THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 15/09

EXTENDING THE SCOPE OF APPLICATION OF THE REGULATORS' CODE AND THE PRINCIPLES OF GOOD REGULATION

Memorandum of comment submitted in February 2009 by The Institute of Chartered Accountants in England and Wales, in response to the consultation document of this title, issued by the Department for Business, Enterprise and Regulatory Reform in November 2008.

This response has been prepared after discussion with other members of the Accountants Affinity Group of the Anti-Money Laundering Supervisors Forum, and takes account of comments that they have made.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the ICAEW) welcomes the opportunity to comment on the consultation paper *Extending the Scope of Application of the Regulators' Code and the Principles of Good Regulation* published by Department for Business, Enterprise and Regulatory Reform.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. In common with the other CCAB bodies, its regulation of its members, in particular its responsibilities in respect of auditors (which is a statutory function) is overseen by the Financial Reporting Council. Other statutory regulatory functions are the operation of the Designated Professional Body regime for the regulation of investment business under Part XX of the Financial Services and Markets Act 2000 (overseen by the FSA) and the licensing of Insolvency Practitioners where consistency of regulatory standards are maintained by the Joint Insolvency Committee, under the oversight of the Insolvency Practices Council. Money laundering regulation is the fourth area of statutory regulation undertaken by the ICAEW, although there is no oversight of our activities at the moment. However, HM Treasury have recently consulted the anti-money laundering supervisory bodies on improving means of reviewing the effectiveness of their anti-money laundering supervision activities. We have accepted the principle of proportionate and cost effective oversight in this area.

3. As a world leading professional accountancy body, the ICAEW provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.

4. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The ICAEW operates under the control of a Council, as substantial majority of which is democratically elected by those members, and which holds us accountable for the way in which we ensure that standards are maintained. The Institute's disciplinary and regulatory committees act independently of the Council, and include lay members as well as chartered accountants among their membership. Some of these committees are chaired by a lay member.

MAJOR POINTS

5. Acting within our public interest remit, the ICAEW has been an unambiguous supporter of the development of the Principles of Good Regulation ("the Principles") and the Regulators' Compliance Code ("the Code"). We believe them to be an important tool, in a democratic society, to ensure that public bodies which are regulators of the private sector ("public regulators") and other sections of the administration do not impose regulatory burdens which are higher than is justified in the public interest. Over regulation may occur in the effort to ensure compliance with the strictest of interpretation of regulatory responsibilities or in order to save costs to

the regulators themselves. Democratic pressures are often only felt indirectly by public regulators, and they can be unduly influenced by the pressure towards over-regulation which results from the public and political attention caused by occasional serious regulatory failures.

6. We support not just the development of the Principles as a means of promoting good regulation by public regulators, but the Principles themselves. Were we ourselves to depart from the Principles, we would expect our members to challenge such departures and ultimately would support such challenges.

7. However, it must be recognised that the statutory application of the Principles and the Code can themselves impose regulatory costs, which must inevitably be borne ultimately by the regulated population. Unnecessary application of the Principles can therefore itself represent a departure from those same Principles, by representing disproportionate and poorly targeted regulation.

8. In addition, though we recognise that both public and private bodies exercising a statutory function are within the remit of the Legislative and Regulatory Reform Act 2006, the extension to AML supervisory bodies would represent a significant extension in the way in which the Act has been implemented. We understand that very few private bodies have been included in the Listing Order made under section 24 of the Legislative and Regulatory Reform Act 2006, and that none of these are professional bodies. In fact, our information so far indicates that they are limited to some but not all of the operating bodies of the Financial Reporting Council, but not to the Council itself. To include professional bodies within the statutory remit of the Principles and Code does not appear to have been given the careful consideration which such an extension warrants and risks a number of unintended consequences, additional costs and outcomes at variance with settled public policy objectives, with limited and doubtful benefits in terms of uniformity of approach in terms of AML supervision.

9. As mentioned above, HM Treasury has recently consulted on methods of review and oversight of the supervisory activities of the private AML supervisors. This is an activity that we have accepted as a useful function, but it completely negates the need for other forms of oversight in this area.

DETAILED CONSIDERATION

Distinguishing Features of Professional Bodies

10. The private AML supervisors, as professional bodies, have the following characteristics, which are absent from public regulators, and which provide an adequate enforcement mechanism for proportionate and well targeted regulation, without the need for statutory backing.

    - ***Membership influence –*** By and large, the regulated population are the members of the supervisory body, and thus have more direct control over the proportionality and fairness with which it carries out its regulatory functions than is the case with public sector regulators, whose functions are have little or no answerability to their regulatory population. The use of lay members on regulatory and disciplinary committees serves as a counterbalance.

- ***Market Forces –*** Most of the private sector AML supervisors are effectively acting in competition with each other and this acts as a form of brake on excessive regulation. However, while there are few barriers to prevent individual accountants, bookkeepers, tax advisers or insolvency practitioners from resigning their membership of a particular professional body so as to change their AML supervisor there is little evidence that this is happening. In any event, all the accountancy bodies are members of the AMLSF Accountants Affinity Group, (as is the HMRC, which is the default supervisor and a public regulator) and so share good regulatory practice.

- ***Oversight Regulation –*** Many of the private sector are already (or will shortly be) subject to oversight regulation of their regulatory functions. Though this oversight will mainly be focussed on preventing under-regulation, rather than being focussed on over-regulation or inappropriate use of regulatory powers, we would expect this to be part of their regulatory remit where such matters became a cause of concern. This applies to the six Chartered Accountancy professional bodies, which are members of the Consultative Committee of Accountancy Bodies (CCAB) which are under the oversight of the Financial Reporting Council (FRC) and to the legal sector professional bodies, which will shortly be subject to the oversight of the Legal Services Board. Whether the AML supervisory bodies should be subject to some form of oversight is the subject of a recently closed consultation with the supervisory bodies by HM Treasury.

Any one of these represents a sufficient reason for distinguishing between private and public regulators, and in particular for not imposing the regulatory control mechanisms on the private sector which have proved necessary for the public sector.

11. In the remainder of this response, we mainly make our points from the point of view of the ICAEW, but we would expect many of the points we make would apply equally to other professional bodies which are AML supervisors.

Consistency and Uniformity

12. Paragraph 5.14 of the consultation suggests that it is appropriate to extend the Compliance Code and the Better Regulation principles to the private bodies when they exercise functions under the money laundering regulations to promote a uniform approach across all regulators enforcing the money laundering regulations. However, such apparent uniformity would be achieved at the cost of ignoring a number of facts:

    - Public and private sector bodies are not uniform in nature – they have very different controls over their functions.

    - The professional bodies have a number of (statutory and non-statutory) regulatory and other functions which control the quality of service provided by their members. To introduce additional statutory obligations only in relation to AML supervision introduces diversity, rather than uniformity, into their operations.

    - Further, a number of the professional bodies are subject to an oversight body which is not within the scope of application of the Principles and Code. To

include one of the functions of a professional body within the scope of the Principles and Code, but not its oversight body, not only lacks uniformity, but risks regulatory conflicts.

13. It has been suggested that apart from engendering lack of uniformity across the regulatory landscape, exclusion of the private regulators might encourage public regulators to transfer their enforcement functions to private ones in the knowledge that such bodies are not caught by a statutory duty to have regard to better regulation principles and standards. In the case of the AML regulations, this is not a significant risk, not just because the private regulators will already be acting in the interests of their members in applying good regulatory principles, but also because such transfers would not be achievable. Most of the public AML regulators are the sole regulator for their sector. Within the accountancy sector, HMRC are the default regulator which means that most of their regulatory population is expected to consist of unqualified accountants and bookkeepers, who do not have the option of regulation by a professional body.

14. Treating public and private regulators the same, despite their differing characteristics, could increase uniformity but would be unlikely to increase consistency. Considerable efforts have been made, through the AML Supervisors Forum and other means, to promote consistency of regulatory requirements. An example of this is the CCAB Guidance, which has been adopted as guidance by all the AML supervisors in the accountancy sector and which has Treasury approval.

Burdens

15. We would not expect that the statutory application of the Principles and the Code to make a significant difference to the way in the ICAEW carried out its functions, and so their application would not improve the position of our membership, or the fairness and proportionality with which we regulate them. However, it opens up a further complication into our relationship with our members which is unnecessary and could impose costs. For example, it could increase the opportunity for members to question our decisions without foundation but on the basis of the statutory application of the Code. Such unfounded challenges can require significant staff time and resources for them to be resolved.

16. The ICAEW has integrated its AML supervision into our existing arrangements for Practice Review. Overall, this has considerably reduced compliance burdens on our member firms, for example by combining AML visits with others that we would undertake. This ensures that visits to member firms are kept to a minimum consistent with the maintenance of the reputation of the ICAEW and its members, and our AML supervisory obligations. However, in assessing this approach to our regulation, it is necessary to measure the proportionality overall, not on a sector by sector basis. A challenge to our regulation, on the basis of AML supervision alone, would be counter-productive to the overall purpose of the Code and its reputation.

17. The ICAEW has been rigorous in its lobbying efforts, to reduce unnecessary regulatory burdens on our members and their clients, in the area of AML compliance. We believe that we have been influential in removing unnecessary burdens in the following areas:

- introduction of a voluntary reporting option, under the Proceeds of Crime Act – which relieves firms from the need to ensure that they are within the scope of the regulated sector, or have another valid over-ride to client confidentiality requirements, before making a money laundering suspicious activity report (SAR), as well as increasing the number of SARs made and available to law enforcement authorities;

- introduction of the abbreviated report regime, for certain categories of SAR;

- extension of the exemption from reporting in privileged circumstances to our members in practice;

- the removal from the requirement to report of suspected money laundering where the identity of the suspect and the whereabouts of the proceeds are unknown.

In addition, the ICAEW (in conjunction with the other CCAB bodies) introduced formal guidance to the effect that client identification for AML purposes could be carried out on risk-based, rather than rules-based, principles before this approach was enshrined in the law or indeed generally accepted. It is difficult to see how these consistent efforts to reduce unnecessary compliance burdens on our members and their clients could be improved by statutory inclusion within the scope of the Principles and Code.

Unintended Consequences

18. Over many years, Governments have been moving in the direction of the privatisation of public functions, believing that market disciplines will assist in the provision cost effective services. We agree with this approach, but these benefits will be weakened if, instead of leaving the private sector the freedom to work in ways that will improve its brand characteristics and hence its success, the Government treats such bodies as quasi public sector bodies. To treat private bodies so inappropriately risks a number of unintended consequences, in addition to those we have listed in this response.

19. In contrast, we cannot identify any adverse consequences of treating public and private regulators differently, in ways that reflect their differing characteristics, nor do we believe that there are any unintended ones that have not yet been identified. There are a number of areas where public and private regulators work in identical or closely related areas, such as insolvency practice, where BERR licences a number of practitioners, and investment business, where some professional bodies regulate their members for some services, rather than this being done by the FSA. We are not aware of any call in these areas for the professional bodies to make themselves subject to the statutory remit of the Principles and Code.

CONCLUSION

20. We support the extension of the scope of the application of the Principles of Good Regulation and the Regulators Compliance Code to all those public regulators listed in the consultation paper, which are not subject to alternative means of ensuring maintenance of fair and cost effective regulation.

21. We do not support the inclusion of the private AML regulators within the formal statutory remit of the Principles, or the Code, as we consider that to do so would in itself represent unnecessary over-regulation, especially given the Treasury's intention to introduce a scheme to promote consistency of supervisory standards in this area.

22. Were this proposal to be carried forward, it should be subject to more careful consideration than is indicated by a single paragraph in a consultation aimed mainly at extension of the Principles and Code in relation to public regulators, to try and ensure that unintended consequences are avoided and the additional costs are taken into account in drawing up the Impact Assessment.

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