

insolvency

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insolvency newsletter

This special issue of the Newsletter has been prepared to address two issues of special regulatory importance.

PRE-PACK ADMINISTRATIONS

All licensed insolvency practitioners will by now have received a letter from the Insolvency Service regarding the regulation of pre-packs. Office holders are with immediate effect being asked to send to the Insolvency Service, at the address set out below, a copy of the information that they are now required to provide to creditors under paragraph 2.9 of SIP 16 (which came into effect on 1 January 2009). If the office holder does not provide the required information under the exceptional circumstances clause of paragraph 2.10, then the reasons given to creditors for the non-provision of the information should also be sent to the Insolvency Service in the same way.

The Insolvency Service acknowledges in its letter that pre-packs can be a useful tool which can ultimately save jobs and rescue businesses that would not otherwise survive a company's insolvency. But there have recently been a number of highly critical media stories which have suggested that abuses have occurred; Ministers claim to have additional anecdotal evidence of this. The stated goal of this new initiative by the Insolvency Service is for it to be able to demonstrate that pre-packs, when undertaken responsibly, can bring benefits to creditors.

ACCA does not believe that the action requested by the Insolvency Service will amount to a significant burden on IPs and encourages its licence holders to comply.

The address to send the SIP16 information to is Insolvency Practitioner Policy Section, The Insolvency Service, Area 5.6, 21 Bloomsbury Street, LONDON WC1B 3QW. It can be sent by e-mail to IPPolicy.Section@insolvency.gsi.gov.uk

INSOLVENCY CODE OF ETHICS

As members will be aware, the Insolvency Code of Ethics (the 'Code') has recently been revised: the full revised Code can be found in the ACCA Insolvency Handbook issued in January. This article summarises the changes that have been made.

The revised Code should be applied by IPs in all professional work that may lead to an insolvency appointment. The standards set out in it are to be adhered to not only by IPs but also by all members of their insolvency teams. Failure to observe the Code, as revised, may not of itself constitute professional misconduct but will be taken into account in assessing the conduct of an IP should the situation arise.

The revised Code is comprised of two parts as before: Part 1 containing the fundamental principles and Part 2 dealing with specific applications of the code. An additional Part 3 has been included in respect of cases conducted under Scottish law.

Part 1: General Application of the Code

Under Part 1, an IP is required to comply with a set of fundamental principles. These were, formerly, Integrity, Objectivity, Competence, Due Skill and Courtesy. They are now presented as Integrity, Objectivity, Professional Competence and Due Care, Confidentiality and Professional Behaviour. The revised Code provides a greater explanation of the standards expected of IPs for each principle described.

The principle of Confidentiality now introduced emphasises that confidential information acquired as a result of professional and business relationships should not be disclosed to third parties without authority unless there is a legal or professional right or duty to do so and should not be used for personal advantage. The principle of Professional Behaviour encompasses courtesy, consideration, the necessity to comply with relevant laws and regulations and to avoid any action that discredits the profession.

The 'Framework Approach' is retained in the revised Code as a method for IPs to use to identify actual or potential threats to their compliance with the fundamental principles and to determine whether there are any safeguards available to offset them. The new Code is more specific about what the structure of this approach involves, viz

- taking reasonable steps to identify any threats to compliance with the fundamental principles
- evaluating such threats and
- responding in an appropriate manner to those threats.

As regards the first step, the previous version had identified two principal ways in which objectivity could be impaired – in cases of ‘self-review’ and in cases of ‘self-interest’. A number of detailed examples were given of circumstances in which threats of both kinds could arise.

Following an evaluation of these threats that was carried out in the process of revising the Code, the two threats, of self-review and self-interest, are retained but there are three additional categories of threat, namely Advocacy, Familiarity and Intimidation. Examples of how each of the five categories may arise are provided in the Code.

It is explained that Advocacy threats may occur when an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised. Familiarity threats may occur when, because of a close relationship, an individual becomes too sympathetic or antagonistic to the interests of others. Intimidation threats may occur when an IP may be deterred from acting objectively by threats, actual or perceived.

As regards the second step in the Framework Approach, namely evaluating the threat identified, the IP should take into account what a reasonable and informed third party would conclude was acceptable.

And in responding to the threats, IPs should consider what safeguards are appropriate in the circumstances. Some of these safeguards are addressed by legislation and SIPs. But the IP should also implement safeguards through the work environment, including those specific to an insolvency appointment. The revised Code provides specific examples of safeguards in this second category. They include documented policies and procedures to be put in place in order to consider and to comply with the fundamental principles of the Code before the acceptance of and during an insolvency appointment. It also refers to leadership that stresses the importance of compliance and to staff training to ensure that staff fully comprehend the necessity of compliance.

Part 2: Specific Application of the Code

Part 2 of the Code previously provided an annex of particular circumstances that gave rise to self-review and self-interest threats. The revised Code covers this ground in a different way. First, it considers how the Code should be applied in particular circumstances where IPs may face ethical dilemmas. It goes on to provide an extensive list of possible safeguards to reduce the threat to an acceptable level.

Particular emphasis is paid in Part 2 of the revised Code to whether an IP should agree to accept an insolvency appointment, especially where the insolvency practitioner will be an officer of the court. Again, a list of safeguards has been suggested. Following appointment, any threats should continue to be kept under appropriate review.

The revised Code goes into greater detail in order to identify those circumstances that could pose a conflict of interest.

To ensure professional competence and due care, the Code now provides a checklist of a number of matters that ought to be considered. It also includes a succinct list for identifying professional and personal relationships which may give rise to threats to the principle of objectivity.

As well as referring to the realisations of assets by an IP and the circumstances surrounding their realisations, the revised Code now also refers to the sale of assets and business of an insolvent company shortly after appointment on pre-agreed terms. This ties in with the new SIP 16, pre-packaged sales in administrations, which came into effect on 1 January 2009.

There are now extended sections that deal with obtaining specialist advice and services, the charging of fees both prior to and after accepting appointments and how the IP obtains appointments whether by active marketing or otherwise. The revised Code also deals with referral fees, commissions, gifts and hospitality and the circumstances where they may or not be accepted.

The revised Code emphasises the importance of keeping written contemporaneous records to justify any actions taken and to demonstrate the steps taken and the conclusions reached in identifying, evaluating and responding to any threats.

Finally, as previously, the revised Code concludes with examples of specific circumstances and relationships that will create threats to compliance with the fundamental principles both where they relate to a previous or existing insolvency appointment and where they do not.

Editor: John Davies, Head of Business Law
e-mail: daviesj@accaglobal.com

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