Non-compliance with Laws and Regulations

General Whistleblowing Guidance for Members

Contents

Introduction

1. This guidance is intended to assist members on their responsibilities relating to the disclosure of non-compliance with laws and regulations encountered in the course of their professional work, and related matters of professional conduct and ethics. However, issues surrounding whistleblowing can be complicated and members are strongly encouraged to obtain their own independent legal advice where appropriate.

2. It covers circumstances where a member is required or may be permitted to disclose confidential information to a third party relating to non-compliance with laws and regulations with or without the consent of the party to whom the duty of confidentiality is owed.

3. Pursuant to SIP 1 paragraph 4, an insolvency practitioner ("**IP**") who becomes aware of any IP who they consider is not complying or who has not complied with the relevant laws and regulations and whose actions discredit the profession, should report that IP to the complaints gateway operated by the Insolvency Service or to that IP's recognised professional body.

4. Members should refer to paragraphs 390.1 to 390.20 A2 of the Insolvency Code of Ethics (available here: https://insolvency-practitioners.org.uk/regulation-and-guidance/), which contains guidance on "Responding to non-compliance with laws and regulations" and members are reminded that the Insolvency Code of Ethics advises of a requirement on IPs on addressing non-compliance with legal or regulatory provisions – see R390.6, R390.8, R390.15 & R390.16.

5. This guidance has been prepared in good faith, but neither the IPA nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done (or not done) in reliance on it.

Laws and regulations:

6. Non-compliance with laws and/or regulations comprises acts of omission or commission, intentional or unintentional which are contrary to the prevailing laws (civil or criminal) and/or regulations committed by any of the following parties:
   a) an entity over which the IP has been appointed,
   b) those charged with the governance of an entity;
   c) management of an entity;
   d) other individuals working for or under the direction of an entity;
   e) the IP's employing organisation;
   f) those charged with the governance of the employing organisation;
   g) management of the employing organisation;
   h) other individuals working for or under the direction of the employing organisation. (Para 390.5 A1 Insolvency Code of Ethics).

7. In order to identify, and if appropriate, disclose such non-compliance, members have a responsibility to keep up-to-date with the laws and regulations applicable to the role, business sector and country in which they operate. Paragraph 390.6 of the Insolvency Code of Ethics requires insolvency practitioners to obtain an understanding of the legal or regulatory provisions of other jurisdictions where appropriate and to comply with them, including requirements to report matters to appropriate authorities and prohibitions on alerting relevant parties.

8. Failure to report non-compliance with laws and regulations may constitute an offence and could render a member liable to fines or even imprisonment (as described below). Conversely encouraging whistleblowing can give confidence to staff and can help to avoid civil and criminal liability, for example, under s.7 Bribery Act 2010 for failure to prevent bribery or the Criminal Finances Act 2017 for failure to prevent facilitation of tax evasion. Robust whistleblowing policies may also help a corporate entity comply with its duties under the Modern Slavery Act 2015 and similar provisions.

Circumstances indicating non-compliance with laws or regulations.

9. Members may encounter non-compliance with laws or regulations in their professional work in many circumstances, including but not limited to:
   - fraud or theft (including false accounting / creation of misleading documents);
   - insider dealing, market abuse;
   - other acts of dishonesty such as payment or receipt of bribes, conspiracy soliciting or inciting the commission of a crime;
   - money laundering offences including 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 Nominated Officer ('NO') or the National Crime Agency (NCA);
   - "tipping off" offences;
   - offences in relation to taxation;
   - health and safety offences;
   - breaches of employment legislation;
   - environmental offences;
   - criminal damage;
   - perjury and contempt of court offences;
   - bankruptcy or insolvency offences.

The Insolvency Code of Ethics: Professional duty of confidentiality.

10. The fundamental principle of confidentiality (see R100 and R104 Insolvency Code of Ethics) (https://insolvency-practitioners.org.uk/regulation-and-guidance/) is particularly relevant to the disclosure of suspected or actual non-compliance with rules and regulations.

11. An IP should not disclose confidential information acquired as a result of professional and business relationships outside the firm or employing organisation without proper and specific authority unless there is a legal or professional duty or right to disclose (see R104.3d Insolvency Code of Ethics).

12. There are circumstances when an insolvency practitioner's duty of confidentiality is overridden and they are required to disclose confidential information or when such disclosure might be appropriate (R104.3 Insolvency Code of Ethics), such as when:
   - disclosure is required by law (e.g., by court order, Company Directors Disqualification Act 1986, Proceeds of Crime Act 2002, Terrorism Act 2000, Terrorism Act 2006;
   - disclosure is permitted by law and authorised;
   - there is a professional duty or right to disclose, when not prohibited by law.

13. Disclosure of information to a third party may be required or justifiable even without the consent of the person to whom the duty of confidentiality is owed if it is:
   - in the public interest;

- in order to protect a members' own interests; (i.e., in order to defend themselves against a criminal charge, disciplinary proceedings, a civil penalty or a taxation offence.)

14. When making a disclosure to a third party without consent (of the party to whom the duty of confidentiality is owed) a member must act reasonably and in good faith when dealing with the proper authorities (see below for further information) and exercise caution when making statements and assertions and should consider whether it is appropriate to inform the entity of the IP's intentions before disclosing the matter. Members' attention is drawn to R390.15 of the Insolvency Code of Ethics (https://insolvency-practitioners.org.uk/regulation-and-guidance/).

15. In deciding whether to disclose confidential information, the member should use their professional judgment and also consider the points raised in paragraph 104.3 A2 of the Insolvency Code of Ethics:

    - whether disclosure could harm the interests of the parties and third parties (regardless of whether the member receives consent to disclose the information);
    - whether or not all the relevant information is known and substantiated, to the extent practicable; factors affecting the decision to disclosure include whether the situation involves unsubstantiated facts, incomplete information, or unsubstantiated conclusions;
    - the proposed type of communication, and to whom it is addressed;
    - whether the parties to whom the communication is addressed are appropriate recipients.

Legal Professional Privilege

16. Reporting of Information which may be subject to Legal Professional Privilege (LPP) requires particularly careful consideration. LPP is important because it protects clients by allowing them to speak frankly with their legal representative on the basis that communications between them will not be disclosed to third parties without the client's specific consent.

17. The issues surrounding a disclosure involving LPP are not straightforward, and members are advised to seek their own independent legal advice prior to disclosing information which may be subject to LPP.

Seeking advice prior to disclosure

18. When a member suspects a default or unlawful act has been committed by another person, the member should use their professional judgment and carefully consider the circumstances to determine whether their suspicions are sufficient to require them to report the matter. The member should refer to their firm's internal policies and procedures (see internal reporting below).

19. A member who is uncertain how to proceed should consider taking independent legal advice. Issues concerning an IP's duties may arise at short notice, accordingly members are encouraged to identify suitably qualified sources of legal advice in advance of any need for advice arising.

Internal reporting

20. Generally, before disclosing the matter to third parties, and unless there is a good reason not to, a member should first raise suspected (or known) non-compliance with laws and regulations within reporting lines in their firm (or employing organisation) in accordance with internal policies and procedures. A member should consider reporting matters internally to their immediate superior, or the appropriate NO.

21. Members making a disclosure should ordinarily use the correct internal procedures and channels for whistle-blower disclosures, unless there is good reason to believe it would be inappropriate to do so.

22. All discussions with individuals regarding defaults or unlawful acts must comply with the money laundering regulations regarding reporting requirements and must avoid "tipping off" (see below).

23. Reports of known or suspected money laundering offences (whether voluntary or required by law) should normally be made to the NO without delay. The NO will determine whether or not a report should be made to the NCA. In circumstances where there is a real risk that disclosure to those parties might prejudice any investigation or court proceedings or is prohibited by law (e.g. "tipping off"), the IP should make their report to the proper authority (see below for further details) without delay and without first informing other relevant parties.

24. A member may wish to obtain independent legal advice if they are unable to discuss matters with a higher authority within their organization, or if the member believes that the appropriate corrective action will not be taken and the appropriate disclosures will not be made timeously to the proper authorities or if the member is uncertain how to proceed.

Tipping off

25. 'Tipping off' is a specific offence under s.333A Proceeds of Crime Act 2002 (POCA) and s.21D Terrorism Act 2000.

26. In general terms, 'Tipping off' refers to the disclosure of information that could alert a person involved in criminal activity that they are under suspicion and/or investigation for money laundering or other criminal activities (including terrorism). 'Tipping off' may be committed in a variety of ways and will occur, for example, where a person who receives information in the course of business in the regulated sector:

- has made or suspects that either a Suspicious Activity Report (SAR), of a SAR with a

Defence Against Money Laundering ('DAML') request has been made under POCA and alerts a relevant individual (such as the suspect or their associate) that a relevant disclosure has been made to the NCA (or to any other individual), where that alert is likely to prejudice any investigation, or

- discloses that an investigation (into allegations that an offence under POCA has been committed) is being contemplated or is being conducted, where that disclosure is likely to prejudice any investigation that might be conducted.

Disclosure to third parties.

Disclosure required or authorised by law.

27. The law may require or authorise disclosure of information to the proper authorities (see below for further details) without the employer's or client's consent, for example, pursuant to a court order, or when a member suspects money laundering, or when preventing an act of terrorism.

28. Where the IP is authorised or required by law to make a disclosure, such disclosure should be made to a proper authority (see below for further details).

29. Failure to comply with disclosing requirements required by law may result in a member breaching the law and committing an unlawful act (e.g., breach of court order, or breach of confidentiality).

Disclosure in the public interest

30. A distinguishing mark of the insolvency profession is its acceptance of the responsibility to act in the public interest. Hence, a member has a responsibility to act in the public interest (Insolvency Code of Ethics paragraphs 110.1, 390.4 and 390.14 - https://insolvency-practitioners.org.uk/regulation-and-guidance/)). When responding to suspected non-compliance, the IP's objectives are:
    (a) to comply with the principles of integrity and professional behaviour;
    (b) to seek to enable management or where appropriate those charged with governance of the entity (and the employing organization), by alerting them, to rectify, remediate or mitigate the consequences of the suspected non-compliance, or to deter the commission of non-compliance which has not yet occurred, and
    (c) to take such further action as appropriate in the public interest

31. Members 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. For further guidance see Insolvency Code of Ethics paragraphs 390.14 to 390.16, which details an IP's responsibility to disclose confidential information where it is in the public interest to do so. Inconsequential matters and misconduct of a personal nature are excluded.

32. The public interest test is a legal concept to determine whether a particular action or

decision is in the best interests of the general public. The precise definition of the public interest test can vary depending on the specific context in which it is used, but it generally involves consideration of the benefits and drawbacks of a proposed action or decision to the public as a whole.

33. When considering such a disclosure, a member should, where appropriate, follow the internal procedures of their employer or firm in an attempt to rectify the situation. If the matter cannot be resolved, a member should determine the following:
    - legal constraints and obligations;
    - whether members of the public are likely to be adversely affected;
    - the gravity of the matter, for example the size of the amounts involved and the extent of likely financial damage;
    - the possibility or likelihood of repetition;
    - the reliability and quality of the information available; and
    - the reasons for the employer or firm's unwillingness to disclose matters to the relevant authority.

34. When considering whether disclosure should be made on public interest grounds a member should evaluate each situation on its own merits and should seek independent legal advice if uncertain about the appropriate course of action.

35. Where a member considers that disclosure in the public interest is required, the member should initially assess whether it is appropriate to inform the relevant individual or organisation about the issue, allowing them a chance to address it prior to disclosing the matter to the relevant authority.

36. Examples of situations where the public interest may require, or permit disclosure are set out in section 1 of the Public Interest Disclosure Act 1998 (PIDA) and Part IVA section 43B of the Employments Rights Act 1996 (see below).

37. Where the IP believes that disclosure of suspected or actual non-compliance with laws or regulations would be in the public interest the IP should make a disclosure to a proper authority (see below for further information).

38. Anyone who is considering making a disclosure to the IPA should ensure that the disclosure is in the public interest and should consider seeking their own independent legal advice prior to making a disclosure.

Proper authorities for disclosure in the public interest

39. Proper authorities are defined by Denning LJ in Initial Services v Putterrill, 1968 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 National Crime Agency
- The Crown Prosecution Service (E&W)
- The Crown Office and Procurator Fiscal Service (Scotland)
- Police forces
- The Financial Conduct Authority
- The Department for Business and Trade
- Recognised Professional Bodies

Note that the "proper authorities" for disclosure in the public interest are not necessarily "prescribed persons" to whom protected disclosures may be made under PIDA. A list of prescribed persons and bodies can be found here: https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2

40. A member making a disclosure of a suspected or actual non-compliance with law or regulation directly to a proper authority should ensure that their report includes:

- the name of the entity;
- any statutory authority under which the report is made;
- the context in which the report is made;
- the matters giving rise to the report;
- a request that the recipient acknowledge that the report has been received;
- their name and;
- the date on which the report was written.

The Public Interest Disclosure Act 1998 (PIDA) and The Employment Rights Act 1996 (ERA)

41. Where a worker exposes illegal, illicit or dangerous activity (or its concealment) they may have some legal protections pursuant to section 1 of PIDA, which inserted sections s.43A to s.43L into the Employment Rights Act 1996 (ERA). A worker's claim must ordinarily be presented to the employment tribunal within three months of the detriment (or dismissal), subject to any extension granted for participating in the ACAS early conciliation scheme.

42. The legislation grants a "worker" the right not to be subjected to any detriment imposed by their employer due to making a "protected disclosure" defined in s.43A & B ERA. Workers may claim financial compensation (potentially including aggravated and exemplary damages) for discrimination, dismissal or victimisation arising from the making of a protected disclosure. Dismissal (or redundancy) of an employee will automatically be unfair if the principal reason for the dismissal (or redundancy) was because the individual made a protected disclosure. Further, the usual qualifying minimum period of service and the upper limits on compensation do not apply. Co-workers who subject an

individual to detriment in relation to a protected disclosure may also be fixed with personal liability (for which the employer may also be vicariously liable).

43. The Department for Business and Trade is currently reviewing the framework of whistleblowing law.

Worker (s.43K ERA)

44. The concept of a "worker" in the whistleblowing legislation is wider than the usual definition and extends to agency workers and freelance workers. The concepts of "worker" and "employer" are widely defined (by s.43K ERA) and the IPA considers that an Insolvency Practitioner is likely to be a worker for these purposes and so potentially entitled to the PIDA / ERA protections.

Qualifying Disclosures and Protected Disclosures (s.43A and s.43B ERA)

45. A worker makes a "qualifying disclosure", where the worker reasonably believes that the disclosure is in the public interest and tends to show one or more of the following 'relevant failures':

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(See s.43B ERA for more information)

46. A disclosure is not a qualifying disclosure, however, if the person making the disclosure commits an offence by making it (s.43B ERA). For example, a disclosure which amounts to the offence of tipping off would not be protected by ERA.

47. Note that a qualifying disclosure made by a worker will only become a "protected disclosure" if the disclosure is made to one of the persons listed in sections 43C to 43H ERA, and in accordance with those sections, which are summarised below. A worker who makes a protected disclosure is granted some limited statutory protections by PIDA / ERA.

Protected disclosures to Employer (s.43C ERA)

48. Qualifying disclosures made by a worker to their employer are protected disclosures. The legislation encourages disclosures to be made to the employer (internal disclosure) as the primary method of whistleblowing. It is relatively common for protected disclosures to be made to a worker's employer. Where appropriate, workers should use the procedure authorised by the employer for making disclosures.

Protected disclosures to non-employers responsible for the wrongdoing (s.43C ERA)

49. Qualifying disclosures are protected disclosures if they are made to a person (other than the worker's employer) where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of that person (the "responsible person").

Protected disclosures to legal adviser (s.43D ERA)

50. Qualifying disclosures made in the course of obtaining legal advice are protected disclosures.

Protected disclosures to Minister of the Crown (s.43E ERA)

51. Qualifying disclosures are protected disclosures if the worker's employer is either appointed under an enactment by a Minister of the Crown or a member of the Scottish Executive or a body whose members are so appointed, and the disclosure is made to a Minister of the Crown or a member of the Scottish Executive.

Protected disclosures to a prescribed person (s.43F ERA)

52. Qualifying disclosures are protected if the worker makes the disclosure to a person prescribed by an order made by the Secretary of State and the worker reasonably believes that:
    (i) the relevant failure falls within the description of matters in respect of which the prescribed person is prescribed, and
    (ii) that the information disclosed, and any allegation contained in it, are substantially true.

    Note that the conditions for making a disclosure to a prescribed person are therefore more stringent than the conditions for making a protected disclosure under s.43C to s.43E ERA. Members who believe that the information and allegations therein are substantially true, should carefully check that the relevant failure falls within the matters for which that person is prescribed before reporting to that prescribed person.

53. The Department for Business and Trade publishes a list of prescribed persons, the matters for which they are prescribed persons and their contact details (www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2). Prescribed persons include the Secretary of State for Business and Trade , National Crime Agency, HMRC, Environment Agency, Health and Safety Executive, Food

Standards Agency, Competition and Markets Authority, Secretary of State for Business and Trade, Financial Conduct Authority, Prudential Regulation Authority, Information Commissioner, Ofcom, Ofsted, General Medical Council, a member of the House of Commons and many others, operational in England, Wales and Scotland.

54. The IPA and other Recognised Professional Bodies are not prescribed persons under PIDA / ERA, however, protected disclosures concerning fraud or other misconduct in relation to companies can be made to the Secretary of State for Business and Trade via the Intelligence Team, Insolvency Service, Intel.team@insolvency.gov.uk.

Protected disclosures in other cases, aka "wider disclosure" (s.43G ERA)

55. Qualifying disclosures are protected in other cases if,
    (a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, and
    (b) the worker does not make the disclosure for personal gain (when assessing personal gain, disregard any reward payable by or under any enactment – s.43L ERA), and
    (c) either,
        (i) at the time of disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer, or
        (ii) where no person is prescribed (per s.43F ERA) in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
        (iii) that the worker has previously made a disclosure of substantially the same information to his employer or in accordance with s.43F,

    and

    (d) in all the circumstances it is reasonable for the worker to make the disclosure, having regard to:
        (i) the identity of the person to whom the disclosure is made,
        (ii) the seriousness of the relevant failure,
        (iii) whether the relevant failure is continuing or likely to occur in the future,
        (iv) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
        (v) any action which the employer or the person to whom the worker has made a previous disclosure (per (c)(iii) above) has taken or might reasonably be expected to have taken as a result of the previous disclosure.
        (vi) if the worker made a previous disclosure to their employer (per (c)(iii) above), whether the worker complied with any procedure whose use was authorised by the employer.

56. Note that the conditions for making a "wider disclosure" protected under s.43G are more stringent than the conditions for making a protected disclosure under gateways s.43C to s.43F ERA.

Protected Disclosure of exceptionally serious failure (s.43H ERA)

57. If the relevant failure is exceptionally serious, then the conditions for making a protected disclosure are not quite as stringent as under s.43G ERA.

58. Qualifying disclosures of exceptionally serious failures are protected disclosures if:
    (a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
    (b) the worker does not make the disclosure for personal gain (when assessing personal gain, disregard any reward payable by or under any enactment – s.43L ERA),
    (c) the relevant failure is of an exceptionally serious nature, and
    (d) in all the circumstances of the case, it is reasonable for the worker to make the disclosure, having regard in particular to the identity of the person to whom disclosure is made.

Disclosing suspected money laundering to the IPA

59. Disclosures will be dealt with by the IPA under our responsibilities as a Supervisory Authority under The Money Laundering, Terrorist Financing & Transfer of Funds (Information on the Payer) Regulations 2017 (MLR17) and our duties as a regulator of insolvency matters.

60. Offences that may indicate Money Laundering include:

- Concealing, transferring, disguising or converting criminal property or removing such property from the UK;
- Entering into or becoming aware of arrangements which it is known would facilitate the acquisition or control of criminal property.

Guidance for Members

61. Where a member is required by law to disclose confidential information as a result of MLR17, an IP should always disclose that information in a way that is compliant with the relevant law.

62. The IPA has set-up an email address which can be used to make a confidential disclosure to the IPA regarding suspected money laundering. The address is: amlwhistleblowing@ipa.uk.com

Guidance for third parties

63. Not only does the IPA welcome disclosures from members of the IPA, it also welcomes and supports disclosures from third parties including general members of the public.

64. The IPA has set-up an email address which can be used to make a confidential disclosure to the IPA regarding suspected money laundering. The address is: amlwhistleblowing@ipa.uk.com

65. Disclosures should provide as much detail as is available and at least the identity of the person against whom the allegation is being made and any documentary evidence or detail that would assist the IPA in carrying out relevant enquiries.

66. Disclosures should provide as much information as possible about the suspected money laundering activities. This may include details such as names, dates, amounts and any other relevant information. If possible, provide evidence to support your concerns. This may include documents, emails, or other records that you have access to.

Anonymous reporting and confidentiality

67. The IPA, when in receipt of confidential information from an IPA member or third party will process that information in accordance with its responsibilities and duties as a regulatory body and, in the case of disclosure pursuant to anti-money laundering or anti-terrorist legislation as a Supervisory Authority under MLR17.

68. The IPA will treat all disclosure reports with the utmost confidentiality. The information will only be shared with individuals who need to know for the purpose of the investigation.

69. The identity of the person who made the disclosure will not be disclosed to anyone outside of the IPA without their consent, except where required by law.

70. IPA members and third parties do have the option of reporting their concerns anonymously. However, anonymous reporting should be a last resort as it may hinder the investigation process. It should only be used if the IPA member or third party has a genuine reason not to disclose their identity.

Disclosure to HMRC

71. The IPA also supports disclosures to HMRC where the public or an IPA member believes that another IPA member is committing tax evasion or fraud or is assisting with tax evasion or fraud. The HMRC tax fraud hotline is 0800 788 887. Disclosures to the HMRC hotline do not prevent a disclosure also being made to the IPA.

Documentation

72. When disclosing confidential information, a member must bear in mind that any decision to disclose may be called into question at a future date. A member is advised to keep detailed contemporaneous notes of meetings and telephone conversations relating to the matter.

73. In situations where a member discloses confidential information to a third party, a member is encouraged to keep a record of:

- Any consent given;

- discussions held or decisions taken concerning the disclosure of confidential information;
- a schedule summarising disclosures and to whom they are made;
- copies of relevant documentation; and
- any legal or other advice obtained.

Further Information

74. There are various organisations which may be able to provide you with support, such as:

- 'Protect', the independent whistleblowing charity offer a confidential helpline. Their contact details are:

  Helpline: 0203 117 2520

  Email: info@protect-advice.org.uk

  Website: https://protect-advice.org.uk/contact-protect-advice-line/

- "ACAS", whose website is available here: https://www.acas.org.uk/

- "Citizens Advice", whose website is available here: https://www.citizensadvice.org.uk/