

Review of Part C of the Code, Phase 2—Matters for Consideration

How the Project Serves the Public Interest

Over half of the world's professional accountants are professional accountants in business (PAIBs) in the traditional sense – being accountants who do not work in public accounting practices. PAIBs are a very diverse constituency, and work as employees or consultants in commerce, industry, financial services, education, and the public and not-for-profit sectors. Many are in a position of strategic or functional leadership, or are otherwise well-placed to collaborate with colleagues in other disciplines to help their organizations toward long-term sustainable success.

All organizations require relevant and reliable information in order to conduct their affairs. In addition, interested external parties (such as investors, suppliers, customers, creditors and government agencies) require relevant and reliable information to assess an organization's situation, in order to ensure accountability to them or for them to make decisions about the organization. In particular, enabling PAIBs to better deal with the issue of inappropriate pressure on them, with respect to the presentation of information, will contribute to the public interest because such pressure may lead to the quality of financial and other information on which users rely being undermined.

It is also in the public interest that PAIBs who are responsible for the preparation of such information do so honestly, and that the information they present is not false or misleading, or prepared or presented recklessly or negligently.

Project Proposal

1. The Part C project proposal is divided into two phases. Phase 1 addresses the following sections:
 - Section 300, *Introduction*
 - Those parts of Section 310 which were deleted in the Conflicts of Interest project but which remain relevant to “pressure”
 - Sections 320, *Preparation and Reporting of Information*
 - Section 330, *Acting with Sufficient Expertise*
 - Section 340, *Financial Interests*

Phase 2 addresses Section 350, *Inducements*.

October 2014 Board Meeting

2. At the October 2014 Meeting, the Board approved for exposure the proposed changes to the sections that fall under Phase 1 and the proposed new Section 370, *Pressure to Breach the Fundamental Principles*. The Exposure Draft (ED) was issued in November 2014, with a comment period until April 15, 2015 to allow stakeholders adequate time to formulate responses given that the Board also issued in October 2014 the consultation paper on improving the structure of the Code.

November 2014 Task Force Meeting

3. At its November 2014 meeting, the Task Force invited Messrs. Jeff Kaye and Peter van Veen from Transparency International UK (TI-UK) to give a presentation regarding the global role of TI-UK and how its work specifically relates to PAIBs. The presentation was informative and constructive. As a result, the Task Force has recommended to Board leadership that Messrs. Kaye and van Veen be invited to speak on their work at the January 2015 Board meeting in order to provide context for, and inform, the Board discussion on the topic of inducements.
4. At its meeting, the Task Force reviewed literature and guidance from other organizations regarding the offering and accepting of various forms of gifts and inducements in order to ascertain how they approach the topic. The documents the Task Force reviewed included:
 - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
 - Summary of 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business.
 - Summary of World Bank Group Integrity Compliance Guidelines.
 - ICAEW Report on Business and Economic Crime in an International Context.
 - Woolf Committee Report – Independent report on the ethical policies and processes at BAE Systems.
 - UK Law Firm Employee Policy on Bribery, Gifts and Inducements.
 - IFAC Employee Gift Policy.
5. The Task Force considered the extant wording of Section 350 of the Code and possible amendments that could be made.
6. The Task Force noted that the description of an inducement in extant paragraph 350.1 is wide ranging but does not refer to important aspects such as facilitation payments or bribery. Accordingly, the Task Force felt that some consideration could be given to expanding the description and possibly providing definitions of various types of inducements, notably gifts.
7. In addition, the Task Force considered how the extant section 350 could be restructured to be more logical and practical, and hence of more benefit when being referred to by the PAIB. The use of specific headings was discussed, with guidance detailed under the definition of various types of inducements, the process of identifying threats, the evaluation of these threats, possible safeguards with respect to the receiving and giving of inducements, and guidance on how to deal with inducements along with hypothetical examples.

Matters for Consideration

8. This paper focuses on potential improvements to Section 350 which concerns PAIBs receiving and making offers of inducements. It includes a general discussion and identifies a number of matters that the Task Force has begun to consider. No firm conclusions have been made and comments and suggestions from Board members on the matters raised are requested.

9. Bribery and corruption are major problems in many jurisdictions in both developed and developing economies. Major public interest issues are created by these activities. In addition to possible adverse effects on social norms and expectations, there can be a measurably large impact on GDP and other measures of the social welfare of an economy.
10. Bribes (including facilitation payments) are a challenging and perennial problem area for PAIBs, especially in the context of an international code of ethics and for organizations operating across jurisdictional and cultural boundaries. The responsibility of professional accountants to act in the public interest implies that the possible effects on the public must be considered by PAIBs when they offer or accept inducements that are intended to or may result in a breach of the fundamental principles of the Code. Inducements present problems in relation to the responsibilities of PAIBs to act both in the public interest (paragraph 100.1) and in the legitimate interest of the PAIB's employing organization (paragraph 300.4).¹
11. If there are situations in which there is a conflict between the public interest and the interest of the employing organization, the Code implies that the responsibility to the public takes precedence over the interest of the employing organization.
12. It is important to note that paragraph 300.4 refers specifically to the "legitimate aims" of the employing organizations. This could be interpreted to suggest that there are no conflicts between the legitimate aims of the employing organization and the public interest. Hence, an inducement that violates the fundamental principles should not advance either the public interest or the legitimate aims of the employing organization. So, inducements that do violate the fundamental principles could be in the interest of the employing organization, but would not advance its legitimate aims.

CHARACTERIZATION OF INDUCEMENTS

13. After a review of the information sources listed above, the Task Force has tentatively concluded that the basic concept underlying the issue of inducements is whether an "advantage" is offered or accepted, and whether such an offer or acceptance may be intended to, or may, result in a breach of the fundamental principles.
14. The Task Force notes that advantages (to violate the fundamental principles of the Code) could take a variety of forms. While large cash payments or high value gifts made with the intention of gaining an advantage are obvious examples, numerous more subtle forms could exist which may not be readily identifiable as constituting an advantage. These could include, for example: hospitality and entertainment, discounts, loans, travel, political contributions, charitable donations and sponsorships, solicitation and extortion, benefits and perks to relatives, employment of relatives, education and training projects and in-kind assistance.

¹ Paragraph 300.4 of the Code states that a PAIB *"has a responsibility to further the legitimate aims of the accountant's employing organization. This Code does not seek to hinder a professional accountant in business from properly fulfilling that responsibility, but addresses circumstances in which compliance with the fundamental principles may be compromised."*

15. The Task Force considered the provision of guidance on what constitutes an advantage. This could include:
 - (a) Any form of direct or indirect benefit with a cash value, such as a cash gift, discount, real property, or chattels.
 - (b) Any form of direct or indirect non-financial benefit, such as a non-cash gift, corporate hospitality, vacation, favor, perk or use of third party property.
 - (c) Specific types of advantages, such as: cash payments, benefits and perks to relatives, education and training projects, infrastructure, political donations.
16. There could also be acknowledgement that advantages may benefit individual employees (both PAIBs and non-PAIBs) and/or the employing organization, but may not be in the public interest or advance the legitimate aims of the employing organization.
17. In the light of the above, the Task Force noted that while the nature of the inducement is a matter for consideration, consideration would also need to be given to the purpose and intention of offering an inducement. More specifically, there needs to be consideration as to whether the offer was being made with the intention of gaining an advantage, which would not otherwise have been gained without the inducement. The Task Force also acknowledged that the intention of the giver and perception of the receiver would need to be considered, as these could be different for both parties.
18. The Task Force considered that corporate gifts could be perceived in different ways, such as a simple public relations exercise by the company making the gift or as corporate philanthropy, for example, sponsorship of an arts event that would perhaps not have taken place without such sponsorship. The Task Force was of the view that a reasonable test for judging the intention behind the gift could be how the gift would be interpreted by a reasonably informed third party.

FACILITATION PAYMENTS

19. From the review of the various literature listed in paragraph 4, there is a growing consensus that facilitation payments constitute a form of bribery. Therefore, the Task Force was of the view that they should not be differentiated from other forms of corruption. As with other forms of bribery, what actually constitutes a facilitation payment could be unclear.

CULTURAL DIFFERENCES

20. Inducements may take different forms or have different dynamics across cultures. For example, what is considered to be a gift in one jurisdiction may be regarded as a bribe in another. Further complexity exists because laws and cultural practices are undergoing change in both developed and developing economies. In addition, a number of national laws governing bribery have significant extra-territorial aspects.
21. In some countries, bribery and corruption may be so engrained in the social fabric that it may be virtually impossible to conduct business without paying bribes on a regular basis.
22. In many cultures, it is customary and expected to make and to accept gifts, and to provide hospitality in the course of business. Section 350 would need to recognize this, and at the same time not have a “flexible” standard of acceptable behavior.

TASK FORCE DELIBERATIONS

23. The Task Force considered the following issues that need to be addressed as part of Phase 2. Given that work on the project has only begun, the Task Force has not yet drawn any firm conclusions on these matters.
1. Introduction of general statements to address:
 - (a) Offering and accepting an advantage:
 - (i) The introductory paragraph of section 350 could consider both the offering and accepting of an advantage and being associated with offering and accepting an advantage.
 - (b) What are the motives for offering an advantage?
 - (c) Threats and risks that may accompany offering and accepting an advantage. These include:
 - (i) Self-interest, advocacy, familiarity, intimidation.
 - (ii) Risks to the employing organization such as:
 - Legal.
 - Organizational.
 - Reputational.
 2. Consideration of matters relating to the offering of an advantage, e.g.:
 - (a) Identification and evaluation of threats.
 - (b) Identification and implementation of safeguards.
 - (c) Guidance to PAIBs.
 3. Consideration of matters relating to the acceptance of an advantage, e.g.:
 - (a) Identification and evaluation of threats.
 - (b) Identification and implementation of safeguards.
 - (c) Guidance to PAIBs.
 4. Suitable definitions of all types of advantages (including facilitation payments.)
 5. How to deal with facilitation payments. These typically are the payment of a relatively small amount to a government official to secure or expedite a routine governmental action, often to avoid bureaucratic delays or inaction if payment is not made. TI-UK classifies facilitation payments as bribes. While such payments are illegal in many jurisdictions, they are also common (often expected) in others.
 6. The current and future legal framework around bribery and corruption and how this may impact potential amendments to Section 350. Consideration would need to be given to:
 - (a) A link to the proposed standard being developed by the Board regarding responding to non-compliance or suspected non-compliance with laws and regulations (NOCLAR).

- (b) The persistently changing laws and social norms.
- (c) The complexity around compliance with laws and regulations:
 - (i) A number of laws have extra-territorial reach, for example, making facilitation payments in a foreign country that could be illegal in the home country of the employing organization.
 - (ii) Some laws require disclosure of payments of any kind to governments and government officials.
 - (iii) Legal status and social norms may differ if the jurisdiction of the giver and receiver differ.
- (d) How the legal status of an advantage (be it an offer or acceptance) can vary. Thus, an advantage may be:
 - (i) Illegal (and therefore a violation of fundamental principles).
 - (ii) Legal, but a violation of fundamental principles and may be contrary to social norms of the particular jurisdiction.
 - (iii) Legal, and not a violation of fundamental principles (and may be not contrary to social norms).

Matters for Consideration

1. Do IESBA members have specific suggestions of additional resources that may provide the Task Force with guidance to best inform the direction of the Task Force's work on Phase 2?
2. Do IESBA members have any views on the Task Force deliberations on the matters above?
3. Do IESBA members have any suggestions for additional matters the Task Force should consider?

Way Forward

24. While the Phase 1 ED is open for comment, the Task Force will continue to work on Phase 2. The Task Force is due to meet in May 2015 to consider the responses to the Phase 1 ED with the aim of reporting back on these to the Board at the June 29-July 1, 2015 meeting.