ZIMBABWE

ACT

To amend the Estate Administrators Act [*Chapter 27:20*] and to provide for matters connected therewith or incidental thereto.

ENACTED by the Parliament and the President of Zimbabwe.

1 Short title

This Act may be cited as the Estate Administrators Amendment Act, 2018.

2 Amendment of section 1 of Cap. 27:20

Section 1 ("Short Title") of the Estate Administrators Act [*Chapter 27:20*] (hereinafter called "the principal Act") is amended by the insertion after "Estate Administrators" of "and Insolvency Practitioners".

3 Amendment of section 2 of Cap. 27:20

Section 2 ("Interpretation") of the principal Act is amended by—

(a) the insertion in the definition of—

(i) "Compensation Fund" after "Administrators" of "and Insolvency Practitioners";

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(ii) "Council" after "Administrators" of "and Insolvency Practitioners";

(b) the insertion of the following definition—

""work of an insolvency practitioner" means any act performed by a person in a capacity as—

(a) trustee or provisional trustee of an insolvent estate appointed under the Insolvency Act [*Chapter 6:04*]; or

(b) liquidator or provisional liquidator or judicial manager of a company appointed under the Insolvency Act [*Chapter 6:04*]; or

(c) liquidator or corporate rescue practitioner appointed under the Insolvency Act [*Chapter 6:04*]; or

(d) agent of a trustee, provisional trustee, liquidator, provisional liquidator, judicial manager, provisional judicial manager or corporate rescue practitioner referred to in paragraphs (a) to (c).";

(c) by the repeal of the definition of "Register" and the substitution of—

""Register" means the Register of—

(a) Estate Administrators established in terms of section nineteen; and

(b) Insolvency Practitioners established in terms of section 25A;";

(d) in the definition of "work of an estate administrator" by the repeal of—

(i) paragraph (c) and (d); and

(ii) paragraph (e) and the substitution of the following—

"(e) agent of an executor, tutor or curator referred to in paragraphs (a) and (b);".

4 Amendment of section 4 of Cap 27:20

Section 4 ("Functions and powers of the Council") of the principal Act is amended in subsection (2) by the insertion after "specified in the" of "First".

5 Amendment of section 19 of Cap 27:20

Section 19 ("Disqualification for membership of Council") of the principal Act is amended by—

(a) the insertion after "Register" of "of Estate Administrators" wherever it appears in that section;

(b) the deletion of "at all reasonable times" and the substitution of "during working hours".

6 New part inserted in Cap. 27:20

The principal Act is amended by the insertion after Part III of the following Part—

"PART IIIA

REGISTRATION OF INSOLVENCY PRACTITIONERS

25A Register of Insolvency Practitioners

(1) The Council shall establish a register, to be known as the Register of Insolvency Practitioners, which shall contain the names of all persons who are provisionally and finally registered as insolvency practitioners as provided for in this Part.

(2) The secretary of the Council, subject to any directions given to him or her by the Council, shall be responsible for maintaining the Register and ensuring that entries are made in the Register recording—

(a) the name and such other particulars as may be prescribed of each person whom the Council has directed shall be registered, and whether such person has been provisionally or finally registered in terms of the Insolvency Act [*Chapter 6:04*]; and

(b) that a practising certificate has been issued to a registered person, or that any such practising certificate has ceased to be valid; and

(c) particulars of the cancellation or suspension of any person's registration, and of the restoration of any such cancelled registration or the termination of any such suspension; and

(d) any necessary corrections or alterations to any particulars or facts referred to in paragraph (a), (b) or (c); and

(e) any other particulars that may be prescribed.

(3) The secretary of the Council shall provide the Master of the High Court with an updated copy of the Register by the 31st of January of every year, and shall advise the Master of each and every amendment to the Register within seven days of having amended the Register in compliance with subsection (2)(a) to (e).

25B Register to be open to inspection

Any person may inspect the Register and make copies of any entry therein during working hours on payment of such fee as may be prescribed:

Provided that no such fee shall be payable by—

(a) a police officer or member of the Public Service acting in the course of his or her duty as such; or

(b) any other person whom the secretary of the Council has authorised to inspect the Register.

25C Qualifications for provisional and final registration

(1) Subject to subsection (6), a person shall be qualified to apply for provisional registration as an insolvency practitioner if—

(a) he or she is registered as a legal practitioner in terms of the Legal Practitioners Act [*Chapter 27:07*]; or

(b) he or she is registered as a public accountant or public auditor in terms of the Public Accountants and Auditors Act [*Chapter 27:12*]; or

(c) he or she is a member of the Institute of Chartered Secretaries and Administrators in Zimbabwe established in terms of the Chartered Secretaries (Private) Act [*Chapter 27:03*]; or

(d) any related field the Council may consider.

(2) Subject to subsection (6), a person shall be qualified to apply for final registration as an insolvency practitioner if he or she qualifies in terms of subsection (1) and in addition—

(a) has passed an examination in insolvency law as set and approved by a subcommittee of the Council established for this purpose; and

(b) has completed a period of no less than 2,500 hours of supervision under the guidance of an experienced insolvency practitioner covering a period of no less than two years and no more than three years.

(3) Subsections (1) and (2) shall only apply to a person applying for registration as an insolvency practitioner after the coming into operation of this Act, or to a person who is already registered as an estate administrator but does not meet the transitional requirements set out in subsection (4).

(4) A person who before the coming into operation of this section was a licensed estate administrator, and whose subscriptions are fully paid up, does not have to comply with the requirements of subsections (1) and (2) in order to be finally registered to act as an insolvency practitioner.

(5) A person referred to in subsection (4) shall submit such information to the Council as it may require in order to determine whether such person is suitable for appointment as an insolvency practitioner.

(6) An application made in terms of this section shall be submitted to the Council as prescribed within a period of 6 months from the coming into operation of this Act.

(7) The Council shall have the right to deny any such applicant the right to be registered and licensed under this provision if it is of the opinion that such person is not a fit and proper person for the purposes of acting as a duly registered and licensed insolvency practitioner.

(8) Any existing estate administrator who without good cause fails to apply for registration under subsection (4) within the specified time limit, will be required to meet the requirements of subsections (1) and (2) in order to be registered as an insolvency practitioner.

(9) A person shall not be qualified for provisional or final registration if—

(a) he or she has been adjudged or otherwise declared insolvent or bankrupt in terms of a law in force in any country, and has not been rehabilitated or discharged; or

(b) made an assignment to or arrangement or composition with his creditors in terms of a law in force in any country, and the assignment, arrangement or composition has not been rescinded or set aside; or

(c) within the period of five years immediately preceding his application for registration—

(i) he or she has been convicted inside or outside Zimbabwe of a criminal offence which, in the opinion of the Council, is of a disgraceful or dishonourable nature; or

(ii) he or she has behaved in a manner which, in the opinion of the Council, is of a disgraceful or dishonourable nature;

or

(d) he or she has been certified either inside or outside Zimbabwe to be mentally disordered or intellectually handicapped or of unsound mind in terms of the Mental Health Act, [*Chapter 15:12*] or an equivalent law in a foreign country, and the certification remains in force.

(10) Before reaching a decision as to whether or not a person does not qualify for registration in terms of subsection (4), or is disqualified for registration in terms of subsection (9), the Council shall—

(a) inform him in writing of the grounds on which it might reach such a decision and afford him or her a reasonable opportunity to make representations in the matter, in writing or in person as the Council thinks fit; and

(b) pay due regard to any representations made by him or her in terms of paragraph (a).

25D Application for registration

Any person who wishes to be provisionally or finally registered as an insolvency practitioner shall submit to the secretary of the Council an application therefor in the form and manner prescribed, together with the prescribed registration fee, and the secretary shall forthwith cause the application to be laid before the Council.

25E Registration

(1) The Council shall consider every application for provisional and final registration laid before it in terms of section 25D, and—

(2) if the Council is—

(a) satisfied that the applicant is qualified for registration, the Council shall direct the secretary of the Council to register the applicant; or

(b) not so satisfied, the Council shall refuse the application and direct the secretary of the Council to notify the applicant in writing of its decision.

(3) Whenever the secretary of the Council registers a person in terms of this section, he or she shall issue that person with a certificate of provisional or final registration in the form prescribed.

25F Cancellation or suspension of registration

(1) Subject to subsection (2), the Council shall direct the secretary of the Council to cancel the registration of any registered person who—

(a) having been qualified for registration in terms of section 25C(1)(a) to (c), ceases to be so qualified; or

(b) has been adjudged or otherwise declared insolvent or bankrupt in terms of a law in force in any country; or

(c) has made an assignment to or arrangement or composition with his or her creditors in terms of a law in force in any country; or

(d) is certified either inside or outside Zimbabwe to be mentally disordered or intellectually handicapped or of unsound mind in terms of the Mental Health Act [*Chapter 15:12*] (or an equivalent law in a foreign country; or

(e) has been found guilty of a breach of the professional code of conduct contained in the Second Schedule, and the disciplinary committee of the Council has imposed a sanction of cancellation of registration, and all avenues of appeal or review have been exhausted.

(2) Before reaching a decision as to whether or not a registered person's registration should be cancelled in terms of subsection (1), the Council shall—

(a) inform him or her in writing of the grounds on which it might reach such a decision and afford him a reasonable opportunity to make representations in the matter, in writing or in person as the Council thinks fit; and

(b) pay due regard to any representations made by him in terms of paragraph (a).

(3) Subject to section 55(2), the secretary of the Council shall—

(a) cancel the registration; or

(b) record the suspension from practice in the Register;

of the registered person when directed to do so by the Council following an inquiry in terms of that section.

(4) Whenever the secretary cancels or suspends a person's registration in terms of this section, he or she shall—

(a) notify that person, in writing, of the cancellation or suspension; and

(b) cause notice of the cancellation or suspension to be published in the *Gazette*; and

(c) update the Register and inform the Master in accordance with section 25A(3);

and such person shall henceforth be ineligible for appointment as an insolvency practitioner under the Companies Act [*Chapter 24:03*] or the Insolvency Act [*Chapter 6:04*].

25G Restoration of registration

A person whose registration has been cancelled in terms of section 25F may apply for his or her registration to be restored, and sections 25C, 25D and 25E shall apply, with necessary changes, as if he or she were applying for registration.

25H Code of ethics for insolvency practitioners

(1) The code of ethics set out in the Second Schedule shall regulate the conduct of insolvency practitioners.

(2) The code of ethics referred to in subsection (1) shall apply, with necessary changes, to the conduct of the estate administrators.

(3) The Minister may, by statutory instrument, amend the code of ethics referred to in subsection (1).".

7 Amendment of section 26 of Cap. 27:20

Section 26 ("Prohibition against practice without practising certificate")(1)(a) of the principal Act is amended by the insertion after "administrator" of "or of an insolvency practitioner".

8 New section inserted after section 29 of Cap. 27:20

The principal Act is amended by the insertion after section 29 of the following section—

"29A Renewal and refusal to renew practising certificates for insolvency practitioners

(1) A practising certificate issued to an insolvency practitioner under section 28 shall be renewed annually in line with the period of validity referred to in section 29.

(2) Upon application for renewal by an insolvency practitioner in terms of subsection (1), the secretary of the Council shall, prior to renewing the practising certificate, ensure that—

(a) the subscription fee of the applicant is fully paid up; and

(b) a copy of the audit statement referred to in section 34 has been filed with the secretary of the Council; and

(c) the applicant has provided proof that he or she has completed at least 15 hours of appropriate continuing professional development during the previous calendar year:

Provided that in the case of an insolvency practitioner whose registration as an insolvency practitioner has not endured for a full calendar year, this requirement may be dispensed with.

(3) An insolvency practitioner who does not comply with subsection (2) shall not be issued with a renewed practising certificate until such time as he or she has complied with the requirements of that subsection.

(4) An insolvency practitioner applying for the renewal of a practising certificate shall apply to the secretary of the Council in the form and manner prescribed.".

9 Insertion of new section to Part VII

The principal Act is amended by the insertion of new section after section 53 as follows—

"53A This part to apply to insolvency practitioners

This part shall, in addition to estate administrators, also apply, with necessary changes to the insolvency practitioners.".

10 Amendment of section 54 of Cap. 27:20

Section 54 ("Improper of disgraceful conduct")(1) of the principal Act is amended by the insertion of the following paragraphs after paragraph (g)—

"(h) demands from any client, employee or prospective employee any sexual favour as a condition of—

(i) the rendering of any service in his or her capacity as a registered person;

(ii) the mitigation or waiver of any fee for any professional service in his or her capacity as a registered person;

(iii) doing any thing in relation to an employee or potential employee of the registered person that would constitute an unfair labour practice by an employer in terms of section 8(g) of the Labour Act [*Chapter 28:01*];

(iv) engaging in unwelcome sexually-determined behaviour towards any client or employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the place where the registered person carries on his or her work.;".

11 New section inserted in Cap: 27:20

The principal Act is amended by the insertion after section 58 of the following section—

"58A Part VIII also to apply to insolvency practitioners

This part shall, in addition to estate administrators apply to insolvency practitioners with necessary changes.".

12 Insertion of new schedule to Cap 27:20

The principal Act is amended by the insertion after the existing Schedule of the following new Schedule—

"SECOND SCHEDULE (Sections 25H)

CODE OF ETHICS FOR THE INSOLVENCY PRACTITIONERS

PART A

Definitions and scope

1. Unless otherwise stated the following definitions apply—

"close or immediate family" includes a spouse (including persons living together as man and wife where there is no legal marriage), dependent, parent, brother, sister, child;

"close relationship" includes both a close professional and personal relationship.

"entity" means a corporate body;

"fundamental principles" means the fundamental principles set out in Part B of this Code;

"individual within the practice" means the insolvency practitioner, any principals in the practice and any employees within the practice;

"insolvency practitioner" has the same meaning as under this Act;

"insolvency practitioner appointment" means formal appointment in terms of the provisions of the Act;

"insolvency practitioner's team" means any person under the control of the insolvency practitioner in the carrying out of his or her functions;

"practice" means the organisation in which the insolvency practitioner practices;

"principal" in respect of a partnership, means a partner or any person who is held out to be a partner; in respect of a sole practitioner; and

"professional body" means a professional body to which the insolvency practitioner belongs.

2. Failure to observe this Code may not constitute professional misconduct, but will be taken into account in assessing the conduct of an insolvency practitioner.

PART B

FUNDAMENTAL PRINCIPLES

Integrity

3. An insolvency practitioner shall be honest in all professional and business relationships.

Objectivity

4. An insolvency practitioner shall not allow bias, conflict of interest or undue influence to override professional or business judgment.

Professional competence and due care

5. (1) An insolvency practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives

competent professional service based on current developments in practice, legislation and techniques, including international best practices.

(2) An insolvency practitioner shall act diligently and in accordance with applicable technical and professional standards when providing professional services.

Confidentiality

6. (1) An insolvency practitioner shall respect the confidentiality of information acquired as a result of professional and business relationships and shall not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose.

(2) Confidential information acquired as a result of professional and business relationships shall not be used for the personal advantage of the insolvency practitioner or third parties.

Professional behaviour

7. An insolvency practitioner shall—

(a) comply with relevant laws and regulations; and

(b) avoid any action that discredits the profession; and

(c) conduct him or herself with courtesy and consideration towards all with whom he or she comes into contact with when performing his or her work.

PART C

Framework approach

8. (1) The framework approach is a method that insolvency practitioners can use to identify actual or potential threats to the fundamental principles and determine whether there are any safeguards that might be available to offset them.

(2) The framework approach requires an insolvency practitioner to—

(a) take reasonable steps to identify any threats to compliance with the fundamental principles; and

(b) evaluate any such threats; and

(c) respond in an appropriate manner to those threats.

Identification of threats to the fundamental principles

9. (1) An insolvency practitioner shall take reasonable steps to identify the existence of any threats to compliance with the fundamental principles that arise during the course of his or her professional work.

(2) An insolvency practitioner shall take particular care to identify the existence of threats which exist prior to, or at the time of, taking an insolvency practitioner appointment or which, at that stage, may reasonably be expected to arise during the course of such an insolvency practitioner appointment.

(3) In identifying the existence of any threats, an insolvency practitioner shall have regard to relationships whereby the practice is held out as being part of a national or an international association.

(4) Threats may fall into one or more of five categories—

(a) self-interest threats: which may occur as a result of the financial or other interests of a practice or an insolvency practitioner, or of a close or immediate family member of an individual within the practice;

(b) self-review threats: which may occur when a previous judgment made by an individual within the practice needs to be re-evaluated by the insolvency practitioner;

(c) advocacy threats: which may occur when an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised;

(d) familiarity threats: which may occur when, because of a close relationship, an individual within the practice becomes too sympathetic or antagonistic to the interests of others;

(e) intimidation threats: which may occur when an insolvency practitioner may be deterred from acting objectively by threats, actual or perceived.

(5) The following are examples of the possible threats that an insolvency practitioner may face—

(a) self-interest threats—

(i) an individual within the practice having an interest in a creditor or potential creditor with a claim that requires subjective adjudication; or

(ii) concerns about the possibility of damaging a business relationship; or

(iii) concerns about potential future employment.

(b) self-review threats—

(i) the acceptance of an insolvency practitioner appointment in respect of an entity where an individual within the practice has recently been employed by or seconded to that entity; or

(ii) an insolvency practitioner or the practice having carried out professional work of any description, including sequential insolvency practitioner appointments, for that entity.

(c) advocacy threats—

(i) acting in an advisory capacity for a creditor of an entity; or

(ii) acting as an advocate for a client in litigation or dispute with an entity.

(d) familiarity threats—

(i) an individual within the practice having a close relationship with any individual having a financial interest in the insolvent entity;

(ii) an individual within the practice having a close relationship with a potential purchaser of an insolvent's assets or business.

(e) intimidation threats—

(i) the threat of dismissal or replacement being used to—

(a) apply pressure not to follow relevant laws and regulations made under this Code, any other applicable guidelines or technical or professional standards;

(b) exert influence over an insolvency practitioner appointment where the insolvency practitioner is an employee rather than a principal of the practice;

(ii) being threatened with litigation; or

(iii) the threat of a complaint being made to the insolvency practitioner's professional body.

Evaluation of threats

10. (1) An insolvency practitioner shall take reasonable steps to evaluate any threats to compliance with the fundamental principles that he or she has identified.

(2) In complying with subparagraph (1), an insolvency practitioner shall consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.

Possible safeguards

11. (1) Having identified and evaluated a threat to the fundamental principles an insolvency practitioner shall consider whether there are any safeguards that may be available to reduce the threat to an acceptable level.

(2) Generally, the relevant safeguards which vary depending on the circumstances fall into the following two broad categories—

(a) safeguards created by the profession and legislation; and

(b) safeguards in the work environment.

(3) In the insolvency context, safeguards in the work environment can include safeguards specific to an insolvency practitioner appointment, which safeguards seek to create a work environment in which threats are identified and the introduction of appropriate safeguards is encouraged. Such safeguards include—

(a) leadership that stresses the importance of compliance with the fundamental principles;

(b) policies and procedures to implement and monitor quality control of engagements;

(c) documented policies regarding the identification of threats to compliance with the fundamental principles, the evaluation of the significance of these threats and the identification and application of safeguards to eliminate or reduce threats, other than those that are trivial, to an acceptable level;

(d) documented internal policies and procedures requiring compliance with the fundamental principles;

(e) policies and procedures to consider the fundamental principles before the acceptance of an insolvency practitioner appointment;

(f) policies and procedures regarding the identification of interests or relationships between individuals within the practice and third parties;

(g) policies and procedures to prohibit individuals from inappropriately influencing the outcome of an insolvency practitioner appointment;

(h) timely communication of a practice's policies and procedures, including any changes to them, and appropriate training and education on such policies and procedures to all individuals within the practice;

(i) designating a member of senior management to be responsible for overseeing the adequate functioning of the safeguards system;

(j) a disciplinary mechanism to promote compliance with policies and procedures;

(k) published policies and procedures to encourage and empower individuals within the practice to communicate to senior levels within the practice or the insolvency practitioner any issue relating to compliance with the fundamental principles that concerns them.

PART D

SPECIFIC APPLICATION OF THIS CODE

Insolvency practitioner appointments

12. (1) Before agreeing to accept any insolvency practitioner appointment (including a joint appointment), an insolvency practitioner shall consider whether acceptance would create any threats to compliance with the fundamental principles. Of particular importance will be any threats to the fundamental principle of objectivity created by conflicts of interest, or by any significant professional or personal relationships.

(2) In considering whether objectivity or integrity may be threatened, an insolvency practitioner shall identify and evaluate any professional or personal relationship that may affect compliance with the fundamental principles. The appropriate response to the threats arising from any such relationships shall then be considered, together with the introduction of any possible safeguards. Generally, it will be inappropriate for an insolvency practitioner to accept an insolvency practitioner appointment where a threat to the fundamental principles exists, or may reasonably be expected to arise, during the period for which the insolvency practitioner is appointed, unless—

(a) disclosure is made, prior to the insolvency practitioner appointment, of the existence of such a threat to the Court or to the creditors on whose behalf the insolvency practitioner would be appointed to act and no objection is made to the insolvency practitioner being appointed; and

(b) safeguards are or will be available to eliminate or reduce that threat to an acceptable level. If the threat is other than trivial, safeguards should be considered and applied as necessary to reduce them to an acceptable level, where possible.

(3) The following safeguards may be considered—

(a) involving or consulting another insolvency practitioner from within the practice to review the work done; or

(b) consulting an independent third party, such as a committee of creditors, a professional body or another insolvency practitioner; or

(c) involving another insolvency practitioner to perform part of the work, which may include such insolvency practitioner taking a joint appointment where the conflict arises during the course of the insolvency practitioner appointment; or

(d) obtaining legal advice from a legal practitioner with appropriate experience and expertise; or

(e) changing the members of the insolvency practitioner's team; or

(f) procedures to prevent access to information by the use of information barriers (for instance, strict physical separation of such teams, confidential and secure data filing); or

(g) clear guidelines for individuals within the practice on issues of security and confidentiality; or

(h) the use of confidentiality agreements signed by individuals within the practice; or

(i) regular review of the application of safeguards by a senior individual within the practice not involved with the insolvency practitioner appointment; or

(k) terminating the financial or business relationship that gives rise to the threat; or

(l) seeking directions from the Master or the Court.

(4) As regards joint appointments, where an insolvency practitioner is specifically precluded by this Code from accepting an insolvency practitioner appointment as an individual, a joint appointment will not be an appropriate safeguard and will not make accepting the insolvency practitioner appointment appropriate.

(5) In deciding whether to take an insolvency practitioner appointment in circumstances where a threat to the fundamental principles has been identified, the insolvency practitioner shall consider whether the interests of those on whose behalf he or she would be appointed to act would best be served by the appointment of another insolvency practitioner who did not face the same threat and, if so, whether any such appropriately qualified and experienced other insolvency practitioner is likely to be available to be appointed.

(6) An insolvency practitioner will encounter situations where no safeguards can reduce a threat to an acceptable level. Where this is the case, an insolvency practitioner shall conclude that it is not appropriate to accept an insolvency practitioner appointment.

(7) Following acceptance, any threats shall continue to be kept under appropriate review and an insolvency practitioner shall be mindful that other threats may come to light or arise. There may be occasions when the insolvency practitioner is no longer in compliance with these guidelines because of changed circumstances or something which has been inadvertently overlooked. This would generally not be an issue provided the insolvency practitioner has appropriate quality control policies and procedures in place to deal with such matters and, once discovered, the matter is corrected promptly and any necessary safeguards are applied. In deciding whether to continue an insolvency practitioner appointment, the insolvency practitioner may take into account the wishes of the creditors who, after full disclosure has been made, have the right to retain or replace the insolvency practitioner.

(8) In all cases an insolvency practitioner will need to exercise his or her judgment to determine how best to deal with an identified threat. In exercising his or her judgment, an insolvency practitioner shall consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would conclude to be acceptable. This consideration will be affected by factors such as the significance of the threat, the nature of the work and the structure of the practice.

Conflicts of interest

13. (1) An insolvency practitioner shall take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles.

(2) Examples of where a conflict of interest may arise are where—

(a) an insolvency practitioner has to deal with claims between the separate and conflicting interests of entities over whom he or she is appointed; or

(b) there is a succession of or sequential insolvency practitioner appointments; or

(c) a significant relationship has existed with the entity or someone connected with the entity.

(3) Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance; therefore, the safeguards used should generally include the use of effective information barriers.

Practice mergers

14. (1) Where practices merge, they shall be treated as one for the purposes of assessing threats to the fundamental principles.

(2) At the time of the merger—

(a) existing insolvency practitioner appointments shall be reviewed and any threats identified; and

(b) principals and employees of the merged practice become subject to common ethical constraints in relation to accepting new insolvency practitioner appointments to clients of either of the former practices.

(3) However, existing insolvency practitioner appointments that are rendered in apparent breach of this Code by a merger need not be determined automatically, provided that a considered review of the situation by the practice discloses no obvious and immediate ethical conflict.

(4) Where an individual within the practice has, in any former practice, undertaken work upon the affairs of an entity in a capacity that is incompatible with an insolvency practitioner appointment of the new practice, the individual shall not work or be employed on that assignment.

Professional competence and due care

15. (1) Prior to accepting an insolvency practitioner appointment the insolvency practitioner shall ensure that he or she is satisfied that the following matters have been considered—

(a) knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities; and

(b) an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed; and

(c) knowledge of relevant industries or subject matters; and

(d) experience with relevant regulatory or reporting requirements; and

(e) assignment of sufficient staff with the necessary competencies; and

(f) use of experts where necessary; and

(g) compliance with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

(2) The fundamental principle of professional competence and due care requires that an insolvency practitioner should only accept an insolvency practitioner appointment when the insolvency practitioner has sufficient expertise.

Professional and personal relationships

16. (1) The environment in which insolvency practitioners work, and the relationships formed in their professional and personal lives, can lead to threats to the fundamental principle of objectivity. In particular, the principle of objectivity may be threatened if any individual within the practice, the close or immediate family of an individual within the practice or the practice itself, has or has had a professional or personal relationship that relates to the insolvency practitioner appointment being considered.

(2) Professional or personal relationships may include (but are not restricted to) relationships with—

(a) the entity; or

(b) any director, shadow director, former director or former shadow director of the entity; or

(c) shareholders of the entity; or

(d) any principal or employee of the entity; or

(e) business partners of the entity; or

(f) companies or entities controlled by the entity; or

(g) companies which are under common control; or

(h) creditors (including debenture holders) of the entity; or

(i) debtors of the entity; or

(j) close or immediate family of the officers of the entity; or

(k) others with commercial relationships with the practice.

(3) Where a professional or personal relationship of the type described in subparagraph (2) has been identified, the insolvency practitioner shall evaluate the impact of the relationship in the context of the insolvency practitioner appointment being sought or considered. Issues to consider in evaluating whether a relationship creates a threat to the fundamental principles may include the following—

(a) the nature of the previous duties undertaken by a practice during an earlier relationship with the entity;

(b) the impact of the work conducted by the practice on the financial state or the financial stability of the entity in respect of which the insolvency practitioner appointment is being considered;

(c) whether the fee received for the work by the practice is or was significant to the practice itself or is or was substantial;

(d) the time elapsed since professional work was last carried out by the practice for the entity;

(e) whether the insolvency practitioner appointment being considered involves consideration of any work previously undertaken by the practice for that entity;

(f) the nature of any personal relationship and the proximity of the insolvency practitioner to the individual with whom the relationship exists and, where appropriate, the proximity of that individual to the entity in relation to which the insolvency practitioner appointment relates;

(g) whether any reporting obligations will arise in respect of the relevant individual with whom the relationship exists;

(h) the nature of any previous duties undertaken by an individual within the practice during any earlier relationship with the entity;

(i) the extent of the insolvency practitioner's team's familiarity with the individuals connected with the entity.

(4) Having identified and evaluated a relationship that may create a threat to the fundamental principles, the insolvency practitioner shall consider his or her response including the introduction of any possible safeguards to reduce the threat to an acceptable level. Such safeguards may include—

(a) withdrawing from the insolvency practitioner's team;

(b) terminating (where possible) the financial or business relationship giving rise to the threat;

(c) disclosure of the relationship and any financial benefit received by the practice (whether directly or indirectly) to the entity or to those on whose behalf the insolvency practitioner would be appointed to act.

17. (1) An insolvency practitioner may encounter situations in which no reasonable safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level. In such situations, the relationship in question will constitute a significant professional or personal relationship. Where this is the case the insolvency practitioner shall conclude that it is not appropriate to take the insolvency practitioner appointment.

(2) Consideration should always be given to the perception of others when deciding whether to accept an insolvency practitioner appointment. Whilst an insolvency practitioner may regard a relationship as not being significant to the insolvency practitioner appointment, the perception of others may differ and this may in some circumstances be sufficient to make the relationship significant.

Dealing with the assets of an entity

18. (1) Save in circumstances which clearly do not impair the insolvency practitioner's objectivity, insolvency practitioners shall not themselves acquire, directly or indirectly, any of the assets of an entity, nor knowingly permit any individual within the practice, or any close or immediate family member of the insolvency practitioner or of an individual within the practice, directly or indirectly, to do so.

(2) Where the insolvency practitioner sells the assets and business of an insolvent company shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity. Creditors or others not involved in the prior agreement may also see the sale as a threat to objectivity. The threat to objectivity may be eliminated or reduced to an acceptable level by safeguards such as obtaining an independent valuation of the assets or business being sold, or the consideration of other potential purchasers.

(3) It is also particularly important for an insolvency practitioner to take care to ensure (where to do so does not conflict with any legal or professional obligation) that his or her decision-making processes are transparent, understandable and readily identifiable to all third parties who may be affected by the sale or proposed sale.

Obtaining specialist advice and services

19. (1) When an insolvency practitioner intends to rely on the advice or work of another, the insolvency practitioner shall evaluate whether such reliance is warranted. The insolvency practitioner shall consider factors such as reputation, expertise, available resources and the applicable professional and ethical standards. Any payment to the third party should reflect the value of the work undertaken.

(2) Threats to the fundamental principles (for example familiarity threats and self-interest threats) can arise if services are provided by a regular source independent of the practice. Safeguards should be introduced to reduce such threats to an acceptable level.

(3) Where services are provided from within the practice, or by a party with whom the practice (or an individual within the practice) has a business or personal relationship, an insolvency practitioner shall take particular care to ensure that the best value and service is being provided.

Fees and other types of remuneration

20. (1) Where an engagement may lead to an insolvency practitioner appointment, an insolvency practitioner shall make any party to the work aware of the terms of the work and, in particular, the basis on which any fees are charged and which services are covered by those fees.

(2) After accepting an insolvency practitioner appointment, an insolvency practitioner must not accept referral fees or commissions unless where to do so is for the benefit of the insolvent estate.

(3) Where an insolvency practitioner has accepted such fees or commissions, he or she must make disclosure to creditors.

Gifts and hospitality

21. (1) An insolvency practitioner, or a close or immediate family member, may be offered gifts and hospitality. In relation to an insolvency practitioner appointment, such an offer will give rise to threats to compliance with the fundamental principles. For example, self-interest threats may arise if a gift is accepted and intimidation threats may arise from the possibility of such offers being made public.

(2) In deciding whether to accept any offer of a gift or hospitality the insolvency practitioner shall have regard to what a reasonable and informed third party having knowledge of all relevant information would consider to be appropriate.

Where such a reasonable and informed third party would consider the gift to be made in the normal course of business without the specific intent to influence decision-making or obtain information, the insolvency practitioner may generally conclude that there is no significant threat to compliance with the fundamental principles.

(3) If an insolvency practitioner encounters a situation in which no reasonable safeguards can be introduced to reduce a threat arising from offers of gifts or hospitality to an acceptable level he or she should conclude that it is not appropriate to accept the offer.

(4) An insolvency practitioner shall not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.

Record keeping

22. (1) An insolvency practitioner will be expected to be able to demonstrate the steps that he or she took and the conclusions that he or she reached in identifying, evaluating and responding to any threats, both leading up to and during an insolvency practitioner appointment, by reference to written up to date records.

(2) The records an insolvency practitioner maintains, in relation to the steps that he or she took and the conclusions that he or she reached, must be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of his or her actions.

Timeliness

23. (1) In the interests of minimising costs, administrations should be conducted in a timely manner. To ensure that statutory requirements are met, insolvency practitioners should use and maintain a checklist or other systems that alert them to critical dates such as—

(a) statutory obligations and notifications; and

(b) meetings; and

(c) reporting:

Provided that where an extension of time is required, the insolvency practitioner will need to give reasons for the need for additional time.

(2) An insolvency practitioner may claim remuneration and costs of applying for an extension of time from the administration, subject to any order from the Court. An insolvency practitioner may not claim remuneration and costs for applying for an extension of time if the reason for the failure to meet the deadline was attributable to the poor conduct of the insolvency practitioner such as—

(a) failure to meet deadlines; or

(b) lack of knowledge of the time limits; or

(c) poor processes; or

(d) inadequately trained or supervised staff.

(3) Insolvency practitioners must ensure that stakeholders are clearly advised of time limits that impact on them and the consequences of not meeting those time limits.