

# Consultation on guidance on aspects of the ICAEW Code of Ethics

A document issued by the Institute of Chartered Accountants in England and Wales

Comments from ACCA

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ACCA welcomes the opportunity to comment on the proposals issued by ICAEW. The ACCA Global Forum for Ethics has considered the draft guidance, and the views of its members are represented in the following.

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## OVERALL COMMENTS

ACCA welcomes attempts to provide guidance in support of ICAEW's Code of Ethics ('the Code'). However, the proposals must also be viewed in the context of the Code of Ethics for Professional Accountants produced by the International Ethics Standards Board for Accountants ('the IESBA Code'). The IESBA Code is the code with which all the professional bodies that are members of the International Federation of Accountants (IFAC) must require compliance of their members.

The ICAEW Code includes some specific provisions that must apply where the strict application of the Code would otherwise not be in the public interest (most notably overriding the *confidentiality* requirement). The ACCA Code of Ethics and Conduct includes similar provisions. However, it is important to note that the IESBA Code mentions 'the public interest' only four times in the whole of Part A. Most notably, the IESBA Code states:

*'A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. 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 shall observe and comply with this Code.'*<sup>1</sup>

We agree with the appeal tribunal that the public interest responsibility of a professional accountant is to act in accordance with the five fundamental principles and, when threatened, to safeguard those principles. However, it is when facing threats that the ability to comply with the fundamental principles becomes more difficult. For example, in practice the principle of *integrity* includes terms such as 'straightforward', which may mean different things to different people. Therefore, in seeking to safeguard the fundamental principles, the third party perspective of 'the public' can assist, and the question of where

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<sup>1</sup> IESBA Code, paragraph 100.1



the public interest lies helps to provide clarity concerning the appropriate course of action, even if a definition of ‘the public interest’ cannot be clearly articulated.

The report of the Appeal Tribunal considered the hypothetical example of a proposed takeover, and concluded: ‘We regard the suggestion, if it be made, that the accountants are not free to accept the engagement without considering the vague question whether the takeover is in the public interest as absurd’. We believe this misses the point slightly. The professional accountant should *always* consider the public interest. However, different professional accountants will often reach different conclusions (eg depending on who are ‘the public’, what are their interests, the relevant timeframe under consideration, etc). This suggests that there is often value in documenting the decision-making process, but does not remove the need to *consider* the public interest and to strive to uphold it.

Understanding the spirit of the Code helps the professional accountant to identify the right course of action in any given situation. If the Code has been well-drafted, then following the spirit of the Code should not present any conflicts with any of the Code’s specific requirements. We acknowledge, however, that the spirit of the Code is something that could be usefully explained in training and guidance, and this would meet the paramount requirement of improving understanding and enhancing ethical conduct.

There must be consistency in understanding and application of the Code. Nevertheless, we believe that this is not to be achieved by seeking a definition of ‘public interest’. Instead, we believe that to propose any definition would present a significant risk that users of the Code would focus more on interpretation of the definition to suit their circumstances, rather than on the spirit of the Code. Focusing on a definition of the public interest would be so complicated that the definition would become stretched and expanded to include a range of interests and opinions, reducing clarity but perhaps raising the expectations of stakeholders nevertheless. The existing fundamental principles provide clarity, while allowing freedom to act on behalf of clients and employers. Therefore, observance of the fundamental principles allows the professional accountant to serve the public interest.



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## SPECIFIC ISSUES

In this section of our response, we answer the eight questions set out in section 2.2 of the consultation paper.

### *Public interest responsibility of accountants*

**Question 1: Do you agree with the interpretation given of the requirements in the Code that the individual member's public interest responsibility as regards ethical behaviour is to comply with the spirit as well as the letter of the Code? If not, what do you consider the public interest responsibility of an individual member to be and how should this be defined?**

We should avoid encouraging professionals to have a narrow view of the public interest. However, it is important that professionals have a clear understanding of what is expected of them. The challenge is, therefore, to achieve this balance. The IESBA Code states:

*'The conceptual framework approach assists professional accountants in complying with the ethical requirements of this Code and meeting their responsibility to act in the public interest.'*<sup>2</sup>

We believe the framework of fundamental ethical principles upon which the IESBA Code is based is comprehensive, and complete compliance with the fundamental principles amounts to acting in the public interest. The conceptual framework helps the professional accountant to identify threats to the fundamental principles and safeguard those principles. Because the conceptual framework helps professional accountants to safeguard the fundamental principles, it also helps them to act in the public interest.

Of course, professional accountants must act with integrity, which implies following the spirit as well as the letter of the Code. The spirit of the Code must be clear to professional accountants using the Code, ie what the Code is intending to achieve. This should provide the desired outcome of better

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<sup>2</sup> IESBA Code, paragraph 100.6



understanding and consistency in the Code's application. However, compliance with the letter of the Code would imply compliance with all the fundamental ethical principles, which are wide-ranging. Therefore, if the Code has been appropriately drafted, compliance with the letter of the Code cannot present any conflict with the spirit of the Code.

If this is not the case, it must be because there is a flaw in the detail of the Code, which highlights the problem of being too prescriptive. If the Code is written in such a way that the fundamental principles are paramount, then the spirit of the Code simply helps the professional accountant to identify the right course of action more easily. It should not contradict any of the Code's requirements.

We firmly believe that no attempt should be made to define the public interest. It would be difficult (if not impossible) to construct a definition with which all interested parties would be in agreement. That is not to say that a professional accountant should not have regard for the public interest. In most situations, the right course of action will be clear, and adhering to the principle of upholding the public interest will not present a significant challenge. In other situations, it would be good practice to document why the action taken was believed to be in the public interest. This process would assist the professional accountant in acting objectively and demonstrating integrity, and might also serve to avoid disciplinary action.

**Question 2: What, if any, additional safeguards or other actions should members practically take, over and above those suggested in the draft guidance:**

- a) When in doubt as to whether an action would discredit the profession?
- b) To avoid association with activities that are likely to bring the profession into disrepute?
- c) When the public would be likely to be interested in the outcome of the service or activity?

First, we suggest that professional accountants should get used to considering discreditable *conduct*, rather than action alone. (Conduct would include inaction.)



We suggest that due regard for safeguarding the reputation of the professional accountant and his or her firm or employer would be a useful proxy to safeguarding the reputation of the profession. Transparency (to the extent appropriate) is an effective safeguard, as it requires the professional accountant to assess whether third parties might regard any other safeguards to be necessary. More specifically, discussions with a professional body concerning the threats and safeguard are usually very helpful. In fact, the IESBA Code states:

*'When a professional accountant encounters unusual circumstances in which the application of a specific requirement of the Code would result in a disproportionate outcome or an outcome that may not be in the public interest, it is recommended that the professional accountant consult with a member body or the relevant regulator.'*<sup>3</sup>

The wording under (c) above risks confusion. The issue we are addressing in this consultation response is how to take decisions in the public interest. This bears little or no relationship to the public (or individuals) being interested in the outcome of a service or activity. Even when nobody appears interested (perhaps not even aware), the public interest must be considered.

**Question 3: A number of illustrative examples of considerations that might apply are given in the draft guidance. Are these helpful? Are there additional examples that could usefully be included to illustrate the issues discussed, or other aspects of the draft guidance note in section 3.1 where additional discussion would be helpful?**

The conclusion in the consultation paper (page 9) is that compliance with only the first four fundamental principles would usually be enough to uphold the public interest, and it asserts: '... if an accountant were to act in accordance with the fundamental principles in relation to a lawful transaction which comes to be regarded as against the public interest, that would not in itself, absent very unusual circumstances, amount to an act of misconduct.' Therefore, it is unclear why the section on 'Association with misleading acts or information' is highlighted within the draft guidance, particularly as this is adequately covered in the IESBA Code in respect of the fundamental principle of *integrity*.

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<sup>3</sup> IESBA Code, paragraph 100.11



Indeed, the suggestion that a professional accountant should not be associated with misleading information because it would bring discredit seems to undermine the IESBA Code, which considers such behaviour to be related to the fundamental principle of *integrity*, rather than that of *professional behaviour*. To attempt to relate public interest to discredit throughout the draft guidance is, in our opinion, inappropriate.

We believe that some of the examples set out within the draft guidance are not analysed to the extent necessary to be able to derive a useful understanding of decision-making in the public interest. On page 9, the paper states:

*'Similarly, the discredit obligation does not mean that members cannot act for clients whose legal activities are of a controversial nature with the general public, eg, tobacco or animal research. There is a clear public interest that such businesses, as long as they remain lawful, should have access to accountancy services.'*

What this example does not consider is that the professional accountant must make a subjective decision, and so is entitled to form his or her own opinion with regard to whether acting for such a client is in the public interest. As already stated, it will often be good practice to document why a decision to act (or not to act) is considered to be in the public interest.

The discussion concerning whether advising a client within the requirements of the law might, on occasions, not be in the public interest is worthwhile. However, this concern is most often considered in the context of professional conduct in relation to taxation. It is suggested that providing advice to enable avoidance of tax is neither in the public interest nor *professional behaviour* if it brings discredit to the professional accountant or the accountancy profession. In our opinion, to focus on discredit in the ICAEW guidance reduces the value of the guidance, which should be capable of wider application. However, we support the fact that the draft guidance refers to the taxation guidance (page 11), and we believe this should be highlighted as an example of how to act in the public interest.

On page 9 of the consultation paper, the draft guidance states 'it would not be in the public interest for members to set themselves up to make broad political



or philosophical judgements when deciding whether to accept engagements'. But the draft guidance lacks balance if it fails to also recognise that there are certainly occasions on which the course of action that is in the public interest is perfectly clear.

**Question 4: Notwithstanding its intention, do you think that the draft guidance note in section 3.1 is inconsistent with the Code's requirements for members? If so, in what way?**

We believe we have answered this point in our comments above. Considering the draft guidance as a whole, we consider that it fails to adequately support the overriding public interest requirement. It appears that the reason for this is simply that the public interest cannot be defined. However, this is not a reason to disregard the importance of upholding the public interest. The public is entitled to always expect a professional accountant to 'do the right thing', even though 'the right thing' cannot always be defined.

Within the guidance, it may be considered important that some terms are expressed loosely or conceptually, so that high standards of behaviour may be expected, even though enforcement may be more difficult to achieve. Upholding the public interest is an important principle, but what 'the public interest' means will always be open to debate. Although business may prefer a precise definition, we do not consider it necessary or desirable.

**Question 5: No change in the wording of the current Code itself is envisaged as necessary to clarify the issues discussed in the draft guidance. Do you believe there should be amendments to clarify the current position, and if so, what changes would you propose?**

We believe that an assumption has been made that the Code itself does not require change. We feel this may be short-sighted. We accept that the removal of text from the Code might appear radical. However, we suggest that the expectations of the public (and the original tribunal) might have been heightened by some of the detailed explanation added to the Guide to Professional Ethics concerning the public interest.





**Question 6: Looking forward to future evolution of the Code, do you think that there are issues in respect of the matters addressed by the draft guidance note in section 3.1 that the accountancy profession should consider when evaluating potential future changes? If so, what?**

We believe that improved understanding of the fundamental principles and use of the conceptual framework in the IESBA Code is usually best achieved by clear guidance, rather than changes to the IESBA Code itself. This is not to dismiss the potential benefits of the various projects currently being undertaken by the IESBA with a view to clarifying the IESBA Code. With regard to the ICAEW Code, we support the move to create guidance, which should help to maintain high standards of behaviour. However, there are risks in relation to the guidance if it is in any way flawed.

As suggested in response to question 5 above, we believe that changes to the ICAEW Code might be appropriate. We recommend that the next step should be to consider thoroughly the reasons why the initial tribunal process reached the conclusions it did, and why the report of the appeal tribunal described aspects of the Guide to Professional Ethics as ‘vague and unhelpful’.

***Identifying and managing conflicts and  
Determining the basis of charging fees***

**Questions 7 and 8: Do you have any comments on the draft guidance in section 3.2? Do you have any comments on the draft guidance in section 3.3?**

All three pieces of proposed guidance, in fact, concern problems in dealing with conflicting interests. There may be occasions on which the professional accountant inadvertently fails to pay due regard to the interests of another party or the public, and guidance can help with this. More usually, the professional accountant may encounter a self-interest threat (eg through a fee charging structure, or the competing interests of clients where the professional accountant may, in fact, favour the interests of one client over the other). Guidance must deal with these two types of problem in different ways. Where there is a self-interest threat, there will be a tendency for the professional accountant to conceal or underplay his or her self-interest.



Therefore, we believe that the background to this consultation does not justify the simultaneous production of three pieces of guidance. Instead, the focus should be on the public interest, with users being first alerted to their public interest obligations, and then advised how to deal with the threat (to objectivity) of self-interest when faced with a public interest question. We suggest the other two pieces of guidance should be combined.

Some of the examples of identifying and managing conflicts are useful but, although some are closely related to the problematic situations of the MG Rover case, they do not move forward the efforts for clarity in respect of the public interest. We have specific concerns about the paragraphs concerning conflicts within clients. They place importance (as is appropriate) on fiduciary relationships. However, owing a duty through such a relationship is very different from exercising that duty. We support the view that the identification and discharging of a professional accountant's fiduciary responsibility is important. However, the proposed paragraph 9 requires considerable revision, in order to clarify that the point being made is not entirely one relating to public interest.

This section of the guidance also states that the manner in which stakeholders' interests are protected is 'an especially important consideration when one or more groups of stakeholders are large in number ...'. We are concerned that this implies that the interests of a larger population necessarily outweigh other interests.

In the section on informed consent, examples are given of situations in which consent should not be sought. However, it should make clear that other safeguards against the threat to objectivity (and, more importantly, perceived objectivity) should be implemented. It should also be made clear that the driver for taking such a course of action must be that seeking consent would not be in the public interest.

Generally, we believe that the importance of the public's perception of objectivity has not been sufficiently addressed within 3.2 and 3.3.



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## CONCLUSIONS

ACCA's response to this consultation focuses on the public interest responsibility of accountants, as we believe this to be an important issue, and any guidance issued should not be diluted by guidance in respect of other areas. Although enhanced clarity within the Code, or in supporting guidance, must be welcomed, there will always be a place for the overriding requirement to act in the public interest. This is because there is often a lack of clarity surrounding a particular ethical dilemma, and the dilemma can only be resolved by answering the question: 'What is in the public interest?' Attempts to define the public interest will impede such a process.

We believe that, in drafting the consultation paper, an assumption may have been made that no changes to the ICAEW Code itself are necessary. If so, we recommend that this assumption be reconsidered. Some proposals in the paper appear to be attempting to support surplus text in the Code that may, in fact, be adding to the difficulty of identifying the public interest in any given situation. We believe there is a risk that the proposed guidance, if issued in its current form, could further impede clarity.



Think Ahead

