INSOLVENCY CODE OF ETHICS CONSULTATION QUESTIONNAIRE

RESPONSE OF THE PRACTICE GUIDANCE, ETHICS & STANDARDS COMMITTEE OF THE INSOLVENCY PRACTITIONERS ASSOCIATION

1 Do you believe that the revised version of the Code provides a clear structure and uses clear language under which to operate? No

2 If "no", please explain why.

It is understood that there is a desire to create further certainty and enhance enforceability of the Code by the use of the imperative. This is broadly supported.

However, the change of language to "shall" appears to have been implemented on a indiscriminate basis. In a number of instances this is not appropriate in the context of the specific requirement and in others it is grammatically incorrect. It is also inconsistent with both the agreed JIC style guide for drafting (which prescribes the use of "should" to denote required practice) and the current drafting style of UK legislation (which uses "must" where a requirement is absolute).

On an additional stylistic point, there are a number of instances of the incorrect usage of "judgment", which ought to be spelled with an "e" ("judgement") unless reference was being made to the decision of a Court.

Lastly, we understand that italics were historically used for defined terms. However, the current usage appears inconsistent and it is questioned whether it is useful or necessary in any event.

3 Do you believe that the Code would be supported by issuing guidance and will be an effective way of assisting stakeholders to understand the application of the framework to specific situations? No

Ideally, the Code should stand alone and be capable of interpretation without the need for additional guidance.

4 If "no", please explain why.

The Ethics Code prescribes a process to be adopted. It mandates the application of that process, but not necessarily in the outcome, which is for the Practitioner themselves to determine. The risk of including further examples, whether within the Code or as additional guidance, is that Practitioners may conclude that, if an example is not listed as proscribed, then it may be considered acceptable. A list will invariably never be exhaustive. The provision of additional examples also risks undermining the requirement that the framework is applied in every case.

5 Please provide information on areas where you consider guidance would be particularly helpful.

We consider that a template for documenting the application of the framework both at the inception of instruction and throughout the appointment could usefully be provided.

Additionally some further clarity that the Code is of equal application to non-appointment taking Practitioners could usefully be included in paragraph 6. [See question 19 below].

6 Do you believe that the revised version of the Code identifies in Part 2 Section H the key matters of specific application where an IP is an employee? No

Whilst we support the inclusion of a section concerning employee IPs, it was understood that the reason for doing so was to support Practitioners in such roles, in the context of their dealings with their employers. We do not feel that the current drafting adequately achieves this.

Requiring a Practitioner to resign their employment may interfere with their human and employment rights, may well be unenforceable and may precipitate an undesirable "abandonment" of portfolios. This is unlikely to be in the interests of stakeholders, when compared to an orderly exit from the practice and from the appointments affected. It also places the burden exclusively on the Practitioner, as opposed to reducing an employer's ability to unduly influence the Practitioner, which we understand is the intended purpose.

Additionally, the moving of the current provisions of para 16 (now 24(1)) to a specific section concerning employees has resulted in the deletion of a further example of intimidation threat currently contained at para 16(a)(i) concerning pressure not to *"follow regulations, this Code, any other applicable code, technical or professional standards"*. We consider that this could usefully be retained within the code in the context of intimidation threats to Practitioners (and their practices) generally, rather than being confined to circumstances where the Practitioner is an IP.

7 If "no", what additions do you believe should be made to the matters contained in the Code?

We would suggest that the furthest that the Code ought reasonably to extend is a requirement to resign the insolvency appointment(s), where statutory mechanisms exist for a replacement Practitioner to be appointed, a process in which RPBs may legitimately intervene, where necessary.

We would also suggest also the insertion of a further sentence to the effect that:

> ***"An Insolvency Practitioner must not enter into a contract of employment that would fetter their ability to comply with the fundamental principles of the Code, nor accept instructions from their employer that would contravene these principles."***

This may enhance employee Practitioners' ability to negotiate appropriate contractual terms and, at least, resist contractual pressure that may be applied to them.

8 Do you believe that the provisions in the Code relating to an IP obtaining specialist advice or services (Part 2 Section C) remain appropriate? No

Questions concerning the ethics of paying for specialist advice and services are inextricably linked to those concerning the current prohibition upon payments for the introduction of introduction of insolvency appointments.

We are of the view that both issues should be examined concurrently and in the context of both the broader regulatory landscape and the public interest.

Practitioners must necessarily be at liberty to pay for the services of specialist third parties (although the Code requires that they should consider whether "such reliance is warranted"). These services will take a number of forms, from valuation or legal services, payments to assist in the production of a Statement of Affairs and/or finalise a company's accounts, or packaged pre-IVA information.

The requirement per para 74 (formerly para 53) is that the service reflects the "value of the work undertaken". Value to whom (whether the practitioner or the insolvent) is not specified and value is itself fundamentally subjective and can be difficult to assess.

Where the value is not demonstrably reflected, it would be arguable that the payment was in fact not in respect of the service, but as either a) a payment for the introduction itself (which is prohibited); or b) where the service provider is a connected entity, a secret profit or concealed remuneration for the Practitioner. Both scenarios clearly constitute breaches of the fundamental principles.

9 If "no", please explain why and what amendments you believe should be made.

Notably, the ability to use third party services is not limited to post-appointment services, nor, in our view, should it be. Practitioners need to be able to purchase the specialist assistance they need, both pre and post-appointment, particularly where that assistance is itself a regulated activity. Differentiating between different types of service would be a difficult and potentially arbitrary exercise.

Given that the provision of debt advice is an FCA regulated activity, utilising the services of an FCA regulated lead introducer / advice provider may in fact be desirable and something that should be encouraged and facilitated.

The current exclusion from FCA authorisation under which most Insolvency Practitioners operate is somewhat deficient, in that it only allows them to provide debt advice services when acting as office holder, or "in reasonable contemplation" of being appointed as such. This effectively precludes IPs from providing advice about bankruptcy and non-statutory debt solutions (they may only provide "information and explanations" about these options).

Perhaps unhelpfully, HM Treasury have declined to provide in legislation that debt advice lead introducers require FCA authorisation. To the contrary, they maintain that packaging information is not providing "advice" (though it is difficult to conceptualise how referring a debtor to an IVA provider is not tantamount to "advising" them to enter an IVA).

The effect of this approach is that the packaged information or leads are coming largely from an unregulated sector. This has led organisations such as the Money Advice Trust to express their concerns about whether consumers are suffering detriment as a consequence. We have also detected concern from within the insolvency profession about the practices of unregulated lead generators and a desire to see these activities regulated.

The revision of the Ethics Code provides an opportunity for the profession to constructively contribute to protecting consumers by encouraging the use of regulated "specialists"; linking this to the requirement that reliance upon them is "warranted".

The second sentence of para 74 could usefully be reinforced to state:

> *"The Insolvency Practitioner shall consider factors such as reputation, expertise, resources available, **whether the service is regulated** and **any** applicable professional and ethical standards."*

This is elaborated upon below in connection with payment for the introduction of insolvency appointments.

10 Do you consider the provisions in Part 2 Section C are adequate where the specialist advice or services provider is an entity or person where there is a personal or business relationship Yes

Given the fiduciary nature of insolvency appointments, it is not appropriate for a Practitioner to make a secret profit. Where there is connectivity with a supplier, transparency and appropriate safeguarding are important to maintaining trust and confidence in the profession. The current provisions are not unduly onerous, though we would comment that not all of the proposed changes to "shall" (as opposed to must or should) are appropriate or grammatically correct.

11 If "no", please explain why and what amendments you believe should be made.

N/A

12 Do you believe that the provisions in the Code relating to referral fees or commission in respect of an engagement which may lead to an *insolvency appointment* or during an *insolvency appointment* (Part 2 Section D) remain appropriate? No

13 If "no", please explain why and what amendments you believe should be made.

Para 80 mandates the disclosure to creditors of referal fees or commissions received by a practitioner prior to their appointment. However, where fees or commissions are accepted after having accepted an appointment, the disclosure requirement is effectively optional (para 83). The reason for this difference is unclear and we would suggest that disclosure should be made in all circumstances.

Where fees or commissions are accepted during the conduct of an appointment, para 82 mandates that they must be accepted for the benefit of the estate. An alternative approach may be that, provided there was full transparency, such fees could reasonably be used in lieu or reduction of remuneration.

Lastly, it is noted that disclosure is only made in respect of pre-appointment receipts by the Practitioner themselves, and not necessarily their practice. This may be problematic, particularly in the context of additional products and services not uncommonly sold to individual debtors during the pre-appointment stages (banking facilities, life and health insurance products).

Generally, paras 79-83 would more usefully be expressed in the imperative "must", as oposed to the current "should".

14 The Code sets out in Part 2 Section E that due to the 'special nature' of insolvency appointments, the payment or offer of any commission for or the furnishing of any valuable consideration towards the introduction of insolvency appointments is inappropriate.

Please explain why you consider insolvency appointments to be of a 'special nature' and what the 'special nature' is.

It is notable that the supposed "special nature" is not defined within the Code. There is historic, statutory provision relating to the liquidation of companies (corrupt inducement) but notably, no similar statutory prohibitions in relation to personal insolvency or other forms of corporate insolvency proceedings. It is understood that a similar ethical prohibition in relation to payments for the introduction of audit was removed some time ago.

The "special nature of insolvency" prohibition may have been derived from that liquidation provision, in that it may have been designed to discourage improper incentives for a referral of a debtor (personal or corporate) to an IP, but the reasons for the Code's long standing provision on this are hard to trace and clearly not fully understood.

It may be more understandable to refer to the fiduciary nature of insolvency appointments as an alternative.

15 Do you believe that the provisions in the Code relating to obtaining insolvency appointments (Part 2 Section E) remain appropriate? No

Paying for "packaged information" or "leads" (which may or may not result in insolvency appointments) is common place in the personal insolvency and debt solutions market, and is not expressly prohibited by the Code where these payments are made for the supply of specialist advice or services, reflecting the value of the service provided (see question 8 above). Furthermore, such payments are specifically permitted within the FCA regime for the regulation of debt counselling providers and these sectors are intrinsically linked with the provision of statutory debt solutions.

The market has operated in this way for many years and the established practice is to pay a flat rate to avoid any suggestion that this is a prohibited commission. Arguably, this is not significantly different from payments made to introducing accountants for assisting in the production of a statement of affairs and/or finalising accounts, and given the size and complexity of the debt solutions market, it is perhaps overly simplistic to suggest that paying for packaged information (or leads) in this way should simply be banned.

Given that an IP may not pay for such a lead with reference to it converting to an insolvency appointment (for fear of it being deemed to be a prohibited payment) there is little economic or regulatory incentive for the lead introducer to provide appropriate advice or have regard to the sustainability of cases, as the lead introducer will necessarily get paid either way. By not being FCA authorised, they avoid the associated costs of regulation.

It is arguable, therefore, that the current absolute prohibition on payments for the introduction of insolvency appointments may be inadvertently driving the provision of lead generation services by the unregulated sector as the economic link between the lead and the likelihood of conversion and sustainability has been broken. These practices are potentially harmful for consumers and also for the profession and this strained interpretation of the professional conduct framework for insolvency practitioners is difficult for stakeholders to perceive as sufficiently robust.

These limitations add further peril for consumers that the advice they receive may not be as comprehensive as it would be, were insolvency professionals allowed to deliver full-spectrum advice (which they currently may not). A number of organisations, including the Money Advice Trust, believe that consumers would be better served by the debt advice element delivered by an FCA authorised debt adviser.

The current and uncomfortable position whereby payments to these parties are made by way of payments for specialist services (discussed above), whilst appearing to be ostensibly a prohibited payment for the introduction of an appointment, is undermining external confidence in the regulatory framework and should be addressed.

16 If "no", please explain why and what amendments you believe should be made.

The historic reticence to abolish the prohibition on the payment for the introduction of insolvency appointments for fear that this creates a market were appointments invariably go to the highest bidder is understood. However, the revision of the current Ethics Code provides an opportunity to consider whether the current blanket-ban is achieving its intended outcome and/or whether standards could in fact be enhanced by its revision.

We suggest that a minor revision would assist in addressing the current problem areas without opening the floodgates to the wholesale commoditisation of appointments.

It is suggested that the consumers would be better protected and the profession able to operate in a more transparent and understandable manner were the Ethics Code to expressly provide that pre-appointment payments for "necessary and regulated services" (e.g. provision of audit, legal services, valuation services or debt advice provision) were not considered to be a payment for the introduction of an insolvency appointment.

> *"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:*
>
> *a) an arrangement between an Insolvency Practitioner and an employee whereby the employee's remuneration is based in whole or in part on introductions obtained for the Insolvency Practitioner through the efforts of the employee; or*
>
> ***b) A payment for specialist advice and services made in respect of a necessary and regulated service.***

It is suggested that permitting practitioners to make transparent payments to regulated providers of services (such as FCA authorised debt counsellors) would not create a market for insolvency referrals that does not already exist, but would restrict that market to those that are properly regulated in the services they provide. It would also render the regulation of Practitioners against these standards something that external stakeholders would find more readily understandable and thereby engender greater trust and confidence in the work of the insolvency profession.

17 Do you consider that the approach taken within the Code to matters under Part 2 Section C, Section D and Section E should differentiate between personal and corporate appointments? No

We consider that the same framework and considerations apply in both corporate and personal insolvency situations. Any distinction would be artificial and would risk undermining confidence that the same rigorous standards are applied to all Practitioners, in all of their professional work, as required by paragraph 6.

18 If "yes", please explain why and how the approach should differ.

N/A

19 Are there any other amendments you would wish to suggest to the Code? Please provide details below.

Paragraph 31: We consider that reference could usefully be made to the corporate culture of the practice, and its leadership, rather than the current emphasis on top down enforcement of ethical standards. The leadership of the practice should demonstrate the application of expected ethical standards in addition to stressing their importance.

In a more general context, we consider that it could be reinforced that the Code is of application throughout the conduct of an appointment (the current drafting emphasises pre-appointment considerations). This could be assisted by amendment to paragraph 6 to the effect:

"An Insolvency Practitioner should ensure that the Code is applied in all professional work relating to ***the conduct of*** *an insolvency appointment, and to all professional work that may lead to an insolvency appointment,* ***irrespective of whether that pratitioner ultimately acts as office holder****."*

This submission is made on behalf of the Insolvency Practitioners Association by its Practice Guidance, Ethics & Standards Committee, with the concurrence of its Council.

This submission is not intended to represent the views of every member of the Association, who remain individually at liberty to submit responses in a personal capacity, or upon behalf of their practices.

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