INSOLVENCY CODE OF ETHICS

TRANSPARENCY AND CONFIDENTIALITY:
A GUIDANCE NOTE

A. INTRODUCTION

1. This document relates to the Insolvency Code of Ethics ("the Code"). This document is to be read in conjunction with the Code.

2. This document has been prepared in order to supplement the principles contained within the Code. To the extent that there is any conflict between the contents of this document and the provisions of the Code, the provisions of the Code will take precedence.

3. The purpose of this document is to:

    1) Emphasise the importance of the requirement that members should take care to ensure, where to do so does not conflict with any legal or professional obligation, that their acts, dealings and decision making processes are transparent, understandable and readily identifiable (as to which see Section B below); and

    2) Offer some further guidance in relation to the fundamental principle of confidentiality (as to which see Section C below).

B. THE IMPORTANCE OF TRANSPARENCY

4. Paragraph 36 of the Code provides that an Insolvency Practitioner in his role as an office holder:

    "…has a professional duty to report openly to those with an interest in the outcome of the insolvency. An Insolvency Practitioner should always report on his acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable. An Insolvency Practitioner should bear in mind the expectations of others and what a reasonable and informed third party would consider appropriate."

5. The Council regards this provision of the Code to be of fundamental importance. It is imperative that all members ensure that, except where to do so would conflict with any legal or professional obligation, their acts, dealings and decision making processes are transparent, understandable and readily identifiable. All members should endeavour to deal with third parties fairly in relation to the provision of information.

6. In particular, members in their capacity as office holders should maintain appropriate communication with creditors and such other persons who may be interested in the outcome of the insolvency in order to keep them informed of progress.

7. In this regard, office holders should take care to ensure that any reports prepared for creditors or other persons interested in the outcome of the insolvency are clear and understandable. Where appropriate, a full explanation should be given of any significant decisions or material events that have taken place in the insolvency and the reasons for them.

8. Where a report or information is provided in relation to the approval of any matter (for example the office holder's fees) the office holder should be particularly mindful to provide sufficient supporting information to enable those responsible for the approval to form a judgement as to whether approval is appropriate having regard to all the circumstances of the case.

9. The requirement for members to act transparently is particularly important where the assets and business of an insolvent company are sold shortly after appointment on pre-agreed terms. It is in the nature of such sales that creditors at large are not given the opportunity to consider the sale of the business or assets before it takes place. It is therefore particularly important that creditors are provided with a detailed explanation and justification of why a pre-agreed sale was undertaken, so that they can be satisfied that the office holder has acted with due regard to the interests of those affected.

10. Similar principles to those described above apply in relation to correspondence by members with third parties. Such correspondence should be clear, and understandable. Where the correspondence relates to a decision taken by the member in his capacity as an office holder or otherwise it should normally provide a full explanation of the relevant decision together with the reasons for it.

11. There may be circumstances in which it is not possible for a member to provide information relating to a particular matter because of a conflicting legal or professional obligation. Examples of such situations include where the relevant information is commercially sensitive or where there is a legal obligation not to disclose. In such circumstances, the member should still consider whether some details of the relevant matter can be provided that do not conflict with the legal or professional obligation. This is particularly so where the relevant matter may be of significance to creditors or other persons interested in the outcome

of the insolvency. Where the member is in doubt as to whether disclosure is appropriate in all the circumstances it may be appropriate for him to seek legal advice.

C. CONFIDENTIALITY

12. Paragraph 4 of the Code sets out five fundamental principles which an Insolvency Practitioner is required to comply with. The fundamental principle of confidentiality requires that:

> "An Insolvency Practitioner should respect the confidentiality of information acquired as a result of professional and business relationships and should 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. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the Insolvency Practitioner or third parties."

13. In order for a party to be held liable for breach of confidence it must be usually be shown that: (1) the material communicated to him had the necessary quality of confidence; (2) it was communicated or became known to him in circumstances entailing an obligation of confidence; and (3) there was an unauthorised use of that material. For material to be protected as confidential its availability to the public must be restricted.

14. A member may acquire information which he is obliged to keep confidential. In particular, a member should be alert to the possibility of inadvertent disclosure of such confidential information, particularly in relation to any person with whom the member has had a long or close professional or personal relationship. Confidential information acquired by a member in the course of an assignment must not be used otherwise than for the proper performance of his professional duties.

15. The fundamental principle of confidentiality did not appear in the previous Insolvency Ethical Guide. Some concern was expressed during the consultation period that the inclusion of this fundamental principle may be inconsistent with an insolvency practitioner's duty or obligation, in certain circumstances, to disclose confidential information. This is not considered to be the case. As drafted, the fundamental principle of confidentiality makes it clear that where an insolvency practitioner has a legal or professional right or duty to disclose he may do so.

16. When considering the application of the principle of confidentiality it is also important that members recognise that the circumstances in which obligations of confidence will arise are likely to be different where they have been appointed as an office holder to those where the member acts as an adviser. Where a member has been appointed as an office holder a client/professional relationship will not arise between the office holder and the entity in respect of which he has been appointed. Indeed, following the

appointment of an office holder the rights of confidentiality formerly held by the entity will often vest in or fall under the control of the office holder (at least in the insolvency of a corporate body).

17. As emphasised in Section B above, where obligations of confidentiality do not exist and where to do so does not conflict with any other legal or professional obligation members will be required to ensure that their acts, dealings and decision making processes are transparent.

18. Members should be especially careful not to enter into new obligations of confidence that might have an impact on transparent communication with interested parties, other than for proper commercial reasons. A particular risk of this arises with non-disclosure agreements included in contracts for the sale of the business or assets of an entity in the circumstances outlined in paragraph 9 above.