sign a copy of the engagement letter to indicate acceptance of the terms, or if this is not possible, members should make it clear that they make no representations to third parties as to the sufficiency of the procedures adopted.

Defining the purpose of reports

18 A member may be able to restrict his liability to his client by clearly restricting the use to which a report may be put. The restriction should be included in the engagement letter and should identify the purpose for which the work has been requested. Appropriate wording and its efficacy will depend on the circumstances of each individual case. The following is an example only:

'This report/statement is intended solely for the information and use of the boards and managements of X Limited and Y Limited in connection with the proposed sale of Y Limited to A Limited and should not be used for any other purpose.'

19 Where a document is prepared in the first instance for discussion with, or approval by, the client or others, and is liable to be altered before it appears in its final form, this fact should be made clear so as to prevent persons from placing undue reliance upon it. This may be done by making clear that the document is only a draft. But if it is in fact intended to be relied upon or no final form is prepared, little or no protection will be afforded. A member should introduce a term into the engagement letter and restate it in the transmittal letter to make it clear to the client that he cannot rely on any document so marked, except with the member's consent. Similarly, where oral reports are likely to be provided prior to delivery of a final written report, members should make it clear in the engagement letter, and at the time of

making the oral report, that such an oral report does not constitute the member's definitive opinions and conclusions and that these will be contained solely in the final written report.

20 Where financial material is prepared or reported on by a member for some particular purpose, he will not usually be liable to an unknown third party who relies on it for any other purpose for which it is or may be unsuitable. In such cases, the member would usually have no reason to suppose that such reliance would be placed on it. Members would, however, be well-advised to make the position clear by including in the document itself a statement of the purpose for which it was prepared, along the lines of the example in paragraph 18 above.

Restricting the use of the member's name

21 Members should endeavour to ensure that no statement or document issued by their client (other than financial statements in the form in which they have been reported on by the member as auditor) bears their name unless their prior consent has been obtained. It is often desirable for a suitable paragraph to be included in the engagement letter.

22 There have been occasions when the use of a member's name in a document has been interpreted by third parties as implying that the company is financially sound and well conducted, whether or not this is in fact the case. If a member is aware that a client proposes to cite his name, he should inform the client that his permission must first be obtained and in appropriate cases he should withhold his permission.

Identifying the authorised recipients of reports

23 The implications of the duty of care to third parties are important for all members who produce or report upon financial statements or provide reports of various other kinds (whether for a fee or not) which may be relied upon by persons other than those for whom they were originally prepared. Some documents which by their nature will inevitably be subject to general publication, such as auditors' reports under the Companies Act or accountants' reports for listing particulars, may not by their nature be capable of being restricted as to their use. In other cases, however, it may be possible for a member to reduce his exposure to the claims of third parties by restricting the use of the report to named parties.

24 It can be made a term of the contract between the member and his client that the member's report or statement may not be circulated to third parties without the member's prior written consent. If the client does then circulate the document he will be in breach of contract.

25 In addition the reports or statements may appropriately contain a rubric specifically restricting circulation. For example:

'Confidential: This report (statement) has been prepared for private use of X (the client) only.'

When a document is so marked but is nevertheless relied upon by a third party without the member's consent, the member may still be able to resist liability on the basis that the third party was not a person whom he should have had in mind as being likely to suffer loss by his negligence. Such a rubric should be introduced only where the circumstances warrant it, as it would tend to be devalued by indiscriminate use in connection with documents which by their nature must receive a wide distribution.

Limiting or excluding liability

To the client

26 In many cases a member may limit or occasionally even exclude liability in an agreement with a client, but this will not always be effective at law. The main relevant considerations are set out in paragraph 10 of the Appendix. Appropriate reference should be made in the letter of engagement to any exclusion or restriction of liability. If an attempt is made to introduce such a provision into an existing relationship or in relation to a transaction for which instructions have already been accepted, difficulty may be experienced in showing that there is any legal consideration for the client's agreement to submit to the exemption provisions.

27 It may be appropriate to exclude liability in respect of certain claims by the client where there has been fraud, misrepresentation or wilful default by the client or his employees. Such clauses cannot be introduced into engagement letters for certain statutory audits because of the general prohibition on any limitation of liability in section 310 of the Companies Act 1985 and corresponding provisions in some other statutes. They may, however, be appropriate in non-statutory audit work and in non-audit engagements. Members who are undertaking statutory audits which are not governed by the Companies Act 1985 should familiarise themselves with the relevant statutory provisions relating to liability to determine whether it is possible to limit their liability in respect of their audit work.

28 For all engagements (other than certain statutory audits as discussed above) and particularly where the risks associated with a non-audit engagement are unacceptably high, members should consider the need to negotiate a limitation on the monetary amount of any liability to the client. The purpose of such a clause in the engagement letter is to put a monetary limit on the claims that a client can make for breach of the member's contractual obligations or negligence. The efficacy of such a clause will depend on whether it is reasonable, judged under the Unfair Contract Terms Act 1977, and some of the factors to be taken into account are set out in paragraph

10(b) of the Appendix. Members should ensure that any monetary limitation imposed under a contract is reasonable in amount and is agreed by means of a genuine negotiation with the client.

To a third party

29 An exclusion or restriction of a member's liability will not generally avail him against a third party unless that third party has notice of the exclusion or restriction. Section 2 of the Unfair Contract Terms Act 1977 also applies to an attempt to exclude or restrict liability to third parties for negligence. It provides that where a person is in principle liable for negligence, he cannot exclude or restrict that liability by reference to a notice, except where the notice is reasonable. The same criteria for reasonableness are applied as to contractual terms (see paragraph 10(b) of the Appendix), but reasonableness is considered as at the time when the liability arose rather than at the time when the contract was made. In each case it will be for the member to prove the reasonableness of the term or notice on which he relies.

30 Where a member prepares for his client a report which may be seen and relied upon by third parties, the member is recommended to include in his report a definition of the responsibilities of the engagement, the purpose of the report and its use, as discussed in paragraph 18 above. In addition to this, the member may also wish to exclude liability to third parties. Where the identity of the third party is known to the member, in view of the terms of the Unfair Contract Terms Act 1977, the member may well be in a better position if he were to enter into a separate contract with the third party, incorporating a fully negotiated exclusion or limitation of liability clause. This will prevent the third party from arguing that he had no notice of the exclusions. Alternatively, and in any case, the member may include a disclaimer in the report to the effect that he accepts no responsibility to any third party who may rely on the report. This may be effective, subject to the reasonableness test in the Unfair Contract Terms Act 1977. Care should be taken to ensure that third parties do not attempt to establish contractual status, for example by paying the member an unsolicited nominal sum, without obtaining the member's express agreement to the change in status or becoming party to the engagement letter.

31 Where a member (necessarily with the authority of his client) passes information directly to a third party, the effectiveness of a disclaimer will depend upon the nature of the information. For example, when giving references or making statements regarding creditworthiness or similar matters, the normal commercial practice is to state that, although the reference or statement is given or made in good faith, the member accepts no financial responsibility for the opinion he expresses. Such disclaimers will generally be effective where the references or statements can be seen not to be information of a kind which is expected to be the result of extensive knowledge or research by the member.

32 Sometimes, however, a member may supply directly to a third party information of a kind which the third party (unless he is told otherwise) can

reasonably expect to be the result of research of a more or less extensive kind. An example of this is provided in technical release AUDIT 4/00 (TECH 29/00)[2] *Firms' reports and duties to lenders in connection with loans and other facilities to clients and related covenants*, which incorporates proposed disclaimers of responsibility for auditors who receive requests from banks to rely on audited accounts, either before or after the audit opinion has been signed.

33 Where potential acquirers, investors or lenders request access to the working papers of the auditors of a target company or group, the auditors should only permit access on the basis of an agreed disclaimer of any duty or liability as a result of providing access or information. This disclaimer should be obtained both from those to whom the access is granted (usually another firm of auditors) and from the potential acquirers, investors or lenders who make the request.

34 A disclaimer may be appropriate in a document which is prepared neither in response to the instructions of a particular client nor for any statutory or public purpose, e.g., a textbook or a newsletter. In such cases, substantial reliance upon it for a particular purpose would usually not be reasonable. A member can reinforce his legal position in relation to documents of this kind by including a disclaimer of liability in the document itself. The form of the disclaimer will depend upon the nature of the document. In many cases a disclaimer along the following lines is appropriate:

'No responsibility for loss to any person acting or refraining from acting as a result of any material in this publication can be accepted by Y [the member, the author or publisher]. Professional advice should be taken before applying the contents of this publication to your particular circumstances.'

Obtaining an indemnity

From the client or a third party

35 It may be appropriate to obtain indemnities from clients in respect of claims from third parties arising from the contents of a report or directly from third parties. These indemnities, known as 'hold harmless' clauses, obligate the client or third party to indemnify the member from third-party claims but do not limit the third parties' ability to assert their claims.

36 Indemnities may not be practical in situations where a report can be expected to receive wide circulation, such as in the case of accountants' reports in listing particulars or in an acquisition circular. Where use of the report is restricted, however, or where (as in the case of preliminary announcements of results by listed companies) there is no requirement for a public statement about the auditor's involvement to be made, it may be reasonable to include an indemnity against any claims or other losses which the auditor may suffer from actions by third parties, including the costs of defending any such action.

[2] See also AUDIT 1/01, Reporting for Third Parties.

37 It must be remembered that an indemnity does not prevent a claim from being brought against the indemnified party, it merely gives him a right to pass on his liability to the indemnifier. It follows therefore that if the indemnity is in some way ineffective or the indemnifier does not have adequate resources to meet the liability, the indemnified party will be left unprotected.

Receiverships, trust and secretarial work

38 A member acting as a receiver incurs personal liability for his acts and may, in particular, incur liability under commercial contracts irrespective of negligence on his part. Accordingly, if a member appointed by a debenture holder to act in this capacity has to manage a business, he should endeavour to ensure that he is fully indemnified by the person who appoints him against all loss and damage arising from his management. If such an indemnity cannot be obtained, he should endeavour to ensure that contracts into which he enters on behalf of that business include a clause to the effect that he assumes no personal liability thereunder.

39 It is often prudent for a member who is appointed to act as a trustee or asked to carry out certain secretarial work, such as cheque signing, to obtain an appropriate indemnity. In the former case, an instrument creating a trust can give a wide form of indemnity if the settlor is willing to approve its inclusion in the deed; in the latter, the member should arrange for an indemnity to be obtained from his client.

Defining scope of professional competence

40 In expressing an opinion or giving advice on difficult and complicated matters (for example in the field of taxation), members should bear in mind the magnitude of the financial and other consequences should the advice tendered be incorrect or misconceived. Although a member in general practice is deemed by the law only to undertake to bring a fair and reasonable degree of skill and competence to the problem on which he is required to advise, in appropriate circumstances this may include recognising the need to obtain the approval of his client to consult another person with specialist experience of the matter in question. Occasions may also arise when a member may wish to consider declining a particular assignment because, for example, he is of the opinion that the matter on which his advice is sought does not fall within the normal scope of his accountancy practice. Members are reminded that one of the fundamental principles established in Section 3, Code of Ethics, 3.2, General application (Part A), is that a member should not accept or perform work which he is not competent to undertake unless he obtains such advice and assistance as will enable him competently to carry out the work.

41 Where the engagement arises as a result of a commercial agreement between other parties, the member will not be able to vary the terms of his engagement without a variation of the terms of the agreement by the parties

to it. The member should therefore ensure that the terms of the engagement, as defined in the agreement, are acceptable and he should decline to accept any engagement where he is unable to fulfil the terms of the agreement or where he considers that the risks of the engagement are too high. Problems which a member may wish to avoid include: owing a duty of care to a party known to be litigious; owing a duty of care to both sides of a transaction; and being required to perform limited procedures or merely a preparation only engagement without any limitation clauses.

Conclusion

42 Members are reminded that, even if they use their best endeavours to ensure that they adopt all the relevant measures discussed above, they may still be exposed to legal claims from clients or third parties. Whether or not these claims have merit, members should ensure that they have established proper procedures to deal with all claims promptly, to notify their insurers and to seek appropriate legal advice.

Appendix – Legal Considerations

Defences to an action for negligence

1 It would be a defence to an action for negligence to show:

a. that no duty of care had been owed to the plaintiff in the circumstances; or
b. that there had been no negligence; or
c. that the negligent act or omission had not been an effective cause of the plaintiff's loss; or
d. in the case of actions in tort that no financial loss had been suffered by the plaintiff; or
e. that the action was statute-barred.

The fourth defence would not be available to a claim in contract, but only nominal damages would be recoverable and in those circumstances it is unlikely that such an action would be brought.

Standard of work

2 Where there is a contractual relationship, unless an express agreement is made between the accountant and his client to the contrary, the standard of work required of an accountant is defined by section 13 of the Supply of Goods and Services Act 1982, whereby there is an implied term that the supplier (i.e., accountant) will carry out the service with reasonable skill and care. The same standard is applied by common law where there is a duty of care in tort.

3 The skill and care required will be judged principally on the nature of the work agreed to be undertaken. An accountant who undertakes work of an

unusually specialised nature, or work of a kind whose negligent performance is particularly liable to cause substantial loss, will usually be taken to have assumed a duty to exercise the higher degree of skill and care reasonably to be expected of any accountant undertaking such demanding work. This will, especially, be the case if he holds himself out as being experienced in the kind of work in question. In no case, however, is the duty likely to be absolute. Opinions expressed or advice given will not give rise to liability merely because in the light of later events they prove to have been wrong, even if they amounted to an error of judgement, provided that they were arrived at using the skill and care which was reasonable for an accountant undertaking such work.

Liability to third parties

4 Liability to third parties may arise where there is a duty of care owed by the member in tort. Whilst an accountant will also almost always owe a duty of care to his own client, that duty is likely to be coextensive with his contractual duty.

5 Following *Caparo Industries plc v. Dickman* (1990) 2 AC 605 HL, (see in particular the speeches of Lord Bridge at pages 620H to 621A and Lord Oliver at page 638 C to E), a duty of care to a particular third party may be owed by accountants where there are all of the following ingredients: foreseeability of damage to the third party, a relationship of proximity or neighbourhood with that third party, and a situation where it would be fair, just and reasonable to impose a duty of a given scope on the accountants. Although the courts have attempted to limit the circumstances in which a duty will be held to exist, it would be prudent to assume that it will exist in a situation where the accountant knows of the existence of a third party whom he reasonably expects to receive and rely on the accountant's work for a particular transaction or purpose and to whom damage will be caused if the work has been done negligently. The danger of a duty being imposed will be increased where that third party has no other source of advice and where the purpose of the accountant's work is to induce the third party to take the particular action that he has taken.

6 While it must be emphasised that each case will depend on its particular circumstances the courts have recognised a number of circumstances in which a liability to third parties in tort will not generally arise and indicated some of the material factors in addressing that issue:

Liability to shareholders/investors

a. The House of Lords decided in *Caparo Industries plc v. Dickman* (supra) that the auditors did not owe a duty of care to individual shareholders, whether or not they were existing shareholders, who purchased shares in the company in reliance on the audited accounts.
b. In *Al-Nakib Investments v. Longcroft* (The Times, 4 May 1990) it was decided that a duty of care was owed to subscribers who relied on a prospectus but not to anyone else who bought shares in the market in reliance on the prospectus. However, there may be liability under section

152 of the Financial Services Act 1986 to investors where advisers' opinions or reports are contained in listing particulars.

c. The Court of Appeal decided in *James McNaughton Group v. Hicks Anderson and Co* (1991) 1 All ER 135 that the auditors of a target company did not owe a duty of care to an identified takeover bidder who relied on draft accounts. The accounts were produced for the target and not for the bidder, they were in draft and not final and it was not foreseeable that the bidder would not take independent advice. On the other hand, the same court held in *Morgan Crucible v. Hill Samuel* (1991) Ch. 295 that it was plainly arguable that a duty of care was owed to an identified bidder by auditors where extracts from financial statements were included in the defence document which were intended to lead to an increased bid.

Liability to lenders

d. In *Al Saudi Banque* v *Clark Pixley* (1989) 3 All ER 361 it was decided that auditors owed no duty of care to a bank lending money to a company in reliance on accounts, whether the bank was an existing creditor or not, where the auditors were not aware of the bank's existence nor of the fact that lenders were relying on the accounts.

7 The implications of tortious liability are important for all accountants who produce reports or statements of various kinds (whether for a fee or not) which are liable to be relied upon by persons other than those for whom they were originally prepared.

8 An accountant may sometimes be informed, before he carries out certain work, that a third party will rely upon the results. An example likely to be encountered in practice is a report upon the business of a client which the accountant has been instructed to prepare for the purpose of being shown to a potential purchaser or potential creditor of that business. In such a case, it would be prudent for an accountant to assume that he will be held to owe the same duty to the third party as to his client, unless he has taken steps to disclaim liability as discussed in paragraphs 27 to 32 of Section 9.1, Managing the professional liability of accountants, in which case his liability may be reduced.

9 It is, however, important that members should appreciate that the precise ambit of the test in *Caparo Industries plc* v *Dickman* (supra) remains uncertain and, for example, a duty of care to a third party may also arise when an accountant does not know that his work will in fact be relied upon by a particular third party, but only knows that it is work of a kind which is liable in the ordinary course of events to be relied upon by a third party, although it will be more difficult for an unidentified third party to show a sufficient degree of proximity to meet the test.

Excluding or limiting liability to a client

10 The following are the main relevant considerations.

Auditors under the Companies Acts and certain other statutes:

a. Section 310 of the Companies Act 1985 makes void any provision in a company's articles or any contractual arrangement purporting to exempt the auditor from or to indemnify him against any liability for negligence, default, breach of duty or breach of trust. Whilst it is believed that this section only covers audit work as distinct from other work carried out by the auditor for the audit client, this question has not yet been decided by the court. Although section 727 of the Companies Act 1985 empowers the court in certain circumstances to grant relief either wholly or in part from any of such liabilities, it appears that these powers have seldom been exercised and it is very unlikely that an auditor would be relieved of liability. There are similar provisions in respect of audits under some other statutes.

The Unfair Contract Terms Act 1977

b. This Act introduces extensive restrictions upon the enforceability of exclusions and limitations of liability for negligence and breaches of contract (where a party contracts with an individual consumer or contracts on standard terms of business). Section 2 of the Act, which applies in England, Wales and Northern Ireland, makes void any exclusion or limitation of liability for negligence, even in a case where the other party has agreed to it unless the party seeking to rely on that exclusion or restriction can show that it was a fair and reasonable one in the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made, or, where a non-contractual notice is relied on, in all the circumstances when the liability arose. Part II of the Act contains a somewhat similar provision applying as part of the law of Scotland. If a clause is held to be unreasonable, it is struck out in its entirety, leaving liability completely unlimited. Because the courts look at each individual case on its own facts, there is little general guidance as to what exclusions or restrictions of liability for negligence will be regarded as reasonable. There are, however, a number of specific factors which the courts may take into account when considering reasonableness.

These include:

i. whether the client knew or ought to have known of the term – it must have been brought to the client's attention before entering into the contract rather than buried in the small print on the back of a standard form;
ii. the nature and bargaining powers of the parties – the more sophisticated the client and the greater his bargaining power, the more likely it is that the term will be held to be reasonable;
iii. the resources of the accountant and the availability to him of insurance cover – the greater his resources, the higher any limit on the extent of liability should be;
iv. the nature of the transaction and the size of the likely loss – the larger the transaction and any potential loss, the higher the limit should be;
v. the availability of similar services from another provider without the client having to accept a similar exclusion or limitation – if there are

other providers of similar services in the market who do not impose similar limitations then the client may not be able to argue that he was forced to accept the term;

vi. the size of the fees payable – the higher the fees, the higher the limit should be;

vii. whether any inducement was received by the client to agree to the term – an inducement to accept the term would make it easier to argue that the term was reasonable.

A total exclusion of liability is most unlikely to be considered reasonable other than in exceptional circumstances.

Arrangements to cover the incapacity or death of a sole practitioner

(Revised 1 January 2009)

The Institute is regularly made aware of problems which have arisen where a sole practitioner has become physically or mentally incapacitated and consequently unable to continue to manage their practice, or has died without making adequate arrangements for the carrying on of their practice by his personal representatives. The following guidance is intended to be of assistance to sole practitioners in identifying the solutions to the problems which will inevitably arise in the event of their incapacity or death. These may affect clients, other members and firms who may be involved in the continuation of the practice, and the member's personal representatives, their advisors and any other persons who may be concerned.

General considerations

1 All practitioners have a duty to ensure that their practices are at all times properly supervised and conducted, including implementing arrangements to cover holidays and sickness of the practitioner. The problems which will inevitably arise where a sole practitioner ceases to be able to conduct his practice because of continuing incapacity or death are much more serious. The interruption of services resulting in particular from mental incapacity or death will cause considerable difficulty and inconvenience to the practitioner's clients, additional anxiety for their family and reduction in the value of the practice or even its disintegration.

2 It is therefore vital for a sole practitioner to confront these problems and difficulties, preferably when he or she first enters into practice, and to make arrangements appropriate to each of the following circumstances to enable the practice to be carried on with a minimum of dislocation:

(a) short-term absence due to holiday or sickness;
(b) continuing physical incapacity;
(c) mental incapacity;
(d) death.

The arrangements in respect of (b), (c) and (d) should provide, as far as is possible, for the practice to be continued as a going concern by the member's alternate until such time as the sole practitioner recovers or a decision is made to dispose of the practice. Where the office has been authorised under the Learning and Professional Development Regulations as an Authorised Training Employer these arrangements should include provision for notification of death or anticipated prolonged absence of the sole practitioner to the Learning and Professional Development Department of the Institute so that provision can be made to ensure that Approved Training is not placed in jeopardy.

3 The arrangements may be made with another sole practitioner or with a

firm, or through support arrangements set up by the member's district society. Any effective arrangements will require very specific legal measures, such as those described in paragraph 7 below. It is, however, first necessary to consider the specific legal problems associated with the provision of services in the reserved areas of practice, if incapacity or death of a sole practitioner should occur.

Legal considerations arising in reserved areas

(i) Audit

4 An audit appointment is of a firm (in the case of a sole practitioner an individual) by the audited company. As such it would be contrary to the company's intention if some other party whom it had not appointed were to sign an audit report. Also, the Companies Act 2006 requires the senior statutory auditor, which will be the sole practitioner, to sign the audit report for a company, and certain other entities, in his or her own name. It would not be possible for an alternate to sign the audit report in place of the sole practitioner. Temporary incapacity, mental or physical, of itself would not necessarily terminate the appointment, however the practical matters outlined above may cause the appointment to cease. You may find it helpful to consult the APB Bulletin, '*"The Senior Statutory Auditor" under the United Kingdom Companies Act 2006'*.

Where a sole practitioner auditor dies, a casual vacancy arises and there is no facility for an alternate, even if properly appointed as a special executor under the practitioner's will (see paragraph 7b), to sign the audit report.

(ii) Insolvency

5 Insolvency is a personal appointment. Although during the course of an insolvency appointment a practitioner frequently employs managers and other staff to carry out certain work on his behalf, it would not be possible for an alternate to be appointed to act, save by the court or other relevant entity empowered under the Insolvency Act 1986. An alternate could however be appointed to deal with the purely administrative matters arising from a sole practitioner's resignation or vacation of office, if the latter became incapacitated, physically or mentally. If an insolvency appointee dies, the appointment is automatically vacated.

(iii) Investment business

6 A designated professional body licence is of a firm. An alternate could undertake work that requires a licence on behalf of a licensed firm provided they were competent to do so. In the event of the death of the sole practitioner the firm no longer meets the eligibility requirements of a licence. There are provisions for a temporary dispensation and the firm should contact Professional Standards at the Institute immediately.

Effective arrangements

7 Legal measures are available to assist firms in making appropriate arrangements. Implementation of these legal arrangements can provide

effective legal continuity of a sole practitioner's practice in the case of their incapacity, mental or physical, or death. These measures consist of the following:

(a) a valid Power of Attorney (to deal with incapacity), plus
(b) a 'Special Executor' clause, for inclusion in the sole-practitioner's will to cover the possibility of the practitioner's death.

8 Members may, given the complexity and variety of testamentary situations, require assistance from their own solicitors.

9 For further assistance please contact the Ethics Advisory Services on +44 (0)1908 248 258.

The names and letterheads of practising firms

(Revised with effect from 1 January 2009)

This guidance applies to all members in practice including affiliates, member firms and employees of member firms. Member firms are reminded that they are responsible for the professional conduct of non-members. The guidance should be read in conjunction with Part A of the Code of Ethics in Section 3.2 of the Members' Handbook (www.icaew.com/membershandbook).

1.0 For the purposes of this guidance the term 'letterhead' means any part of the *member's* or *member firm's* notepaper and documents used by the *member* or *member firm* for communicating with clients or other parties.

1.1 Subject to the bye-laws and the following guidance, a *member* or *member firm* may practice under whatever name or title it sees fit.

1.2 A practice name should be consistent with the dignity of the profession in the sense that it should not project an image inconsistent with that of a professional practice bound to high ethical and technical standards.

1.3 A practice name should not be misleading.

1.4 It would be misleading for a *member firm* with very few offices to describe itself as 'international' merely on the grounds that one of them was overseas. Similarly it would be misleading for a sole practitioner to add the suffix 'and Associates' to the name of his practice unless formal arrangements were agreed with two or more consultants or firms.

1.5 A practice name would be misleading if in all the circumstances there was a real risk that it could be confused with the name of another firm, even if the *member(s)* of the practice could lay justifiable claim to the name.

1.6 It has been the custom of the profession for *members* to practice under a firm's name based on the names of past or present *members* of the firm itself or of a firm with which it has merged or amalgamated. A practice name so derived will usually be in conformity with this guidance.

1.7 There is no objection to membership of a trading group being indicated on the *member's* or *member firm's* notepaper or elsewhere in proximity to the practice name. However, the name of such a firm should be clearly distinguishable from the name of an *associated firm* or group. Thus, it would be misleading for a member of a trading group to bear the same name as the group, but there could be no objection to a *member* or *member firm* practising under its own name 'as a member of (a named accountancy group)'.

Use of the Description 'Chartered Accountant'
2.0 Use of the description 'Chartered Accountant' is governed by principal bye-law 55 and the regulations made thereunder, in particular the Regulations Governing the Use of the Description 'Chartered Accountants', and also this guidance.

2.1 The description 'Chartered Accountants' should not form part of the name of a firm.

2.2 *Member firms* which meet the requirement of bye-law 55 and the Regulations made thereunder are encouraged to use the description 'Chartered Accountants'. A firm which describes itself as 'Chartered Accountants' may list the services it wishes to offer on its stationery.

2.3 *Member firms* which use the description 'Chartered Accountants' may couple that description (i.e. 'Chartered Accountants and . . .') with all or any of the following if these are areas of professional business in which they have expertise:

(i) 'Management Consultants'
(ii) 'Business Advisers'
(iii) 'Tax Consultants'

Where one or more of these descriptions is used, *member firms* should be able, if called upon, to demonstrate that they hold the relevant expertise.

2.4 *Member firms* which use the description 'Chartered Accountants' may also couple that description with any other Chartered description (for example 'Chartered Accountants and Chartered Tax Advisers').

2.5 A *member firm* should carry out a review of the descriptions it uses from time-to-time, to ensure the use of those descriptions can be justified. (Note: claims to authority to work in reserved areas such as audit and investment business are governed by the appropriate regulations and in the case of insolvency work by the relevant legislation.)

2.6 *Principals* in a *member firm* describing itself as 'Chartered Accountants' who are also *principals* in other firms, should ensure there is a clear distinction between the firms entitled to use the description and those which are not so entitled.

Legal Requirements
3.0 A practice letterhead must comply with partnership and company law as appropriate, and with the Business Names Act 1985.

Overseas Firms
4.0 Overseas *member firms* are required to comply with any local laws as to practice names so far as overseas are concerned. Subject thereto, they may describe themselves in any manner conformable to the practice of the

profession locally provided that the principles set out in paragraphs 1.0 to 1.3 above are observed.

New and Changed Names
5.0 Save where the name of a *member firm* is based on the names of past or present members of the *member firm* itself or of a firm with which it has merged or amalgamated, when a new *member firm* is to be set up and when it is desired to change the name of an existing *member firm, members* are recommended, as a means of ensuring compliance with this guidance, to consult the Institute, as to the propriety of the proposed name.

Persons Named on Letterheads of Member Firms
6.0 It should be clear from the letterhead of a practice whether any person named thereon, other than persons named only in the name of the *member firm*, is a partner of the practice, a sole practitioner, in the case of a corporate practice, a director or in the case of a limited liability partnership, a member.

6.1 *Member firms* which use the description 'Chartered Accountants' should distinguish chartered accountants mentioned on the letterhead of a practice from persons not entitled to be so described by the use of designatory letters or otherwise.

6.2 In the case of a corporate practice which uses the description 'Chartered Accountants' but which does not list its directors on the letterhead, the *member firm* should maintain a list of the directors which distinguishes Chartered Accountants from persons not entitled to be so described, and should refer to the existence of the list on its letterhead.

6.3 No person named on the letterhead of a practice should be described by a title, description or designatory letters to which he is not entitled.

Regulated firms and members
7.0 Members working in the regulated areas of audit, insolvency and investment business (whether licensed by the Institute or authorised by the Financial Services Authority) should comply with any relevant requirements to disclose their regulated status.

Sources of Advice
8.0 A member who is in doubt as to their ethical position may seek advice from the Institute's Ethics Advisory Services by e-mail ethics@icaew.com or phone +44 (0)1908 248 258. The Ethics Advisory Services is available to all members and is a confidential service free from the duty to report professional misconduct within the Institute. Further information on the Ethics Advisory Services can be found on http://www.icaew.com/ethicsadvice.

Documents and records: ownership, lien and rights of access

Issued 1 September 2006 replacing the previous Section (Handbook Statement '1.302') of the same name. The references in this Section have been updated for the Companies Act 2006.

Further less formal guidance is available to members of the Institute, in a number of areas covered by this Section, including Technical Releases and the member only helpsheets available from the members services area of the website at www.icaew.co.uk/members.

In this Section the masculine gender imports the feminine gender throughout.

Contents

Introduction

1 This Section has been issued to give guidance to members in practice on four matters.

Which documents does the member own?
1.1 Consideration under the heading 'Ownership' below is given to what documents or records are or are not owned by members. The question of ownership will be a matter of both law and fact and can often be a complex question to decide. This Section does not, and cannot, seek to determine ownership; rather it highlights the sorts of issues of which members need to be aware when seeking to determine ownership.

How long should the member retain documents?
1.2 Consideration under the heading 'Document Retention' below is given to those issues which a member is advised to consider concerning the adoption of a document retention policy.

If the client owns the documents does the member always have to hand them over?
1.3 Consideration under the heading 'Lien' below is given to what rights by way of lien a member has over documents and records not owned by him (including the exercise of lien in fee disputes).

What obligations does a member have to allow others access to documents which the member holds?
1.4 Consideration under the heading 'Rights of access by clients and third parties' below is given to the rights of clients and third parties to demand access to documents held by members (both those owned by a member and those owned by the client) and the related issue of allowing access to third parties.

1.5 The guidance reflects the law in England and Wales as at July 2006.[1] It is also assumed that the member provides his services in a professional relationship governed by the laws of England and Wales. There may, however, be cases in which either by express agreement or by implication from the circumstances, a foreign law[2] will apply. In these circumstances a member is advised to consider taking legal advice from a lawyer qualified to practise in the jurisdiction in question.

1.6 Many of the issues which give rise to the need to consult this Section could be avoided (or the effects minimised) through the careful drafting of

[1] References updated in August 2008.
[2] 'Foreign law' in this context should be read to include the law of Scotland and Northern Ireland as well as jurisdictions outside the UK which may differ from the law of England and Wales.

engagement letters. In this regard, members are referred to Section 9.1, 'Managing the professional liability of accountants', for more details.

Documents and Records

2 In this Section the term 'documents' is not confined merely to documents stored on paper, but extends to any information which can be understood by the senses or is capable of being made intelligible by the use of equipment. The term therefore covers information that is stored on microfilm or electronically, for example on hard disks, CDs and other media, including messages sent by e-mail and online sources.

3 Similarly, ss.386 to 389 of the Companies Act 2006 do not require the accounting records of a company to be stored on paper and, accordingly, members may be in possession of records of a client which may be stored on computer or some other non-paper format.

Ownership

Determination of ownership

4 Determination of ownership is generally a mixed question of law and fact and can often be a complex question to resolve. Where particular documents and records are not owned by the member they generally belong to the client. In order to determine whether documents and records belong to the member it may be necessary to consider:

a. the capacity in which the member acts in relation to his client;
b. the contract between the member and his client usually as evidenced in an engagement letter; and
c. the purpose for which the documents and records exist or are brought into being.

The capacity

5 A member may act for a client either as principal or as agent depending on the nature of the work covered by the engagement. Examples of these are given below. The distinction is significant in relation to the ownership of documents created by the member during the engagement. As a general rule, where the relationship between the member and his client is that of principal and principal, documents prepared, acquired or brought into being by the member solely for his own purpose as principal belong to the member and only those documents brought into being by the member on the specific instructions of the client belong to the client. Where the relationship between a client and the member is that of principal and agent, documents brought into being by the member pursuant to the retainer normally belong to the client. In either case, documents and records provided initially by the client to the member will remain the property of the client.

The contract

6 It is recommended that members consider dealing with the issue of ownership of documents in the engagement letter with their clients. Any specific agreement reached between the member and his client relating to the ownership of documents produced by the member will override the principles referred to above. Although such an agreement does not have to be in writing, in the interests of certainty, it is recommended that any express agreement with the client is documented.

7 The table below comprises a non-exhaustive list of the capacities in which a member may act for a client. It is assumed in the table that the terms of the contract between the member and his client are silent on the question of ownership and therefore the principles referred to in paragraphs 4 to 6 above are implied. This table is intended to be indicative and helpful and is not intended to compromise a member's legal rights. If a member, without consent of the client, takes a contrary view to the position shown in the table he is recommended to seek legal advice.

Nature of work

8 The question of ownership will depend on the nature of the work to be done. For example:

Nature of work	**Type of document**	**Who has ownership?**
Auditing		
Preparation of audit report whether carried out under statutory provisions or not	Any documents prepared by member solely for purpose of carrying out his duties as auditor Audit Report	Member Client
Accountancy		
Preparation of accounting records	Accounting Records	Client
Preparation of financial statements from client's records	Financial statements Draft/office copy of financial statements[3] Correspondence with third parties	Client Member Member[4]

[3] If, however, the client has specifically asked for drafts to be prepared for him, they will belong to the client because then the drafts are the 'product' which is required by the client.

[4] Provided that the client has not required the member to produce these documents for him (*Chantrey Martin & Co v. Martin* [1953] 2 QB 286).

Preparation of financial statements from incomplete records where not instructed by client to work from those records	Schedules	Member[5]
Analysis of banking accounts prepared by member	Reports, memoranda or notes Drafts of the above	Client Member[6]
Other accountancy	Records prepared by the member which are required by law to be kept by the client	Client
Other accountancy	File copies of any documents including drafts	Member
Tax assistance and advice		
Preparation and submission of accounts, returns and computations or VAT returns to HM Revenue & Customs ('HMRC') and other tax compliance work	Accounts, schedules and computations, correspondence between the member and HMRC in relation to the same	Client[7]
Agreement of the client's tax liabilities including those following an enquiry or investigation	Any documents	Client

[5] However, in the case of a body incorporated under statutory provisions, the position is different. For example, s.386 of the Companies Act 2006 sets out the accounting records which a company must keep. Where schedules have not been kept by the client company but such schedules were prepared for the client company in order that it should comply with these legal requirements they would belong to the company.

[6] See above.

[7] *Chantrey Martin & Co v. Martin* [1953] 2 QB 286.

Nature of work	Type of document	Who has ownership?
Preparation of a report for a client to submit to HMRC in connection with an enquiry or investigation	The report and supporting schedules Papers used in preparing the report	Client Client
Provision of advice to a client on tax liabilities arising out of an enquiry or investigation	The report and supporting schedules Papers used in preparing the report	Client Member
Tax consulting, advice or planning	Drafts, internal memoranda, etc. Letters, reports or documents of advice	Member Client
Consulting and advisory work		
Corporate advisory services	Reports and other deliverables Other papers produced as part of the engagement but not provided to the client	Client Member
Insolvency		
Appointments as administrators, administrative receivers or liquidators	Any documents	Please refer to the footnote[8]

[8] As administrators, administrative receivers or liquidators, the fundamental duties of an insolvency practitioner are regulated by Insolvency Act 1986 and Insolvency Rules 1986. In that capacity, members may therefore wish to seek legal advice.

Appointment as a receiver	Any documents created as agent for the company which owns the assets to which the debenture relates[9] All other documents[10]	Company Member

The purpose for which documents and records exist

9 The table below comprises a non-exhaustive list of the purposes for which documents exist which in turn may affect the question of ownership. Again, this table is intended to be indicative and helpful and is not intended to compromise a member's legal rights. If a member, without consent of the client, takes a contrary view to the position shown in the table he is recommended to seek legal advice.

Purpose	**Type of document**	**Who has ownership?**
Communications between a member and his client	Letter received by the member from the client File copy of letter sent by the member to the client	Member Member
Communications between members and third parties	Correspondence to and from a member acting as agent for the client Correspondence to and from a member for purpose of obtaining specialist advice for the client Correspondence to and from a member acting as principal[11]	Client Client Member

[9] The overwhelming majority of modern debentures provide that the receiver is the agent of the company and s.44 Insolvency Act 1986 deems any administrative receiver to be an agent of the company until the company goes into liquidation. However, there will be rare cases where neither of these conditions applies such that the receiver will be the agent of the debenture holder in which case documentation may be created as agent for, and be the property of, the debenture holder.

[10] Members are reminded that the majority, if not all, documentation produced as receiver will be in the capacity of agent either of the company or the debenture holder (see footnote 8 above). Therefore, a member seeking to rely on a lien in such circumstances may wish to seek legal advice.

[11] This would include documents which are not the end product of the member's work, for example: (i) documents confirming or otherwise the balance of an account between a third party and the client, such as those in respect of bank balances or custody of securities; and (ii) other documents which the member has obtained solely for his own use in carrying out his duties as principal. These will normally include correspondence between the member and the client's solicitors in which the member is giving or receiving information (as opposed to advice).

Purpose	Type of Document	Who has ownership?
Internal file notes	Files notes made where member acting as agent (ie, tax compliance work) and preparation of file notes reflected in the fees charged to client	Client
	File notes made where member acting as principal	Member
	File notes prepared other than in relation to work done for the client	Member

Document Retention

10 For additional guidance, members are recommended to consider obtaining further professional or legal advice when drafting a document retention policy.

Members' policy

11 Members are recommended to have and implement a document retention policy in respect of their files and other documents.[12] Some problems or misunderstandings may be avoided if a member's document retention policy is communicated to clients although members should be aware that such communication may give rise to contractual commitments. Members are therefore recommended to make it clear to clients whether the document retention policy is a contractual obligation on the part of the member or not.

12 Members are also reminded that there are certain statutory and regulatory obligations which would govern the periods for retention such as rules regarding documents relating to a client's tax affairs or documents relating to regulated business such as financial services. Members are recommended to seek further professional or legal advice when formulating a document retention policy.

Lien

13 Members may be advised to seek further professional and legal advice when exercising liens.

[12] Ethics Advisory Services have a helpsheet on document retention policies which can be obtained from the Institute's website: www.icaew.co.uk/members.

'General liens' and 'particular liens'

14 A lien is a right of a person to retain possession of the owner's property until the owner pays what he owes to the person in possession. At law there are both general and particular liens. Only a particular lien is likely to be relevant to a member.[13] A particular lien is a lien over property which can be retained only until payment of a particular debt due in respect of that property is paid. An accountant has a particular lien over documents belonging to his client in respect of which the accountant has performed work for which he has not been paid the fee due.[14]

Conditions for the exercise of a particular lien

15 A right of particular lien (in the absence of any agreement to the contrary) will exist only where all of the following circumstances apply:

(i) *The documents retained must be the property of the client who owes the money and not of a third party, no matter how closely connected with the client*.
Accordingly, where a member carries our work for both a company and its directors in their private capacities and where fees remain outstanding in respect of the work done for the directors personally, no right of lien will exist over the company's documents.

(ii) *The documents must have come into the possession of the member by proper means*.
Accordingly, if a member receives documents belonging to a client from a third party in error, the member would not be entitled to exercise a lien over them.

(iii) *Work must have been done by the member in respect of the documents.*
A member may exercise a lien over documents where he has done work in respect of them. Case law indicates that a member's lien would be undermined if a fee note is not submitted or an oral demand not made within a reasonable period of time.[15] The Institute's ethical principles, in particular the fundamental principle of integrity, oblige that a member acts not only with honesty but also with fair dealing. As such, a member who has not already issued an invoice in relation to such work or communicated to the client that there are fees due (and the amount due) must do so as soon as is practicable to ensure that both his legal position is maintained and that he complies with the Institute's high ethical standards.

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[13] General liens are those liens which allow the creditor to retain possession of any property belonging to the debtor in respect of any debt; not necessarily a debt which relates directly to the retained property itself. Members are advised that it is not likely to be worthwhile to assert a general lien in law against a client unless they are expressly given the right in their contract with the client.

[14] In *Woodworth v. Conroy* [1976] QB 884 at 890, Lawton LJ said '*accountants . . . have at least a particular lien over any books of account, files and papers . . .*'

[15] *Albemarle Supply Co v. Hind* [1928] 1 KB 307, *Woodworth v. Conroy* [1976] QB 884.

(iv) *The fees for which the lien is exercised must be outstanding in respect of such work and not in respect of other unrelated work.*
Where documents belonging to, or created for, a client relate to an earlier or different engagement for which no fees are outstanding, no right of lien can be exercised over those documents in respect of other engagements for which fees are outstanding. For example, where a member is holding documents which relate to the preparations of a client's financial statements, the member may not exercise a lien over those documents in respect of unpaid fees which relate to tax advice provided to the same client.

Special cases
16 There are various special cases where the normal position regarding the existence and enforcement of liens does not apply. Special cases may arise as a result of the provisions of a particular statute, or from considerations of general public policy and include the following.

Statutory books of companies
17 An established line of authority exists in which the courts have held that no lien can exist over books or documents of a registered company which, either by statute or by the articles of association of the company, have to be available for public inspection or to be kept at the registered office or some other specified place or to be dealt with in any special way.[16] Accordingly, documents such as the register of members and directors' minute books cannot become the subject of a lien.

Accounting records of companies
18 A lien cannot be asserted over accounting records as defined in s.386 Companies Act 2006 ('Accounting Records') because such records are required[17] to be kept as set out in the Companies Act 2006, and must be open to inspection in accordance with the provisions of that Act[18].

19 Accounting Records cover a wide range of documents and are not limited, say, to double entry ledgers and journals[19]. Examples of what might constitute Accounting Records are as follows:

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[16] *Re Capital Fire Insurance Association* [1883] 24 Ch.D 408 and *Re The Anglo-Maltese Hydraulic Dock Co Limited* [1885] 54 LJ Ch. 730. These cases concerned solicitors' liens; however, the same principles apply to accountants.
[17] By s.386 Companies Act 2006.
[18] *DTC (CNC) Ltd v Gary Sargeant & Co* [1996] 1 BCLC 529 (NB this case was determined on the basis of the 1985 Companies Act. There is no subsequent case law which undermines the principles of the court's decision).
[19] The Technical Release *Accounting records* (FRAG 5/92) contains further guidance on the requirement to keep accounting records. This Guidance was written in the context of the requirements of the Companies Act 1985 but the Institute regards it as continuing to give valid guidance as there is no substantive change between the 1985 and 2006 Acts. However, it is expected to be superseded by guidance to be published by the Financial Reporting Council.

- sales invoices;
- purchase invoices;
- cheque books;
- paying-in books; and
- bank statements.[20]

20 Whilst it might, from the above list, appear to a member that practically all documents which constitute accounting records (in its widest possible sense) will be Accounting Records, the statutory requirement is only that the company should keep adequate accounting records which (i) are sufficient to show and explain the company's transactions and (ii) are such as to disclose with reasonable accuracy the financial position of the company at any time and to enable the directors to ensure that any balance sheet and profit and loss account prepared under the Companies Act 2006 complies with the requirements of that Act. Accordingly, where, for example, a company keeps a purchase ledger, the underlying invoices are unlikely to be Accounting Records.

Administrative receiverships and receiverships

21 Where a member has a lien over the books of account or other documents of a company, the appointment of a receiver does not affect the lien.

22 Although a debenture may prevent a company from creating any mortgage or charge in priority to the debenture, a member's lien is not a mortgage or charge created by the company. Debenture holders cannot therefore prevent a member from acquiring a lien. Such a lien would be untouched by debenture holders taking possession and appointing a receiver.[21] Even where a receiver is appointed by the court, the lien will be unaffected unless the court orders otherwise.

Administrations and liquidations

23 Where a company is the subject of an administration order, or is in liquidation or has a provisional liquidator appointed, a member cannot exercise a lien over any records of the company where the administrator or liquidator has no other way of obtaining possession of such records and so must hand them over.[22] There is one exception, however, where the documents held by a member give title to property (for example, title deeds, share certificates or bills of lading), have been pledged or are held as security for some liability of the company and are held on that basis. This, however, is a difficult area and members may wish to take legal advice on the operation of the exception in any particular case.

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[20] *DTC (CNC) Ltd v. Gary Sargeant & Co* (NB. This case was determined on the basis of the 1985 Companies Act. There is no subsequent case law which undermines the principles of the case.)

[21] *Brunton v. Electrical Engineering Corporation* [1892] 1 Ch. 434.

[22] Section 246 Insolvency Act 1986.

Bankruptcy

24 As in liquidations, a member cannot exercise a lien over any records of the bankrupt, except where the lien relates to documents which give title to property and are held by the member on that basis.[23] Again, this exception is a difficult area and members may wish to take legal advice.

Fee disputes

25 If a client seeks to repay a debt to a member by offering a sum which is less than the total amount owed, a member does not have to accept that amount as settlement in full. However, where a member wishes to accept a smaller sum as a part payment, the member is advised to tell the client (preferably in writing) at the time of acceptance. If the member does not do this, they may adversely affect their legal rights to repayment of the balance.

26 Members are expected to take reasonable steps promptly to resolve any dispute relating to fees[24]. Reasonable steps might include seeking to negotiate, communication with the client, alternative dispute resolution or legal action.

27 Where a legal right of lien exists, the Institute Council supports the exercise of that lien provided that it is appropriate in all the circumstances to do so. Institute guidance on how to handle or avoid complaints[25] indicates that the right of lien exists to persuade a client to pay an outstanding bill. That said, it may be inappropriate to continue to exercise a lien in circumstances where a dispute is to be resolved by formal means (eg, arbitration or litigation). If a member wishes to continue to exercise a lien in such circumstances they are strongly advised to seek legal advice.

Summary

28 Before seeking to exercise a lien, a member is advised to consider whether they fall into any of the special cases outlined in this statement. In all but the most straightforward situations a member is recommended to consider whether legal advice is appropriate. A member will ordinarily have met the standards required by the Institute where they have taken legal advice which supports the decision to exercise a lien or where their circumstances fall clearly within the situations set out in this statement. At the same time though they may need to consider whether any of the circumstances affect the ethical position. In this regard, members may wish to consult the Ethics Advisory Services helpline or a support member.

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[23] Section 349 Insolvency Act 1986.
[24] Section 3.3, Professional accountants in practice, Part B, paragraph 240.4F.
[25] Section 2.8, '*The duty on firms to investigate complaints – guidance on how to handle or avoid them*'.

Data Protection

29 The Data Protection Act 1998 applies to 'personal data'.[26] Members who decide how and why personal data is processed, must comply with the rules set out in that Act regarding fair and lawful data processing. These rules are more commonly known as the data protection 'Principles'. These 'Eight Principles' form the backbone of the Act and apply to all forms of processing. All members who decide how and why personal data is processed have a personal responsibility under the Act to comply with the Eight Principles. Members are therefore advised to consider the Act in the context of any requests for documents or information which may result in the transfer of personal data without the consent of those to whom the personal data relates. For specific guidance, members are referred to Technical Release *Data Protection Act 1998 and its Application to the Major Practice Streams of Accountancy Practices* (Tech 07/04).

Rights of Access

Duties of members to their clients and the powers of third parties to require access: the basic principles

30 Members are reminded that, regardless of whether particular documents are owned by a member or his client, confidentiality is an implied term of every client engagement. In consequence, voluntary access to information or documents should be given only:

- after obtaining the client's consent; or
- where the member's duty of confidentiality to his client is overridden by the powers of third parties to require access to, or compel production of, documents; or
- where the member has a legal right or duty to disclose the information; or
- where the member feels obliged to volunteer information in the circumstances discussed in Section 7.1, 'Professional conduct in relation to defaults or unlawful acts'.

31 Members are reminded of the overriding nature of statutory and other provisions when considering confidentiality. Where public bodies, office holders and regulators (including European institutions) seek access to, or production of, information or documentation in a member's possession under the relevant statutory or regulatory powers, a member is under an obligation to his client to take reasonable steps to satisfy himself that any power is being exercised correctly. Members are reminded that such powers may not extend to requiring members to produce documents which are subject to legal

[26] In other words, data which relate to a living individual who can be identified from those data (or a combination of those data and data which is or is likely to come into the possession of the person processing the data). Members are reminded that personal data may also be 'sensitive personal data' and are referred to the Act if in doubt as to the requirements.

professional privilege. In circumstances where a member believes he may hold documents which are subject to such privilege and where he is being required to produce or give access to such documentation, the member is recommended to take legal advice.

32 It is recommended therefore that members ask the entity requesting the information or documentation to state the source of its power and any statutory or regulatory limitations on those powers before releasing any documentation or providing information. If the documentation sought belongs to a client and the member is unsure of the requesting body's power, it will usually be open for the member to seek the client's consent to disclose. However, provided that the request is made pursuant to a legitimate power, the member's duty of confidentiality will be overridden. Members are reminded that it may not be appropriate to seek the client's consent in all circumstances. This is particularly true in matters subject to the money laundering reporting regime.[27] If in any doubt as to whether it is appropriate to seek a client's consent, members should seek advice from the Ethics Advisory Services or legal advice as appropriate.

33 In certain circumstances, where the power being exercised or the obligation on the member is not clear, the member may wish to take legal or professional advice.

Requests for access from clients

Access for the client himself
34 If a client requests access to documents which belong to him then, subject to any lien, access ought normally to be given. Where the documents requested belong to the member, the member's response to such request is more difficult to determine as a member's willingness to assist will depend on the circumstances in which access is being sought. Giving access may increase the risk of litigation against the member, even where no obvious likelihood exists. However, there are circumstances where allowing access would result in the client being better informed, thereby reducing such risks.

35 Where a director or directors of a client company seek access to documents which either belong to the client company or contain confidential information relating to the client company in connection with the personal affairs or interests of those directors rather than in furtherance of the company's interests, members should obtain authorisation from the board of directors or, where appropriate, from outside shareholders, before permitting access.

36 A client who is an individual also has certain rights under the Data Protection Act 1998 to be provided with a copy in permanent form of all

[27] See Section 9.5, '*Anti-money laundering guidance for the accountancy sector*'. See also Section 7.1, '*Professional conduct and disclosure in relation to defaults or unlawful acts*'.

personal information that is held by a member about them whether contained on client files or otherwise. Copies are obtained by the client making a Subject Access Request. The Institute has issued further guidance on the requirements of the Data Protection Act in the form of Technical Release *Data Protection Act 1998 and its Application to the Major Practice Streams of Accountancy Practices* (Tech 07/04) which is available to members. Where the documents to which the data subject has requested access are subject to a lien, the data subject is generally entitled to have communicated to him a description of the data held by the member and the type of information held in those data.[28] Members seeking to exercise a lien in respect of an individual's documents who receive a Subject Access Request from that individual are warned that there is a balance to strike between compliance with data protection legislation and their legal right of lien. Members may wish to seek legal advice in such circumstances.

Access for the benefit of a third party

37 Sometimes investigating accountants are engaged by a third party to review aspects of the affairs of a company for the purpose of disposals, acquisitions or investments. Access to the working papers of the auditors or the tax advisers of such a company will frequently assist the investigating accountants to perform this task. However, in recent years, auditors and tax advisers have been reluctant to permit such access due to the risk of unintentionally creating duties of care to third parties. The audit or the tax advice will not have been planned and performed in contemplation of any particular commercial transaction and it is for the relevant third party to arrange for appropriate due diligence work to be performed.

38 As discussed above, an auditor's working papers belong to the auditor and so an auditor is not obliged to give access to them in this situation. The position may be the same for the tax adviser depending on the nature of the work performed and the terms of any engagement letter. However, refusing access is unhelpful to the client company who is normally a willing participant in the transaction. An alternative way forward is for members to have a developed policy regarding access to working papers, providing certain conditions are met.

39 The reluctance to permit access can be largely overcome by the use of client authorisation and 'release' letters. The purpose of these letters is to deal with any confidentiality issues and to provide a framework within which members can make their papers available and provide explanations while limiting as far as possible any additional risks. For specific guidance, members are referred to further guidance issued by the Institute. At the time of issue of this Section, this is contained in Technical Release *Access to Working Papers by Investigating Accountants* (Audit 04/03) which contains templates for the necessary letters.

[28] Section 7 of the Data Protection Act 1998.

Requests for documents by Her Majesty's Revenue & Customs (HMRC)

40 HMRC has been reviewing the powers that it inherited from the former Inland Revenue and HM Customs & Excise. Powers of access to information and documents have been harmonised across the main taxes, namely income tax, capital gains tax, corporation tax and VAT as well as 'relevant foreign taxes' (as defined). The new rules are in s.113 of and Schedule 36 to Finance Act 2008[29].

41 Until the new rules come into effect, the VAT provisions are addressed to 'every person who is concerned (in whatever capacity)' in a supply of goods and services including a customer. Such persons may be required to furnish information to the Commissioners.[30] However, it is questionable whether it includes an accountant in possession of the books and records because he is not concerned in any way with actual supplies of goods and services made by his client and so a court order could be necessary to compel an accountant to release such documents.[31] Members in doubt should seek legal or professional advice.

42 In respect of direct tax and, when the new rules come into force, VAT and relevant foreign taxes, HMRC have wide powers to require information of both the taxpayer and third parties which can include the member. Members should consider the authority cited by the authority seeking access and if in any doubt should seek legal or professional advice.

Requests for documents by regulators

43 In the event that a member receives a request for documents or information from a regulator, including but not limited to the Financial Reporting Council (FRC), the Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB), the member is strongly recommended to take legal advice.

Freedom of Information Act 2000

44 Members are referred to further guidance issued by the Institute. At the time of issue of this Section, this is contained in Technical Release *Guidance on the Implications of the Freedom of Information Act 2000* (Audit 02/05).

45 The Freedom of Information Act 2000 ('FOIA') gives individuals and businesses a general right of access to information held by public authorities in England and Wales, whether obtained before or after the Act came into force on 1 January 2005. A wide range of bodies are listed as being public authorities[32] for the purposes of FOIA including: Government Departments, the Financial Services Authority, the Inland Revenue and the Bank of England.

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[29] The date on which this becomes effective had not been determined as at August 2008.
[30] See s.113 of and Schedule 36 to Finance Act 2008, when in force.
[31] See in particular the cases relating to *AE Hamlin* [1983] STC 780 and *EMI Records* [1986] STC 374.
[32] The ICAEW is not a public authority under the Act.

46 In addition, the Secretary of State may by order designate as a public authority for the purposes of the FOIA an entity that is providing, under a contract made with a public authority, a service whose provision is a function of that authority.[33] This may have implications where a public authority outsources the performance of one of its functions to a third party such as internal audit services to a member, in which case that member could become subject to FOIA in respect of the outsourced services only.

47 FOIA provides a right of access to all recorded information held by public authorities or on their behalf, which could include information relating to a member or a member's business (where, for example, the member has provided services to a particular public authority), subject to certain exemptions. Any person making a request to a public authority for identified information is entitled to be informed in writing by the authority whether it holds information of the description specified in the request and, if so, to have that information communicated to him. No reason need be given for the request. The public authority generally has 20 working days to respond and can charge a fee. In general, any information held by the public authority can be requested under the Act. However, there are several exemptions to the general right to information which public authorities can use to refuse disclosure. Some exemptions are absolute while others are qualified. Public authorities can only invoke qualified exemptions where the public interest in disclosing the information is outweighed by the public or private interest in invoking the relevant exemption. Exemptions to note are (i) a qualified exemption for personal data if to disclose the information would breach the Data Protection Act; (ii) an absolute exemption if the requested information was provided to the public authority in confidence (i.e., if the information was disclosed it would be an actionable breach of confidence);[34] and (iii) a qualified exemption for commercially sensitive information and trade secrets. It should be noted that third parties, such as members, do not have the right to prevent disclosure, as it is up to the public authorities to determine if the exemption applies. However, it is expected that public authorities will consult third parties when appropriate.

[33] Section 5 Freedom of Information Act 2000.
[34] Although this itself would be subject to a public interest test under the common law relating to confidence.

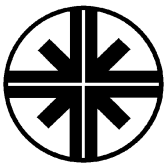
Anti-money laundering guidance for the accountancy sector

Guidance for those providing audit, accountancy, tax advisory, insolvency or related services in the United Kingdom (including such firms providing trust or company services) on the prevention of money laundering and the countering of terrorist financing. Issued by the Consultative Committee of Accountancy Bodies in August 2008.

This handbook section gives the text of the Anti-Money Laundering Guidance issued by the CCAB. It replaces the previous Handbook section 7.2 and technical releases issued in October 2007 (Tech 05/07) and December 2007 (Tech 07/07).

The Guidance is addressed to all entities providing audit, accountancy, tax, insolvency or related services in the United Kingdom by way of business, irrespective of membership of a recognised professional body. We hope that this will promote consistency of compliance with requirements, both between competing firms and where work is sub-contracted from one firm to another. The Guidance should also be followed by any accountancy firm which also provides trust or company services within the meaning of the Money Laundering Regulations 2007.

The Guidance (excluding Appendix A – Supplementary guidance for the Tax Practitioner) has been approved by Treasury (approval granted in July 2008). This means that courts must take it into account when determining whether an accountant's conduct gives rise to certain offences under anti-money laundering legislation. It will also be taken into account in relevant professional disciplinary enquiries. Appendix A has been submitted for Treasury approval. The version submitted for Treasury consideration is included in this handbook statement.



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The Chartered Institute of Management Accountants
The Chartered Institute of Public Finance and Accountancy

Anti-money laundering guidance for the accountancy sector

Guidance for those providing audit, accountancy, tax advisory, insolvency or related services in the United Kingdom, on the prevention of money laundering and the countering of terrorist financing. Issued by the Consultative Committee of Accountancy Bodies, in August 2008.

The Anti-Money Laundering Guidance for the Accountancy Sector has been approved by Treasury (excluding Appendix A – Supplementary guidance for the Tax Practitioner, which has been submitted for Treasury approval separately). Guidance which is approved by Treasury is 'relevant guidance' within the meaning of the Money Laundering Regulations 2007. Courts must consider relevant guidance when determining whether an accountant's conduct gives rise to certain offences under either the Proceeds of Crime Act 2002 or the Money Laundering Regulations 2007. It is this Guidance which practitioners should consider as authoritative when implementing and complying with anti-money laundering requirements.

The Guidance provides the accountancy sector with not only an interpretation of the requirements of the Money Laundering Regulations 2007 (which became effective from 15th December 2007) and primary legislation relating to money laundering and terrorist financing but also practical guidance on good practice for matters not prescribed in law.

This Guidance includes a number of minor changes made since the Guidance was issued in December 2007 (following the publication of an exposure draft in October 2007).

The Guidance reflects not only law but the experience of practitioners. For more complex areas of customer due diligence, our Guidance continues to be cross referred to the guidance notes issued by the Joint Money Laundering Steering Group. However, it is intended that, at least for most smaller practitioners, the Guidance will be self contained and the need to refer to additional external material will be minimal.

To aid easy access, use is made of defined terms explained in a glossary and each section is prefaced with key points for quick reference.

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GLOSSARY

Glossary Annex A – The Specified Disclosure Obligations
Glossary Annex B – HM Treasury consolidated list of persons designated as being subject to financial restrictions.
APPENDIX A – Supplementary Anti-Money Laundering Guidance for Tax Practitioners

Section 1 – About this Guidance

KEY POINTS

- UK anti-*money laundering* regime requirements are set out in the Proceeds of Crime Act 2002 (*POCA*) (as amended by the Serious Organised Crime and Police Act 2005 (*SOCPA*)), the Money Laundering Regulations 2007 (*2007 Regulations*) and the Terrorism Act 2000 (*TA 2000*) (as amended by the Anti-Terrorism, Crime and Security Act 2001 (*ATCSA 2001*) and the Terrorism Act 2006 (*TA 2006*)).
- HM Treasury approval for this *Guidance* has been granted. As such the Courts must take it into account in deciding whether or not an offence has been committed under ss.330–331, *POCA* or the *2007 Regulations* by an *individual* or *business* within its scope.
- *Businesses* and *individuals* should take account of this *Guidance* when acting in the course of business as auditors, *external accountants*, *insolvency practitioner*s and *tax adviser*s, and when acting in the course of business as trust and company service providers. Failure to do so could have serious legal, regulatory or professional disciplinary consequences.
- Where other professional or trade bodies have produced specialist *Guidance* concerning particular services or activities, *businesses* and *individuals* may need, to have regard to that *Guidance* as a supplement to this *Guidance*.

Introduction

1.1 Terms that appear in *italics* in this *Guidance* are explained in the Glossary.

1.2 This *Guidance* has been drafted to be consistent with the *Guidance* for the UK financial sector issued by the Joint Money Laundering Steering Group (*JMLSG*). Some of the material contained in this guide draws significantly on *JMLSG* wording, for which thanks are due to the *JMLSG*. The *JMLSG Guidance* is very comprehensive, and where *businesses* or *individuals* require further guidance, they may seek it from the *JMLSG Guidance*. *Businesses* and *individuals* carrying out *defined services* who follow the *JMLSG Guidance*, adapted for the circumstances in which they are practising, will be deemed to have followed this *Guidance*.

1.3 This *Guidance* has been prepared to assist accountants and related *businesses* and professionals in complying with their obligations, arising from United Kingdom legislation, in relation to the prevention, recognition and reporting of *money laundering*.

Businesses and *individuals* within the scope of this *Guidance*

1.4 The *Guidance* is addressed to *businesses* and *individuals* covered by Regulation 3(1)(c) of the *2007 Regulations* ie, those who act in the course of a business carried on by them in the United Kingdom as an auditor, *external accountant*, *insolvency practitioner* or *tax adviser* (as defined in Regulation 3(4) to 3(8)), and those who act in the course of business as trust or company service providers under Regulation 3(1)(e) of the *2007 Regulations* (as defined in Regulation 3(10)). These services are referred to together for the purpose of this *Guidance* as the *defined services.*

Businesses that provide both accountancy services and trust or company services and that are supervised by HMRC should generally follow this *Guidance* but also have regard to 'Appendix 10: Supplementary guidance for trust or company services providers' of the HMRC guide 'MLR 8 – Preventing money laundering and terrorist financing'.

1.5 This *Guidance* is not addressed to *independent legal professional*s, even where they are acting as *tax adviser*s, *insolvency practitioner*s or trust or company service providers. *Independent legal professional*s should refer to *Guidance* issued by their professional body or *anti-money laundering supervisory authority.* Where *businesses* have sub-contracted parts of their work for clients to other *individuals* or *businesses* situated outside of the United Kingdom, it is likely that those others will be subject to local anti-money laundering law and not to United Kingdom law in respect of the work undertaken by them. However, the responsibility of United Kingdom *businesses* and *individuals* for compliance with the 2007 Regulations and *POCA and TA* in respect of the conduct of their business, and in respect of information or other matters coming to them in the course of conducting that business, remains whether or not parts of the work are sub-contracted.

1.6 Regulation 3(7) defines *external accountant* as someone who provides *accountancy services* by way of business to other persons, when providing such services. *The 2007 Regulations* do not define the term *accountancy services*. For the purpose of this *Guidance, accountancy services* includes, any service provided under a contract for services (ie, not a contract of employment) which pertains to the recording, review, analysis, calculation or reporting of financial information.

1.7 Employees of organisations which are not providing *defined services* are outside the scope of this *Guidance*. Those employed in other *regulated sectors* (financial services, law firms, estate agents, high value dealers or casinos) should have regard to *Guidance* issued by the employer's trade or professional body or *anti-money laundering supervisory authority*. Employees are not engaged in the *regulated sector* for the purposes of the anti-*money laundering* legislation, if their employer is not acting in the *regulated sector*. Nor are those providing services privately on an unremunerated and voluntary basis, since those services will not have been provided 'by way of business'. Services

provided in the course of employment or business in *defined services* will however be included, even if provided to the *client* on a pro-bono or unremunerated basis.

1.8 All persons (including those outside the *regulated sector*) risk committing the *money laundering offences* and are required to report suspicions of *terrorist financing* formed in the course of their trade, profession or employment. However, those outside the *regulated sector* have no mandatory requirements for reporting knowledge or suspicions of non-terrorism related *money laundering* (although if they are themselves involved in the *money laundering,* reporting under s.338, POCA (authorised disclosures) is required if the person is to benefit from the defence available in this regard under ss.327–329, POCA), or for maintaining anti-*money laundering* systems. Additional guidance on both the legal requirements and on the avoidance of *money laundering* risk, for accountants or tax advisers working outside the *regulated sector*, may be sought from an appropriate trade or professional body.

1.9 All *businesses* and *individuals* within the scope of this *Guidance* should have regard to its content, in respect of all *defined services.* Members and member firms of the *CCAB* member bodies and other professional bodies which adopt this *Guidance* should be aware that failure to take account of the provisions of this *Guidance* can give rise to a liability to disciplinary action. *Businesses* and *individuals* undertaking *defined services* who are supervised by HMRC should refer to the HMRC's web site to determine the likely effects of failure to take into account this *Guidance*.

1.10 It should also be noted that the way in which *businesses* and *individuals* apply the provisions of this *Guidance* will be likely to influence decisions by their professional bodies on whether they have complied with general ethical requirements, for example relating to integrity, the need to consider the public interest, or regulatory requirements.

1.11 *Businesses* and *individuals* may also need to have regard to *Guidance* issued by other standard setters, professional bodies or trade associations where this relates to particular specialist services. Additional *Guidance* should be read in conjunction with this *Guidance*. Such *Guidance* includes (but may not be limited to):

- Auditors – Auditing Practices Board Practice Note 12 'Money Laundering: Interim *Guidance* for Auditors in the UK'.
- *Tax advisers* – Supplementary Guidance for Tax Practitioners (Appendix A).

1.12 This *Guidance* does **not** deal with the specific requirements of the Financial Services Authority (*FSA*). Accordingly, those providing financial services and regulated by the *FSA* should additionally refer to *FSA* requirements, which incorporate anti-*money laundering Guidance* issued by the Joint Money Laundering Steering Group (*JMLSG*).

1.13 However, this *Guidance* **does** cover the requirements of firms providing services under the Designated Professional Body provisions of Part XX, section 326 of the Financial Services and Markets Act 2000, or otherwise providing financial services under the oversight of their professional body. Such activities for the purpose of this *Guidance* are included within the scope of *defined services.*

1.14 As well as *'business relationship',* the *2007 Regulations* refer to 'occasional transactions', ie, those outside the *business relationship* valued at over €15,000. 'Occasional transactions' is a cogent term in a banking context but is difficult to apply in the context of *accountancy services*. Therefore this *Guidance* uses only '*business relationship*', a more natural term for accountancy and related services, throughout.

Role of supervisory bodies

1.15 The *2007 Regulations* require all *businesses* to be supervised by an appropriate *anti-money laundering supervisory authority*. For many *businesses* acting as *external accountants* and/or auditors, *tax advisers* or *insolvency practitioners* the supervisory authority will be the professional body to which they belong. A full list of approved supervisory authorities for the accountancy sector is set out in Schedule 3 to the *2007 Regulations,* including all six *CCAB* member bodies and certain other accountancy and tax bodies. Those *businesses* that are not members of, or otherwise regulated by, one of the approved bodies will be supervised by HMRC. Where a *business* or *individual* is subject to more than one *anti-money laundering supervisory authority* the relevant *anti-money laundering supervisory authorities* may (Regulation 23(2)) agree that one shall act in respect of that *business* or *individual* but they are not obliged to do so. Accordingly some *businesses* and *individuals* will continue to have to respond to more than one *anti-money laundering supervisory authority*.

Legal requirements and status of this *Guidance*

1.16 The legislation which embodies the UK anti-*money laundering* regime is contained in:

- The Proceeds of Crime Act 2002 (*POCA*) as amended by The Serious Organised Crime and Police Act 2005 (*SOCPA*) and relevant statutory instruments;
- The Terrorism Act 2000 (*TA 2000*) (as amended by the Anti Terrorism Crime and Security Act 2001 (*ATCSA*) and the Terrorism Act 2006 (*TA 2006*)) and relevant statutory instruments; and
- The Money Laundering Regulations 2007 (*2007 Regulations*) and relevant statutory instruments.

POCA and *TA 2000* contain offences which may be committed by *individuals* or entities, whereas the *2007 Regulations* deal with the systems and controls

which *businesses* are required to have and contain offences which may be committed by *businesses* as well as the key *individuals* within them.

1.17 Approval by HM Treasury has been granted in relation to this *Guidance*. This means the Courts must have regard to the *Guidance* in deciding whether *businesses* or *individuals* affected by it have committed an offence under the *2007 Regulations* or under ss.330–331, *POCA*. Of course, this *Guidance* cannot be exhaustive. It may be necessary to seek advice either from trade or professional bodies, *anti-money laundering supervisory authorities* or other sources on issues and situations not covered by this *Guidance*.

1.18 This *Guidance* has been prepared on the basis that compliance with its requirements, and recommendations, will ensure compliance with relevant legislation and professional requirements. Within this *Guidance*, the term 'must' is used to indicate a legal or regulatory requirement and accordingly the use of this term indicates where following this *Guidance* is considered mandatory. *Businesses* and *individuals* may seek alternative interpretations of the UK *anti-money laundering* regime if they wish but they are recommended to consider the impact of any advice they receive on their obligations and be able to justify why they have preferred to implement an alternative interpretation. However, there are many instances where law and regulation does not prescribe the required actions. In such instances the term 'should' (and other terms suggesting possible ways in which *businesses* and *individuals* may approach matters subject to this *Guidance*) are used to indicate good practice methods that may be employed to meet statutory and regulatory requirements. *Businesses* and *individuals* need to consider the specific circumstances of their own situation in determining whether the suggested good practice methods are appropriate, or whether they consider alternative practices may be employed to achieve compliance with law and regulation. In all cases, *businesses* and *individuals* need to be prepared to be able to explain to their anti-*money laundering supervisory authority* the rationale for their procedures and why they consider they are compliant with law and regulation.

1.19 Note that the UK anti-*money laundering* regime does not apply to some services that *businesses* may undertake and applying the regime's requirements to all their services may in these cases be unnecessarily costly. This *Guidance* assumes that many *businesses* will find it easier, and more effective, to apply the requirements to all their services. However, it is a decision for each *business* to take. Where *businesses* choose to outsource or subcontract work to non-regulated entities, they should bear in mind that they remain subject to the obligation to maintain appropriate risk management procedures to prevent *money laundering* activity. In that context, they should consider whether the subcontracting increases the risk that they will be involved in or used for money laundering, in which case appropriate controls to address that risk should be put in place.

1.20 Those involved in the provision of management consultancy services or interim management should be particularly alert to the possibility that they

could be within the scope of the anti-*money laundering* regime to the extent they supply any of the *defined services* when acting under a contract for services in the course of business.

1.21 Throughout this *Guidance*, *businesses* and *individuals* subject to the provisions of the UK anti-*money laundering* regime through being covered in Regulation 3, *2007 Regulations* or Schedule 9 to *POCA* are referred to as being part of the *regulated sector.* Note that whilst *POCA* refers to those covered in Schedule 9 as 'regulated' persons and the *2007 Regulations* refer to those covered by Regulation 3 as 'relevant' persons, those included in the two categories are identical.

1.22 Throughout this *Guidance*, the *nominated officer* required to be appointed by a *business* under the *2007 Regulations* to receive disclosures in accordance with Part 7, *POCA* is referred to by the name commonly used in the *regulated sector* as a *Money Laundering Reporting Officer* or *MLRO*.

Section 2 – The offences

KEY POINTS

- The three *money laundering offences* are those contained in ss.327–329, the Proceeds of Crime Act 2002 (*POCA*). The Terrorism Act 2000 (*TA 2000*) also creates similar offences relating to *terrorist financing*. In this *Guidance*, the term '*money laundering*' will encompass *terrorist financing* activities.
- Detailed *Guidance* as to the provisions of the *TA 2000* has not been provided as the requirements for the *regulated sector* are very similar to those contained in *POCA* which are described in detail. Reporting of *terrorist financing* suspicions is through the same channels as *money laundering* suspicions.
- The *money laundering* offences are framed very broadly and are designed to catch any activity in respect of *criminal property*, including possession of the proceeds of one's own *criminal conduct*.
- *Criminal conduct* is widely defined by s.340, *POCA* to be conduct that is an offence in any part of the UK as well as conduct occurring elsewhere that would have been an offence if it had taken place in the UK. There are very limited exceptions to this for conduct which is both known to be legal in the country in which it is committed and which falls within the specific exceptions set out in orders made by the Secretary of State.
- *Criminal property* is defined by s.340, *POCA* as being the benefit of *criminal conduct* where the alleged offender knows or suspects that the property in question represents such a benefit.
- *Terrorist property* is defined in s.14, *TA 2000* as money or property likely to be used for terrorist purposes, or the proceeds of commissioning or carrying out terrorist acts.
- The *money laundering* offences and the similar offences under *TA 2000* can be committed by any person, whether or not they are part of the *regulated sector*. Defences available to any person charged with such offences include reporting to the appropriate authorities and obtaining consent. *Individuals* working in any *business* can commit, subject to limited exemptions, the offence of failing to disclose *terrorist financing*.
- There are three further types of *POCA* offences relevant to *individuals* to whom this *Guidance* relates. These are the failing to disclose offences in ss.330–331, *POCA* (NB: s.332 contains a similar offence relating to *MLRO's* outside of the *regulated sector*); *tipping off* (s.333A, *POCA*); and *prejudicing an investigation* (s.342, *POCA*). There are similar offences in ss.19–21A, *TA 2000*.
- The offence of failing to make a *money laundering* disclosure (often referred to as failing to report) can be committed by any *individual* working in the *regulated sector* or by an *MLRO* working in other *business*. The offence of *tipping off* is set out in s.333A, *POCA* which

applies to those in the *regulated sector* only. The *POCA* offence of *prejudicing an investigation* can be committed by anyone. There are similar failing to disclose and *tipping off* offences contained in *TA 2000*.

- It is a criminal offence for a *business* not to comply with the *2007 Regulations*, if that *business* is within their scope. It is also an offence for any partner, director or officer of the *business,* to consent to or connive at the non-compliance or by neglect to cause non-compliance.

What is money laundering?

2.1 In UK law *money laundering* is defined very widely, and includes all forms of handling or possessing *criminal property*, including possessing the proceeds of one's own crime, and facilitating any handling or possession of *criminal property*. *Criminal property* may take any form, including in money or money's worth, securities, tangible property and intangible property. *Money laundering* can be carried out in respect of the proceeds of conduct that is an offence in the UK as well as most conduct occurring elsewhere that would have been an offence if it had taken place in the UK. For the purpose of this *Guidance*, *money laundering* is also taken to encompass activities relating to *terrorist financing*, including handling or possessing funds to be used for terrorist purposes as well proceeds from terrorism. Terrorism is taken to be the use or threat of action designed to influence government, or to intimidate any section of the public, or to advance a political, religious or ideological cause where the action would involve violence, threats to health and safety, damage to property or disruption of electronic systems. Materiality or de minimis exceptions are not available in relation to either *money laundering* or *terrorist financing* offences.

2.2 *Money laundering* activity may range from a single act, eg, being in possession of the proceeds of one's own crime, to complex and sophisticated schemes involving multiple parties, and multiple methods of handling and transferring *criminal property* as well as concealing it and entering into arrangements to assist others to do so. *Businesses* and *individuals* need to be alert to the risks of *clients*, their counterparties and others laundering money in any of its possible forms. The *business* or its *client* does not have to be a party to *money laundering* for a reporting obligation to arise (see section 3). Where criminal proceeds have already arisen, s.340(11), *POCA* includes within the definition of *money laundering* any attempt, conspiracy or incitement to commit an offence under ss.327–329, *POCA* as well as aiding, abetting, counselling or procuring an offence under ss.327–329, *POCA*. In the case of *terrorist financing*, it is an offence to attempt to commit an offence under ss.15–18, *TA 2000* even if *terrorist property* has not come into being, eg, under s.15(1), *TA 2000* where the invitation to provide money or other property for *terrorist financing* is in itself an offence. Further, the definition of *'terrorist property'* means that all dealings with funds or property which are

likely to be used for the purposes of terrorism, even if the funds are 'clean' in origin, is a *terrorist financing* offence.

Money laundering offences

2.3 Sections 327–329 in the Proceeds of Crime Act (*POCA*) (as amended by the Serious Organised Crime and Police Act 2005 (*SOCPA*)) define the *money laundering* offences. **Anyone** can commit one of these. Conviction of any of these offences is punishable by up to 14 years imprisonment and/or an unlimited fine. A person commits a *money laundering* offence if he:

- **Conceals,** disguises, converts or transfers *criminal property*, or removes *criminal property* from England and Wales, or from Scotland or from Northern Ireland (s.327);
- Enters into or becomes concerned in an **arrangement** which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of *criminal property* by or on behalf of another person (s.328); or
- **Acquires**, uses or has possession of *criminal property* except where adequate consideration was given for the property (s.329).

2.4 None of these offences are committed if:

- the persons involved did not know or suspect that they were dealing with the proceeds of crime; or
- a report of the suspicious activity is made promptly to an *MLRO* (an *internal report*) or direct to *SOCA* (a *suspicious activity report*, or *SAR*) under the provisions of s.338, *POCA,* and (if the report is made before the act is committed) the appropriate consent is obtained before doing the act*; or*
- no report is made, there was a reasonable excuse for this failure (note that there is no *money laundering* case law on this issue and it is anticipated that only relatively extreme circumstances, such as duress, might be accepted); or
- the act is committed by someone carrying out a law enforcement or judicial function; or
- the conduct giving rise to the *criminal property* was reasonably believed to have taken place outside of the UK, and the conduct was in fact lawful under the criminal law of the place where it occurred, and the maximum sentence if the conduct had occurred in the UK would have been less than 12 months (except in the case of an act which would be an offence under the Gaming Act 1968, the Lotteries and Amusements Act 1976 or under ss.23 or 25, *FSMA*, which will fall within the exemption even if the relevant sentence would be in excess of 12 months). In this *Guidance*, this is referred to as the *overseas conduct exemption.*

2.5 It should be noted that the tests relating to overseas conduct (set out in SI 2006 No1070 and in Section 2.4, final bullet, of this *Guidance*) are complex and onerous. These are very stringent tests, and as such *individuals* and *businesses* need to be cautious in their application.

2.6 There is a further exemption for deposit taking bodies (accountancy *businesses* holding clients' money cannot use this exemption) who may continue to run an account containing *criminal property* where the each transaction is less than the threshold amount (currently £250) set out in s.339A, *POCA.*

2.7 Note that ss.15–18, Terrorism Act 2000 (*the TA 2000*) also create similar offences (*terrorist* offences) to those contained in ss.327–329, *POCA* but that there is no *overseas conduct exemption* or threshold amounts.

Offences of failing to disclose

2.8 *Individuals* in the *regulated sector* commit an offence if they fail to make a disclosure in cases where they have knowledge or suspicion, or reasonable grounds for suspicion, that *money laundering* is occurring. Disclosure must be made to their *MLRO* or direct to *SOCA* under s.330, *POCA*. In this *Guidance*, disclosure to an *MLRO* is referred to as an *internal report* and to *SOCA* as a *suspicious activity report* or *SAR*. *MLROs* have a duty to make disclosures under s.331, *POCA* if they have knowledge, suspicion or reasonable ground to suspect *money laundering* as a consequence of an *internal report*. The s.332 failure to disclose offence is similar and would apply to an *MLRO* in a business outside of the *regulated sector*, including an *MLRO* appointed to deal with reports emanating from non-regulated business within a *business* that conducted both regulated, and non-regulated services, in respect of suspicions arising from *internal reports.* This is not further addressed in this *Guidance*. These offences are punishable by imprisonment of up to 5 years and/or an unlimited fine.

2.9 Similar provisions regarding failure to disclose are contained in s.19, and 21A, *TA 2000*. The s.19 failure to report offence is applicable to **anyone** in employment or business outside of the regulated sector, with s.21A being applicable to all those in the *regulated sector*.

The failure to disclose offence under Sections 330 and 331 *POCA*

2.10 The failure to disclose offence in s.330 is committed if an *individual* fails to make a report comprising the *required disclosure* as soon as is practicable either in the form of an *internal report* to his *MLRO* or in the form of a *SAR* to a person authorised by the Serious Organised Crime Agency (*SOCA*) to receive disclosures. The obligation to make the *required disclosure* arises when:

- a person knows or suspects, or has reasonable grounds for knowing or suspecting that another person is engaged in *money laundering;*
- the information or other matter on which the above is based came to him in the course of business in the *regulated sector;*
- he either can identify that other person, or has information concerning the whereabouts of the laundered property or the information he has may assist in identifying the person or the whereabouts of the property (the

laundered property is that which forms the subject of the matter of the known or suspected *money laundering*).

2.11 An *MLRO* is obliged to report if he is satisfied that the information received in *internal report*s meets the tests set out in 2.10. An *MLRO* may commit the s.331, *POCA* offence if he fails to pass on reportable information in *internal report*s that he has received, as soon as is practicable, to *SOCA*.

Required Disclosure

2.12 *Individuals* need to take care to ensure that any information held by them which is part of the *required disclosure*, ie, the identity of the suspect (if known), the information or other matter on which the knowledge or suspicion of *money laundering* (or reasonable grounds for such) is based and the whereabouts of the laundered property (if known) is passed as soon as is practicable to the *MLRO*. Additional information held by the *individual* which identifies other parties involved in or connected to the matter should also be given to the *MLRO*.

2.13 Further *Guidance* on the making of *SARs,* including the appropriate form and manner of reporting, is given in sections 5 and 6 below.

Defences and exemptions

2.14 There are defences to and exemptions from the failing to disclose offences as follows:

- there is reasonable excuse for not making a report (note that there is no *money laundering* case law on this issue and it is anticipated that only relatively extreme circumstances, such as duress and threats to safety, might be accepted); or
- the *privilege reporting exemption* (see sections 7.26 to 7.46 below) applies; or
- the *individual* does not actually know or suspect *money laundering* has occurred and has not been provided by his employer with the training required by the *2007 Regulations* (Regulation 21). If the employer has failed to provide the training, this is an offence on the part of the employer. The effect for the individual who has not been provided with training is that the objective test (of being required to report if there are 'reasonable grounds' for knowledge or suspicion) is removed; or
- it is known, or believed on reasonable grounds, that the *money laundering* is occurring outside the UK, and is not unlawful under the criminal law of the country where it is occurring.

In determining whether an offence has been committed under ss.330 and 331, the Courts must have regard to the content of this *Guidance* when applied to an *individual* delivering *defined services* or to an *MLRO*.

2.15 Whilst an *individual* in the *regulated sector* has a duty to report, other persons may voluntarily report to *SOCA* and also receive the protections available both in terms of potentially creating a defence to a *money laundering*

offence and also the protection against accusations of breach of confidentiality providing the report is properly made under the provisions of either of ss.337 and 338, *POCA* (see section 6.10) as appropriate.

Tipping off

2.16 The offence of *tipping off* was previously set out in s.333, *POCA*, but was removed by statutory instrument (effective from 26 December 2007). The s.333, *POCA* offence meant anyone not acting in the course of a business in the *regulated sector* could commit this offence which consisted of:

- knowing or suspecting that a report has been made either to an *MLRO* or to *SOCA* (under either s.337 or s.338, *POCA*); and
- making any disclosure which he knows or suspects is likely to prejudice any investigation that might follow that report.

There were limited exceptions relating to persons carrying out law enforcement or judicial functions, and to legal advisers acting in privileged circumstances provided the disclosure is not made with the intention of furthering a criminal purpose.

The penalty for this offence is a maximum of 5 years imprisonment, or an unlimited fine, or both.

2.17 Section 333, *POCA* is replaced by s.333A, *POCA* which applies only to the *regulated sector.* The criminal offence of *tipping off* in s.333A, *POCA* arises where a person in the *regulated sector* discloses either:

- that a disclosure has been made by a person of information obtained in the course of a *regulated sector business* either to an *MLRO* or to *SOCA* (under either s.337 or s.338, *POCA*) or to any other person authorised by *SOCA* to receive disclosures, or to the police or HMRC and the disclosure is likely to *prejudice any investigation* that might be conducted following the disclosure referred to; or
- that an investigation into allegations that a *money laundering* offence has been committed, is being contemplated or is being carried out and the disclosure is likely to prejudice that investigation and the information disclosed came to the person in the course of a *business* in the *regulated sector.*

A *tipping off* offence will not be committed under s.333A, *POCA* if the person did not know or suspect that the disclosure was likely to *prejudice any investigation* that followed.

The penalty for this offence on summary conviction is a maximum of three months imprisonment, or a fine on scale 5, or both and on conviction on indictment to imprisonment for a term not exceeding two years, or a fine or both. There are a number of exceptions to this prohibition on revealing the

existence of a report or an actual or contemplated investigation which are as follows:

- **Disclosures within an undertaking or group etc** (s.333B): a person does not commit an offence if he makes a disclosure to another person employed by the same undertaking as him, and nor does an *independent legal professional* or a *relevant professional adviser* commit an offence if the disclosure is made to another *independent legal professional* or a *relevant professional adviser* where both the person making the disclosure and the person to whom it is made are in either an EEA state or a state imposing equivalent anti-*money laundering* requirements and those persons perform their professional activities within different undertakings that shares common ownership, management or control.
- **Other permitted disclosures between institutions etc** (s.333C): an *independent legal professional* or a *relevant professional adviser* does not commit an offence if he makes a disclosure to another person of the same kind from a different undertaking but of the same professional standing as himself (including as to duties of professional confidentiality and the protection of personal data) where the disclosure relates to the same *client* or former *client* of both advisers and involves a transaction or provisions of a service that involved them both, the disclosure is only made for the purpose of preventing a *money laundering* offence and the disclosure is made to a person in an EU Member State or a State imposing an equivalent money laundering requirements. This means that eg, an accountant may only disclose to another accountant, and not to a lawyer or another kind of *relevant professional adviser*.
- **Other permitted disclosures (general)** (s.333D): an offence is not committed if a disclosure is made to an *anti-money laundering supervisory authority* by virtue of the Money Laundering Regulations 2007 or for the purpose of the prevention, investigation or prosecution of a criminal offence in the UK or elsewhere, an investigation under *POCA,* or enforcement of any order of a court under *POCA*. In addition, and of importance to those who are *relevant professional advisers*, an offence is not committed by a *relevant professional adviser* if he makes the disclosure to his *client* for the purpose of dissuading the *client* from engaging in conduct amounting to an offence.

2.18 Any of the *tipping off* offences contained in s.333A, *POCA* will only occur in the circumstances described, but there may be circumstances where a money launderer may be alerted to the possibility that a report will be or has been made or an investigation conducted, other than by a disclosure of such fact eg, by unexpected delay caused by waiting on *consent*. These have been distinguished in this *Guidance* by use of the phrase '*alerting a launderer*'. *Businesses* will also need to take care to guard against *alerting a launderer,* as part of their policies and procedures aimed at preventing operations related to *money laundering*.

2.19 A *tipping off* disclosure may be made in writing or verbally, and either directly or indirectly – including through inclusion of relevant information in

published information. Considerable care is required in carrying out any communications with *clients* or third parties following a report. Before any disclosure is made relating to matters referred to in an *internal report* or *SAR*, it is important to consider carefully whether or not it is likely to constitute offences of *tipping off* or *prejudicing an investigation*. It is suggested that *businesses* keep records of these deliberations and the conclusions reached (sections 7.10 and 7.11).

2.20 However, *individuals* and *businesses* in the *regulated sector* will frequently need to continue to deliver their professional services and a way needs to be found to achieve this without falling foul of the *tipping off* offence. Section 333D(2) is of assistance in this regard (disclosure to his *client* for the purpose of dissuading the *client* from engaging in conduct amounting to a *money laundering* offence). More *Guidance* on acting for a *client* after a *money laundering* suspicion has been formed is given in section 9.

Prejudicing an investigation

2.21 This offence is set out in s.342, *POCA*. This offence is committed where a person:

- knows or suspects that a *money laundering*, confiscation or civil recovery investigation is being conducted or is about to be conducted; and
- makes a disclosure which is likely to *prejudice the investigation*; or
- falsifies, conceals or destroys documents relevant to the investigation, or causes that to happen.

As with *tipping off* offences, the person making the disclosure does not have to intend to *prejudice an investigation* for this offence to apply. However, there is a defence available if the person making the disclosure did not know or suspect the disclosure would be prejudicial, did not know or suspect the documents were relevant, or did not intend to conceal any facts from the person carrying out the investigation.

2.22 There are limited exceptions relating to persons carrying out law enforcement or judicial functions, and to legal advisers acting in privileged circumstances provided the disclosure is not made with the intention of furthering a criminal purpose.

2.23 Considerations similar to those set out under *tipping off* above apply in terms of how the offence may be committed and of taking precautions to ensure any disclosure made does not *prejudice an investigation*. *Businesses* should ensure they have sufficient document retention policies in place (see section 3.9 of this *Guidance* – Record Keeping) to meet the needs of this section of *POCA* and the *2007 Regulations*, as well as their legal and professional obligations more generally.

Knowledge and suspicion

Knowledge or suspicion?

2.24 An offence is committed by an *individual* in the *regulated sector* if he fails to report where he has knowledge, suspicion or reasonable grounds for suspecting *money laundering* activity. There is no definition of knowledge or suspicion within *POCA* and so interpretation of their meaning will rely on judgements in past legal cases, as well as this *Guidance* and on the ordinary meaning of the words.

2.25 Having knowledge means actually knowing that something is the case.

2.26 Case law suggests that suspicion is a state of mind more definite than speculation, but falls short of knowledge based on evidence. It must be based on some evidence, even if that evidence is tentative – simple speculation that a *client* may be *money laundering* is not sufficient grounds to form a suspicion. Similarly, a general assumption that low levels of crime (eg, not declaring all cash takings) are endemic in particular industry sectors does not amount to reasonable grounds for suspicion of particular *clients* operating in that sector.

2.27 A frequently used description is that '. . . A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion, but without sufficient evidence"' (*Queensland Bacon PTY Ltd v. Rees [1966] 115 CLR 266 at 303, per Kitto J*). In another more recent case, *Da Silva [2006] EWCA Crim 1654,* 'It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'

2.28 *Money laundering* occurs only when *criminal property* has accrued to someone from a criminal act. In addition, it must be borne in mind that for property to be *criminal property* not only must it constitute a person's benefit from *criminal conduct*, but the alleged offender (ie, the person alleged to be laundering *criminal property*) must know or suspect that the property constitutes such a benefit. This means, for instance, that if someone has made an innocent error, even if such an error resulted in benefit and constituted a strict liability criminal offence, then the proceeds are not *criminal property* for the purposes of *POCA* and no *money laundering* offence has arisen until and unless the offender becomes aware of the error (eg, s.167(3), Customs and Excise Management Act 1979). *MLROs* need to consider carefully before reporting whether the information or other matter they intend to report meets these criteria. Examples of unlawful behaviour which may be observed, and may well result in advice to a *client* to correct an issue, but which are not reportable as *money laundering* are given below:

- offences where no proceeds or benefit results, such as the late filing of company accounts. However, *businesses and individuals* should be alert to the possibility that persistent failure to file accounts could represent part of

a larger offence with proceeds, such as fraudulent trading or credit fraud involving the concealment of a poor financial position.
- misstatements in tax returns, for whatever cause, but which are corrected before the date when the tax becomes due.
- attempted frauds where the attempt has failed and so no benefit has accrued (although as this may still be a Fraud Act offence in England, Wales and Northern Ireland or the common law offence of fraud in Scotland, *individuals* and *businesses* may wish to consider reporting to their local police force or, once operational, the 'National Fraud Reporting Centre'). This includes '419'[1] letters and other attempted advanced fee frauds where there is no knowledge of benefit accruing. In the case of such letters, *individuals* and *businesses* may wish to consider following the guidance on the Metropolitan Police Fraud Alert internet pages (www.met.police.uk/fraudalert).

Where a *client* refuses to correct, or unreasonably delays in correcting, an innocent error that gave rise to proceeds and which was unlawful, *businesses* should consider what that indicates about the *client's* intent and whether the property has therefore now become *criminal property.*

Reasonable grounds for knowledge or suspicion

2.29 *Individuals* in the *regulated sector* must make an *internal report* or a *SAR*, as applicable, if there are 'reasonable grounds' for knowledge or suspicion, as well as actual knowledge or suspicion. This 'reasonable grounds' test creates an objective test – persons in the *regulated sector* will not be able to rely on an assertion of ignorance or naivety where this would not be reasonable to expect of a person with their training and position. For example, a person might be considered to have reasonable grounds for knowledge of *money laundering* if he had actual knowledge of, or possessed information which would indicate to a reasonable person, that another person was committing or had committed a *money laundering* offence; or had deliberately ignored the obvious inference from information (ie, wilfully shutting one's eyes) known to him that another person was committing or had committed a *money laundering* offence. Please note that the interpretation of 'reasonable grounds' has not, as yet, been tested by the courts for the purposes of *POCA.*

2.30 'Reasonable grounds' should not be confused with the existence of higher than normal risk factors which may affect certain sectors or classes of persons. For example, cash-based *businesses* or complex overseas trust and company structures may be capable of being used to launder money, but this capability of itself is not considered to constitute 'reasonable grounds'.

2.31 Existence of higher than normal risk factors require increased attention to gathering and evaluation of 'know your *client*' information, and heightened awareness of the risk of *money laundering* in performing

[1] Otherwise known as 'Nigerian scam' letters or equivalent.

professional work, but do not of themselves require a report of suspicion to be made. For 'reasonable grounds' to come into existence, there needs to be sufficient information to advance beyond speculation that it is merely possible someone is laundering money, or a higher than normal incidence of some types of crime in particular sectors.

2.32 It is important that *individuals* do not turn a blind eye to information, but make reasonable enquiries such as a professional with their qualifications, experience and expertise might be expected to make in such a situation within the normal scope of their assignment or client relationship, and draw a reasonable conclusion such as may be expected of a person of their standing. *Individuals* should exercise a healthy level of professional scepticism, and if unsure of the action that should be taken, consult with their *MLRO* or otherwise in accordance with their *businesses'* procedures. If in doubt, *individuals* should err on the side of caution and make a report to their *MLRO*.

Non-compliance with the money laundering regulations

2.33 It is a criminal offence for a *business* not to comply with the *2007 Regulations*, if it is within their scope. An offence may also be committed by any partner, director or officer of the *business,* who has consented to or connived at the non-compliance or where the non-compliance is attributable to his neglect.

2.34 The relevant offences are referred to below. *Individuals* and *businesses* should appreciate that there are a wide range of requirements in respect of which failure to comply could be considered to be a criminal offence.

2.35 The offences are set out in Regulation 45 and those which are relevant to the provision of *defined services* relate to:

- Regulation 7 – failure to apply *customer due diligence* measures
- Regulation 8 – failure to apply ongoing monitoring of *business relationships* and *customer due diligence*
- Regulation 9 – failure to comply with the requirements on timing of verification of identity of *clients* and any beneficial owner
- Regulation 11 – continuing with transaction/*business relationship* where unable to apply *customer due diligence* measures
- Regulation 14 – failure to apply enhanced *customer due diligence* and ongoing monitoring where required
- Regulation 18 – failing to follow a direction made by HM Treasury under this regulation (directions where *FATF* applies counter-measures)
- Regulation 19 – failure to keep the required records
- Regulation 20 – failure to establish, maintain, monitor and manage the required policies and procedures
- Regulation 21 – failure to take appropriate measures to provide the required training

- Regulations 26, 27 – failures regarding certain registration procedures where the Commissioners (HMRC) are the supervisory body (not applicable to those supervised by a body listed in Schedule 3)
- Regulation 33 – failure to comply with registration requirements specified by the Commissioners (not applicable to those supervised by a body listed in Schedule 3)

2.36 Further *Guidance* on compliance with the *2007 Regulations* is given in sections 3 to 7 below. As Treasury approval has been obtained the Courts are obliged to take into account compliance with this *Guidance*, in deciding whether an offence has been committed.

Section 3 – Anti-money laundering systems and controls

KEY POINTS

Under the Money Laundering Regulations 2007 (*2007 Regulations*) *businesses* are required to establish appropriate risk-sensitive policies and procedures in order to prevent activities related to *money laundering* and *terrorist financing* including those policies and procedures which provide for:

- identification and scrutiny of complex or unusually large transactions, unusual patterns of transactions with no apparent economic or lawful purpose and other activities regarded by the regulated person as likely to be of the nature of *money laundering* or *terrorist financing*;
- prevention of use of products favouring anonymity;
- determination of whether a *client* is a *PEP*;
- *customer due diligence*, ie, procedures designed to acquire knowledge about the firm's *clients* and prospective *clients* and to verify their identity as well as monitor *business relationships* and transactions;
- internal reporting including appointment of an *MLRO* to receive the *money laundering* reports required under the Proceeds of Crime Act 2002 (*POCA*) and the Terrorism Act *(TA 2000*) and a system for making those reports;
- record keeping, including details of *customer due diligence* and supporting evidence for *business relationships*, which need to be kept for five years after the end of a relationship and records of transactions, which also need to be kept for five years;
- internal control, risk assessment and management, compliance monitoring, management and communication; and
- in addition, *businesses* are required to take measures to make relevant employees aware of the law relating to *money laundering* and terrorist finance, and to train those employees in how to recognise and deal with transactions which may be related to *money laundering* or *terrorist financing*.

In order to ensure compliance is appropriately managed, *businesses* will need to ensure sufficient senior management oversight, appropriate analysis and assessment of the risks of *clients* and work/product types, systems for monitoring compliance with procedures and methods of communicating procedures and other information to personnel.

Introduction

3.1 *POCA* offences may be committed not only by *individuals* and *businesses* in the *regulated sector* but by any person. In contrast, the *2007 Regulations* impose obligations on *businesses* in the *regulated sector* as to the systems and controls they need to have in place to meet the requirements of the UK anti-*money laundering* regime. Under these regulations, not only must each *business* put anti-*money laundering* systems and controls in place but it also has a duty to ensure that relevant staff are aware of these systems and are appropriately trained. *Businesses* are explicitly required to monitor and manage their compliance with the *2007 Regulations,* to ensure continued observation of the requirements.

3.2 *Individuals* involved in the failure of *businesses* to meet their obligations under the *2007 Regulations* may be subject to criminal sanction, as may the *business* itself. Criminal sanctions for breach of the *2007 Regulations* only apply directly to the *individuals* working within a *business* when their neglect, connivance or consent has led to the failure to comply by the *business*.

The requirements

3.3 The *2007 Regulations'* requirements of *businesses* are contained in the following Parts:

- *customer due diligence* (Part 2 of the *2007 Regulations*); and
- record-keeping, procedures and training (Part 3 of the *2007 Regulations*).

Systems

3.4 The *2007 Regulations* place requirements on *businesses* to have in place a wide range of systems in order to prevent operations related to *money laundering* or *terrorist financing*. The requirements cover the following issues. Where a separate section of this *Guidance* deals in detail with this matter, this is shown after the relevant heading, the other matters are dealt with in this section:

- *customer due diligence* and ongoing monitoring (see section 5 of this *Guidance*);
- reporting procedures (see sections 6 and 7 of this *Guidance*);
- record-keeping;
- internal control;
- risk assessment and management (see section 4 of this *Guidance*);
- compliance management; and
- communication.

3.5 The level of detail in the *2007 Regulations* as to what the requirements mean varies considerably, with *customer due diligence* being explained in some detail in Part 2 of the *2007 Regulations,* and with some detail being provided in respect of internal reporting procedures (Regulation 15) and record-keeping (Regulation 19). The *2007 Regulations* are less comprehensive on

what is expected in respect of internal control, risk assessment and management, compliance management and communication.

3.6 *Businesses* need to establish systems that create an internal environment or culture in which people are aware of their responsibilities under the UK anti-*money laundering* regime and where they understand that they are expected to fulfil those responsibilities with appropriate diligence. In deciding what systems to install, a *business* will need to consider a range of matters including:

- the type, scale and complexity of its operations;
- the number of different business types it is involved in;
- the types of services it offers, and its *client* profiles;
- how it sells its services;
- the type of business transactions it becomes involved in or advises on; and
- the risks associated with each area of its *business* in terms of the risks of the *business* or its services being used for *money laundering* or terrorist operations, or the risks of its *clients* and their counterparties being involved in such operations.

3.7 *Businesses* should allocate responsibility for internal controls and effective risk management to a member of senior management, and should also ensure that the appointed *MLRO* has sufficient seniority and authority to carry out his task, whether or not these two functions are held by the same person. All *businesses* will need systems and controls, appropriate to the size and nature of their *business*, sufficient to achieve the following:

- determination and recording of the firm's systems for anti-*money laundering* awareness, *client* acceptance, *customer due diligence* and on-going monitoring requirements (including whether a customer is a *PEP*), consultation with and internal reporting to the *MLRO* (where applicable – sole practitioners with no staff and no associates are not required to have internal reporting procedures or an *MLRO*), and dissemination of such policies and procedures to all relevant staff;
- development and documentation of the firm's risk assessment of its *business*;
- training of all relevant staff, including systems and controls to ensure training is taken/attended and understood;
- methods for identification of topical update material and its dissemination as appropriate to senior management and other personnel;
- systems for periodic testing that policies and procedures comply with legislative and regulatory requirements;
- monitoring the compliance of the *business* with the policy and procedures including reporting to senior management on compliance and addressing any identified deficiencies.

3.8 In addition, *businesses* are recommended to maintain the following additional systems, for effective internal control and risk management:

- detailed documentation of policies and procedures in relation to matters not routinely a matter for *client* facing staff, such as *customer due diligence*

for higher risk *clients*; information provision to senior management, training, awareness and compliance monitoring, and the role of the *MLRO*;
- provision in new product/service development processes for consideration of new services or business areas from an anti-*money laundering* perspective, and update of policy and procedure where appropriate;
- consideration at appropriate intervals of the *business* profile and whether the firm's risk assessment and/or policy and procedures require updating in response.

Appropriate systems might also include a policy of acceptance of new *clients* being reserved to partners or other senior personnel, who may wish to refer to the *MLRO* for advice, if it is proposed to accept *clients* from outside the usual and well understood *client* base of the firm.

Record-keeping

3.9 Records must be kept of *clients'* identity, the supporting evidence of verification of identity (in each case including the original and any updated records), the firm's *business relationships* with them (ie, including any non-engagement related documents relating to the *client* relationship) and details of any occasional transactions and details of monitoring of the relationship. These records must be kept for five years after the end of the relevant *business relationships* or completion of the transactions. Care is needed to ensure retention of historic, as well as current records. *Businesses* are also recommended to store securely information relating to both *internal reports* and *SARs* for at least the same period, ie, at least five years after receipt by the *MLRO*. Documentation of reports is dealt with in further detail in section 7 below. Shown below is a summary of record-keeping requirements specified in the *2007 Regulations* for *customer due diligence* and *business relationships*/ occasional transactions and *Guidance* in respect of retention of internal reporting procedures and training records for which specific guidance is not given in the *2007 Regulations*.

Record	Retention period	Comments
Specified in the 2007 Regulations		
i) Client identification, including evidence of identity	**5 years** from end of *business relationship*.[2]	Care should be taken to ensure that records are not destroyed by one department, while another is still within the five year retention period or has undertaken new business with

[2] As well 'business relationship', the *2007 Regulations* refer to 'occasional transactions', ie, those outside the *business relationship* valued at over €15,000. 'Occasional transactions' is a cogent term in a banking context but is difficult to apply in the context of *accountancy services*. Therefore this *Guidance* uses only '*business relationship*', a more natural term for *accountancy and related services*, throughout.

Record	Retention period	Comments
		the *client*. Where a *business* is engaged with several different activities with a *client*, it may decide to keep details of *customer due diligence* within each part of the firm so engaged, or to maintain central files, depending on its internal organisation. Evidence of *client* identity can be held in a variety of forms, eg, in hard copy or in electronic form in accordance with the document retention policies employed within the *business*.
ii) Business relationships	**5 years** from the date when all activities in relation to the *business relationship* were completed – except in the case of particular transactions within that *business relationship* the retention period is 5 years from the date on which the transaction was completed	Records of *business relationships* and occasional transactions (ie, client assignment working papers and related documents) also need to be maintained for 5 years from the end of the relationship or transaction. For particular transactions within a *business relationship*, the records for the particular transaction need only be retained for 5 years from the completion of that transaction. In the context of provision of *defined services* it would be reasonable to treat each engagement or assignment as a 'particular transaction'. As *businesses* will need to maintain records for a wide range of purposes that comply with both legal and professional requirements for retention of documentation, it is not anticipated that any special system should be needed but that the general document retention systems employed within the *business*, provided they meet these standards, should be sufficient.
Not specified in the 2007 Regulations		
iii) Suspicious activities	Not prescribed	Records of *internal reports*, the *MLRO's* consideration of them, any subsequent reporting decision and issues connected to consent,

Record	Retention period	Comments
		production of documents etc are a vital record as they may form the basis of a defence to accusations of *money laundering* and related offences. For this reason, it is recommended that such records are retained for at least 5 years after being made and possibly longer, at least whilst the *business relationship* continues. Records of *internal reports* are not considered to form part of *client* assignment working papers and so it is recommended that such records are kept, in a secure form separately from the *businesses'* normal methods for retaining *client* work documents. This is to guard against inadvertent disclosure to any party who may have or seek access to the *client* working paper files where the existence of otherwise of an *internal report* or *SAR* is not relevant to the purpose for which they are examining the files.
iv) Training	Not prescribed	We recommend that evidence of assessment of training needs and steps taken to meet such needs is retained. *Businesses* should determine a retention period in the light of their normal retention period for training and other internal records, but we recommend they be kept for at least 5 years in order to demonstrate a continuing compliance with current and previous regulations.

Reporting procedures

3.10 A *business's* internal procedures should clearly set out what is expected of *individuals* who form suspicions or obtain knowledge of possible *money laundering*. The reports can take any form specified by the *business* in internal procedures, eg, phone calls, emails, in writing, supplemented by copies of third party documents and working papers but *businesses* should ensure that, whatever forms the reporting takes, relevant personnel are aware of the procedures to be used. Consideration should be given to how to minimise the

number of copies of reporting information held within a *business*. *Businesses* may wish to consider whether it is advisable to specify telephone or face to face contact with the *MLRO* as the preferred initial reporting step, with the reporting records being created by the *MLRO*, supplemented as necessary with copy information from *client* files.

3.11 It is recommended that all details of *internal reports* are held by the *MLRO* and excluded from *client* files. The duty to report is a matter which does not fall within the delivery of professional services to *clients* and accordingly reporting details are not required to be placed on *client* files. Exclusion of information from *client* files assists in avoiding inadvertent or inappropriate disclosure of information and provides some protection against the threat of *tipping off*. *Client* files should retain only that information relevant to, and required for, the professional work being undertaken. It should be noted that *anti-money laundering supervisory authorities* have an obligation under Regulation 24(2) to make reports of suspicion. However, the law is not clear as to the interaction of the *POCA privilege reporting exemption* (section 7.26–7.46) and the 2007 *Regulations* and unless this is resolved, there remains the risk of an *anti-money laundering supervisory authority* reporting a matter that was properly the subject of the *privilege reporting exemption*. Keeping internal reporting papers separate from *client* files may assist in mitigating this risk but is not a complete solution.

3.12 Further *Guidance* is given for *individuals,* on forming suspicions and making *internal reports* in section 6 and *Guidance* for *MLROs* in checking and validating *internal reports* and making *SARs* to *SOCA* in section 7.

Communication and Training

3.13 The *2007 Regulations* provide that all 'relevant' employees are required to be 'made aware' of law relating to *money laundering* and *terrorist financing*, and regularly given training in how to recognise and deal with transactions which may be related to *money laundering* or *terrorist financing*. Though the *2007 Regulations* contain no express requirement, it is considered to be best practice for these provisions to be applied to all partners in firms and to sole practitioners and it is likely to be necessary to train all *client*-facing staff (see section 3.15 below).

3.14 In considering a training plan, *businesses* need to keep in mind the objectives they are trying to achieve, which is to create an environment effective in preventing *money laundering* and which thereby helps protect *individuals* and the *business*.

3.15 When considering which staff may be considered relevant, *businesses* should consider not only those who have involvement in *client* work, but also, where appropriate, those who deal with the *business* finances, and those who deal with procuring services on behalf of the *business* and who manage those services. Accordingly, it is likely that all *client*-facing staff will be considered relevant and at least the senior support staff. *Businesses* may decide to provide

comprehensive training to all relevant staff members, or may chose to tailor its provision to match more closely the role of the employees concerned. In particular, *MLROs* may require supplementary training, and members of senior management may also benefit from a customised approach or some supplementary training.

3.16 A training programme for relevant staff needs to contain content on the law and content which puts this into the context in which the *business* operates, to enable recognition of suspected *money laundering* in that context, and which illustrates the 'red flags' which staff should be aware of in conducting business. The core elements of law making up the UK anti-*money laundering* and anti-terrorism regime, are set out in this *Guidance* (in particular in section 2). In addition, *businesses* may wish to include reference to other elements of law where criminal penalties may be applied and where these relate directly to the work of the *individual* or *business*, eg, an *FSA* approved person might be expected to have a reasonable working knowledge of the parts of *FSMA 2000* relevant to his work. Whilst it is not necessary for relevant personnel to develop specialist knowledge of criminal law in general, they may reasonably be expected to apply the general legal and business knowledge which might normally be held by a person of their role and experience in determining whether to make a report to the *MLRO*.

3.17 Training also needs to cover how to deal with transactions which might be related to *money laundering* and *terrorist financing*. This would include training on the *businesses'* internal consultation and advisory systems (to assist *individuals* in assessing whether they have a valid suspicion) internal reporting systems and the *businesses'* expectations for confidentiality and the avoidance of *tipping off* and *alerting a money launderer*. Further *Guidance* on recognising *money laundering* by those undertaking *defined services* is given in section 6.

3.18 As regards the frequency of training, this is a matter for each *business* to consider. It may be influenced by changes in law, regulation or professional guidance, by new case law or national/international findings, or by a change in the profile and perceived risks of the *business.* Each *business* should consider the frequency of its training, possibly on an annual basis, and document its assessment as to whether the current training and state of awareness of employees is sufficient, or whether a supplement is needed. It may not be necessary to repeat the whole of a training programme on a regular basis, but it may be possible to provide concise update material which accomplishes the dual role of refreshing or expanding knowledge and generally reminding staff of the importance of effective anti-*money laundering* work.

3.19 Training methods may be selected to suit the size, complexity and culture of the *business*, and may be delivered in a variety of ways including face to face, self-study, e-learning and video, or a combination of methods. *Businesses* should keep records of attendance at, or completion of, training and are recommended to provide for some form of test or other confirmation of understanding of the training.

3.20 Should a *business* fail to make provision for the training of relevant employees, then under s.330(7), *POCA* a member of staff who does not know or suspect someone is engaged in *money laundering* gains a defence against the failure to disclose offence (ie, if there is only reasonable grounds for knowledge or suspicion and the staff member fails to make an *internal report*). However, such an omission is likely to open the *business* to the risk of prosecution for breach of the *2007 Regulations*. The significance of training records to both *individuals*, and *businesses* is reflected in the recommendation in section 3.9.

3.21 *Businesses* need to make arrangements to ensure new staff are trained as soon as possible after they join the *business*.

Section 4 – The risk-based approach

KEY POINTS

- A risk-based approach allows *businesses* to target resource and effort where the risk is greatest and, conversely, reduce requirements where the risk is low.
- *Businesses* must establish adequate and appropriate policies and procedures relating to risk assessment and management in order to prevent operations related to *money laundering* or *terrorist financing*.
- *Businesses* must –
  (a) determine the extent of *customer due diligence* measures (section 5) on a risk-sensitive basis depending on the type of *client*, *business relationship*, or services to be provided;
  (b) be able to demonstrate to their *anti-money laundering supervisory authorities* that the extent of *customer due diligence* measures is appropriate in view of the risks of *money laundering* and *terrorist financing*.
- *Businesses* are required to take a risk-based approach and have adequate measures to verify the identity of beneficial owners so that they are satisfied that they know who the beneficial owner is and what the control structure is in respect of a *client* who is other than a natural person (Regulation 5(1)(b)).
- *Businesses* are required to undertake scrutiny of transactions and other activities throughout the course of a *business relationship* to ensure consistency with *businesses' and individuals'* knowledge of the *client*, his business and risk profile.
- *Businesses* must also keep up-to-date the information collected in applying *customer due diligence* measures.
- *Businesses* must apply *customer due diligence* measures at appropriate times to existing *clients* on a risk-sensitive basis.

Risk assessment and management

Policies and Procedures

4.1 All *businesses* must have appropriate policies and procedures for assessment and management of the risk of the *business* being used for *money laundering*, of failing to recognise it where it occurs and report it when required. A risk-based approach to anti-*money laundering* incurs cost which is proportionate to this risk, focusing effort where it is needed and has most impact.

4.2 Professional firms are likely to already have in place policies and procedures to minimise professional, *client* and legal risk. Anti-*money laundering* procedures and policies may be integrated into existing risk

management systems or be controlled separately. In either case, anti-*money laundering* policies and procedures should be valuable to *businesses*, in contributing to the control of risks to both *businesses* and *individuals* in this and other areas.

Risk profile

4.3 The development of a *money laundering* risk profile for the *business* enables a risk-based policy and approach to be developed, and thus to determine the most cost effective and proportionate way to manage and mitigate the *money laundering* and *terrorist financing* risks faced by the *business*. The risk profile of a *business* is determined by:

- identifying the *money laundering* and *terrorist financing* risks that are relevant to the *business*; and
- designing and implementing controls to manage and mitigate these risks, and record their operation.

Managing compliance

4.4 *Businesses* are required to monitor and manage their compliance with and internal communication of their policies and procedures and this includes their systems for risk assessment and management, as well as their other anti-*money laundering* policies and procedures (Regulation 20(1)). All such systems should be managed through monitoring the operation of the controls, updating them where necessary and assessing whether they have been effective. *Businesses* may come into contact with activity in the *client's* business which they perceive as likely, by its nature, to be related to *money laundering* or *terrorist financing* (in particular, complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose). In those circumstances, *businesses* have a duty to pay special attention to such an activity.

4.5 *Businesses* can decide for themselves how to carry out their risk assessment, which may be simple or sophisticated depending on the nature of their practice. Where the practice is simple, involving few service lines, with most *clients* falling into similar categories, a simple approach may be appropriate for most *clients*, with the focus being on those *clients* that fall outside the norm.

4.6 A risk-based approach can never, by its nature, be an error-free system. However, it ensures the most cost effective results by directing the attention of *businesses* to the risks relating to different *clients* and services, in order to determine what level of knowledge and verification is required when establishing a *business relationship* and in conducting that relationship.

The risk-based approach

4.7 Each *business* needs to make a reasoned decision as to how it intends to manage *money laundering* risk. A risk-based approach does, however, enable a

business to target its effort on conducting *customer due diligence* more effectively with increased depth of work being conducted where the risks are perceived, on a rational basis, to be higher.

4.8 Senior management engagement and commitment is needed to produce and embed a successful risk-based approach, and it also needs effective communication to all staff members who need to use it.

4.9 *Businesses* may assess the *money laundering* risks of:

- different products and services,
- *client* types and sectors, and
- the jurisdictions of *client* origin, funding, investment and conduct of business

and apply a simple risk categorisation of low/normal/high on the basis of these categories. Such an approach is valid, and should be capable of minimising complexity, but needs to retain an element of discretion and flexibility where risk ratings may be raised or lowered with appropriate management input in response to particular or exceptional circumstances.

4.10 *Businesses* may also wish to consider the different types of risk to which they are exposed. These risks may include:

- being used in an active sense to launder money through the handling of cash or assets,
- becoming concerned in an arrangement which facilitates *money laundering*, through the provision of investment services or the provision of trust or company services,
- risks attaching to the *client* and/or those who trade with or otherwise interact with *clients* as regards their potential for involvement in *money laundering*.

4.11 A simple matrix prepared from a risk-assessment of the factors considered above may be prepared to provide a basic framework for the categorisation of *clients* and engagements, and to direct the depth and type of *customer due diligence* accordingly.

4.12 Chapter 4 of the *JMLSG Guidance* notes provides useful additional guidance on the risk-based approach

Developing and applying a risk based approach

4.13 In developing a risk-based approach, *businesses* need to ensure it is readily comprehensible and easy to use for all relevant staff. In cases of doubt or complexity, *businesses* may wish to consider putting in place procedures where queries may be referred to a senior and experienced person, eg, the *MLRO* for a risk-based decision which may vary from standard procedures.

4.14 To develop the approach it is necessary to review the *business* and consider what *money laundering* risks might attach to each service type, *client*

type etc. One way to consider this in relation to the *defined services* is outlined below, but there are other approaches that may be equally or more valid depending on the type of *business*.

4.15 *Businesses* should consider first the type of risk presented.

- Is the risk that the *business* might be used to launder money or provide the means to launder money? Examples might include handling *client* money, implementing company and trust structures, handling insolvent estates where assets are tainted by crime etc.
- Is the risk that the *client* or its counterparties might be involved in *money laundering*? Examples might include *clients* who are *PEPs* (see section 5.27), or who are high profile and attract controversy or adverse comment in the public domain, or who are involved in higher risk sectors and jurisdictions (eg, those where corruption is known to be a higher risk), or who are known to be potentially involved in illegal activities, such as tax evaders seeking advice to resolve their affairs, and certain forensic work connected with fraud or other crime etc.

4.16 Consideration of these risk types should enable the *business* to draw up a simple matrix of characteristics of the *client* or service which are considered to present a higher than normal risk, and those which present a normal risk. Some may, by long acquaintance and detailed knowledge, or by their status (eg, listed, regulated and government entities as defined for the purpose of *simplified due diligence* in the *2007 Regulations*) be considered to present a lower than normal risk.

4.17 This matrix can then be incorporated into *client* acceptance procedures, and as step 1 of the *customer due diligence* process, allows a *money laundering* risk level to be assigned to ensure appropriate, but not excessive, *customer due diligence* work is carried out.

4.18 It is important for the approach adopted to incorporate a provision for raising the risk rating from low or normal to high if any information comes to light in conducting the *customer due diligence* that causes concern or suspicion.

4.19 In all cases, even where *clients* qualify for *simplified due diligence* under the terms of the *2007 Regulations*, or where they are considered low risk for other reasons, to assist in effective ongoing monitoring *businesses* should gather knowledge about the *client* to allow understanding of:

- who the *client* is
- where required, who owns it (including ultimate beneficial owners – see section 5.6)
- who controls it
- the purpose and intended nature of the *business relationship*
- the nature of the *client*
- the *client's* source of funds
- the *client's* business and economic purpose.

4.20 The information specified in the bullet points above are referred to in the remainder of this *Guidance* as 'know your client' or 'KYC' information which is one step in the *customer due diligence* process. However, *businesses* may avail themselves of the opportunity to conduct verification of identity on a simplified basis both under the terms of the *2007 Regulations*, where applicable, and otherwise where the accumulated knowledge of the *client* is considered sufficient to prove its identity on a risk-sensitive basis without collecting additional documents as might be required for a new *client* considered to present a normal risk (provided in both cases that any relevant requirements of the *2007 Regulations,* for example in relation to the identification of beneficial owners, are met).

4.21 *Businesses* need to set out clear requirements for collecting KYC information about the *client* and for conducting verification of identity, to a depth suitable to the assessment of risk. Set out in this *Guidance* are some high level guidelines as to how *businesses* might approach this. More detailed *Guidance* is contained in the *JMLSG Guidance* notes, Chapters 4 and 5.

Section 5 – Customer due diligence

KEY POINTS

- Effective '*customer due diligence*' measures are an essential part of any system designed to prevent *money laundering* and are a cornerstone requirement of the Money Laundering Regulations 2007 (*2007 Regulations*).
- *Businesses* should take a **risk-based approach** to allow effort to be concentrated on higher risk areas (**also see section 4**). Risks must be assessed before the appropriate level of *customer due diligence* can be applied.
- *Customer due diligence* measures need to be carried out:
  - when establishing a *business relationship,*
  - when carrying out an occasional transaction,
  - where there is a suspicion of *money laundering* or *terrorist financing*, and
  - where there are doubts concerning the veracity of previous identification information.
- *Businesses* are required to ensure *customer due diligence* procedures are applied to all *clients*, both new and existing. *Customer due diligence* must be applied to existing *clients* (ie those existing prior to the *2007 Regulations* coming into force) at appropriate times on a risk-sensitive basis.
- **Before** entering a *business relationship*, *businesses* must:
  - identify and verify the *client's* identity using documents or information from reliable and independent sources,
  - identify the beneficial owner of the *client* (where there is one), including understanding the ownership and control structure of the *client* and verifying, according to risk, the identity of the beneficial owner(s),
  - obtain information on the purpose and intended nature of the *business relationship.*
- Verification of identity may in certain circumstances be conducted during the establishment of a *business relationship* if this is necessary not to interrupt the normal course of business and there is little risk of *money laundering* or *terrorist financing* occurring, provided the verification is completed as soon as practicable after contact is first established.
- **During** a *business relationship*, *businesses* must monitor activity on an ongoing basis. This includes scrutiny of transactions, source of funds and other elements of knowledge collected in the *customer due diligence* process, to ensure the new information is consistent with other knowledge of the *client* and keeping the documentation concerning the *client* and the relationship updated.

- *Businesses* can use a variety of tools and methods to conduct *customer due diligence*; the onus is on them to satisfy themselves and to be able to demonstrate to their *anti-money laundering supervisory authority* the appropriateness of their approach.

Why is this important?

5.1 *Customer due diligence* measures are a key part of the anti-*money laundering* requirements. They ensure that *businesses* know who their *clients* are, ensure that they do not accept *clients* unknowingly which are outside their normal risk tolerance, or whose business they will not understand with sufficient clarity to be able to form *money laundering* suspicions when appropriate. If a *business* does not understand its *client's* regular business pattern of activity it will be very difficult to identify any abnormal business patterns or activities. In addition *businesses* must be in a position to supply the *client's* identity to *SOCA* should that *client* become the subject of a *SAR*.

5.2 Many *businesses* will have other procedures for *client* acceptance, for example to ensure compliance with professional requirements for independence and to avoid conflicts of interest. The requirements of the *2007 Regulations* may either be integrated with those procedures or addressed separately. In either case, initial *customer due diligence* information not only assists in acceptance decisions, but also enables the *business* to form well-grounded expectations of the *client*'s behaviour which provides some assistance in detecting potentially suspicious behaviour during the *business relationship*.

5.3 The processes required for compliance with anti-*money laundering* initial *customer due diligence* requirements contribute vitally to the overall picture of potential *clients* and appropriate risk assessment of them. However, a lack of concern raised during *customer due diligence* does not automatically mean that the *client* and engagement will remain in their initial risk category. Continued alertness for changes in the nature or ownership of the *client*, its business model, or its susceptibility to *money laundering* – or actual evidence of the latter – must be maintained.

What is customer due diligence?

5.4 The *2007 Regulations* provide an outline of the required components of *customer due diligence* which *businesses* need to ensure are integrated into *client* acceptance processes and the continuing conduct of the *business relationship*. The required components are:

- identifying the *client* (ie, knowing who the *client* is) and verifying the identity of the *client* (ie, confirming that identity is valid by obtaining documents or other information from sources which are independent and reliable);

- identifying the beneficial owner(s) (see section 5.6) of a *client*, if there is one, so that the identity of the individual(s) who is the ultimate owner or controller is known, the ownership and control structure is understood and also that their identities are verified, as required, on a risk-sensitive basis; and
- information on the purpose and intended nature of the *business relationship*.

5.5 Whilst the *2007 Regulations* do indicate some cases where either *simplified due diligence* may be employed or *enhanced due diligence* must be employed, they do not specify, comprehensively, how to apply a risk-based approach in conducting *customer due diligence*. Section 4 of this *Guidance* provides a high level outline of the key elements of a risk-based approach. If further detail is required it is recommended that reference is made to the *JMLSG Guidance* notes which cover the subject in depth and, as HM Treasury approved *Guidance* for the financial services industry, may be considered as a reliable additional source of information in supplement to this *Guidance*.

What is a beneficial owner?

5.6 The *2007 Regulations* set out in some detail the meaning of 'beneficial owner' in terms of bodies corporate, partnerships, trusts and other legal entities/arrangements not falling into the three categories listed above as well as special provisions regarding estates of deceased persons and a catch all provision that, where not otherwise specified, defines the beneficial owner as the person who ultimately owns or controls the *client* or on whose behalf a transaction is being conducted. The provisions regarding beneficial ownership are set out in Regulation 6 and are summarised below:

- **Bodies corporate** – beneficial owner means any individual who, in respect of any body other than a company whose securities are listed on a *regulated investment market*, owns or controls, directly or indirectly including through bearer share holdings, more than 25% of the shares or voting rights in the body or who otherwise exercises control over the management of the body.
- **Partnerships** (other than limited liability partnerships established under the Limited Liability Partnerships Act 2000) – beneficial owner means any individual who ultimately is entitled to or controls (directly or indirectly) more than 25% of the capital or profits of the partnership or more than 25% of the voting rights in the partnership or who otherwise exercises control over the management of the partnership.
- **Trusts** – beneficial owner means any individual who is entitled to a *specified interest* in at least 25% of the capital of the trust property, or where a trust is not set up entirely for the benefit of persons with a *specified interest*, the class of persons in whose main interest the trust is set up or operates or any individual who has control (a trust controller) over the trust. Where a class of persons is identified, it is not a requirement for all members of that class to be separately identified.

- **Other entities and arrangements** (meaning an entity or arrangement which administers and distributes funds) – where the individuals who benefit from the entity or arrangement have been determined, beneficial owner means any individual who benefits from at least 25% of the property of the entity or arrangements. Where those benefiting have yet to be determined, beneficial owner means the class of persons in whose main interest the entity or arrangement is set up or operates or an individual who exercises control over at least 25% of the property of the entity or arrangement. Where a class of persons is the beneficial owner, it is not a requirement for all members of that class to be separately identified. Note that where an individual is the beneficial owner of a body corporate which benefits from, or exercises control over, the property of an entity or arrangement, the individual is to be regarded as having that benefit or control and so is classed as the beneficial owner.
- **Estates of deceased persons** – the beneficial owner is considered to be the executor or administrator of the estate (full detail is shown in Regulation 6(8)).

5.7 The focus on identifying and, where appropriate, verifying the identity of beneficial owners is not only an important element of the required *customer due diligence* information, but is also an important factor in an effective risk-based approach to *client* acceptance. *Businesses* will need to be diligent in their enquiries in this field, taking into account that information may sometimes not be readily available from public record sources. This will necessitate a flexible approach to information gathering which will often involve direct enquiry of *clients* and their other advisers and professional service providers as well as undertaking public record searches in the UK and overseas.

Application and timing of customer due diligence measures (when)

5.8 Identification and verification of identity procedures (together termed as 'ID procedures') should normally be completed **before** entering into a *business relationship*. This applies also to occasional transactions. ID procedures are also required at other times, for example, when there is a suspicion of *money laundering* or *terrorist financing* or where there are doubts about the sufficiency of identification information already held. If it is concluded the information held is insufficient, the *business* should remedy this as soon as is practicable. Should a suspicion be developed about the *client*, *businesses* will need to consider whether they are satisfied that the information already held is sufficient and up to date or whether any additional or updated information is required in respect of the *client(s)* in question in order that the information required by Regulation 5 (customer due diligence) is met. In particular, in any case where suspicion is developed, *simplified due diligence* may no be longer be applied. This means if *simplified due diligence* had been applied, additional information will need to be collected in accordance with *businesses'* risk-based procedures. *Businesses* must bear in mind in conducting

this *customer due diligence* work the need to avoid disclosing that a *money laundering* report has been made, or that an investigation is underway, or may be commenced (see sections 2.17–2.21 Tipping Off).

5.9 The *2007 Regulations* allow for completion of ID procedures 'during the establishment of a *business relationship*' rather than before if the measures are completed as soon as practicable after the initial contact **but only** when such a process is necessary not to interrupt the normal conduct of business and there is little risk of *money laundering* or *terrorist financing* occurring. *Guidance* on how this might reasonably be applied in the case of provision of the *defined services* is provided below, although this is not intended to be prescriptive, or exclusive. *Businesses* should not complete any assignment for a *client* (eg, including transfer of *client* monies or delivery of work product) before *customer due diligence* has been carried out in full in accordance with the *businesses'* procedures.

5.10 If procedures are not completed before entering a *business relationship*, *businesses* and their *clients* may suffer considerable cost and inconvenience in having to terminate a relationship if ID procedures either cannot be completed, or where the results are unsatisfactory.

5.11 *Customer due diligence* should also be completed before undertaking occasional services for the *client* that do not form part of an ongoing *business relationship*. *Businesses* must understand why the *client* requires the service, the identities of other parties that might be involved, and any potential for *money laundering* that may arise.

When delay may be acceptable

5.12 In forming new *business relationships*, there are some cases where delay **may** be acceptable, such as in urgent insolvency appointments, and urgent appointments that involve ascertaining the legal position of a *client* or defending the *client* in legal proceedings.

5.13 In such cases, *businesses* should still gather enough information to allow them at least to form a basic assessment of the identity of the *client* and *money laundering* risk and to complete other acceptance formalities such as considering the potential for conflicts of interest.

5.14 In other cases, where the majority of information required has been collected before entering a *business relationship*, short time extensions to complete collection of remaining information may be acceptable, provided this is caused only by administrative or logistical issues, and not by any reluctance of the *client* to provide the information and is necessary not to interrupt the normal course of business. Such extensions should be exceptional, rather than the norm. It is recommended that such extensions of time are considered and agreed by a member of senior management or the *MLRO* to ensure the reasons for the extension are valid and do not give rise to concern over the risk category of the *client* or the potential for *money laundering* suspicion.

5.15 If evidence is delayed (rather than refused), *businesses* should consider:

- the credibility of the *client's* explanation,
- the length of delay,
- whether the delay is in itself reasonable grounds for suspicion of *money laundering* requiring a report to *SOCA* and/or a factor indicating against acceptance of the *client* and engagement, and
- documenting the reasons for delay and steps taken.

Non-compliance through client refusal
5.16 If a prospective *client* refuses to provide evidence of identity or other information properly requested as part of *customer due diligence*, the *business relationship* or occasional transaction must not proceed any further and any existing relationship with the *client* must be terminated (but see sections 5.56–5.59 on insolvency cases). Consideration must be given as to whether a report needs to be made to *SOCA* under *POCA* or *TA 2000.*

5.17 Where the appointment is of either a lawyer or *relevant professional advisor* in the course of ascertaining the legal position for the *client*, or performing the task of defending or representing the *client* in or concerning legal proceedings (including advice on instigating or avoiding proceedings) the requirement to cease acting and consider reporting to *SOCA* does not apply although *customer due diligence* information will still need to be collected within the time constraints in Regulation 9. *Businesses* are advised to consider the position very carefully before applying this exception to ensure that the type of work and their professional status fall within the definitions set out in Regulations 11(2) and (3).

Continuing customer due diligence
5.18 In addition to considerations before entering a *business relationship*, *customer due diligence* must be exercised on an ongoing basis during the relationship, as part of regular monitoring of *money laundering* risks or occasioned by the *client* undergoing significant changes. *Businesses* may wish to consider reviewing *customer due diligence* and other *client* information on a periodic basis, as well as in response to perceived risks.

5.19 Changes such as the appointment of new senior managers or shareholders and/ or controlling parties, changes in the *client's* strategy or changes of business profile should prompt *businesses* to re-apply *customer due diligence* procedures. These may differ from those adopted for a new *client*, and although there may be a change in focus the objective remains the same: to have a sound understanding of the *client's* identity and activities in order to assess risks of *money laundering* and to have accurate underlying records.

The risk-based approach to client due diligence

5.20 Regulation 7(3) requires *customer due diligence* measures to be carried out on a risk-sensitive basis. This means that *businesses* need to consider how

their risk assessment and management procedures (see section 3 above) flow through into their *client* acceptance and ID procedures, to give sufficient information and evidence, in the way most appropriate to the *business* concerned.

5.21 In addition, there are certain circumstances where the *2007 Regulations* themselves lay down categories where *simplified due diligence* or *enhanced due diligence* is appropriate, according to national and international assessments of the risk of *money laundering*.

Simplified due diligence

5.22 '*Simplified due diligence*' is a phrase used in the *2007 Regulations* (Regulation 13) which means that a *business* is not required to apply the *customer due diligence* measures laid out in Regulation 7, as set out in section 5.20 above, where the *business* has reasonable grounds for believing that a *client* falls into the relevant categories. *Businesses who* may be permitted to apply the *simplified due diligence* exemptions but who perceive other than a low risk of *money laundering* in a specific case, should consider applying their standard or *enhanced due diligence* processes. In any case where a *client* or potential *client* has been subject to *simplified due diligence* and a suspicion or *money laundering* or *terrorist financing* arises in relation to that *client*, the *simplified due diligence* provisions must no longer be applied and the *customer due diligence* requirements of Regulation 7 must be applied, subject to any *tipping off* issues.

5.23 The main categories of relevance to those providing *defined services* are:

- *credit* or *financial institutions* subject to the provisions of the *money laundering directive* or equivalent overseas requirements,
- companies listed on a regulated EEA market or equivalent overseas requirements subject to *specified disclosure obligations*,
- UK public authorities and certain public authorities in the EU and EEA (see Schedule 2 paragraph 2).

Simplified due diligence is also available for some categories of products and transactions which may be provided by financial institutions.

5.24 *Businesses* should set out clearly in their internal procedures what is considered to constitute reasonable grounds for a belief that a *client* can be made subject to *simplified due diligence*. Evidence should be obtained either as to the regulated status of the *credit* or *financial institution* (such as a print out from the regulator's official web-site or listing), or the listed status of the company (such as a print out from the exchange's official web-site or listing, or details of the listing obtained from a trusted, independent commercial provider of company information). With regard to public authorities, recourse to official government web-sites is recommended. In each case, where the body is not subject to UK, EC or EEA law, justification will also need to be recorded as to how the provisions and other conditions regarding *specified*

disclosure obligations in respect of listed companies, and the check and balance procedures and other conditions in respect of public authorities outside the UK, have been met. Recourse to information provided from time to time by the *JLMSG* is recommended (www.jmlsg.org.uk). Where *simplified due diligence* applies, *businesses* are not required to apply standard *customer due diligence* measures. However, *businesses* must still carry out ongoing monitoring (see section 5.46) and appropriate KYC information should therefore still be obtained (see section 4.19).

Enhanced due diligence

5.25 A risk-based approach to *customer due diligence* will identify situations which by their nature can present a higher risk of *money laundering* or *terrorist financing*. Regulation 14 sets out a general provision that *enhanced due diligence* must be applied in such situations and means that the *business* must obtain additional *customer due diligence* information about the *client*.

5.26 The *2007 Regulations* also specify that *enhanced due diligence* must be applied in a number of situations, of which two are relevant to providers of *defined services* and are outlined below:

- if a *client* has not been physically present for identification purposes, and if so, one or more additional measures must be taken to *enhance due diligence,* for example by, inter alia, either gathering additional documents, data or information, or taking additional steps to verify documents or obtain a confirmatory certificate from a *credit or financial institution* subject to the *money laundering directive*; and
- if a *business relationship* or occasional transaction is to be undertaken with a *politically exposed person* (*PEP*) in which case the *business* must provide for senior management approval for the relationship to be established, must take adequate measures to establish the source of wealth and funds which are involved and must conduct enhanced monitoring of any relationship entered into.

Politically exposed persons (*PEPs*)

5.27 The *2007 Regulations* define a *PEP* as a person '. . . who is or has, at any time in the preceding year been entrusted with a prominent public function by a state other than the United Kingdom, a community institution or an international body' or a family member or known close associate of such a person. Details of what are considered to be prominent public functions are shown in Schedule 2, paragraph 4(1)(a). For risk management and reputational risk reasons, *businesses* may wish to treat as *PEPs* individuals who held such positions more than a year ago. As regards establishing whether someone is considered to be a family member or known close associate, regard need only be had to information in the public domain or in the possession of the *business*. 'International body' is not defined, and due consideration should be given to the type, reputation and constitution of the body before excluding it or its representatives from *enhanced due diligence*. However, bodies such as the United Nations, NATO and *FATF* may

reasonably be included within the definition of an international body for this purpose.

5.28 Under the *2007 Regulations*, *clients* who are *PEPs* must always be subject to the *enhanced due diligence* measures referred to in section 5.26 above.

5.29 Businesses are required to have risk sensitive measures in place to recognise *PEPs*. This can be a simple check conducted by enquiring of the *client* and perhaps using an internet search engine. *Businesses* that are likely to regularly undertake services for *PEPs* may need to subscribe to a specialist database. To the extent possible, *businesses* should be aware of any news during a *business relationship* that could change a *client's* status to *PEP*.

Prohibited relationships

5.30 The *2007 Regulations* set out circumstances which constitute prohibited relationships. In Regulation 16, correspondent banking relationships with *shell banks*, or a bank known to permit use of its accounts by a *shell bank* are prohibited. In addition, set up of anonymous accounts in the UK is prohibited, and *customer due diligence* must be applied to any existing accounts continuing in existence after 15 December 2007 before such an account is used.

5.31 All *businesses* must pay special attention to services or, where relevant, products or transactions that might allow anonymity and take measures to prevent their use in *money laundering* or terrorist activity. *Businesses* must include any such product or transaction within those requiring *enhanced due diligence*.

5.32 In addition, *businesses* must comply with any prohibition issued by HM Treasury in respect of any person, or State to which the Financial Action Task Force has decided to apply counter-measures (see also section 5.44). Directions may be given not to enter into *business relationships*, carry out *occasional transactions* or proceed with any such arrangements already in progress. The Government also issues advisory notices, against countries with material deficiencies in their anti-*money laundering* and counter *terrorist financing* (AML/CTF) regimes, based on the *FATF* Non-Cooperative Countries or Territories (NCCTs) list (consisting of countries with extremely ineffective AML/CTF legislation and systems which prevent them from adequately cooperating internationally in combating *money laundering* and *terrorist financing*) and other *FATF* concerns. An advisory notice requires that *businesses* and *individuals* in the UK should exercise caution when entering into *business relationships* in such countries. Advisory notices are available from the HM Treasury website under 'press notices'. *Businesses* may subscribe to receive press notices on the HM Treasury website.

Reliance on third parties

5.33 *Businesses* may rely on third parties, subject to the third parties' consent, to complete all or part of *customer due diligence* as set out below but

they should be cautious in relying on third parties as they will remain liable for any failure to comply notwithstanding their reliance on a third party (see Regulation 17). *Businesses* should consider requiring copies of relevant information and documentation from the third parties, in order that they may satisfy themselves the information is sufficient.

5.34 Reliance may be made on persons who are:

- regulated *credit* or *financial institutions* (excluding money service businesses);
- professional lawyers, auditors, *external accountants*, *insolvency practitioner*s or *tax adviser*s;

'professionals' in the second of these categories must be regulated by one of the *anti-money laundering authorities* listed in Part 1 of Schedule 3 to the *2007 Regulations*, or be subject to equivalent regulation in an EEA or non-EEA state including mandatory professional registration recognised by law and supervision for compliance with requirements equivalent to the *money laundering directive*. *Businesses* may outsource their *customer due diligence* measures but remain liable for any failure in the *customer due diligence*.

5.35 Information on equivalence is very limited at present, but further information should shortly be published by HM Treasury following an EU study.

5.36 Before reliance may be placed on one of those specified above, the other *individual* or *business* must agree to reliance being placed. If consent is obtained, the *individual* or *business* consenting to the reliance must take great care to ensure they have adequate systems in place to keep proper records and to respond to any request for these.

5.37 An *individual* or *business* consenting to be relied upon must, if requested, make available to the person relying as soon as is reasonably practicable:

- any information obtained about the *client* (and any beneficial owner) when applying *customer due diligence* measures; and/or
- copies of any identification and verification data and other documents on the identity of the *client* (and any beneficial owner) obtained when applying *customer due diligence* measures.

5.38 Before placing reliance, an *individual* or *business* seeking to rely must take steps to ensure the person being relied upon will provide the required information.

5.39 Any *individual* or *business* consenting to be relied upon must ensure the records of *customer due diligence* which become the subject of reliance are retained for 5 years from the date on which reliance commences.

5.40 Failure by a person who has been relied upon to comply with the requirements in relation to responding to requests for information, relying upon a person without having ensured they will provide the information required on request, or failing to keep the records required after reliance has been allowed are all criminal offences as set out in Regulation 45.

Where reliance is placed on a third party, *businesses* are not required to apply standard *customer due diligence* measures. However, *businesses* must still carry out ongoing monitoring (see section 5.46) and appropriate KYC information should therefore still be obtained (see section 4.19).

5.41 Whilst reliance may be a useful and efficient feature of a *customer due diligence* system between parties who are able to build a relationship of trust, it should not be entered into lightly. *Individuals* and *businesses* need to consider carefully whether they wish to be relied upon and before so consenting ensure:

- their *client* (and any other third party whose information would be disclosed) has no objection to their information being passed to the person seeking reliance; and
- that they have in place the necessary record-keeping systems.

Conducting customer due diligence

'Know your client' or 'KYC'
5.42 The resources used to undertake effective *customer due diligence* are not prescribed. Various sources may be used to enhance a *business'* knowledge of their *client*, including direct discussion with the *client*, information (eg, websites, brochures, reports etc) prepared by the *client* and review of public domain information.

5.43 *Businesses* need to consider whether there are any particular steps they wish to specify for use in higher risk cases to increase the depth of *customer due diligence*, such as seeking out wider information from extensive internet and press searches concerning the potential *client*, its key counterparties, its sector and jurisdiction, or possibly using subscription databases which provide a quick way of accessing public domain information and in many cases provide links to persons or companies known to be associated with the potential *client* (see sections 5.54 to 5.55 on electronic identification).

5.44 *Businesses* might, as appropriate to their risk assessment, wish to check the names of *clients* against lists of persons subject to asset-freezing restrictions, including under financial sanctions and terrorism *financial restrictions*. HM Treasury maintains a consolidated list of persons designated as being subject to *financial restrictions* in force in the UK but recourse may be had to further lists such as those issued by the UN and the US Treasury Office of Foreign Assets Control or OFAC). Some electronic resources also include an automated check against this information as part of the product.

Specific customer due diligence prompts

5.45 It may be helpful for a list of questions or prompts to be incorporated into *customer due diligence* procedures. Examples are given at the end of this section (section 5A) which should be amended to suit the particular *business' client* base and services.

Ongoing monitoring

5.46 Ongoing monitoring of the *business relationship* is required. This comprises scrutiny of activity during the relationship, including enquiry into source of funds if needed, to ensure all is consistent with expected behaviour based on accumulated *customer due diligence* information. In addition, it is required that the documentation concerning the relationship (including *customer due diligence*) is kept updated as laid out in Regulation 8, *2007 Regulations*. The need to update *customer due diligence* information should be considered at appropriate times, following a risk based approach, according to the firm's knowledge of the *client* and changes in its circumstances or the nature of services provided by the firm. A firm also may wish to consider this need, on a more routine basis, as appropriate opportunities arise. Examples of such opportunities are:

- at the start of new engagements and when planning for recurring engagements;
- when a previously stalled engagement restarts;
- whenever there is a change of control and/or ownership of the *client*;
- when there is a material change in the level, type or conduct of business; and
- where any cause for concern, or suspicion, has arisen (in such cases, care must be taken to avoid making any disclosure which could constitute *tipping off*).

Risk-based verification

5.47 Application of a risk-based approach is of considerable importance in verification, both to ensure a good depth of knowledge in higher risk cases, but also to avoid superfluous effort in lower or normal risk cases. Very extensive information is contained in the *JMLSG Guidance* notes. Reference to this is recommended, particularly for overseas *clients*, or those *clients* who have a legal form other than that of a UK private or public company, a UK partnership or LLP, or a UK government body.

5.48 With the more frequently encountered *client* types, ie individuals, UK private or public companies, UK partnerships or LLPs, a UK regulated *business*, or a UK government body, outline *Guidance* on a risk based approach to verification of identity is set out at the end of this section (section 5B).

Documentary evidence used in the verification of identity (How)

5.49 The purpose of verification of identity is to confirm and prove the information collected in so far as it relates to the identity of the *client*. Recourse to documents from independent sources is important. The amount

of reliance that can be placed upon, and thus the strength of, particular forms of evidence varies.

5.50 The following are illustrative of a different of strength of various forms of documentary evidence starting with the highest:

- documents issued by a government department or agency or a Court (including documents filed at Companies House or overseas equivalent)
- documents issued by other public sector bodies or local authorities
- documents issued by *businesses* regulated by the Financial Services Authority or overseas equivalent
- documents issued by professionals regulated for anti-*money laundering* purposes by the bodies listed in Schedule 3 of the *2007 Regulations* or overseas equivalents
- documents issued by other bodies.

5.51 In the case of individuals, documents from highly rated sources that contain photo identification as well as written details are a particularly strong source of verification of identity.

Certification and annotation

Certification
5.52 *Businesses* may wish to consider whether copies of original documents and copies of certified copies of original documents should be certified as true copies to demonstrate their provenance. *Businesses* may wish to create standard stamps or labels to apply to documents, which can then simply be filled in with name, signature and date. *Businesses* should have regard to the standing of the person certifying and may wish to consider specifying from whom certification may be accepted, for instance, *businesses* may decide to restrict acceptance to those documents certified by a person in the permitted categories for reliance (Regulation 17 of the *2007 Regulations*) which are broadly a *credit* or *financial institution* authorised by the *FSA*, a professionally qualified auditor, *external accountant, insolvency practitioner* or *tax adviser*, or *independent legal professional*, or their equivalent in EU countries and other countries which have equivalent law and provided in all cases that the person is subject to supervision as to his compliance with those requirements.

Annotation
5.53 This should be used when the document is as good as an original but is not the original itself. This particularly applies to printouts from the Internet, such as downloads from Companies House, regulator, stock exchange or government websites, or similar trustworthy business information sources. Each document so obtained should bear written evidence showing who printed it, when, from where and should be signed by the relevant person.

Electronic identification
5.54 There are now a number of subscription services that give access to databases of information on identity. Many of these services can be accessed

on-line and are often used by *businesses* to replace or supplement paper verification checks. Subject to 5.55, this means *businesses* may use on-line verification as a substitute for paper verification checks for *clients* considered normal risk, supplemented by additional paper verification checks for higher risk *clients,* or vice versa.

5.55 Before using electronic databases, however, *businesses* should question whether the information supplied is sufficiently reliable, comprehensive and accurate. The following points should be considered before deciding to use an electronic source (either as part of a wider process or, where appropriate, on its own)[3]:

- **Does the system draw on multiple sources?** A single source, eg, the Electoral Roll, is usually not sufficient. A system which uses both negative and positive data sources is generally more robust than one that does not.[4]
- **Are the sources checked across a period of time?** Systems that do not regularly update their data are generally prone to more inaccuracies than those that do.
- **Are there control mechanisms to ensure the quality and reliability of data?** Systems should have built-in checks that ensure the integrity of data and should ideally be transparent enough to show the results of these checks and their bearing on the integrity of data.
- **Is the information accessible?** Systems need to allow a *business* either to download and store the results of searches in appropriate electronic form, or to print off a hardcopy record containing all necessary details as to name of provider, source, date etc.

Insolvency cases

5.56 In the context of insolvency work, the person or entity entering into the *business relationship* is considered to be the insolvent. *Insolvency practitioner*s are also referred to the guidance provided by R3.[5]

5.57 An *Insolvency practitioner* should obtain verification of the identity of the person or entity over which he is appointed. Acceptable evidence of verification may include a court order, a court endorsed appointment, or an appointment made by a debenture holder or creditors meeting supported by a company search or similar. It is not always possible or necessary to obtain identification evidence direct from individuals or individual shareholders or directors in an appointment in respect of a company as their co-operation may not be forthcoming.

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[3] The *JMLSG Guidance* (Section 2, paragraphs 5.3.11–5.3.18) also covers indicators of good electronic identification resources.

[4] 'Positive' data are those that prove an individual exists, e.g. name, current address, date of birth etc, whereas 'negative' data relate known incidents of fraud, including identity fraud, other known offences and registers of deceased persons.

[5] www.r3.org.uk The Association of Business Recovery Professionals, better known as 'R3' (rescue, recovery, renewal).

5.58 It is important for an officeholder to be sure about the identity of the person or entity over which he is taking appointment given the urgency of the situation and the necessity not to delay when this might risk dissipation of assets and erosion of value. However, completion of other KYC elements of *customer due diligence* may not be possible prior to appointment and should be completed as soon as practicable after appointment (if possible, usually within 5 working days).

5.59 *Insolvency practitioner*s post appointment have a very different relationship with the insolvent *client* than that with a normal audit or advisory *client* and have access to a very wide range of information which alters the need for traditional pre-appointment KYC. However, particular focus is needed before, and immediately after, appointment on considering the way the business has been operated and assessing the risk of assets being tainted by crime in which case it may well be necessary, but not as a matter of routine in every case, to apply to *SOCA* for *consent* to perform the normal range of duties of collection, realisation and distribution of assets (see section 8).

Section 5A – Specific prompts for clients

These are suggested prompts only. In order to make the most use of these *businesses* should amend the text to suit their own *client* base and services offered.

A. For entities/businesses

1 What is its purpose in entering into any transaction forming the basis of the proposed engagement or its purpose in seeking services where not related to a specific transaction?

2 What are the entity's main trading and registered office addresses?

3 What are its business activities or purposes and sector?

4 Who controls and manages it (ie, has executive power over the entity – this may be directors, shadow directors or others depending on the circumstances)?

5 If the client is audited, were the accounts qualified and, if so, why?

6 Name and check that the person(s) purporting to represent the entity is/are who they say they are.

7 Who owns it – ultimate beneficial owner(s) and steps in between (at a minimum for companies provide details of any ultimate beneficial owners of more than 25% – for trusts, supply details of trustees and settlors and details of either beneficiaries with more than 25% interest, or the classes of beneficiary, and for collective investment funds or other similar arrangements provide details of the general partner and/or investment manager together with details of any person with more than 25% interest)?

8 What is its business model/intended business model (ie, the mechanism by which a business intends to generate revenue and profits and serve its customers – in terms of broad principles)?

9 What are the key sources of:

- income (eg, trading, investment etc); and
- capital (eg, public share offer, private investment etc)?

10 The history and current (also forecast if readily available) scale of the entity's:

- earnings (eg, turnover and profits/losses); and
- net assets.

11 The entity's geographical connections, so that you are in a position to ask such questions as 'Why is it getting so much money from that place?' and 'Why is it sending assets to that place?'

12 Has the entity been subject to insolvency proceedings, or is it in course of being dissolved/struck-off, or has it been dissolved/struck-off?

B. For individuals

- His or her purpose in entering into any transaction forming the basis of the engagement or purpose in seeking services where not related to a specific transaction.
- Home address and, if applicable/different, trading address.
- His or her purpose in entering into any transaction forming the basis of the engagement or purpose in seeking services where not related to a specific transaction.
- The scale and sources of the individual's capital (past and future).
- The scale and sources of the individual's income (past and future).
- The type and sector of the individual's business activities.
- The individual's geographical connections, so that you are in a position to ask such questions as 'Why is he getting so much money from that place?' and 'Why is she buying assets from that place?'
- Has the individual been subject to bankruptcy proceedings?
  If after enquiry of the individual it is considered that the individual has been subject to bankruptcy proceedings, information can be obtained:
  - for England and Wales, on: www.insolvency.gov.uk/eiir/
  - for Scotland – call The Accountant in Bankruptcy on 0131 473 4600 (Search Team).
  - for Northern Ireland – call The Insolvency Service on 02890 251441 (Insolvency Search Department)
- Has the individual been disqualified as a director?

  Consult Companies House: www.companieshouse.gov.uk/ddir/

Section 5B – Examples of risk-based verification

Set out below are examples of risk-based verification for some of the more common client types. For Guidance on other situations, reference should be had to the *JMLSG Guidance* Notes.

A. Individuals

Met face to face?

Yes and normal risk – obtain:
either: proof of identity – photo identity
or: proof of identity – non-photo identity and proof of address (Please note P.O. Boxes are not acceptable addresses) or date of birth (can be electronic)

No and/or higher risk – obtain:
either: proof of identity – photo identity and an additional piece of evidence
or: proof of identity – non-photo identity, proof of address (Please note P.O. Boxes are not acceptable addresses) or date of birth
Plus: an additional piece of evidence

Sources of evidence

List 1: Evidence of identity

Acceptable photo identity
- valid passport; or
- valid photocard driving licence (full or provisional); or
- national identity card (non-UK nationals issued by EEA member states and Switzerland); or
- firearms certificate or shotgun licence; or
- identity card issued by the Electoral Office for Northern Ireland

Acceptable non-photo evidence of identity:
Documents issued by a government department, incorporating the person's

List 2: Evidence of address or date of birth

- instrument of a court appointment (such as a grant of probate, bankruptcy); or
- current council tax demand letter or statement; or
- current (within the last 3 months) bank statements, or credit/debit card statements issued by a regulated financial sector firm in the UK, EU or JMSLG equivalent jurisdiction (but not those printed off the internet); or
- a file note of a visit by a member of the firm to the address concerned ('home visit'); or
- an electoral register search showing residence in the current or most recent electoral year (can be done via http://newcorp.192.com/search/index.cfm); or
- a recent (last available) utility bill (gas, water, electricity, telephone – **not** mobile 'phone bills); it must be a bill or

name and residential address or their date of birth, eg,

- a current UK full driving licence old version (**not** provisional licences); or
- evidence of entitlement to a state or local authority funded benefit (including housing benefit and council tax benefit), tax credit, pension, educational or other grant; or
- documents issued by HMRC, such as PAYE coding notices and statements of account (NB: employer issued documents such as P60s are not acceptable)
- end of year tax deduction certificates.

statement of account (**not** correspondence); or

- valid photocard driving licence (full or provisional); or
- a current UK full driving licence old version (**not** provisional licences); or
- evidence of entitlement to a state or local authority funded benefit (including housing benefit and council tax benefit), tax credit, pension, educational or other grant; or
- documents issued by HMRC, such as PAYE coding notices and statements of account (NB: employer issued documents such as P60s are not acceptable); or
- a firearms/shotgun certificate; or
- a solicitor's letter confirming recent house purchase or land registry confirmation (you must also verify the previous address).

B. Entities

I. Private company/LLP

Met a representative face to face?

Yes and normal risk – obtain:
Full company search from a national companies registry (or equivalent information obtained through a commercial provider of registry information)
Or
Certified copies of taken from original documents evidencing details of incorporation or registration, registered office and list of directors and shareholders/members

Identify any shareholder/member in the entity holding more than 25% of the equity (rights to either income, capital or voting), or if there is no holding over 25%, where considered appropriate on a risk sensitive basis, the largest holding.

Repeat step above until appropriate ultimate beneficial owners have been identified.

No and/or higher risk – obtain
Select individual(s) and entities that is/are capable of exercising significant influence over this entity either as an appointed director, or as a shadow director or equivalent, **identify** it/them according to whether a legal or natural person

Select any shareholder/member in the entity holding more than 25% of the equity (rights to either income, capital or voting), or where no holding over 25%, the largest holding **and identify** it/them according to whether a legal or natural person

Repeat step above until appropriate ultimate beneficial owners have been verified.

For all entities, if a money service business, verify HMRC registered number (obtain certified copy of certificate or call HMRC National Advice Service on 0845 0109000, Opt. 3)

II. Listed or regulated entity
Obtain either a printout from the relevant regulator's or exchange's web-site (and annotate), or obtain direct written confirmation from the regulator or exchange, confirming the regulated or listed status of the entity (ensure basic details of name, address, any membership or registration details, and any disciplinary details where applicable are provided).

Additional verification steps are not generally considered necessary in such cases as these entities in the UK qualify for application of *simplified due diligence*.

III. Government or similar bodies
Obtain and annotate evidence to confirm the body's:

- main place of operation; and
- the government or supra-national agency controlling it (government and supra-national agency web-sites are a useful source of information);
- for Housing Associations, the printout must contain its registered number, registered company number (where appropriate) and registered address.

Useful, trusted sites include:

UK Government information portal – http://www.direct.gov.uk/Homepage/fs/en
Housing Association Register – http://www.housingcorp.gov.uk
EU official site – http://www.europa.eu.int/
United Nations list of main bodies – http://www.un.org/aboutun/mainbodies.htm
USA government information portal – http://www.firstgov.gov/Agencies/Federal/All_Agencies/index.shtml
Additional verification steps are not generally considered necessary in such cases as these entities in the UK qualify for application of *simplified due diligence*.

IV. Money Service business
Verify HMRC registered number (obtain certified copy of certificate or call HMRC National Advice Service on 0845 0109000, Opt. 3).

Section 6 – Reporting

KEY POINTS

- *Suspicious activity reports* submitted by the *regulated sector* are an important source of information used by *SOCA* in meeting its harm reduction agenda, and by law enforcement more generally.
- *Businesses* are required to have procedures which provide for the nomination of a person (in this *Guidance* the *MLRO*) to receive disclosures (*internal reports*) under Part 7 of *POCA* and which require that everyone in the *business* complies with Part 7 of *POCA* in terms of reporting knowledge, suspicion or reasonable grounds for knowledge or suspicion of *money laundering*.
- Failure to report in accordance with Part 7 of *POCA* where the relevant information or other matter has been obtained through the course of work in the *regulated sector* is a criminal offence which can be committed by any *individual* (s.330, *POCA*), or by the *MLRO* (s.331, *POCA*). There is a similar offence for *MLROs* outside the *regulated sector* in s.332, *POCA*.
- An *individual* other than the *MLRO* fulfils his reporting obligations by making an *internal report* to his *MLRO*.
- The *MLRO* is responsible for assessing *internal reports*, making further inquiries if need be (either within the *business* or using public domain information), and, if appropriate, filing *SARs* with *SOCA*.
- Where a *relevant professional advisor* forms knowledge or suspicion or reasonable grounds for such in 'privileged circumstances' no report should be made to *SOCA* unless this '*privilege reporting exemption*' is overridden by the crime/fraud exception ie where the information or other matter is communicated to the *relevant professional advisor* with the intent of furthering a criminal purpose (section 7.42 to 7.46).
- When reports are properly made they are 'protected' under s.337, *POCA* in that nothing in them shall be taken to breach any restriction on the disclosure of information, however imposed.
- A person who considers he may have engaged or is about to engage in *money laundering*, should make an 'authorised' disclosure (s.338, *POCA*). Such a disclosure, provided it is made (and *SOCA's* consent to the act is obtained) before the act is carried out, or is made as soon as possible on the initiative of that person after the act is done and with good reason being shown for the delay, may provide a defence against charges of *money laundering*. When properly made such reports shall not be taken to breach any restriction on the disclosure of information, however imposed.
- *Consent* may be sought from *SOCA* under s.335, *POCA* (and confirmed to the *business* by the *MLRO* under s.336 *POCA*) to carry out activity that would otherwise be *money laundering* under ss.327–329 *POCA*. If granted, the *consent* provides complete protection against charges of *money laundering* but only in respect of the activity covered by the *consent*.

- *TA 2000* provides for broadly equivalent provisions regarding the reporting of knowledge, suspicion or reasonable grounds for such of *terrorist financing*. The definition of *'terrorist property'* is set out in s.14, *TA 2000* and the *terrorist offences* and provisions regarding reporting, *consent* and *tipping off* are set out in ss.15–21A.

What must be reported?

6.1 Under ss.330–332, *POCA*, failing to report knowledge or suspicion, or reasonable grounds for such, of *money laundering* is a criminal offence (see section 2 of this *Guidance*, which outlines the offences and details of exemptions). The following must be reported, as soon as practicable. These are collectively known as 'the *required disclosure*':

- the identity of the suspect (if known);
- information or other matter on which the knowledge or suspicion of *money laundering* (or reasonable grounds for such) is based; and
- the whereabouts of the laundered property (if known).

6.2 Care is needed to ensure that any information held concerning identity (such as date of birth, passport number, address, registration numbers for companies and so on) is included within the report as well as details of the laundered property and its whereabouts, where known, and reasons for knowledge or suspicion.

6.3 Even if the name of a suspect is not known, any information available which may assist in identifying the suspect or the whereabouts of any of the laundered property must be included in the report, under the provisions of s.330(3A), *POCA*. For example, even if the *business* does not have the name of the suspect, if the *business* is aware the *client* holds the detail the report needs to reflect this as information which may assist in identifying the suspect.

6.4 In cases where the suspect is not known, another subject should be included in the report, whether this is the victim or another subject associated with the activity. The fact that in these cases the subject of the report is not a suspect should be made clear in the report.

6.5 The disclosure requirement relates to any information coming to a person in the course of business in the *regulated sector*, and not just information relating to *clients* and their affairs. This means that reports made may be required on the basis of information not only about *clients*, but about potential *clients*, associates and counterparties of *clients*, acquisition targets and even employees of *businesses* in the *regulated sector*.

Types of report

6.6 Reports made in accordance with the provisions of *POCA* are made under either s.337 (protected disclosures) or s.338 (authorised disclosures).

The Protected Disclosure

6.7 A protected disclosure is any report made by a person providing the *required disclosure,* based on information or other matter coming to their attention in the course of their trade, profession, business or employment, where this information has led to knowledge or suspicion (or reasonable grounds for such) that another person is engaged in *money laundering*.

6.8 A protected disclosure may be made by any person forming a *money laundering* suspicion, at work or carrying out professional activities, whether or not acting within the *regulated sector*. This means that any *individual* or *business,* or other organisation (such as a charity) meeting these conditions may make a voluntary report to *SOCA* in the public interest and benefit from the protections contained in s.337, *POCA* against allegations of breach of confidentiality. In the *regulated sector,* such reports are compulsory (save where an exemption such as the *privilege reporting exemption* applies).

The Authorised Disclosure

6.9 An authorised disclosure is a report made by a person who makes the disclosure:

- before he has carried out a prohibited act (ie, done something which would constitute a *money laundering* offence under ss.327–329, *POCA*); or
- whilst he is doing the prohibited act, or after he has done such an act provided that when he started to do the act he didn't realise that it was *money laundering* (*ie,* did not realise that *criminal property* was involved) and made the report on his own initiative as soon as he knew or suspected *criminal property* was involved; or
- after he has done the prohibited act, provided that there was good reason for not reporting before he committed the act, and he made the report on his own initiative as soon as it was practicable to make it. There is no guidance in *POCA* as to what might constitute 'good reason', but this is likely to be applied narrowly.

Confidentiality protections

6.10 Any report properly made under the provisions of ss.337 and 338, *POCA* cannot be taken to breach any restriction on disclosure of information, however this is imposed. This means considerations of *client* or other duties of confidentiality must not impede reporting, unless the *privilege reporting exemption* applies (see section 7 below) where different considerations apply. Such protection does not exist for reports which are made founded only on speculation or made defensively, founded on generalities or 'just in case'.

Non-*POCA* reporting
6.11 This *Guidance* deals only with obligations under the UK anti-*money laundering* regime – *businesses* and *individuals* should have regard to other obligations they may have, such as reporting responsibilities under the Statements of Auditing Standards, statutory regulatory returns, and reports of misconduct of fellow members of professional bodies. In all cases, the risk of *tipping off* must be considered and avoided. Further *Guidance* on acting for *clients* who are the subject of *SARs* is given in section 9.

Recognising money laundering

The key elements
6.12 The anti-*money laundering* requirements only relate to criminal matters, that is those which attract criminal penalties. Other acts may be unlawful, but not criminal. This distinction is particularly important in areas of work where an array of penalties on both civil and criminal levels exist. An example of this is in relation to infringement of the requirements of the Companies Act where there is a mixture of issues attracting civil penalties and those attracting criminal penalties.

6.13 In most cases of suspicion, the reporter will have in mind a particular type of underlying or predicate *criminal conduct*. However, on occasion a transaction or activity may so obviously lack any normal economic rationale or business purpose as to lead to a suspicion that it may be linked to *money laundering* in the absence of any other credible explanation. *Individuals* should not hesitate to exercise professional scepticism and judgement and should report such matters if appropriate.

6.14 For a matter to be *money laundering*, there must not only be *criminal conduct*, but also proceeds or *criminal property*. These terms are described below.

Criminal conduct
6.15 *Criminal conduct* is that which constitutes an offence in any part of the UK or would do if it was committed in the UK. However, *businesses* and *individuals* should note that under the provisions of the *overseas conduct exemption* (s.330(7A), *POCA)* there are limited exceptions to the requirement to report conduct occurring overseas – see sections 2.4 and 2.5.

6.16 Since UK law defines *money laundering* so widely, any *criminal conduct* which has resulted in any form of *criminal property* will also constitute *money laundering*. It is not expected that *individuals* will become expert in the very wide range of underlying or predicate criminal offences which lead to *money laundering* but they will be expected to recognise those that fall within the professional competence of their role but should use professional scepticism, judgement and independence as appropriate to identify offences.

6.17 If a person knowingly engages in criminal activity but does not successfully benefit from it, he may have committed some other offence (often fraud) but not *money laundering*. If an activity does not result in *criminal property* it cannot constitute a *money laundering* offence. Consequently, there is no obligation to file a *money laundering* report. However, *businesses* and *individuals* may wish to report the matter to the police, or may have other reporting duties (such as those referred to in section 6.11 above).

Criminal property

6.18 *Criminal property* is the benefit derived from a person's criminal activity. Note that *criminal property* (or 'proceeds') can take any form. For example, cost savings from ignoring mandatory health and safety regulations (amounting to a criminal offence) savings as a result of tax evasion, and other less obvious financial benefits can also constitute *criminal property*. Where *criminal* property is used to acquire further assets these further assets themselves become *criminal property.* It is important to note that there is no de minimis level and thus *criminal property* is not identified by its value.

6.19 *POCA* defines *criminal property* in s.340(3)(b), *POCA* as 'property is *criminal property* if it constitutes a person's benefit from *criminal conduct* and the alleged offender knows or suspects, that it constitutes or represents such a benefit'.

Intent

6.20 Except for certain strict liability offences, *criminal conduct* requires an element of criminal intent. S340(3)(b) of *POCA* means that an offender must know or suspect that property is criminal. Conduct which is an innocent error or mistake may be criminal where it constitutes a strict liability offence but will not also be *money laundering*.

6.21 If an *individual* or *business* knows or believes that a *client* is acting in error, the *individual* may approach the *client* and explain the situation and legal risks to him. However, once the criminality of the conduct is explained to the *client*, he must bring his conduct (including past conduct) promptly within the law to avoid a *money laundering* offence being committed. Where there is uncertainty about the legal issues, outside the competence of the *individual, clients* should be referred to an appropriate specialist or professional legal adviser.

6.22 Note that if there are reasonable grounds to suspect that a *client* knew or suspected that his/ its actions were criminal, a report must be made. Even if the *client* does not have the relevant intent, but *businesses* or *individuals* are aware that there is *criminal property*, consideration needs to be given to whether a report has to be made under s.338, POCA to avoid an offence under ss.327–329, POCA (see also section 6.27 and section 8).

Determining whether and when to report

6.23 There can be no hard and fast rules on how to recognise *money laundering*. It is important for all *individuals* to be alert to this issue and to apply their professional judgement and experience.

6.24 *Individuals* need to consider whether activity or conduct observed in the course of business has the characteristics of *money laundering* and, therefore, warrants a report. Most *businesses* will include in their standard anti-*money laundering* systems and procedures arrangements to allow *individuals* to discuss whether the information they hold amounts to a reportable knowledge or suspicion, and *individuals* should take advantage of these arrangements where necessary.

6.25 *Individuals* must report promptly to the *MLRO* (or exceptionally direct to *SOCA*) once the requisite knowledge or suspicion has been formed, or reasonable grounds for such have come into existence. There are no external requirements for the format of an *internal report* and *businesses* may design their systems for *internal reporting* as they wish. *Internal reports* may be made orally or in writing, and may refer to *client* files or contain all the requisite information in a standard form, provided that all the information in the *required disclosure* and other information which the *business* requires under its procedures for the reporting of *money laundering* are reliably provided and recorded.

6.26 To decide whether or not a matter is suspicious *individuals* may need to make further enquiries (within the normal scope of the assignment or *business relationship*) of the *client* or their records. The anti-*money laundering* legislation does not prevent normal commercial enquiries being made to fulfil duties to *clients*, and such enquiries may also assist in understanding a matter to determine whether or not it is suspicious. However, investigations into suspected *money laundering* should not be conducted unless this is within the scope of the engagement, and information is limited to that to which the *individual* would normally be entitled in the course of business. Normal business activities should be maintained and such information or other matter which flows from this will form the proper basis of *internal reports* and *SARs*. To carry out additional investigations is unnecessary and could risk *alerting a money launderer.*

6.27 *Individuals* should be cautious and report to their *MLRO* if in doubt, but may wish to consider the following questions to assist their decision:

- Am I suspicious, or do I know, that activity I have seen is criminal and has caused someone to benefit from it in some way?
- Am I suspicious of an activity which, whilst I can't identify a specific *predicate offence*, is so unusual or lacking in normal commercial rationale that it causes suspicion that money is being laundered?
- If so, do I suspect a particular person or persons of having been involved in criminal activity (or do I know who undertook criminal activity), or does another person that I can name have details of this person(s) or information that might assist in identifying this person(s)?
- Do I know who might have received, or still be holding, the benefit of the criminal activity or where the *criminal property* might be located or have I got any information which might allow the property to be located?
- Do I think that the person(s) involved in the activity knew or suspected that the activity was criminal or do I think the activity arose from innocent error?

- Can I explain coherently what and who I am suspicious of, and why, either in terms of knowledge or suspicion that a *predicate offence* has been committed, or in terms of abnormal activities which may constitute *money laundering*?

Consideration must also be given to whether *individuals* or *businesses* have engaged, or intend to engage, in conduct which could constitute a *money laundering* offence under ss.327–329, POCA (eg, transferring *client* money that comprises *criminal property*). If so, this must also be reported to the *MLRO* as a report may be required under s.338, *POCA* and *consent* requested.

How to report

Internal reports to the *MLRO*

6.28 The *2007 Regulations* require *businesses* to maintain internal reporting procedures that allow any *individual* in the *business* to submit to the *MLRO* a report of knowledge or suspicion or reasonable grounds for such, of *money laundering*. Only by doing this can the *individual* fulfil his obligations under s.330, *POCA* (or in exceptional circumstances, reporting direct to *SOCA*). Of course, sole practitioners who do not employ any staff will simply make their own *SARs* directly to *SOCA*.

6.29 Under s.330, *POCA*, the *internal report* must reach the *MLRO* – a report to a line manager or other colleagues is not enough to comply with the legislation.[6] An *individual* may discuss his suspicion with managers or other colleagues to assure himself of the reasonableness of his conclusions but, other than in group reporting circumstances, the responsibility for reporting to the *MLRO* remains with him. It cannot be transferred to anyone else, however junior or senior they are.

6.30 Where a group (more than one *individual*) arrives at knowledge or reasonable suspicion together by consolidating their thoughts, a single *internal report* may be submitted, in terms agreed by those forming the suspicion and in the names of them all. This may occur, for example, where an engagement team has a reason to be suspicious.

Reports to *SOCA*

6.31 The *MLRO* will be responsible for making decisions on whether the information contained in an *internal report* needs to be relayed to *SOCA* in the form of a *SAR*, and compiling and despatching the *SAR* to *SOCA* (section 7). The *MLRO* will also be responsible for determining whether *consent* is required to continue with the engagement or any aspect of it, and will usually be responsible for decisions on how business should be conducted pending receipt of *consent* (section 8).

[6] Both the *2007 Regulations* and *POCA 2002* use the term 'nominated officer' for *MLRO*.

Section 7 – The MLRO and reporting to SOCA

KEY POINTS

- The role of the *MLRO* carries significant responsibility and should be undertaken by a senior person within the *business* who has sufficient authority to take independent decisions, and who is properly equipped with sufficient knowledge, and resources, to undertake the role.
- The key role is that of receiving *internal reports*, and making *SARs* to *SOCA* as applicable, but *MLROs* may undertake other functions relating to the *businesses'* systems and controls in relation to its anti-*money laundering* activities.
- *Businesses* should make provision for delegates or deputies to cover any absence of the appointed *MLRO* and should ensure all relevant employees are aware of the reporting channels laid down by the *business.*
- It is for *businesses* to determine the format of *internal reports.*
- A *relevant professional adviser* who suspects or has reasonable grounds for knowing or suspecting that another person is engaged in *money laundering* is exempted from making a *money laundering* report where his knowledge or suspicion comes to him in privileged circumstances (the *privilege reporting exemption*).

The role

7.1 The role of the *Money Laundering Reporting Officer* (*MLRO*) carries significant responsibility and should be undertaken by an appropriately experienced *individual*. Although there is no prescribed level of seniority, one of the principals of an accounting firm, or similar in other *businesses*, is likely to be suitable, or another senior and skilled person with sufficient authority to enable decisions to be taken independently. *MLROs* are **required** to:

- consider *internal reports* of *money laundering*;
- decide if there are sufficient grounds for suspicion to pass those reports on to *SOCA* in the form of a *SAR*, and, if so, to make that *SAR*; and
- act as the key liaison point with *SOCA* and law enforcement agencies including dealing with *consent* and disclosure issues.

MLROs **may** also take responsibility for:

- training within the *business*;
- advising on how to proceed with work once an *internal report* and/or *SAR* has been made in order to guard against risks of *tipping off* or *prejudicing an investigation*; and
- the design and implementation of internal anti-*money laundering* systems and procedures.

If this role is not undertaken by the *MLRO*, these responsibilities should be taken on by another sufficiently senior and skilled person within the *business*. This person should work closely with the *MLRO*.

7.2 The functions of an *MLRO* can be delegated, although this does not relieve that *MLRO* of his responsibility, and *businesses* should have contingency arrangements for discharging the duties of an *MLRO* during periods of absence or unavailability. It is recommended that *businesses* appoint an alternate or deputy *MLRO* for these situations and ensure that the reporting channels are well known to all relevant employees.

7.3 Like all *individuals*, *MLROs* can commit the *money laundering* offences as well as the related offences of *failure to disclose*, *tipping off*, and *prejudicing an investigation*.

Assessing internal reports

7.4 When first approached by a colleague with an *internal report*, there are two matters for immediate consideration. Rapid consideration is needed by the *MLRO* as to whether an application for *consent* is required (see section 8). In addition, the *MLRO* should first establish by discussion and review whether or not the *privilege reporting exemption* may apply, as this exemption significantly affects not only whether a *SAR* must be made under the legislation, but also whether it may be made. The *privilege reporting exemption* is limited to *relevant professional advisers*, and will not be available other than to members of well established professional bodies such as those listed in Schedule 3 to the *2007 Regulations* and who meet the requirements set out in s.330(14), *POCA*. Further *Guidance* on the *privilege reporting exemption* is given in sections 7.26 to 7.46 below.

7.5 Once the *MLRO* receives an *internal report*, he must assess it and determine whether it meets the criteria laid down in s.331, *POCA* ie:

- does he know, suspect or have reasonable grounds to know or suspect that another person is engaged in *money laundering*; and
- did the information or other matter giving rise to the knowledge or suspicion come to him in a disclosure made under s.330, *POCA;* and
- does he know the name of the other person or the whereabouts of any laundered property from the s.330 disclosure; or
- can he identify the other person or the whereabouts of any laundered property from information or other matter contained in the s.330 disclosure; or
- does he believe, or is it reasonable for him to believe, that the information or other matter contained in the s.330 disclosure will or may assist in identifying the other person or the whereabouts of any laundered property.

7.6 In each case the *MLRO* should ensure the report contains all the relevant information known to the *individual(s)* making the report and records all necessary aspects as follows:

- who is making the report
- the date of the report
- who is suspected or information that may assist in ascertaining the identity of the suspect (which may simply be details of the victim and the fact that the victim knows the identity but this is not information to which the *business* is privy in the ordinary course of its work)
- who is otherwise involved in or associated with the matter and in what way
- what the facts are
- what is suspected and why
- information regarding the whereabouts of any *criminal property* or information that may assist in ascertaining it (which may simply be the details of the victim who has further information but this is not information to which the *business* is privy in the ordinary course of its work)
- what involvement does the *business* have with the issue in order that requirements for *consent*, the need for consideration of *tipping off* issues, basis of continuance of work and any other necessary guidance for engagement staff may be considered.

7.8 The *MLRO* may also wish to make reasonable enquiries of other *individuals* and systems within the *business.* Such enquiries may either have the effect of confirming the knowledge or suspicion, or reasonable grounds for such, or may provide additional material which enables the cause of suspicion to be eliminated at which point the matter may be closed without a *SAR* being issued.

7.9 In conducting his assessment, the *MLRO* may well wish to consider the criteria set out in section 6 [determining whether to report]. If the *MLRO* considers the information or other matter he has received in an *internal report* meets these criteria then a *SAR* to *SOCA* will be required unless either the *privilege reporting exemption* has been applied on the reporter seeking advice from the *MLRO* and not overridden by the crime/fraud exception or, on analysis of the *internal report* received, the *MLRO* determines that the *overseas conduct exemption* applies (sections 2.4 and 2.5).

The Reporting Record

7.10 It is vital for the control of legal risk that adequate records of *internal reports* are maintained, usually by the *MLRO*. These would normally be details of all *internal reports* made including details of the *MLRO's* handling of the matter, his requests for further information, assessments of the information received, decisions as to whether to conclude immediately or to wait for further developments or information, whether to make a *SAR* or not and on what grounds, any advice given to engagement teams as regards continuation of work and any *consent* requests made.

7.11 Details of *internal reports* submitted as *SAR*s should also be retained. For efficiency, and ease of reference for the *MLRO*, it is recommended that some form of index of reports is kept and internal reference numbers given. The records may be simple, or sophisticated, depending on the size of the

business and the volume of reporting, but all need to contain broadly the same information and be supported by appropriate working papers. These records are important as they may subsequently be required to justify and defend the actions of an *individual* or *MLRO*. There is no prescribed form specified in *POCA* or elsewhere for *internal reports* to an *MLRO*.

Making external reports

7.12 Once an *MLRO* has concluded a report is required, it should be prepared and submitted promptly to *SOCA*.

7.13 The requirement set out in *POCA* as to timing of reports is that a report should be made 'as soon as is practicable' after the information required is received. In practical terms, the interval between receiving an *internal report* and making a *SAR* will vary quite widely. Some matters may be disposed of very rapidly where all the information required to make a *SAR* is received with the first contact, and where this occurs a quick turnaround should be achieved. It is particularly important to work rapidly in matters where *consent* is required, or where '*money laundering* in action' is suspected, ie, another is engaged in current criminal activity which may provide law enforcement with opportunities to intervene. In other cases, where not all the required information is immediately to hand, or where there is material uncertainty as to whether the matter is reportable or not, the *MLRO* may reasonably chose to await further expected developments, and/or seek further information before making a reporting decision.

7.14 *MLROs* can use a variety of manners and methods of submission, to make reports such as:

- *SAR* on-line, using internet transfer
- Moneyweb, using extranet transfer
- Secure (encrypted email) using electronic file transfer by email
- Bulk reports in electronic form using CD etc for transfer
- Hard copy *SOCA* forms (obtainable on the internet or by post on request to *SOCA*) to be typed and submitted by post or fax.

The manners most likely to be of relevance to those providing *defined services* are *SAR* on-line, Moneyweb and the hard copy forms, the other two manners and methods are normally only used by retail banks and others submitting very large quantities of reports. We recommend that *individuals* and *businesses* have regard to guidance on how to make reports published from time to time by *SOCA*. Details of *SOCA*'s preferred reporting methods are available from their web site at www.soca.gov.uk.

7.15 Each of the manners contain compulsory fields which require information, where known, to be provided in accordance with the *required disclosure* provisions. These fields relate to the identity of the reporter, the details of subjects (to the extent known but at least one must be named

whether as victim or suspect and the identity information known provided in the correct specified fields), and in the free text box (variously called 'reason for disclosure' or 'reason for suspicion') the whereabouts of the laundered property, where known, and the description of the reason for suspicion or knowledge.

7.16 Please note that currently there are no prescribed forms which *MLROs* must use. An offence for failing to use the prescribed manner and form for making a *SAR* is contained in s.339(1A), *POCA* but this section is not effective unless or until an order by the Secretary of State. We are not aware of any plans to prescribe manner and form in the immediate future.

7.17 In preparing *SARs*, *MLROs* should seek to present information in a way that is clear and succinct. In particular:

- the full name of the reporting *business* must be provided and the internal reference for the report should be provided in each case;
- identification information held by the *business* (name, address, date of birth, registration numbers etc) must be presented in the appropriate subject fields, and not simply incorporated into the 'reason for suspicion' text;
- where it assists in explaining the matter being reported, it may be appropriate to include a number of subjects in the report, providing such identification information as is known in the manner above for each of them;
- for each subject their role, as far as it is known, in the matter should be made clear and the options of flagging each subject as suspect/victim/unknown used as appropriate;
- where bank account/transaction details are available and relevant, these should be included in the appropriate fields;
- the activity observed should be explained clearly in the reasons for suspicion field, without using jargon or terms which might not be readily understood by non-accountants and, as far as known, giving details of when events occurred;
- features of the activity which are unusual or are considered to denote either a *predicate offence* to *money laundering*, or *money laundering*, should be highlighted as such;
- such information held as to the whereabouts of any laundered property should be given;
- the information given in the reasons for suspicion field should be succinct; and
- the report should be submitted without any supporting documents and accordingly should be able to stand alone to explain the suspicion through provision of the information comprising the *required disclosure*.

7.18 If the *MLRO* so wishes, he may make use of the *SAR Glossary of Terms* provided by *SOCA* and incorporate the relevant terms in his report.

7.19 An important role for the *MLRO* on receipt of an *internal report* and on making a *SAR* is to advise engagement teams on how to continue their

work and interact with the *client* to balance professional responsibilities, risk to the *business* and responsibilities under *POCA*. This area of work is examined in section 9.

Guarding confidentiality

7.20 If *clients* or third parties become aware that an *individual* or *business* has made a *SAR*, this can have adverse effects on *client* relationships and may ultimately endanger the security of staff members. Maintaining the confidentiality of *SARs* is important to *SOCA*[7]. Access to *SAR* information is now provided to end-users in law enforcement and similar agencies by *SOCA* only on condition that undertakings are taken as to compliance with Home Office guidance on preserving the confidentiality of *SARs*. (Home Office Circular 53 / 2005 'Money Laundering: The Confidentiality And Sensitivity Of Suspicious Activity Reports (*SARs*) And The Identity Of Those Who Make Them').

7.21 *SOCA* has provided a reporting line for concerns over breach of confidentiality by end-users of reports and details may be found on http://www.soca.gov.uk/financialIntel/sarBreachLine.html.

7.22 Whilst it is reasonable for the *regulated sector* to expect *SOCA* to make strenuous efforts to protect the confidentiality of those who make *SARs*, reporters should also take such steps as are available to them to protect the confidentiality of *individuals* and *businesses* and the information reported.

7.23 In making reports, *MLROs* should disclose information relevant to the suspicion or knowledge of *money laundering* and information necessary to allow the reader to gain a proper understanding of the matters reported. It is recommended that reporters:

- refrain from including other confidential information where this is not required for compliance with obligations under *POCA*.
- show the name of the *business*, *individual*, or *MLRO* submitting the report only once in the source ID field but nowhere else in the report;
- do not include names of personnel who made *internal reports* to the *MLRO*;
- only include parties as subjects where this information is necessary for an understanding of the report, or to meet the standards of the *required disclosure*; and
- highlight clearly in the reasons for suspicion/disclosure field any particular concern the reporter has about safety (in physical, reputational or other terms).

7.24 Whilst it is reasonable for an *MLRO* to answer questions from a *SOCA* officer or a law enforcement officer aimed simply at clarifying the content of a

[7] The review into the future of the SAR regime, known as the Sir Stephen Lander Review, included recommendations regarding the importance of maintaining and improving confidentiality in the SAR regime.

SAR, any further disclosure to *SOCA* or law enforcement or prosecuting agencies should normally only be undertaken in response to the exercise of a power to obtain information contained in relevant legislation, or in compliance with professional guidance on the balance of confidentiality and making disclosures in the public interest. This provides protection for the *MLRO* and the *business* against any allegation of breach of confidentiality.

7.25 A facility exists for any person to make voluntary disclosures to *SOCA* under s.34, *SOCPA* provided that:

- the disclosure is made for the purposes of the exercise by *SOCA* of any of its functions (ss.2–4, *SOCPA*);
- it is not a disclosure of personal data in contravention of the Data Protection Act 1998 where that personal data is not exempt from its provisions;
- it is not a disclosure prohibited by Part 1, Regulation of Investigatory Powers Act 2000 (relating to unlawful interception of communications).

If a disclosure meets these requirements, the person making the disclosure does not breach any duty of confidentiality or other restriction on the disclosure of information, however imposed. We recommend a cautious approach to disclosure under this section, as it is important to be sure that all the required conditions are met.

The privilege reporting exemption

7.26 With effect from 21 February 2006, a *relevant professional adviser* who suspects or has reasonable grounds for knowing or suspecting that another person is engaged in *money laundering* is exempted from making a *money laundering* report where his knowledge or suspicion comes to him in privileged circumstances (the *privilege reporting exemption*). In such circumstances, provided that the information is not given to him with the intention (by his *client* or another person) of furthering a criminal purpose ('the crime/fraud exception' – see sections 7.42 to 7.46 below), s.330(6) affords the adviser a complete defence against a charge of failure to disclose (ie, to make a *SAR*). By implication, the exemption also means that in these circumstances a *business* should not make a *SAR*, as they are expected to be bound by the same standards of behaviour as is the case for legal professional advisers subject to legal professional privilege.

7.27 Discussions with the *MLRO* to seek advice about making a report under s.330, *POCA* shall not be taken to be an *internal report* when it was not intended as such, eg, if the person initiating the discussion believes the matter falls within the *privilege reporting exemption* and contacts the *MLRO* to confirm this. On receipt of such an approach, it is recommended the *MLRO* still collects the information which would otherwise be included in the *required disclosure* to enable careful consideration with the reporter of whether or not the matter falls within the *privilege reporting exemption* and, if it does, whether

this is overridden by the crime/fraud exception. It is recommended that the *MLRO* documents the decision reached in this regard and the reasons for reaching that decision.

7.28 A *relevant professional adviser* is defined in the legislation as:

- an accountant, auditor or *tax adviser* who is a member of a professional body which is established for accountants, auditors or *tax adviser*s (as the case may be); and which makes provision for:
  (a) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and
  (b) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards.

The *privilege reporting exemption* also extends to persons in partnership with (or equivalent), or employed by, the *relevant professional adviser* to provide them with assistance or support. The information must come to these partners or employees in connection with this assistance or support and to the *relevant professional adviser* in privileged circumstances.

7.29 The legislation does not list which professional bodies meet the criteria listed in s.330(14), but the *CCAB* member bodies meet those criteria and, accordingly, *individuals* who are members of a *CCAB* member body, those in partnership with such *individuals* in *businesses* regulated by the *CCAB* and the employees of such *businesses* and *individuals* are within the scope of the exemptions. If *businesses* or *individuals* are in any doubt as to whether these provisions apply to them, it is recommended that they seek legal advice.

7.30 However, the amendments referred to above affect only the duty to make *money laundering* reports and related disclosures under *POCA*. They do not in any way extend legal professional privilege to advice given by *relevant professional advisers* in any other circumstances. However, *businesses* and *individuals* need to be aware, when responding to requests for further information (sections 9.11 to 9.17), documents subject to a *client's* privilege are not disclosable.

7.31 If a *relevant professional adviser* considers that the information or other matter on which his knowledge or suspicion is based came to him in privileged circumstances, he is obliged to apply the *privilege reporting exemption* in s.330(6), *POCA* (unless the crime/fraud exception applies) and so has no discretion to make a *money laundering* report. This means that the *relevant professional adviser* could find himself in a situation where he might wish to make a report but is prevented from doing so. In such circumstances, he should consider whether he may continue to act, but in carrying out his decision will need to bear in mind the provisions of *POCA* relating to *prejudicing an investigation* (s.342, *POCA*).

7.32 Whether or not the *privilege reporting exemption* applies needs to be considered carefully, including a consideration as to whether the *relevant*

professional adviser was working in privileged circumstances when the particular information or other matter came to him. This is an important consideration, as a *relevant professional adviser* may be providing a variety of services to a *client*, not all of which may create privileged circumstances for this purpose. Accordingly, it is strongly recommended that a careful record is maintained of the provenance of information considered when a decision is made on the applicability or otherwise of the *privilege reporting exemption*.

7.33 Set out below is a description of the two types of privileged circumstances and some examples of work which may fall within or outside of them.

Legal advice

7.34 For the privileged circumstances set out in s.330(10)(a) and (b), *POCA* to apply, the following conditions need to exist:

- there needs to be a confidential communication (written or oral) between the *relevant professional adviser* and his *client*, or a representative of the *client*, in which the *client* seeks or the *relevant professional adviser* gives legal advice;
- that communication must take place within the confines of a professional relationship between them, including an initial meeting which does not progress to a *business relationship*; and
- the communication must relate to legal advice (ie, advice concerning the rights, liabilities and obligations or remedies of the *client* under the law).

Litigation

7.35 For the privileged circumstance set out in s.330(10)(c), *POCA* to apply, the following conditions need to exist:

- there must be a confidential communication (written or oral) between the relevant professional advisor and the *client* or third party;
- the confidential communication must be made for the dominant purpose (ie, the overriding purpose) of being used in connection with actual, pending or contemplated litigation.

Defining contemplated litigation is difficult. In summary, it is usually necessary to be able to identify some act that gives rise to a cause of action in relation to which some threat of legal action has either been clearly intimated or is more than reasonably likely to follow. The party seeking to claim the benefit of litigation privilege must show that he was aware of circumstances that rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility.

Examples of privileged circumstances

7.36 Examples where *relevant professional advisers* might frequently fall within privileged circumstances as regards legal advice privilege include, where this advice is delivered as part of the provision of a *defined service*:

- advice on taxation matters, where the *tax adviser* is giving advice on the interpretation or application of any element of tax law and in the process is assisting a *client* to understand his tax position;

- advice on the legal aspects of a take-over bid, for example on points under the Companies Act legislation;
- advice on duties of directors under the Companies Act;
- advice to directors on legal issues relating to the Insolvency Act 1986, eg, on the legal aspects of wrongful trading; and
- advice on employment law.

7.37 Examples where *relevant professional advisers* might fall within privileged circumstances as regards litigation privilege include:

- assisting a *client* by taking witness statements from him or from third parties in respect of litigation;
- representing a *client*, as permitted, at a tax tribunal; and
- when instructed as an expert witness by a solicitor on behalf of a *client* in respect of litigation.

7.38 It should be noted that conducting audit work does not of itself give rise to privileged circumstances for this purpose, as the *relevant professional adviser* is neither providing legal advice, nor is he instructed in respect of litigation. Nor do routine book-keeping, accounts preparation or tax compliance assignments, though privileged circumstances may arise if the *client* requests or the adviser gives, legal advice on an informal basis, during the course of such an assignment.

7.39 It is recommended that the reasons for the conclusion reached as to whether the *privilege reporting exemption* applies are carefully documented. If the *relevant professional adviser* decides it does apply, he must act in accordance with the *privileged reporting exemption* unless the crime/fraud exception applies. If in doubt, it is recommended that *businesses* and *individuals* seek professional or legal advice.

Recording and discussion with the *MLRO*

7.40 Even where the *client* service team believe that the *privilege reporting exemption* applies, *businesses* should consider whether all matters involving knowledge or suspicion of *money laundering* should still be referred to the *MLRO* for advice or to another appropriate person (see section 7.41 of this *Guidance*). Discussion of a matter with the *MLRO*, where the purpose of the discussion is the obtaining of advice about making a disclosure under s.330, does not alter the applicability of the *privilege reporting exemption*. Given the complexity of these matters, and the need for considered and consistent treatment with adequate documentation of decisions made, a referral to and discussion with the *MLRO* is likely to be beneficial and is recommended. The *MLRO* may decide, with the reporter, to seek further appropriate advice.

7.41 Likewise reporters within a *business* are entitled to seek advice from an appropriate specialist (either a person within the *business* who would fall into the category specified in s.330(7B) or an external adviser who himself is able to apply the *privilege reporting exemption*) without altering the applicability of the *privilege reporting exemption.*

The Crime/Fraud Exception

7.42 Before determining whether the *privilege reporting exemption* must be applied, consideration needs to be given to whether the exemption is lost through application of the crime/fraud exception. This exception, as set out in s.330(11), *POCA*, overrides the *privilege reporting exemption* which:

> 'does not apply to information or other matter which is communicated or given with the intention of furthering a criminal purpose'.

This means that communications that would otherwise qualify under one or other of the above two types of privilege are not covered by the *privilege reporting exemption* where the communication was intended to facilitate or to guide someone (usually the *client* but possibly a third party) in the commission, or furtherance, of any crime or fraud. An example of this might be where tax advice was sought ostensibly to enable the affairs of a tax evader to be regularised but in reality was sought to aid continued evasion by improving the evader's understanding of the relevant issues.

7.43 The crime/fraud exception also applies where communication takes place between a *client* and his adviser in circumstances where the *client* is the innocent tool of a third party's criminal or fraudulent purpose. An example of this might be where a money launderer gives money to a family member, who is unaware of the source of that money, to purchase a property, for which purpose he communicates with his adviser.

7.44 The crime/fraud exception does not apply where the adviser is approached to advise on the consequences of a crime or fraud or similar conduct that has already taken place and where the *client* has no intention, in seeking advice, to further that crime or fraud. This means that a person who is concerned that he may be guilty of tax evasion can approach a *tax adviser* for legal advice in this regard without fear of the exception being invoked. This remains the case even if the potential *client* declines a *client* relationship having received the advice, and the adviser does not know whether the person will proceed to rectify his affairs. However, if the person behaves in a way that makes the adviser suspicious that he intends to use the advice to further his evasion, then a *money laundering* report could be required.

7.45 The crime/fraud exception is a difficult area and the Courts will not usually allow the exception to be invoked unless there is reasonably compelling circumstantial evidence available that demonstrates that the communications have in some way been intended to further the crime or the fraud. A mere speculation may not be sufficient as a basis to invoke it. It is strongly recommended that professional or legal advice is sought in all cases of doubt.

7.46 In summary, the following issues need to be considered before deciding whether to apply the *privileged reporting exemption*:

(a) Are those who received the information or other matter which gave rise to

knowledge or suspicion of *money laundering relevant professional advisers* (s.330(14) and s.330(6)(b))?

(b) Was the *relevant professional adviser* acting in privileged circumstances (s.330(10))?

(c) Was the information or other matter which gave rise to knowledge or suspicion of *money laundering* actually received in privileged circumstances (s.330(10)) and not in some other communication or situation?

(d) Was the information or other matter received or communicated with the intention of furthering a criminal purpose (*ie,* does the crime/fraud exception apply (s.330(10))?

If the answers to (a), (b), and (c) are yes, and the answer to (d) is no, the *privileged reporting exemption* must be applied. If the answer to (a), (b), and (c) are yes and the answer to (d) is yes, the crime fraud exception applies and a *money laundering* report must be made. Further advice should be sought from the relevant professional body or a lawyer in cases of doubt. This issue may be vital in balancing legal and professional requirements for confidentiality and for serving the public interest and the interests of *clients*. If doubts cannot be resolved through internal discussion, through access to normal sources of professional advice, *businesses* are strongly recommended to seek advice from a professional legal adviser with experience of these matters.

Section 8 – Consent

KEY POINTS

- If a *business* or an *individual* believes an activity they are going to undertake would constitute a *money laundering* offence under ss.327–329 *POCA* then they must make an authorised disclosure under s.338, *POCA* (or have a reasonable excuse for not having made such a report); and
- if the authorised report was made before the *money laundering* activity took place, the reporter must receive an appropriate *consent* (s.335, *POCA*) before proceeding with the activity or an offence will be committed.
- On receipt of the appropriate *consent* under s.335, *POCA,* an *MLRO* may then provide this *consent* to the *business* under the provisions of s.336, *POCA*.
- Once a *consent* request is made, this may be granted by *SOCA* or given by default once 7 working days starting the working day after submission of the *consent* request (the 'notice period') has elapsed, or *consent* may be refused.
- If *consent* is refused during the 7 working day notice period, a moratorium period of 31 days starts on the day notice of refusal is received during which the activity may not be undertaken unless and until the moratorium period expires.
- Once the moratorium has expired, then if no restraining action has been taken by law enforcement, the activity in question may be continued.

Matters for consent

8.1 The *MLRO* needs to consider carefully when preparing to make a *SAR* whether continuation of activity by the *business* in respect of the subject matter of the *SAR* may potentially involve the *business* in carrying out an act which would constitute a *money laundering* offence.

8.2 Whilst this, on the face of it, appears relatively unlikely in the context of the *defined services* there are situations where *consent* issues do arise and careful consideration should be given to this possibility.

8.3 Before applying for *consent* it is important to consider whether the proposed activity is a matter to which *SOCA* is empowered to *consent. SOCA*'s power is strictly limited to being able to *consent* to activity that would otherwise be an offence under any of ss.327–329, *POCA*. In particular, it should be noted that *consent* may not be sought or given for offences under s.333A, *POCA* (*tipping off*) or s.342, *POCA* (*prejudicing an investigation*) or for any other *POCA* offence except those under ss.327–329, *POCA.* As well as

having only restricted powers to consent to *POCA* offences, it does not have the power to *consent* to an act which would otherwise constitute the commission of any other criminal offence. Accordingly, it cannot give *consent* to eg, an adviser knowingly submitting a false VAT return on behalf of a *client* as this would be a separate criminal offence on the part of the adviser as well as an offence under s.328, *POCA*.

8.4 If in doubt as to whether a matter requires (or is eligible for) *consent* or not, either legal advice should be sought, or recourse had to helplines provided by the relevant supervisory bodies. Advice should not be sought from *SOCA* as they are not in a position to advise, although it will make clear if a matter falls outside of its powers.

8.5 Some of the more common instances where a *consent* may be required include:

- acting as an insolvency officeholder where there is knowledge or suspicion either that the assets may in whole or in part represent *criminal property*, or where the insolvent entity may enter into or become concerned in an arrangement under s.328, *POCA*;
- designing and implementing trust and company structures for *clients*, including acting as trustees or company officers, where there is knowledge or suspicion that these structures are being, or may be about to be, used to launder money;
- acting on behalf of the *client* in the negotiation and implementation of transactions where these involve an element of *criminal property* being either bought or sold by a *client,* for example corporate acquisitions;
- handling money in *client* accounts which is suspected to be of criminal origin; and
- providing outsourced business processing for *clients* where money is suspected to be of criminal origin.

8.6 There will be some cases where *businesses* consider they no longer wish to act for the *client* in question and will decline to conduct the requested activity and possibly terminate the relationship. This is a matter for the *business* and not a matter for *consent*. However, this is unlikely to be the case in terms of insolvency appointments, or when acting for the innocent purchaser of assets of suspicious origin. *Businesses* may on occasion decide that undertaking an activity which might otherwise constitute an offence under ss.327–329, *POCA* may, at least in the short term, provided there is *consent,* be the most practical option even if there is no intention to continue acting for the *client* in the longer term. In particular, this might apply when monies are already held in *client* account and need to be returned to or paid away on the instructions of a known or suspected criminal and either a *consent* is required to enable transfer of monies away, or law enforcement confiscation activity is required to resolve the matter.

8.7 *Consent* requests must be clear as to the nature of the knowledge or suspicion of *money laundering* and specific as to the type and extent of the

activity for which *consent* is requested, including how that activity would otherwise constitute an offence under ss.327–329, *POCA,* or the *consent* request will not be accepted as a valid request by *SOCA* and no protection will be obtained.

8.8 *SOCA*'s priority in terms of dealing with *consent* issues are understandably focussed on those where there is an opportunity for law enforcement intervention either to confiscate assets or to prevent the commission of crime or acts of terrorism. Clearly, these may not entirely match with the priorities of the person requesting *consent*, who will be driven by *client* and transaction related considerations. To give the best chance of having a *consent* request processed rapidly, it is important to tick the *consent* box provided on the forms and it is recommended that any critical timescale attaching to the activity is explained clearly, and if the report is complex, a summary of key facts and the request is given at the beginning of the report, before explaining the supporting detail.

8.9 In terms of insolvency, *SOCA* are accustomed to dealing with *consent* requests from officeholders and, in general, officeholders should request *consent* to carry out their duties as an officeholder rather than attempting to request *consent* for specific transactions or activities. *SOCA* will try and provide a very rapid turnaround to such requests, as they recognise the unique position of a licensed officeholder acting as such. In order that *SOCA* can rapidly identify requests for *consent* from an insolvency officeholder, this should be made clear at the beginning of the report requesting *consent*, specifying the type of insolvency appointment as well as providing all the other required detail.

Constructive trust

8.10 Where *client* assets or monies are held, and in forming knowledge or suspicion of *money laundering businesses* become concerned about potential third party claims to the assets or monies, appropriately qualified legal or professional advice should be sought. This is a complex area of law and any *SOCA consent* will not protect a *business* against the claims of a third party, but only against any accusation of *money laundering*. However, *SOCA* are aware of the need to avoid any unwarranted disadvantage accruing to the *regulated sector*, arising from issues of constructive trusts. Where constructive trusts could be an issue, *businesses* are strongly advised to draw this to the attention of *SOCA* when making a *SAR*, so that this can be taken into account in the way *SOCA* deals with the application for *consent.*

Suspension of activity

8.11 Once a *consent* request has been made, the process must be adhered to and the activity that would otherwise be a *money laundering offence* refrained

from unless and until *consent* has been received (or the notice period expired), or in the event *consent* has been refused, until the moratorium period has expired. Failure to do so risks prosecution either for a *money laundering* offence and/or, in the case of an *MLRO* giving *consent* for an activity to continue before he is entitled to do so, an offence under s.336(5) punishable by imprisonment and/or a fine.

8.12 It is appreciated that it is extremely difficult, in some cases, to explain to *clients* and other parties why activity has ceased in an unexpected fashion. Whilst *SOCA* will make every reasonable effort to deliver a rapid *consent*, in some cases the full 7 working days will be taken before a decision is reached whilst the matter is considered with law enforcement, and the potential for intervention in terms of confiscation, arrest etc is considered.

8.13 There is nothing in the legislation which provides for how a *business* may/may not deal with the issues arising from delay. There is nothing which requires a *business* to lie to *clients* or other parties, and clearly to lie would be unacceptable conduct for a professional, but *businesses* must take into account the provisions of the offences concerning *tipping off* and *prejudicing an investigation* when informing parties of delays. If the delay is such as to cause the *client* or other parties to question the *business* as to the reasons for delay, *businesses* may be well advised simply and persistently to refuse to enter into any discussion of the matter and explain that, with regret, they are unable at this point to discuss the matter further. Clearly, this is not a form of behaviour or communication with *clients* that would normally be engaged in, but the period after a request for *consent* has been made is an exceptional period, although frequently of very short duration and manageable in the normal course of business.

8.14 In exceptional circumstances, where an unexpected delay in carrying out a service for a *client* is likely to *alert a money launderer,* in a way that could bring harm to an *individual* or the *business* or could materially undermine a criminal investigation, *MLROs* are recommended to ask *SOCA* to be put in touch with the Law Enforcement Authority dealing with the situation, to discuss the circumstances.

Applying for and receiving consent

8.15 *Consent* may only be requested on the basis of a properly submitted *SAR*, made under the provisions of s.338, *POCA* (authorised disclosures). The '*consent* required' option should be selected on all methods of submission to alert *SOCA* to the request and enable them to prioritise appropriately. In cases of real urgency, a telephone call may also be made to alert *SOCA* to any special circumstances.

8.16 The *consent* request should be clear as to the reasons for knowledge or suspicion, the intended activity, and the nature of the consent requested. Great care is needed when requesting consent to cover the extent of the intended activity in a way that makes it clear to *SOCA* exactly what is being requested. Too narrow a *consent* request may mean repeated requests will be

required causing issues of cost and efficiency to the *business* and possibly unnecessary *client* service impact. Too broad or ill-defined a *consent* may well result in *SOCA* having to refuse *consent* or possibly even determining the request is not validly made as it does not show clearly the act or acts to be undertaken which would otherwise be an offence under ss.327–329, *POCA*.

8.17 *Consent* will frequently be received initially over the telephone from *SOCA*, and the name and contact number of the officer, and the *consent* reference should be noted on the *MLRO* records with the date and time of the call. Written confirmation ordinarily follows in due course but this may take several days and *MLROs* may rely on the telephone *consent*.

8.18 Once *consent* has been received by the *MLRO* under the provisions of s.335 *POCA*, he should then (under the provisions of s.336, *POCA*) promptly inform the engagement team affected and give them clearance to continue their work, and any other guidance they might require as regards *money laundering* matters.

8.19 If a period of 7 working days, starting the first working day after the *consent* request is made (the notice period), has elapsed with no refusal having been received, consent is deemed to have been given and the activity may be allowed to continue.

Refusal of consent

8.20 If *consent* is refused during the notice period, then a further 31 days must elapse, starting with the day on which the consent is refused, before the activity may continue (the moratorium period). It may be that during either the notice period, or the moratorium period, that action is taken by law enforcement which means that the activity may no longer be able to be continued (eg, confiscation or other enforcement action may occur).

8.21 If no action has been taken to restrain the activity during the moratorium period, the activity may continue as planned.

Exemptions for banks and deposit takers

8.22 The Serious Organised Crime and Police Act 2005 put in place a threshold provision in *POCA* (ss.327–329) that allows banks and deposit takers to continue to operate an account with an activity which potentially constitutes *money laundering* provided this relates to transactions worth £250 or less or as laid down from time to time in statutory instruments. Note that this change does not affect the requirement to report suspicions, does not constitute a 'de-minimis' provision, and is **not** available to providers of *defined services*.[8]

[8] See *JMLSG Guidance* for details on the change in thresholds for banks and deposit taking institutions.

Section 9 – Post SAR actions

KEY POINTS

- Once a *SAR* has been submitted, the *business* needs to consider whether or not the content of the *SAR* requires any change to, or even cessation in, any related *client* relationship.
- In addition, careful consideration needs to be given to reconciling the need to fulfil professional duties, whilst avoiding the risks of *tipping off*.
- A *SAR* may be followed by requests for further information from law enforcement or prosecuting agencies, both informal and by means of relevant orders. *Businesses* need to have in place procedures for checking the validity of requests, and for ensuring a proper response is made.

Continuing work in connection with a reported matter

Client relationships

9.1 *Businesses* do not have to stop working after submission of a *SAR* unless a *consent* has been requested, in which case all or part of *client* work may well require to be suspended until consent is received. In cases where *consent* has been requested and refused, the work which was the subject of the request will need to be suspended.

9.2 However, even where *consent* was not required, where a *SAR* involves a *client* as a suspect, *businesses* may wish to consider whether the behaviour observed is such that for professional reasons the *business* no longer wishes to act.

9.3 Generally, if following a report of suspicion a *business* wishes for its own commercial or ethical reasons to exit a relationship, there is nothing to prevent this provided the way the exit is communicated does not constitute *tipping off*. This also applies to the *prejudicing an investigation* offence outlined below.

9.4 If a decision is made to terminate a *client* relationship, a *business* should follow its normal procedures in this regard, whilst always bearing in mind the need to avoid *tipping off*.

Balancing professional work and *POCA* requirements

9.5 Normal commercial enquiries to understand a transaction carried out in the course of an engagement will not generally lead to *tipping off*, although care should be exercised to avoid either making a disclosure prohibited under ss.333A–333D, *POCA* (see section 2.19 of this *Guidance*) or making accusations or suggesting that any person is guilty of an offence. It is

important to confine enquiries to those required in the ordinary course of business and not attempt to investigate a matter unless that is within the scope of the professional work commissioned.

9.6 Continuation of work may require discussion with *client* senior management of matters relating to suspicions formed. This may be of particular importance in audit relationships. Care must be taken to select appropriate, and non-complicit, members of senior management for such discussion whilst always bearing in mind the need to avoid *tipping off*.

9.7 In more complex circumstances, consultation with law enforcement may be necessary before enquiries are continued, but in most cases a common sense approach will resolve the issue. Note that neither *SOCA* nor law enforcement may give consent to *tipping off*, but discussions with them are still valuable.

9.8 *Businesses* may wish to consult the *MLRO* or other suitable specialist (for example a solicitor) regularly if there are *tipping off* concerns, and in particular it is important that before any document referring to the subject matter of a report is released to a third party the *MLRO* is consulted and, in extreme cases, law enforcement. Some typical examples of documents released to third parties are shown below as an aide memoire:

- public audit or other attest reports;
- public record reports to regulators;
- confidential reports to regulators (eg to the *FSA* under relevant auditing standards);
- provision of information to sponsors or other statements in connection with Rule 2.12 of the UK Stock Exchange Listing Rules;
- reports under the Companies Directors Disqualification Act 1986;
- reports under s.218 of the Insolvency Act 1986;
- Companies Act statements on resignation as auditors;
- professional clearance/etiquette letters;
- communications to *clients* of intention to resign.

9.9 In particular, audit resignations require statements to be filed at Companies House and the contents of such statements require careful consideration to ensure that statutory and professional duties are met, without including such information as may constitute *tipping off*. There is no legal mechanism for obtaining clearance from *SOCA* for the contents of such statements or other documents relating to resignation. However, *businesses* may well wish in cases of complexity to discuss the matter with *SOCA* or the relevant law enforcement agency in order to understand their perspective and document such discussion.

9.10 *MLROs* may on occasion need advice to assist them in formulating their instructions to the *business.* Legal advice may be sought from a suitably skilled and knowledgeable professional legal adviser, and recourse may also be had to helplines and support services provided by professional bodies.

Discussion with *SOCA* and law enforcement may well be valuable, but *MLROs* should bear in mind these authorities are not able to advise, and nor are they entitled to dictate how professional relationships should be conducted.

Requests for further information

Requests from *SOCA* or Law Enforcement Agencies

9.11 *SOCA* or a Law Enforcement Authority may contact a *business* (usually the *MLRO*) or an *individual* to ask for further information about a *SAR* it/he has submitted. Before responding, it is recommended that a verification process is undertaken to ensure the person making contact is a bona fide member of *SOCA*/law enforcement. This may be most simply achieved by taking a caller's name and agency/force details, and then calling the main switchboard of the agency/force to be put through to the person.

9.12 To the extent that the request is simply aimed at clarifying the content of a *SAR*, *businesses*/*individuals* may respond without the need for any further process.

9.13 However, if the request is for production of documents, or provision of information additional to the *SAR*, it is recommended that *businesses*/*individuals* require the relevant agency to use its powers of compulsion before they respond. This is not intended to be non co-operative, and indeed *businesses*/*individuals* are recommended to engage in constructive dialogue with *SOCA*/law enforcement, including as to the content and drafting of the request, but is intended to protect *businesses*/*individuals* from allegations that they breached confidentiality. *Client* or other third party consent is not required in cases of compulsion, and nor should it be sought due to the risk of *tipping off*.

9.14 Before responding to orders for production of information, *businesses*/*individuals* should ensure they understand:

- the authority under which the request is made;
- the extent of the information requested;
- the required timing and manner of the production of information; and
- what information should be excluded *eg,* that subject to legal privilege.

If in any doubt, *businesses*/*individuals* should seek legal advice. *Businesses* should document their consideration of the issues.

9.15 None of the notices or orders will require the production of information that is subject to legal privilege or legal professional privilege. Terms used in the various relevant Acts of Parliament and the way the terms are defined vary slightly and it may be appropriate to take legal advice if unsure. The interaction of the *privilege reporting exemption* with the

carve-outs for privileged material in the notices and orders outlined below is not clear, and has yet to be tested. This is a complex area of law. If *individuals* or *businesses* are unsure as to whether certain documents fall within the privileged category or not, they should not include these documents in initial disclosure and, before the expiry of the time allowed for disclosure, should inform the person to whom the information is to be provided that they believe they have material subject to privilege and request that, if they think it necessary to gain access to this material, the relevant agency appoint independent counsel to opine as to whether the material is disclosable, or not. The opinion of counsel may then be complied with.

9.16 Before passing across information to an officer, *businesses* should require the person identify themselves by eg showing a warrant card and a copy of the relevant order, or *businesses* may attend the premises of the relevant agency to hand over the information.

9.17 Orders for production of information may be received under a variety of legislation. In each case, production may be required in hard copy even where stored on a computer, or in electronic form where stored as such. Those which most commonly flow from *SARs* include the following:

- Production Orders under the provisions of *POCA*

  Production Orders are made under s.354, *POCA*, and are made only by a judge in respect of a confiscation investigation, or a *money laundering* investigation. The maximum period for compliance will be 7 days starting with the day on which the order is made unless the judge thinks a shorter period should be applied. Failure to comply is treated as breach of a Court Order and penalties will be applied as such. There is no requirement to produce documents which are privileged, being material which a person would be entitled to refuse to produce on grounds of privilege in the High Court. For the interaction of this provision with the *privilege reporting exemption*, see section 9.15 of this *Guidance*.

- Disclosure Notices under the provisions of *SOCPA*

  A disclosure notice may be issued by an investigating authority (the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Lord Advocate or their permitted delegates under s.60, *SOCPA*) in respect of certain offences only. These are broadly those listed in Schedule 2 (Schedule 4 in Scotland) to *POCA,* offences under ss.15–18, *TA 2000*, certain duty offences, false accounting (s.17, Theft Act 1968 in England and Wales) and certain matters concerning attempts at/conspiracy to commit certain offences. S61, *SOCPA* should be referred to in the case of any such notice being received to check it is in respect of a qualifying offence. ss.62–65, *SOCPA* then set out the procedures in respect of the issue of the notice, and the response to it. The provisions of the notice will govern the extent of the information to be provided, and the timing, place and manner of disclosure. There is no requirement to produce documents

or answer questions where the matter is subject to legal professional privilege, or legal privilege (as defined in s.412, *POCA*). For the interaction of this provision with the *privilege reporting exemption*, see section 9.15. Failure, without reasonable excuse, to comply is a criminal offence and penalties of up to two years imprisonment and/or an unlimited fine may be levied.

- S.2 notices issued by the Serious Fraud Office under the provisions of the Criminal Justice Act 1987

  Under s.2, Criminal Justice Act 1987, staff authorised by the Director of the Serious Fraud Office have powers to require a person to answer questions, provide information or produce documents for the purposes of an investigation. Written notice is given where the Serious Fraud Office exercise these powers. In urgent cases, the Serious Fraud Office may require immediate compliance with a notice, but frequently will give a period of time for compliance. There is no requirement to produce documents which are privileged, being material which a person would be entitled to refuse to produce on grounds of privilege in the High Court. Failure to comply is a criminal offence punishable with imprisonment for up to 6 months and/or a fine not exceeding level 5 on the standard scale. For the interaction of this provision with the *privilege reporting exemption*, see section 9.15 of this *Guidance*.

Requests arising from a change of professional advisor (professional enquiries)

Requests regarding identification information
9.18 In such a case the disclosure request may be made under the provisions of Regulation 17, reliance, or the new adviser may simply want copies of identification evidence, in order to assist it in satisfying its own identification procedures. *Businesses* should not release confidential information without the *client's* consent. If reliance is being placed on the *business*, it should follow the guidance in section 5.36 above in relation to record keeping.

Requests for information regarding suspicious activity
9.19 In general, it is recommended that such requests are declined as the *tipping off* offence in the *regulated sector* greatly restricts the ability to make such disclosures. However, to the extent that the request is within the provisions of s.333C, *POCA* (section 2.19 of this *Guidance*) information may be provided (but there is no obligation to do so).

Data Protection Act – Subject Access Requests

9.20 Under the Data Protection Act 1998 *businesses* are exempted from disclosure under a subject access request where disclosure would be or is likely to be prejudicial to the prevention or detection of crime or the capture or conviction of offenders. Where personal data is held on a subject and relates

to knowledge or suspicion of *money laundering* (ie, it has been processed for the purpose of the prevention or detection of crime) it is not required to be disclosed under a subject access request if disclosure may constitute a *tipping off* offence. This exception should be applied to internal **and** *SAR* reporting records.

9.21 Guidance has been issued by HM Treasury (www.hm-treasury.gov.uk/media/D/F/money_laundering.pdf) supporting the position that where granting access would amount to '*tipping off*' then the s.29 Data Protection Act exemption would apply.

9.22 It is recommended that *businesses* document any considerations surrounding the decision to grant or refuse access to information requested in such circumstances (known as a 'subject access request').

Glossary

2007 Regulations	Statutory Instrument 2007 no 2157 – Financial Services 'The Money Laundering Regulations 2007'.
Alerting a money launderer	Disclosures that do not constitute *tipping off* but which nonetheless alert the money launderer to the suspicion regarding their activities.
Accountancy Services	*Accountancy services* includes for the purpose of this *Guidance* any service provided under a contract for services (ie, not a contract of employment) which pertains to the recording, review, analysis, calculation or reporting of financial information.
Anti-Money Laundering Supervisory Authority	Bodies identified by Regulation 23, *2007 Regulations* as being empowered to supervise the compliance of *individuals* and *businesses* with the *2007 Regulations.* The professional bodies designated as *anti-money laundering supervisory authorities* are listed in Schedule 3 to the *2007 Regulations.*
Businesses	A company, partnership or other organisation undertaking *defined services*. This includes accountancy practices, whether structured as partnerships, sole practitioners or corporate practices.
Business relationship	A business, professional or commercial relationship between a relevant person (ie someone to whom the Regulations 2007 apply) and a customer, which is expected by the relevant person, at the time when the contact is established, to have an element of duration.
CCAB	Consultative Committee of Accountancy Bodies: body representing the Institute of Chartered Accountants in England and Wales; the Institute of Chartered Accountants of Scotland; the Institute of Chartered Accountants in Ireland; the Association of Chartered Certified Accountants; the Chartered Institute of Management Accountants; and the Chartered Institute of Public and Finance and Accountancy.
Client	A person in a *business relationship*, or carrying out an occasional transaction, with a *business*.
Consent	Permission given, generally by *SOCA*, for the carrying out of any action that would constitute a *money laundering* offence in the absence of that permission. The definition and ruling legislation for the giving of consent is in s.335, *POCA,* which also deals with the passing of the consent from the *MLRO* to the *individual* concerned (s.336).
Credit institution	Has the meaning given by Regulation 3(2), *2007 Regulations.*

Criminal Conduct	Conduct that is an offence in any part of the UK as well as conduct occurring elsewhere that would have been an offence if it had taken place in the UK. There are very limited exceptions to this for conduct which is both known to be legal in the country in which it is committed and which falls within the specific exceptions set out in orders made by the Secretary of State.
Criminal Property	The benefit of *criminal conduct* where the alleged offender knows or suspects that the property in question represents such a benefit (s.340, *POCA*).
Customer due diligence	The process by which KYC information is gathered, and the identity of a *client* is established and verified, for both new and existing clients.
Defined services	Activities carried on, in the course of business by *businesses* or *individuals* as an auditor, *external accountant*, *insolvency practitioner* or *tax adviser* (Regulation 3(c), *2007 Regulations*), or as trust and company service providers (Regulation 3(e), *2007 Regulations*). It also includes persons providing services under the Designated Professional Body provisions of Part XX, s.326 *FSMA 2000* or otherwise providing financial services under the oversight of their professional body.
EEA	European Economic Area countries, which are the European Union member states plus EFTA (European Free Trade Association) member states.
Enhanced due diligence	Additional due diligence steps that must be applied in situations where there is a higher risk of *money laundering* or *terrorist financing* and in a number of specific situations (Regulation 14), of which two are relevant to providers of *defined services;* where the *client* has not been physically present for identification purposes, if a *business relationship* or occasional transaction is to be undertaken with a politically exposed person (*PEP*).
External accountant	Means a firm or sole practitioner who by way of business provides *accountancy services* to other persons, when providing such services (Regulation 3(7), *2007 Regulations*).
FATF	Financial Action Task Force, created by G7 nations to fight money laundering.
Financial institution	Has the meaning given by Regulation 3(3), *2007 Regulations*.
Financial restrictions	See Glossary annex B.

FSA	Financial Services Authority: statutory regulator of most financial services providers under the Financial Services and Markets Act 2000.
FSMA 2000	Financial Services and Markets Act 2000.
Guidance	*Guidance* which is (a) issued by a supervisory authority or any other appropriate body; (b) approved by the Treasury; and (c) published in a manner approved by the Treasury as suitable in their opinion to bring the *Guidance* to the attention of persons likely to be affected by it. In this *Guidance,* the term has been used for *Guidance* for which Treasury approval has been applied, and is expected to be obtained, as well as that which already has Treasury approval. The circumstances in which Courts and others are required to take the *Guidance* into account in determining whether an offence has been committed are set out in *POCA* and the *2007 Regulations.* Any use of the term 'guidance' outside this definition, has not been italicised in this *Guidance.*
Individuals	Includes sole practitioners and the partners, directors, subcontractors, consultants and employees of *businesses*.
Independent legal professional	Provider of legal or notarial services as defined in Regulation 3(9) in the 2007 Regulations.
Internal Report	A report made to the *MLRO* in a *business.*
Insolvency practitioner	Means any person who acts as an *insolvency practitioner* within the meaning of s 388 Insolvency Act 1986 or Article 3 of the Insolvency (Northern Ireland) Order 1989 (Regulation 3(6), *2007 Regulations*).
JMLSG	Joint Money Laundering Steering Group: body representing UK Trade Associations in the Financial Services Industry and aiming to promote good anti-*money laundering* practices and give relevant practical *Guidance*.
Money laundering	For the purposes of this *Guidance*, *money laundering* is defined to include those offences relating to terrorist finance, which require to be reported under the *TA 2000*, as well as the *money laundering offences* as defined in *POCA*.
Money laundering directive	References in this *Guidance* are to the Third Money Laundering Directive (DIRECTIVE 2005/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) available from: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_309/l_30920051125en00150036.pdf

MLRO	Money Laundering Reporting Officer. This term is used to describe the *nominated officer* appointed under Regulation 20(2)(d), *2007 Regulations* and as referred to in s.331, *POCA*.
Money Laundering Reporting Officer	See *MLRO* above.
Money laundering offences	One of the three *money laundering offences* defined under ss.327–329, *POCA*. In summary the offences comprise the following activities, where a person: • **conceals,** disguises, converts or transfers *criminal property*, or removes *criminal property* from England and Wales, or from Scotland or from Northern Ireland (s.327); • enters into or becomes concerned in an **arrangement** which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of *criminal property* by or on behalf of another person (s.328); or • **acquires**, uses or has possession of *criminal property* except where adequate consideration was given for the property (s.329).
Nominated Officer	Officer required to be appointed by *businesses* carrying on business in the *regulated sector*. See *MLRO* above.
Overseas conduct exemption	Exemption from reporting requirement where an act is reasonably believed to have taken place outside of the UK, and the act was known to be lawful when committed under the criminal law of the place where the act was committed, and the maximum sentence if the act had been committed in the UK would have been less than 12 months (except in the case of an act which would be an offence under the Gaming Act 1968, the Lotteries and Amusements Act 1976 or under ss.23 or 25, *FSMA*).
PEPs	Politically exposed persons, as defined in the *2007 Regulations* paragraph 14(5) and paragraph 4(1)(a) of Schedule 2. See also sections 5.27 to 5.29 above.
POCA	Proceeds of Crime Act 2002.
Prejudicing an investigation	A 'related' *money laundering* offence, defined under s.342, *POCA*. In summary, it captures the making of any disclosure that is likely to prejudice an investigation or falsifying, concealing, or destroying, any documents that are relevant to a *money laundering* investigation, or being complicit in such behaviour.
Predicate offence	Means the underlying offence or any offence as a result of which *criminal property* has been generated.

Privilege reporting exemption	An exemption from reporting suspicions formed on the basis of information received in privileged circumstances (see Sections 7.26–7.46 of this *Guidance*).
Regulated investment market	Within the EEA, has the meaning given by point 14 of Article 4(1) of the Markets in Financial Instruments Directive (MiFID); and outside the EEA, means a regulated financial market which subjects companies whose securities are admitted to trading to disclosure obligations which are contained in international standards and are equivalent to the specified disclosure obligations.
Regulated Sector	Defined in Schedule 9 Part 1, *POCA* (includes those who provide the *defined services*).
Relevant professional adviser	An accountant, auditor or *tax adviser* who is a member of a professional body which is established for accountants, auditors or *tax adviser*s (as the case may be); and which makes provision for (a) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and (b) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards.
Required Disclosure	The identity of the suspect (if known), the information or other matter on which the knowledge or suspicion of *money laundering* (or reasonable grounds for such) is based and the whereabouts of the laundered property (if known).
SAR	Suspicious activity report made to *SOCA*.
SAR Glossary of Terms	Glossary of terms used by *SOCA* to assist in relating/ providing a theme to different SARs to increase effective mining of data by SOCA and Law Enforcement. The use of the terms is not mandatory.
Shell bank	means a *credit institution*, or an institution engaged in equivalent activities, incorporated in a jurisdiction in which it has no physical presence involving meaningful decision-making and management, and which is unaffiliated with a regulated financial group.
Simplified due diligence	The phrase used in the *2007 Regulations* (Regulation 13) which means that a *business* is not required to apply the *customer due diligence* measures set out in Regulation 7 where the *business* has reasonable grounds for believing that a *client* falls into the relevant categories.
SOCA	Serious Organised Crime Agency. *SOCA* is an intelligence-led agency with law enforcement powers, responsible for reducing the social and individual harm of serious organised crime. Reports of known or suspected *money laundering* must be made to *SOCA*.

SOCPA	Serious Organised Crime and Police Act 2005.
Specified disclosure obligations	See Annex A to the Glossary.
Specified interest	A vested interest which is: • in possession or in remainder or reversion (or, in Scotland, in fee); and • defeasible or indefeasible. A 'vested interest' is an interest which to which an entitlement already exists (whether immediately – 'in possession'; or in the future, following the ending of another interest – 'in remainder' or 'in reversion'). It is in contrast to an interest which is merely 'contingent'; a contingent interest is an interest which will only arise on the happening of a particular event, such as surviving to a particular date or surviving a particular person. Determining whether an interest is vested or contingent requires careful analysis. For example, if a trust provides that A has a life interest, and that B has an interest which takes effect on A's death, both A and B will have vested interests and, if B does not survive A, B's interest will devolve as part of B's estate; however, if B's interest is expressed to take effect on A's death only if he (B) is then living, B's interest (which will fail if he predeceases A) is merely contingent. A defeasible interest is one which may be defeated, generally by the exercise of a power under the trust deed; an indefeasible interest is one which cannot be defeated. In the examples given above, A and B both have indefeasible interests. It is important that a defeasible vested interest is not mistaken for a contingent interest. A defeasible vested interest will take effect unless and until it is defeated; a contingent interest on the other hand will not take effect unless and until the event on which it is contingent arises.
Suspicious Activity Report	Otherwise known as a *SAR.* See *SAR* above.
TA 2000	The Terrorism Act 2000 (as amended by the Anti-Terrorism, Crime and Security Act 2001 and the Terrorism Act 2006).
TA 2006	The Terrorism Act 2006.
Tax adviser	Means a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services (Regulation 3(8), *2007 Regulations*). Tax compliance services, eg, assisting in the completion and submission of tax returns is, for the purpose of this *Guidance*, included within the term 'advice about the tax affairs of other persons'.

Terrorist financing	Means an offence under (Regulation 2 *2007 Regulations*): (a) s.15 (fund raising), 16 (use and possession), 17 (funding arrangements), 18 (money laundering) or 63 (terrorist finance: jurisdiction), *TA 2000*; (b) para 7(2) or (3), Schedule 3 to the Anti-Terrorism, Crime and Security Act 2001(a) (freezing orders); (c) article 7, 8 or 10 of the Terrorism (United Nations Measures) Order 2006(b); or (d) article 7, 8 or 10 of the Al-Qaida and Taliban (United Nations Measures) Order 2006(c).
Terrorist offences	The terrorist offences relate to fundraising (inviting another to provide money or other property with the intention or reasonable cause to suspect it is intended to be used for the purposes of terrorism), using or possessing terrorist funds (receiving or possessing money or other property with the intention or reasonable cause to suspect it is intended to be used for the purposes of terrorism), entering into funding arrangements (making arrangements as a result of which money or other property is or may be made available for the purposes of terrorism with the intention or reasonable cause to suspect it is intended to be used for the purposes of terrorism), money laundering, disclosing information relating to the commission of an offence (similar to *tipping off*), or failing to make a disclosure in the regulated sector (ss.19 and 21A *TA 2000* (as amended)).
Terrorist property	Means: (a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), (b) proceeds of the commission of acts of terrorism, and (c) proceeds of acts carried out for the purposes of terrorism.
Tipping off	A 'related' *money laundering* offence for the regulated sector, defined under s.333A–D, *POCA*.
Transaction	The provision of any advice by a *business* or *individual* to a *client* by way of business, or the handling of the *client's* finances by way of business.

Glossary Annex A – The Specified Disclosure Obligations

DETAILS OF THE 'SPECIFIED DISCLOSURE OBLIGATIONS' REFERRED TO IN REGULATION 13(3) MLR2007 RE SIMPLIFIED DUE DILIGENCE

DIRECTIVE 2003/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on insider dealing and market manipulation (market abuse)

Article 6

1. Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers.

Without prejudice to any measures taken to comply with the provisions of the first subparagraph, Member States shall ensure that issuers, for an appropriate period, post on their Internet sites all inside information that they are required to disclose publicly.

2. An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. Member States may require that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information.

3. Member States shall require that, whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties, as referred to in Article 3(a), he must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure and promptly in the case of a non-intentional disclosure.

The provisions of the first subparagraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association or on a contract.

Member States shall require that issuers, or persons acting on their behalf or for their account, draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information. Issuers and persons acting on their behalf or for their account shall regularly update this list and transmit it to the competent authority whenever the latter requests it.

4. Persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, at least, notify to the competent authority the existence of

transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. Member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible.

DIRECTIVE 2003/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

Article 3
Obligation to publish a prospectus
1. Member States shall not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.

2. The obligation to publish a prospectus shall not apply to the following types of offer:

(a) an offer of securities addressed solely to qualified investors; and/or
(b) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors; and/or
(c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50,000 per investor, for each separate offer; and/or
(d) an offer of securities whose denomination per unit amounts to at least EUR 50,000; and/or
(e) an offer of securities with a total consideration of less than EUR 100,000, which limit shall be calculated over a period of 12 months.

However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement.

3. Member States shall ensure that any admission of securities to trading on a regulated market situated or operating within their territories is subject to the publication of a prospectus.

Article 5
The prospectus
1. Without prejudice to Article 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This

information shall be presented in an easily analysable and comprehensible form.

2. The prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market. It shall also include a summary. The summary shall, in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. The summary shall also contain a warning that:

(a) it should be read as an introduction to the prospectus;
(b) any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor;
(c) where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under the national legislation of the Member States, have to bear the costs of translating the prospectus before the legal proceedings are initiated; and
(d) civil liability attaches to those persons who have tabled the summary including any translation thereof, and applied for its notification, but only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

Where the prospectus relates to the admission to trading on a regulated market of non-equity securities having a denomination of at least EUR 50,000, there shall be no requirement to provide a summary except when requested by a Member State as provided for in Article 19(4).

3. Subject to paragraph 4, the issuer, offeror or person asking for the admission to trading on a regulated market may draw up the prospectus as a single document or separate documents. A prospectus composed of separate documents shall divide the required information into a registration document, a securities note and a summary note. The registration document shall contain the information relating to the issuer. The securities note shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

4. For the following types of securities, the prospectus can, at the choice of the issuer, offeror or person asking for the admission to trading on a regulated market consist of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market:

(a) non-equity securities, including warrants in any form, issued under an offering programme;
(b) non-equity securities issued in a continuous or repeated manner by credit institutions,
    (i) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient

coverage for the liability deriving from securities until their maturity date;

(ii) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

The information given in the base prospectus shall be supplemented, if necessary, in accordance with Article 16, with updated information on the issuer and on the securities to be offered to the public or to be admitted to trading on a regulated market.

If the final terms of the offer are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the competent authority when each public offer is made as soon as practicable and if possible in advance of the beginning of the offer. The provisions of Article 8(1)(a) shall be applicable in any such case.

5. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning the format of the prospectus or base prospectus and supplements.

Article 7

Minimum information

1. Detailed implementing measures regarding the specific information which must be included in a prospectus, avoiding duplication of information when a prospectus is composed of separate documents, shall be adopted by the Commission in accordance with the procedure referred to in Article 24(2). The first set of implementing measures shall be adopted by 1 July 2004.

2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following:

(a) the various types of information needed by investors relating to equity securities as compared with non-equity securities; a consistent approach shall be taken with regard to information required in a prospectus for securities which have a similar economic rationale, notably derivative securities;

(b) the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities. The information required in a prospectus shall be appropriate from the point of view of the investors concerned for non-equity securities having a denomination per unit of at least EUR 50,000;

(c) the format used and the information required in prospectuses relating to non-equity securities, including warrants in any form, issued under an offering programme;

(d) the format used and the information required in prospectuses relating to non-equity securities, in so far as these securities are not subordinated, convertible, exchangeable, subject to subscription or acquisition rights or linked to derivative instruments, issued in a continuous or repeated manner by entities authorised or regulated to operate in the financial markets within the European Economic Area;
(e) the various activities and size of the issuer, in particular SMEs. For such companies the information shall be adapted to their size and, where appropriate, to their shorter track record;
(f) if applicable, the public nature of the issuer.

3. The implementing measures referred to in paragraph 1 shall be based on the standards in the field of financial and non-financial information set out by international securities commission organisations, and in particular by IOSCO and on the indicative Annexes to this Directive.

Article 8
Omission of information
1. Member States shall ensure that where the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus:

(a) the criteria, and/or the conditions in accordance with which the above elements will be determined or, in the case of price, the maximum price, are disclosed in the prospectus; or
(b) the acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the final offer price and amount of securities which will be offered to the public have been filed.

The final offer price and amount of securities shall be filed with the competent authority of the home Member State and published in accordance with the arrangements provided for in Article 14(2).

2. The competent authority of the home Member State may authorise the omission from the prospectus of certain information provided for in this Directive or in the implementing measures referred to in Article 7(1), if it considers that:

(a) disclosure of such information would be contrary to the public interest; or
(b) disclosure of such information would be seriously detrimental to the issuer, provided that the omission would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer, offeror or guarantor, if any, and of the rights attached to the securities to which the prospectus relates; or
(c) such information is of minor importance only for a specific offer or admission to trading on a regulated market and is not such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any.

3. Without prejudice to the adequate information of investors, where, exceptionally, certain information required by implementing measures referred to in Article 7(1) to be included in a prospectus is inappropriate to the issuer's sphere of activity or to the legal form of the issuer or to the securities to which the prospectus relates, the prospectus shall contain information equivalent to the required information. If there is no such information, this requirement shall not apply.

4. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraph 2.

Article 10
Information
1. Issuers whose securities are admitted to trading on a regulated market shall at least annually provide a document that contains or refers to all information that they have published or made available to the public over the preceding 12 months in one or more Member States and in third countries in compliance with their obligations under Community and national laws and rules dealing with the regulation of securities, issuers of securities and securities markets. Issuers shall refer at least to the information required pursuant to company law directives, Directive 2001/34/EC and Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards.

2. The document shall be filed with the competent authority of the home Member State after the publication of the financial statement. Where the document refers to information, it shall be stated where the information can be obtained.

3. The obligation set out in paragraph 1 shall not apply to issuers of non-equity securities whose denomination per unit amounts to at least EUR 50,000.

4. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission may, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraph 1. These measures will relate only to the method of publication of the disclosure requirements mentioned in paragraph 1 and will not entail new disclosure requirements. The first set of implementing measures shall be adopted by 1 July 2004.

Article 14
Publication of the prospectus
1 Once approved, the prospectus shall be filed with the competent authority of the home Member State and shall be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as practicable and in any case, at a reasonable time in advance of, and

at the latest at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

2. The prospectus shall be deemed available to the public when published either:

(a) by insertion in one or more newspapers circulated throughout, or widely circulated in, the Member States in which the offer to the public is made or the admission to trading is sought; or
(b) in a printed form to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents; or
(c) in an electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents; or
(d) in an electronic form on the website of the regulated market where the admission to trading is sought; or
(e) in electronic form on the website of the competent authority of the home Member State if the said authority has decided to offer this service.

A home Member State may require issuers which publish their prospectus in accordance with (a) or (b) also to publish their prospectus in an electronic form in accordance with (c).

3. In addition, a home Member State may require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public.

4. The competent authority of the home Member State shall publish on its website over a period of 12 months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved in accordance with Article 13, including, if applicable, a hyperlink to the prospectus published on the website of the issuer, or on the website of the regulated market.

5. In the case of a prospectus comprising several documents and/or incorporating information by reference, the documents and information making up the prospectus may be published and circulated separately provided that the said documents are made available, free of charge, to the public, in accordance with the arrangements established in paragraph 2. Each document shall indicate where the other constituent documents of the full prospectus may be obtained.

6. The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, shall at all times be identical to the original version approved by the competent authority of the home Member State.

7. Where the prospectus is made available by publication in electronic form, a paper copy must nevertheless be delivered to the investor, upon his request and free of charge, by the issuer, the offeror, the person asking for admission to trading or the financial intermediaries placing or selling the securities.

8. In order to take account of technical developments on financial markets and to ensure uniform application of the Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraphs 1, 2, 3 and 4. The first set of implementing measures shall be adopted by 1 July 2004.

Article 16
Supplements to the prospectus
1. Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.

2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within a time limit which shall not be shorter than two working days after the publication of the supplement, to withdraw their acceptances.

DIRECTIVE 2004/109/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

Article 4
Annual financial reports
1. The issuer shall make public its annual financial report at the latest four months after the end of each financial year and shall ensure that it remains publicly available for at least five years.

2. The annual financial report shall comprise:

(a) the audited financial statements;
(b) the management report; and
(c) statements made by the persons responsible within the issuer, whose names and functions shall be clearly indicated, to the effect that, to the best of their knowledge, the financial statements prepared in accordance with the applicable set of accounting standards give a true and fair view

of the assets, liabilities, financial position and profit or loss of the issuer and the undertakings included in the consolidation taken as a whole and that the management report includes a fair review of the development and performance of the business and the position of the issuer and the undertakings included in the consolidation taken as a whole, together with a description of the principal risks and uncertainties that they face.

3. Where the issuer is required to prepare consolidated accounts according to the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, the audited financial statements shall comprise such consolidated accounts drawn up in accordance with Regulation (EC) No 1606/2002 and the annual accounts of the parent company drawn up in accordance with the national law of the Member State in which the parent company is incorporated.

Where the issuer is not required to prepare consolidated accounts, the audited financial statements shall comprise the accounts prepared in accordance with the national law of the Member State in which the company is incorporated.

4. The financial statements shall be audited in accordance with Articles 51 and 51a of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies and, if the issuer is required to prepare consolidated accounts, in accordance with Article 37 of Directive 83/349/EEC.

The audit report, signed by the person or persons responsible for auditing the financial statements, shall be disclosed in full to the public together with the annual financial report.

5. The management report shall be drawn up in accordance with Article 46 of Directive 78/660/EEC and, if the issuer is required to prepare consolidated accounts, in accordance with Article 36 of Directive 83/349/EEC.

6. The Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures in order to take account of technical developments in financial markets and to ensure the uniform application of paragraph 1. The Commission shall in particular specify the technical conditions under which a published annual financial report, including the audit report, is to remain available to the public. Where appropriate, the Commission may also adapt the five-year period referred to in paragraph 1.

Article 5

Half-yearly financial reports

1. The issuer of shares or debt securities shall make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest two months thereafter. The issuer shall ensure that the half-yearly financial report remains available to the public for at least five years.

2. The half-yearly financial report shall comprise:

(a) the condensed set of financial statements;
(b) an interim management report; and
(c) statements made by the persons responsible within the issuer, whose names and functions shall be clearly indicated, to the effect that, to the best of their knowledge, the condensed set of financial statements which has been prepared in accordance with the applicable set of accounting standards gives a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, or the undertakings included in the consolidation as a whole as required under paragraph 3, and that the interim management report includes a fair review of the information required under paragraph 4.

3. Where the issuer is required to prepare consolidated accounts, the condensed set of financial statements shall be prepared in accordance with the international accounting standard applicable to the interim financial reporting adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No 1606/2002.

Where the issuer is not required to prepare consolidated accounts, the condensed set of financial statements shall at least contain a condensed balance sheet, a condensed profit and loss account and explanatory notes on these accounts. In preparing the condensed balance sheet and the condensed profit and loss account, the issuer shall follow the same principles for recognising and measuring as when preparing annual financial reports.

4. The interim management report shall include at least an indication of important events that have occurred during the first six months of the financial year, and their impact on the condensed set of financial statements, together with a description of the principal risks and uncertainties for the remaining six months of the financial year. For issuers of shares, the interim management report shall also include major related parties transactions.

5. If the half-yearly financial report has been audited, the audit report shall be reproduced in full. The same shall apply in the case of an auditors' review. If the half-yearly financial report has not been audited or reviewed by auditors, the issuer shall make a statement to that effect in its report.

6. The Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures in order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 1 to 5 of this Article.

The Commission shall, in particular:

(a) specify the technical conditions under which a published half-yearly financial report, including the auditors' review, is to remain available to the public;
(b) clarify the nature of the auditors' review;

(c) specify the minimum content of the condensed balance sheet and profit and loss accounts and explanatory notes on these accounts, where they are not prepared in accordance with the international accounting standards adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No 1606/2002.

Where appropriate, the Commission may also adapt the five-year period referred to in paragraph 1.

Article 6
Interim management statements
1. Without prejudice to Article 6 of Directive 2003/6/EC, an issuer whose shares are admitted to trading on a regulated market shall make public a statement by its management during the first six-month period of the financial year and another statement by its management during the second six-month period of the financial year. Such statement shall be made in a period between ten weeks after the beginning and six weeks before the end of the relevant six-month period. It shall contain information covering the period between the beginning of the relevant six-month period and the date of publication of the statement. Such a statement shall provide:

– an explanation of material events and transactions that have taken place during the relevant period and their impact on the financial position of the issuer and its controlled undertakings, and
– a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period.

2. Issuers which, under either national legislation or the rules of the regulated market or of their own initiative, publish quarterly financial reports in accordance with such legislation or rules shall not be required to make public statements by the management provided for in paragraph 1.

3. The Commission shall provide a report to the European Parliament and the Council by 20 January 2010 on the transparency of quarterly financial reporting and statements by the management of issuers to examine whether the information provided meets the objective of allowing investors to make an informed assessment of the financial position of the issuer. Such a report shall include an impact assessment on areas where the Commission considers proposing amendments to this Article.

Article 14
1. Where an issuer of shares admitted to trading on a regulated market acquires or disposes of its own shares, either itself or through a person acting in his own name but on the issuer's behalf, the home Member State shall ensure that the issuer makes public the proportion of its own shares as soon as possible, but not later than four trading days following such acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5% or 10% of the voting rights. The proportion shall be calculated on the basis of the total number of shares to which voting rights are attached.

2. The Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures in order to take account of technical developments in financial markets and to ensure the uniform application of paragraph 1.

Article 16
Additional information
1. The issuer of shares admitted to trading on a regulated market shall make public without delay any change in the rights attaching to the various classes of shares, including changes in the rights attaching to derivative securities issued by the issuer itself and giving access to the shares of that issuer.

2. The issuer of securities, other than shares admitted to trading on a regulated market, shall make public without delay any changes in the rights of holders of securities other than shares, including changes in the terms and conditions of these securities which could indirectly affect those rights, resulting in particular from a change in loan terms or in interest rates.

3. The issuer of securities admitted to trading on a regulated market shall make public without delay of new loan issues and in particular of any guarantee or security in respect thereof. Without prejudice to Directive 2003/6/EC, this paragraph shall not apply to a public international body of which at least one Member State is member.

Article 17
Information requirements for issuers whose shares are admitted to trading on a regulated market
1. The issuer of shares admitted to trading on a regulated market shall ensure equal treatment for all holders of shares who are in the same position.

2. The issuer shall ensure that all the facilities and information necessary to enable holders of shares to exercise their rights are available in the home Member State and that the integrity of data is preserved. Shareholders shall not be prevented from exercising their rights by proxy, subject to the law of the country in which the issuer is incorporated. In particular, the issuer shall:

(a) provide information on the place, time and agenda of meetings, the total number of shares and voting rights and the rights of holders to participate in meetings;
(b) make available a proxy form, on paper or, where applicable, by electronic means, to each person entitled to vote at a shareholders' meeting, together with the notice concerning the meeting or, on request, after an announcement of the meeting;
(c) designate as its agent a financial institution through which shareholders may exercise their financial rights; and
(d) publish notices or distribute circulars concerning the allocation and payment of dividends and the issue of new shares, including information on any arrangements for allotment, subscription, cancellation or conversion.

3. For the purposes of conveying information to shareholders, the home Member State shall allow issuers the use of electronic means, provided such a decision is taken in a general meeting and meets at least the following conditions:

(a) the use of electronic means shall in no way depend upon the location of the seat or residence of the shareholder or, in the cases referred to in Article 10(a) to (h), of the natural persons or legal entities;
(b) identification arrangements shall be put in place so that the shareholders, or the natural persons or legal entities entitled to exercise or to direct the exercise of voting rights, are effectively informed;
(c) shareholders, or in the cases referred to in Article 10(a) to (e) the natural persons or legal entities entitled to acquire, dispose of or exercise voting rights, shall be contacted in writing to request their consent for the use of electronic means for conveying information and, if they do not object within a reasonable period of time, their consent shall be deemed to be given. They shall be able to request, at any time in the future, that information be conveyed in writing, and
(d) any apportionment of the costs entailed in the conveyance of such information by electronic means shall be determined by the issuer in compliance with the principle of equal treatment laid down in paragraph 1.

4. The Commission shall, in accordance with the procedure provided for in Article 27(2), adopt implementing measures in order to take account of technical developments in financial markets, to take account of developments in information and communication technology and to ensure the uniform application of paragraphs 1, 2 and 3. It shall, in particular, specify the types of financial institution through which a shareholder may exercise the financial rights provided for in paragraph 2(c).

Article 18

Information requirements for issuers whose debt securities are admitted to trading on a regulated market

1. The issuer of debt securities admitted to trading on a regulated market shall ensure that all holders of debt securities ranking pari passu are given equal treatment in respect of all the rights attaching to those debt securities.

2. The issuer shall ensure that all the facilities and information necessary to enable debt securities holders to exercise their rights are publicly available in the home Member State and that the integrity of data is preserved. Debt securities holders shall not be prevented from exercising their rights by proxy, subject to the law of country in which the issuer is incorporated. In particular, the issuer shall:

(a) publish notices, or distribute circulars, concerning the place, time and agenda of meetings of debt securities holders, the payment of interest, the exercise of any conversion, exchange, subscription or cancellation rights, and repayment, as well as the right of those holders to participate therein;
(b) make available a proxy form on paper or, where applicable, by electronic

means, to each person entitled to vote at a meeting of debt securities holders, together with the notice concerning the meeting or, on request, after an announcement of the meeting; and

(c) designate as its agent a financial institution through which debt securities holders may exercise their financial rights.

3. If only holders of debt securities whose denomination per unit amounts to at least EUR 50,000 or, in the case of debt securities denominated in a currency other than Euro whose denomination per unit is, at the date of the issue, equivalent to at least EUR 50,000, are to be invited to a meeting, the issuer may choose as venue any Member State, provided that all the facilities and information necessary to enable such holders to exercise their rights are made available in that Member State.

4. For the purposes of conveying information to debt securities holders, the home Member State, or the Member State chosen by the issuer pursuant to paragraph 3, shall allow issuers the use of electronic means, provided such a decision is taken in a general meeting and meets at least the following conditions:

(a) the use of electronic means shall in no way depend upon the location of the seat or residence of the debt security holder or of a proxy representing that holder;
(b) identification arrangements shall be put in place so that debt securities holders are effectively informed;
(c) debt securities holders shall be contacted in writing to request their consent for the use of electronic means for conveying information and if they do not object within a reasonable period of time, their consent shall be deemed to be given. They shall be able to request, at any time in the future, that information be conveyed in writing; and
(d) any apportionment of the costs entailed in the conveyance of information by electronic means shall be determined by the issuer in compliance with the principle of equal treatment laid down in paragraph 1.

5. The Commission shall, in accordance with the procedure provided for in Article 27(2), adopt implementing measures in order to take account of technical developments in financial markets, to take account of developments in information and communication technology and to ensure the uniform application of paragraphs 1 to 4. It shall, in particular, specify the types of financial institution through which a debt security holder may exercise the financial rights provided for in paragraph 2(c).

Article 19

Home Member State control

1. Whenever the issuer, or any person having requested, without the issuer's consent, the admission of its securities to trading on a regulated market, discloses regulated information, it shall at the same time file that information with the competent authority of its home Member State. That competent authority may decide to publish such filed information on its Internet site.

Where an issuer proposes to amend its instrument of incorporation or statutes, it shall communicate the draft amendment to the competent authority of the home Member State and to the regulated market to which its securities have been admitted to trading. Such communication shall be effected without delay, but at the latest on the date of calling the general meeting which is to vote on, or be informed of, the amendment.

2. The home Member State may exempt an issuer from the requirement under paragraph 1 in respect of information disclosed in accordance with Article 6 of Directive 2003/6/EC or Article 12(6) of this Directive.

3. Information to be notified to the issuer in accordance with Articles 9, 10, 12 and 13 shall at the same time be filed with the competent authority of the home Member State.

4. In order to ensure the uniform application of paragraphs 1, 2 and 3, the Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures.

The Commission shall, in particular, specify the procedure in accordance with which an issuer, a holder of shares or other financial instruments, or a person or entity referred to in Article 10, is to file information with the competent authority of the home Member State under paragraphs 1 or 3, respectively, in order to:

(a) enable filing by electronic means in the home Member State;
(b) coordinate the filing of the annual financial report referred to in Article 4 of this Directive with the filing of the annual information referred to in Article 10 of Directive 2003/71/EC.

Article 30
Transitional provisions
1. By way of derogation from Article 5(3) of this Directive, the home Member State may exempt from disclosing financial statements in accordance with Regulation (EC) No 1606/2002 issuers referred to in Article 9 of that Regulation for the financial year starting on or after 1 January 2006.

2. Notwithstanding Article 12(2), a shareholder shall notify the issuer at the latest two months after the date in Article 31(1) of the proportion of voting rights and capital it holds, in accordance with Articles 9, 10 and 13, with issuers at that date, unless it has already made a notification containing equivalent information before that date.

Notwithstanding Article 12(6), an issuer shall in turn disclose the information received in those notifications no later than three months after the date in Article 31(1).

3. Where an issuer is incorporated in a third country, the home Member State may exempt such issuer only in respect of those debt securities which have already been admitted to trading on a regulated market in the Community

prior to 1 January 2005 from drawing up its financial statements in accordance with Article 4(3) and its management report in accordance with Article 4(5) as long as

(a) the competent authority of the home Member State acknowledges that annual financial statements prepared by issuers from such a third country give a true and fair view of the issuer's assets and liabilities, financial position and results;
(b) the third country where the issuer is incorporated has not made mandatory the application of international accounting standards referred to in Article 2 of Regulation (EC) No 1606/2002; and
(c) the Commission has not taken any decision in accordance with Article 23(4)(ii) as to whether there is an equivalence between the above-mentioned accounting standards and

- the accounting standards laid down in the law, regulations or administrative provisions of the third country where the issuer is incorporated, or
- the accounting standards of a third country such an issuer has elected to comply with.

4. The home Member State may exempt issuers only in respect of those debt securities which have already been admitted to trading on a regulated market in the Community prior to 1 January 2005 from disclosing half-yearly financial report in accordance with Article 5 for 10 years following 1 January 2005, provided that the home Member State had decided to allow such issuers to benefit from the provisions of Article 27 of Directive 2001/34/EC at the point of admission of those debt securities.

Glossary Annex B

HM Treasury consolidated list of persons designated as being subject to financial restrictions.
This includes targets listed by the United Nations, European Union and United Kingdom under legislation relating to current financial restrictions regimes. The purpose of the HM Treasury list is to draw together in one place all the names of designated persons for the various financial restrictions regimes effective in the UK.

General legal requirements
The UK imposes financial restrictions on persons and entities following their designation at the United Nations and/or European Union. The UK also operates a domestic counter-terrorism regime, where the Government decides to impose financial restrictions on certain persons and entities.

Financial restrictions in the UK are governed by various pieces of legislation. In all circumstances, where an asset freeze is imposed, it is unlawful to deal with the funds or other assets of the designated person or make payments to them or for their benefit.

A list of all financial restrictions currently in force in the UK is maintained by the Treasury's Asset Freezing Unit. The Consolidated List of persons designated as being subject to financial restrictions can be found on the HM Treasury website at: http://www.hm-treasury.gov.uk/financialsanctions.

Further information on financial restrictions can also be found via this website.

There are specific financial restrictions targeted at the Al-Qaida network and Terrorism.

Under the relevant legislation it is a criminal offence for any natural or legal person to:

(a) deal with the funds of designated persons,
(b) make funds and economic resources, and in the case of Terrorism financial services, available, directly or indirectly to or for the benefit of designated persons, or
(c) knowingly and intentionally participate in activities that would directly or indirectly circumvent the financial restrictions or enable or facilitate the commission of an offence relating to a) and b) above.

'Deal with' means:

(a) In respect of funds –
- use, alter, move, allow access to or transfer,
- deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
- make any other change that would enable use, including portfolio management, and

(b) In respect of economic resources –
- use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources.

The purpose of this legislation imposing financial restrictions is primarily to prevent the diversion of funds to terrorism and terrorist purposes.

HM Treasury has the power to grant licenses exempting certain transactions from the financial restrictions. Requests to disapply the financial restrictions in relation to a designated person are considered by the Treasury on a case-by-case basis to ensure that there is no risk of funds being diverted to terrorism. To apply for a licence, please contact the Asset Freezing Unit at HM Treasury using the contact details below.

Businesses
Businesses need to have appropriate policies and procedures in place to monitor payments in order to prevent breaches of the financial restrictions legislation.

For manual checking, businesses can register with the HM Treasury Asset Freezing Unit update service (directly or via a third party).

If checking is automated, businesses will need to ensure that the relevant software includes checks against the latest consolidated list.

The Asset Freezing Unit may also be contacted to provide guidance and to assist with any concerns regarding financial restrictions at:

Asset Freezing Unit
Tel: 020 7270 5664/5454
Fax: 020 7451 7677
E mail: assetfreezingunit@hm-treasury.gov.uk

In the event that a customer or a payee is identified as a designated person payments must not proceed unless a licence is granted by the Treasury, as this would be a breach of the financial restrictions. The Treasury should be informed immediately and the transaction suspended pending their advice. No funds should be returned to the designated person. The firm may also need to consider whether there is an obligation also to report to SOCA under the Proceeds of Crime Act 2002 or the Terrorism Act 2000.

Written reports can be made to the Asset Freezing Unit at:

The Asset Freezing Unit
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Appendix A

Supplementary anti-money laundering guidance for the tax practitioner

Draft guidance for those providing tax services in the United Kingdom, on the prevention of money laundering and the countering of terrorist financing.

This Guidance is issued by

- *the Institute of Chartered Accountants in England and Wales,*
- *the Chartered Institute of Taxation,*
- *the Association of Taxation Technicians,*
- *the Association of Chartered Certified Accountants,*
- *the Chartered Institute of Management Accountants, and*
- *HM Revenue and Customs*

as an Appendix to the anti-money laundering guidance released by the Consultative Committee of Accountancy Bodies (CCAB).

9.5 GUIDANCE PRINCIPALLY FOR MEMBERS IN PRACTICE

This supplementary Guidance is not stand alone Guidance; it must be read in conjunction with the CCAB's anti-money laundering guidance to which this Guidance is an appendix. It focuses on the interaction between anti-money laundering compliance and tax offences and covers the issues that a tax practitioner is most likely to encounter in practice.

The comments received on the exposure draft of this guidance have been considered and incorporated where appropriate. HM Treasury approval of this guidance is being sought. This will mean, if granted, that the Courts must consider the content of the Guidance when determining whether an accountant's or tax practitioner's conduct gives rise to an offence under either the Proceeds of Crime Act 2002 or the Money Laundering Regulations 2007.

Contents

Glossary and interpretation

1.

CCAB	The Consultative Committee of Accountancy Bodies
CDD	Customer Due Diligence
CEMA	Customs and Excise Management Act 1979
HMRC	Her Majesty's Revenue and Customs
ICTA	Income and Corporation Taxes Act 1988
JMLSG	Joint Money Laundering Steering Group
MLR 2007	Money Laundering Regulations 2007
MLRO	Money Laundering Reporting Officer
POCA	Proceeds of Crime Act 2002
SAR	Suspicious Activity Report
SOCA	The Serious Organised Crime Agency
TMA	The Taxes Management Act 1970
UK	United Kingdom
VATA	Value Added Tax Act 1994

2. Words importing the masculine gender include the feminine, words in the singular include the plural and words in the plural include the singular.

Note: This guidance is incomplete on its own. It must be read in conjunction with the CCAB's Anti-Money Laundering guidance.

1. About this supplementary guidance

1.1 This supplementary guidance has been developed by the Institute of Chartered Accountants in England and Wales, the Chartered Institute of Taxation, the Association of Taxation Technicians, the Association of Chartered Certified Accountants, the Chartered Institute of Management Accountants and HMRC for professionals providing tax services.

1.2 This supplementary guidance uses the descriptive term 'tax practitioner' for someone in business offering tax services. The MLR 2007 uses the term 'tax adviser' and defines a tax adviser as

> 'a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services'.

The meaning of 'advice' is widely interpreted. For the purpose of this and the CCAB guidance, tax compliance services, ie assisting in the completion and submission of tax returns, is included within the term. It was considered that, for the purposes of this supplementary guidance, the term 'tax practitioner' minimises the risk of someone assuming that MLR 2007 does not apply to their business because they provide tax compliance services.

1.3 It is intended that approval for this supplementary guidance will be sought from the Treasury in due course. As noted in the CCAB's guidance approval means that the Courts must have regard to the guidance in deciding whether businesses or individuals affected by it have committed an offence under the MLR 2007 or ss.330–331 POCA.

2. How to use this supplementary guidance

2.1 This supplementary guidance is for professionals providing tax services. It focuses on the interaction between anti-money laundering compliance and tax offences and those issues that the tax practitioner is most likely to encounter. It is not intended to be a comprehensive guide to tax offences. It is not stand alone guidance – it must be read in conjunction with the CCAB AML guidance. The broad interpretation of 'tax adviser' means that this guidance cannot cover every aspect of tax work but the principles set out in the CCAB guidance and in this guidance apply to all taxes and duties.

2.2 A tax practitioner must have a clear understanding of his obligations under the anti-Money Laundering legislation. Detailed guidance is given in the CCAB guidance as follows:

Section 1	About this guidance
Section 2	The offences
Section 3	Anti-money laundering systems and controls
Section 4	The risk based approach to Customer Due Diligence
Section 5	Customer Due Diligence
Section 6	Internal reporting
Section 7	Role of MLRO and SAR reporting
Section 8	Consent
Section 9	Post SAR actions

2.3 Where a tax practitioner is uncertain of his obligations under the anti-money laundering legislation he should seek specialist help.

3. Tax practitioners, MLR 2007 and POCA

3.1 The obligations placed on a tax practitioner under MLR 2007 and POCA are covered in the CCAB guidance.

3.2 Paragraph 1.14 of that guidance sets out the role of the supervisory authorities and advises tax practitioners who are in business of the requirement to be supervised by a supervisory authority.

3.3 A tax practitioner should be aware of HMRC's responsibility under MLR 2007 to regulate trust and company service providers, which may impinge upon the work they undertake for their clients. However if the tax practitioner is supervised by another supervisory authority for other tax and accounting services, that supervisory authority can act as supervisor for the trust and company service work.

3.4 Whilst this supplementary guidance focuses on tax offences, a tax practitioner should be aware of the potential need to report to SOCA (or to his firm's MLRO where he is not a sole practitioner) knowledge or suspicion of proceeds derived from any crime which he encounters in the course of his work as a tax practitioner.

3.5 In particular, a tax practitioner should also take proper care, under Section 328 POCA, to ensure he does not become concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person when assisting clients.

4. Overview of the tax sector

4.1 Tax work covers a broad range of activities from routine compliance work to complex tax planning.

4.2 Tax compliance includes the processing and submission of returns to the tax authorities.

4.3 Tax planning looks at advising on and structuring tax affairs in a tax efficient manner. This can sometimes involve the use of trusts, offshore entities and tax favourable regimes.

5. What are the money laundering risks in the tax sector?

5.1 The money laundering risk areas that a tax practitioner may encounter in practice include the following:

(a) Where a client's actions in respect of his tax affairs create proceeds of crime, for example:
- a client's refusal to correct errors (both for the past and on an ongoing basis); or
- a client's deliberate under declaration of profits/income/gain or deliberate overstatement of expenses/losses.

(b) Where during the course of dealing with a client's tax affairs it becomes apparent that the client is holding proceeds of crime derived from criminal activity which may or may not be tax related.

5.2 The tax practitioner needs to be alert to the risk of assisting or facilitating the laundering of proceeds of crime whether through the evasion of taxes or otherwise. For example, where a client puts significant importance on maintaining the anonymity of beneficiaries or owners or in keeping confidential the structure of a complex plan ostensibly intended to minimise legally a tax liability, then the possibility that the funds involved are derived from the proceeds of crime should be kept in mind.

6. Tax offences

6.1 Introduction

6.1.1 There are a number of tax offences which can give rise to the proceeds of crime and SARs. These are discussed further below. When a tax practitioner has identified proceeds of crime, he (or his firm's MLRO where he is not a sole practitioner) should consider carefully whether the privilege reporting exemption applies before submitting a SAR. See section 12 below and section 7 of the CCAB guidance.

6.1.2 A tax practitioner is not required to be an expert in criminal law but he would be expected to be aware of the boundaries between deliberate understatement or other tax evasion and simple cases of error or genuine differences in the interpretation of tax law and be able to identify conduct in relation to direct and indirect tax which is punishable by the criminal law. There will be no question of criminality where the client has adopted in good

faith, honestly and without mis-statement a technical position with which HMRC disagrees.

6.1.3 The main areas where offences may arise in direct tax are:

- tax evasion, including making false returns (including supporting documents), accounts or financial statements or deliberate failure to submit returns;
- deliberate refusal to correct known errors; and less commonly
- failure to obtain consent under s.765 ICTA.

6.2 Taxes Management Act 1970 ('TMA') tax 'offences'

6.2.1 The TMA provides a civil penalty regime covering both fraudulent and negligent conduct. It is only fraudulent or dishonest conduct which is reportable under POCA. The money laundering legislation is only concerned with the proceeds of criminal conduct. Therefore, it is only that conduct which the law treats as criminal offences which can lead to money laundering issues.

6.2.2 Where conduct may attract a civil penalty under the TMA but may also, on the particular facts, amount to criminal conduct then the conduct is criminal. By way of example only, knowingly assisting in the preparation of an incorrect return etc could give rise to a civil penalty under s.99 TMA, but the conduct concerned would typically amount to a criminal offence (such as false accounting or cheating HMRC) as well. Any case where fraudulent conduct is suspected should be reported unless the privilege reporting exemption applies. See section 12 below and section 7 of CCAB guidance.

6.3 Prosecution policy – the need to report

6.3.1 In the tax environment, there are many circumstances in which the tax authorities have a long and established practice of dealing with matters on a civil basis. A policy view is taken that this is a more cost effective approach and that the interest and penalties that can be charged on a civil basis constitute sufficient restitution and deterrent.

6.3.2 This is the case across direct tax and VAT where criminal prosecutions are very much the exception.

6.3.3 However, the practices or anticipated practices of HMRC are irrelevant to the reporting obligations under POCA. If a tax practitioner suspects that a criminal offence may have been committed, and that there may be or may have been proceeds, whether actual or prospective proceeds, then unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance), he is obliged to report to SOCA (or to his firm's MLRO where he is not a sole practitioner) irrespective of the fact that a criminal prosecution may in the member's view be highly unlikely in practice.

7. Reluctance to correct past errors

7.1 Innocent or negligent error – direct tax

7.1.1 It is not uncommon for tax practitioners to become aware of errors in or omissions in current or in past years from clients' tax returns or any calculations or statements appertaining to any liability or an underpayment of tax, for example because a payment date has been missed. If the tax practitioner has no cause to doubt that these came about as a result of innocent mistake or negligence then he will not have formed a suspicion. However, in some cases, the tax practitioner may form a suspicion that the original irregularity was criminal in nature and should make a report unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance).

7.2 Innocent or negligent error – indirect tax

7.2.1 In the case of indirect tax, see section 11 below on handling the original error.

7.3 Unwillingness or refusal to disclose to the tax authorities

7.3.1 Where a client indicates that he is unwilling or refuses to disclose the matter to HMRC in order to avoid paying the tax due, the client appears to have formed criminal intent and hence the reporting obligation arises unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). A tax practitioner will need to be careful in applying the privilege exemption when the client has expressed clear intention to evade taxes and needs to consider whether the crime/fraud exception applies. The tax practitioner should also consider whether he can continue to act and consult his professional body's guidance on such matters. This paragraph applies equally to potential clients for whom the tax practitioner has declined to act.

7.4 Adjusting subsequent returns

7.4.1 Where the law permits the correction of small errors by subsequent tax adjustments, and the original error was not attributable to any criminal conduct, then the adjustment itself will not give rise to the need to report, since no crime will have been committed. However, it should be noted that the legislation does apply to any conduct which constitutes the laundering of the proceeds of any criminal offence however small the amount involved.

8. Intention to underpay tax

8.1.1 A client may suggest that he will in the future underpay tax which would be tax evasion and a money laundering offence when it occurs.

8.1.2 A tax practitioner can and should apply his professional body's normal ethical guidance to persuade the client to comply with the law. Should the client's intention in this regard still remain in doubt, the tax practitioner should consider carefully whether he can commence or continue to act.

8.1.3 A SAR may well be required in such cases once there are proceeds of crime, depending upon the facts and circumstances and whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). As in 7.3.1 above a tax practitioner will need to be careful in applying the privilege exemption when the client has expressed clear intention to evade taxes.

9. Tax evasion

9.1 General

9.1.1 Where a tax practitioner knows or suspects, or has reasonable grounds for knowing or suspecting, that a client or other party is engaged in tax evasion in the UK or overseas, this will clearly amount to one or more of a number of possible criminal offences, such as theft, obtaining pecuniary advantage by fraud, false accounting, cheating HMRC, the offence of fraudulent evasion of income tax under s.144 Finance Act 2000 or a range of specific indirect tax offences (see section 11 below). Unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance) a tax practitioner should report the matter to SOCA (or to his firm's MLRO where he is not a sole practitioner) immediately.

9.1.2 If the suspected evasion is of taxes outside the UK, in circumstances which would be a criminal offence if the conduct occurred in the UK, this should also be reported immediately unless it is known to be lawful under the criminal law applying in that country and that conduct, if carried out in the UK, would attract a maximum sentence in the UK of less than twelve months, except as prescribed by order.

As in other cases, this is unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). There are other very limited exceptions regarding the reporting of overseas criminal conduct; see 2.4 and 2.5 of CCAB guidance.

9.1.3 A tax practitioner can and should apply the principles set out in his professional body's normal ethical guidance to persuade the client to act properly. A tax practitioner will need to consider carefully whether he can continue to act if the client refuses to make a full disclosure to HMRC.

9.2 Civil Investigation of Fraud (CIF) Procedures

9.2.1 In circumstances where a potential or current client asks a member to

act in the making of a CIF disclosure to HMRC a suspicion of tax evasion will often, but not always, arise.

9.2.2 A tax practitioner should be aware that notification to HMRC is not a substitute for a report to SOCA. Where appropriate a report must also be made to SOCA as soon as the tax practitioner has knowledge or suspicion or reasonable grounds for knowledge or suspicion that tax has intentionally not been paid when due. The tax practitioner (or his firm's MLRO where he is not a sole practitioner) should consider carefully whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance) before submitting a SAR.

9.2.3 There may be occasions where the tax practitioner does not hold sufficient information to make a detailed disclosure of his client's tax evasion to HMRC at the same time as he (or his firm's MLRO where he is not a sole practitioner) submits a SAR to SOCA. However the tax practitioner will be keen to protect his client's position by notifying HMRC of the tax evasion before SOCA does so that the case may be regarded as a voluntary disclosure. The practicalities of this situation are covered in a Question and Answer note agreed with HMRC attached as Appendix 1.

10. Failure to obtain Treasury consent – s.765 ICTA

10.1.1 This section is relevant to members who deal with transactions by companies with international aspects – those transactions that may require consent relate to the creation or issuing or transferring of shares or debentures.

10.1.2 Under s.766 ICTA 1988 companies, their officers and advisers may be guilty of criminal offences if a transaction requiring special consent under s.765(1) takes place without such consent. The person needs to know that the actions were unlawful under s.765(1) in order to be guilty of a criminal offence (s.766(1)). In practice this is of limited assistance in cases of innocent oversight because s.766(2) puts the burden of proof as to the person's state of knowledge on to the individual in the case of directors.

10.1.3 The next question is whether there are proceeds. If a client has undertaken a tax planning transaction for which Treasury consent was needed and would have been unlikely to have been granted, the tax not paid as a result of the planning would constitute proceeds from the crime. In other circumstances there may be no proceeds, but this will need to be considered on the facts. Where there are proceeds, the tax practitioner should finally consider whether the alleged offender knew or suspected that the proceeds arose from criminal conduct. The tax practitioner would usually advise the client that a criminal offence may have occurred, so that the client would then have the requisite knowledge.

10.1.4 When a tax practitioner realises that there has or may have been a breach of s.765 ICTA, he (or his firm's MLRO where he is not a sole practitioner) will need to consider making a SAR based on the factors discussed above. He should also bear in mind whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). The tax practitioner should also consider what other action is appropriate, for example, advising the client to notify HMRC.

11. Indirect tax

11.1 Overview

11.1.1 Where indirect tax is concerned, innocent or negligent errors may be criminal offences as strict liability is imposed by such as s.167(3) CEMA which provides:

> *'If any person –*
>
> *(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or any officer, any declaration, notice, certificate or other document whatsoever; or*
> *(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,*
>
> *being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, then, without prejudice to subsection (4) below, he shall be liable on summary conviction to a penalty of level 4 on the standard scale.'*

'Assigned matter' is defined in section 1 of CEMA as meaning 'any matter in relation to which the Commissioners are for the time being required in pursuance of any enactment to perform any duties'.

11.1.2 This broadly makes most errors, however innocent, criminal offences in VAT and all other indirect taxes. The fact that VAT matters are in practice handled under the civil penalties regime in most circumstances is irrelevant (see section 6.3 above) to the fact that there is an offence under s.167(3) CEMA. However an innocent or negligent error will not fall to be classed as money laundering where the person making the error was not aware/did not suspect that they had committed a criminal offence.

11.1.3 Property is only criminal property for the purposes of POCA if it not only constitutes or represents benefit from criminal conduct, but the 'alleged offender knows or suspects that it constitutes or represents such a benefit' (s.340(3) POCA). A client who has knowledge of s.167 CEMA will 'know or suspect' that they are in receipt of funds once they become aware of the error or mistake so the normal SAR regime applies. There is no presumption that the client is aware of the strict liability offence in s.167(3) and a practitioner

does not have to investigate the client's knowledge, but should make a judgement based on his knowledge of the client. If a practitioner believes a report is necessary but that the client made an error or innocent mistake they should consider making reference to this opinion in any SAR they make.

11.1.4 Where the practitioner suspects that the irregularity may have amounted to tax evasion or tax fraud, the need to make a SAR should be considered on the usual basis and in the same way as for direct tax. There are large numbers of specific criminal offences in the indirect taxes legislation and these are outlined in paragraphs 11.2 and 11.3 below. However in essence they all amount to variations on tax evasion and involve some intent to avoid paying the correct amount of tax.

11.1.5 Unwillingness or refusal to correct indirect tax errors should be treated as set out in 7.3 above.

11.2 Other offences applicable across indirect tax

11.2.1 There is a range of crimes in the Customs and Excise legislation, covering such areas as:

- the bribing of a Commissioner, officer or appointed or authorised person;
- the obstructing of an officer performing any duty, or similar conduct;
- production, signing etc of untrue documents and statements;
- the counterfeiting or falsifying of documents;
- obstructing, or failing to assist in, the inspection of a computer;
- the breaching of conditions applied in respect of relief from VAT conferred on specified classes of persons, such as members of visiting forces; and
- the failure to furnish a supplementary declaration under the Intrastat procedure.

In addition there is the common law offence of Cheating the Public Revenue.

11.2.2 There are a number of other offences relating to particular indirect taxes and excise duties, such as stamp duty and stamp duty land tax, alcohol, tobacco products and mineral oil duties, betting and gaming duty, aggregates levy etc. The legislation in respect of these duties, taxes and levies provides the offences specific to them.

11.2.3 As VAT is the indirect tax most commonly advised upon by tax practitioners further details about specific offences applicable to VAT is given in 11.3 below.

11.3 Specific offences applicable in VAT

11.3.1 *Fraudulent evasion of VAT (s.72(1) VATA)*

A person who is knowingly concerned in, or is taking steps with a view to, the fraudulent evasion of VAT by him or any other person is liable under this

offence. A person's conduct may amount to fraudulent evasion under this provision if he understates payments due to the Commissioners for a prescribed accounting period. In certain circumstances the over claiming of VAT (eg a refund in respect of bad debts) may also result in fraudulent evasion. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.2 ***Production, furnishing or sending of false documents and statements (s.72(3) VATA)***

This involves the production, furnishing or sending of a false document with the intent to deceive. In addition, it includes knowingly or recklessly making a false statement. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.3 ***Conduct which must have involved an offence (s.72(8) VATA)***

Where a person's conduct during any specified period must have involved the commission by him of one or more of the offences listed above, then, regardless of whether the specifics of the offence(s) are known, he is guilty of an offence. The purpose of this provision is to cover cases where it can be proved that an offence has been committed during a period spanning a number of prescribed accounting periods, but it is not clear to what extent it was committed in any particular prescribed accounting period within the total period concerned. It is only one offence, even if it covers more than one period. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.4 ***The possession and dealing in goods on which VAT has been evaded (s.72(10) VATA)***

A person commits an offence, and is liable to penalties, if, having reason to believe that tax has been or will be evaded on them, he either acquires possession of any goods; deals with any goods; or accepts the supply of any services. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.5 ***Supplying of goods or service without providing security (s.72(11) VATA)***

A person who is required, under VAT Act 1994 Schedule 11 para 4(2), to give security for the further payment of VAT as a prerequisite for making taxable supplies and who makes those supplies without the provision of security, has committed an offence. If proceeds arose from such conduct, this would also constitute money laundering.

12. The privilege reporting exemption

12.1.1 A tax practitioner should be aware that the privilege reporting exemption does not apply to 'information or other matter which is communicated or given with the intention of furthering a criminal purpose'.

12.1.2 A tax practitioner should read this section in conjunction with paragraphs 7.26–7.46 of the CCAB guidance which covers the privilege reporting exemption and the crime/fraud exception in detail.

12.1.3 In summary a tax practitioner who is a professional legal adviser or a 'relevant professional adviser' who suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering is prohibited from making a money laundering report where the knowledge or suspicion comes to him in 'privileged circumstances'.

12.1.4 Relevant professional adviser is defined in s.330(14) POCA as

> *'an accountant, auditor or tax adviser who is a member of a professional body which is established for accountants, auditors or tax advisers (as the case may be) and which makes provision for*
>
> *(a) testing of competence of those seeking admission to membership of such a body as a condition for such admission; and*
> *(b) imposing and maintaining professional and ethical standards for its members as well as imposing sanctions for non-compliance with those standards.'*

12.1.5 The legislation does not list the professional bodies which meet the criteria but the CCAB bodies, the Chartered Institute of Taxation and the Association of Taxation Technicians meet the criteria and hence their members may be considered to be 'relevant professional advisers'.

12.1.6 Privileged circumstances is defined at s.330(10) POCA as

> *'Information or other matter comes to a professional legal adviser or other relevant professional adviser in privileged circumstances if it is communicated or given to him:*
>
> *(a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client;*
> *(b) by (or by a representative of) a person seeking legal advice from the adviser, or*
> *(c) by a person in connection with legal proceedings or contemplated legal proceedings.'*

12.1.7 The CCAB gives guidance on when the privilege reporting exemption might apply. The CIOT and ATT took Counsel's opinion on the privilege reporting exemption and how it might affect their members. This advice included examples of when the privilege reporting exemption might apply and

is unlikely to apply. Those examples together with the CCAB's are attached as Appendices 2 and 3.

13. Customer due diligence (CDD)

13.1.1 Customer due diligence and beneficial ownership is considered in detail in Section 5 of the CCAB guidance and a tax practitioner should refer to that guidance in the first instance. A tax practitioner may be called upon to advise another professional firm. Unless there is a clear agreement between the firms that the advising firm is intended to form a client relationship with the other firm's client, or unless the advising firm comes into contact with and/or enters into a dialogue with the other firm's client, the other firm is the client of the advising firm and accordingly must be made subject to CDD.

13.1.2 In cases where the advising firm's involvement is also with the other firm's client, then the other firm's client must also be made subject to CDD. It may be possible for the advising firm to rely on the other firm's CDD of the client but there are strict criteria which must be met; see paragraphs 5.33–5.41 of the CCAB guidance.

Appendix 1

Money Laundering and disclosures to HMRC: A Questions and Answers guidance note

This note is an updated version of a note originally agreed between HMRC, the Association of Taxation Technicians and the Chartered Institute of Taxation.

Object of note
To provide guidance about the practical effect of the money laundering legislation on disclosures of tax evasion by tax practitioners.

Questions and answers
1. Will the money laundering requirements make any difference to HMRC's willingness to use Code of Practice 9 or in local offices their willingness to come to a settlement without prosecution?

HMRC have confirmed that the money laundering requirements will not affect enquiries under Code of Practice 9 or local office procedures.

2. Which government departments should I as a tax practitioner inform when I am approached by an individual who tells me that he wants to make a full disclosure of undeclared taxable income and/or gains?

Traditionally, you as a tax practitioner, having taken instructions and collected all necessary information from your client, will have informed the relevant office within HMRC, depending on the circumstances.

But if you have reasonable grounds for knowing or suspecting that your client has intentionally evaded tax then the money laundering laws will also apply. You, or your Money Laundering Reporting Officer (MLRO) if you have one, will be obliged also to make a report to SOCA in the specified form unless the privilege reporting exemption applies. Where you have a MLRO, you must notify him or her and they will in turn consider whether a report should be made to SOCA. See Section 7 of the CCAB anti-money laundering guidance regarding the need to appoint a MLRO where you do not have one.

3. Should I make a report to SOCA when I receive a CoP 9 enquiry letter from HMRC?

It is your knowledge or suspicion that counts rather than HMRC's suspicion. You should make up your own mind whether such a letter gives you grounds for making a report applying the criteria in Section 330 POCA 2002, ie do you know or suspect, or have reasonable grounds for knowing or suspecting, that the client is engaged in money laundering as defined at Chapter 2 of the CCAB anti-money laundering guidance.

4. When should I make a report to SOCA?

The money laundering legislation says that SOCA must be told 'as soon as is practicable after the information or other matter' that gave rise to the knowledge or suspicion was received.

5. It is possible that the potential client may not instruct me at all. Will HMRC monitor me as the tax practitioner named in the SOCA report to see if a disclosure emerges, and if so for how long?

HMRC recognise that the potential client may go elsewhere (or nowhere) for advice. They have said they have no intention of monitoring reputable practitioners after SOCA reports have been submitted.

6. Once I have told SOCA, what happens next assuming no other agency is involved?

SOCA will pass reports to a special intelligence unit within HMRC in the first instance. The unit will consider whether it is suitable for investigation towards criminal prosecution. If it is not, the case will either be considered for enquiry under a Civil Code of Practice or be referred to HMRC's Centre for Research and Intelligence in Llanishen, Cardiff. Where it is considered appropriate to pass intelligence on to relevant staff in taxpayer-facing offices neither the fact that the intelligence has come from SOCA, nor the identity of the original source of the intelligence, is disclosed.

7. Does the need to report to SOCA before I am ready to tell HMRC affect the timing of my providing information to HMRC about my client's undeclared income and/or gains? Although I have made a report to SOCA when approached by a potential client with a tax disclosure to make, I may not immediately be able to approach HMRC because I will have to be formally instructed and the approach to HMRC approved by the client. Collecting and collating the information will inevitably take time especially where several individuals or entities are involved. How long will HMRC regard as a reasonable period before the approach is made while leaving the option of using CoP 9 open?

HMRC have confirmed that a delay would not jeopardise the CoP 9 approach where it would otherwise be available provided that the taxpayer is taking active steps to regularise their affairs. Doing nothing involves the risk that a CoP 9 enquiry may not be available and that prosecution may follow; or at least that penalty abatements are at risk.

One option, having obtained the client's permission, is to put down a marker by writing to HMRC, saying you have been instructed by a named client to act for them in coming to a settlement about undeclared income or gains. You would also provide a date by which you expect to be able to let HMRC have these details.

8. To which HMRC office should I send the marker letter?

Under these circumstances all letters should be sent to the Centre for Research and Intelligence, Ty Glas Road, Llanishen, Cardiff, CF4 5YF.

9. How long a time period for providing the information would HMRC consider reasonable in my 'marker' notification?

It will depend on the circumstances of each case but HMRC have indicated that they will take a reasonable approach.

Your estimated timetable will obviously depend on your assessment of the likely complexity of your client's affairs.

10. What happens if I miss my self-imposed deadline set out in my marker letter?

HMRC appreciate that the information may be difficult to obtain. You should obviously inform HMRC if you wish to extend your self-imposed deadline. You will need to update HMRC from time to time to reassure them that the client is taking active steps to help you move matters forward.

11. What is the position where HMRC already had concerns about a taxpayer and the money laundering notification is the trigger for the raid or the launch of an investigation? HMRC may not be prepared to wait, possibly due to concerns that documents might be destroyed. Would a CoP 9 enquiry

still be a possibility for my client if the normal conditions are met (for example if the raid does not indicate that my client is unsuitable for a CoP 9 enquiry)?

HMRC have informed us that receipt of a report from SOCA or your 'marker' notification will not necessarily make them deviate from their proposed course of action. HMRC will look at the SOCA report in context of all other information available to them regarding a case when prioritizing the cases for investigation.

12. Will HMRC wait for a reasonable period of time before launching an enquiry on receipt of a report from SOCA?

In the majority of cases, given the time it would take for SOCA to pass information to HMRC and for HMRC to consider what action to take, the time lag between the report to SOCA and the making of a voluntary disclosure to HMRC may not be an issue in practice. You should monitor the receipt of acknowledgements to track progress. If you are concerned you could consider the use of a marker letter as discussed above.

Appendix 2

Examples of when the privilege reporting exemption *might* apply
For the privilege reporting exemption to apply the information must come to a legal professional adviser or a relevant professional adviser in privileged circumstances. Whether the privilege reporting exemption applies will depend on the specific facts of the case. These examples are intended as general guidance only and are not a substitute for seeking legal advice in cases of doubt.

Examples included in the CCAB guidance
- advice on taxation matters, where the tax adviser is giving advice on the interpretation or application of any element of tax law and in the process is assisting a client to understand his tax position;
- advice on the legal aspects of a take-over bid, for example on points under the Companies Act legislation;
- advice on duties of directors under the Companies Act;
- advice to directors on legal issues relating to the Insolvency Act 1986, eg, on the legal aspects of wrongful trading; and
- advice on employment law.

Further examples based on advice given to the CIOT and ATT
- advice on how to order or structure a client's tax affairs in a tax efficient manner;
- advice on disclosure obligations to the tax authorities, including advice given in the context of compliance work on reporting requirements and situations where previously there may have been failure to disclose;
- suspicions derived from pre-existing documents may be covered by the reporting exemption where those documents come to the tax practitioner in

privileged circumstances. For example, if a client asked for tax advice on settling past tax under declarations and provided copies of bank statements or invoices or past tax returns in order that the tax adviser could advise, that information could be regarded as having come to the adviser in privileged circumstances.

Examples where relevant professional advisers might fall within privileged circumstances as regards litigation privilege include:

- assisting a client by taking witness statements from him or from third parties in respect of litigation;
- representing a client, as permitted, at a tax tribunal; and
- when instructed as an expert witness by a solicitor on behalf of a client in respect of litigation.

Appendix 3

Examples of when the privilege reporting exemption is unlikely to apply

Examples included in the CCAB guidance
It should be noted that conducting audit work does not of itself give rise to privileged circumstances for this purpose, as the relevant professional adviser is neither providing legal advice, nor is he instructed in respect of litigation. Nor do routine book-keeping, accounts preparation or tax compliance assignments, though privileged circumstances may arise if the client requests or the adviser gives legal advice on an informal basis during the course of such an assignment.

Further examples based on advice given to the CIOT and ATT

- Information uncovered during tax compliance work, for example spotting that personal expenditure had been claimed as a business expense in a previous year.
- Information uncovered during a tax due diligence assignment or other agreed upon procedures exercise which is for the purposes of producing an evaluation report or an assurance based opinion (other than an audit) to the client or a third party.
- Information provided by or communications received direct from any third party particularly if no advice has been sought in respect of the underlying detailed content by the client. For example, receipt of information or communications when acting as the client's tax agent.
- Information received about the client's or a third party's affairs which is outside the scope of the tax services in respect of which the adviser has been engaged.