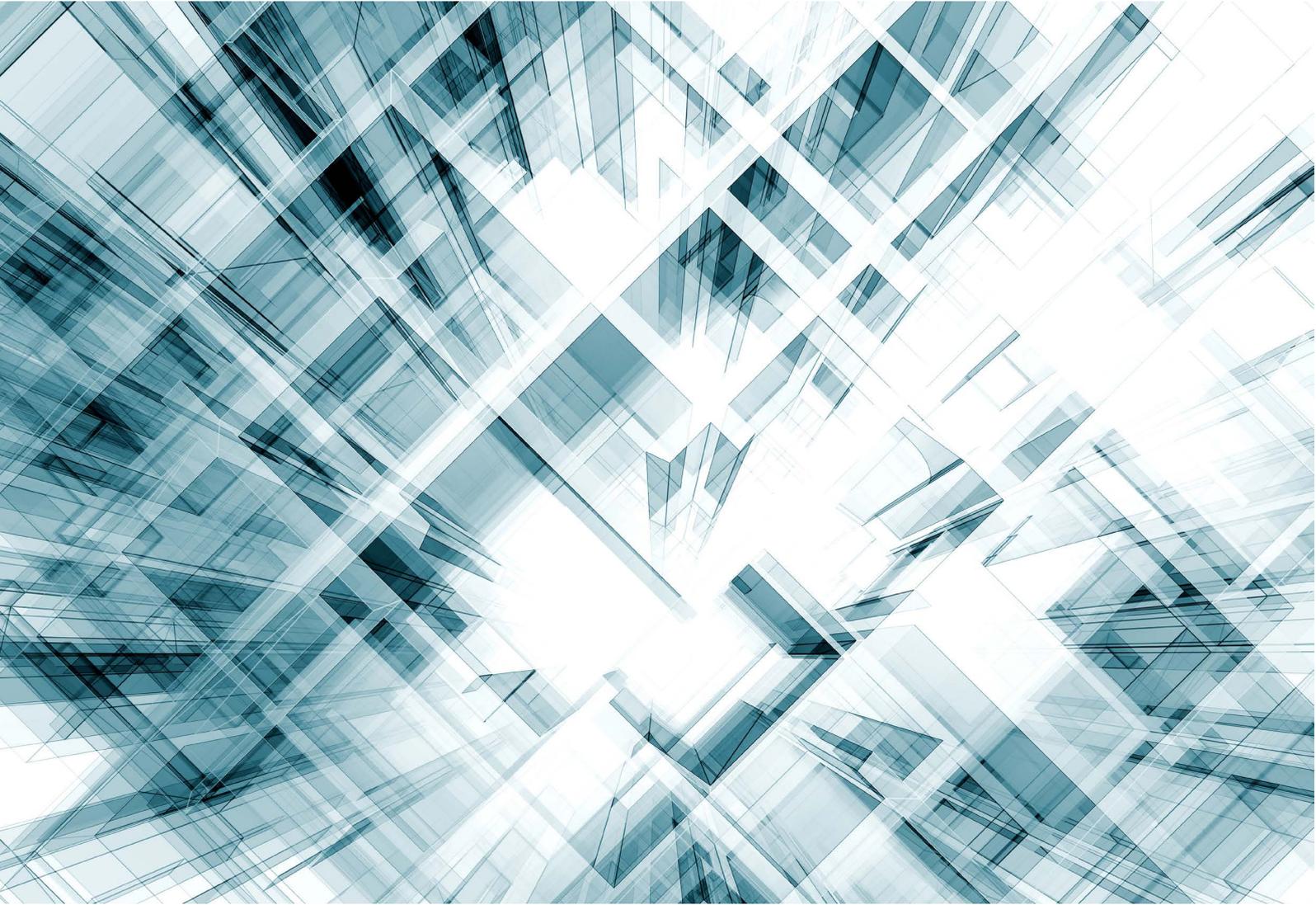




RICS professional standards and guidance, global

Conflicts of interest

1st edition, March 2017



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RICS professional statement, global

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Published by the Royal Institution of Chartered Surveyors (RICS)

Parliament Square

London

SW1P 3AD

UK

www.rics.org

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This guidance was produced by the RICS Commercial Property Professional Group.

First edition published March 2017, revised December 2017 (to add Supporting commentary notes 11 to 14 and signpost them from the PS).

ISBN 978 1 78321 188 3

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Typeset using Typefi.

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Contents

Acknowledgments	ii
RICS professional standards and guidance	1
Introduction	3
Part 1: Professional statement – conflicts of interest and confidentiality	4
1 Conflicts of interest	4
2 Confidential information	4
3 Firm systems and controls	4
4 Definitions used in this professional statement	4
5 Scope and application	5
6 Effective date	5
Part 2: General commentary notes	6
Part 3: Supporting commentary notes	7
Commentary note 1: Record keeping	7
Commentary note 2: Party Conflicts	7
Commentary note 3: Firms	7
Commentary note 4: Informed Consent	8
Commentary note 5: Conflicts where Informed Consent will not (or may not) be enough	9
Commentary note 6: Information Barriers	9
Commentary note 7: Own Interest Conflicts	9
Commentary note 8: Valuation work	10
Commentary note 9: Agency	10
Commentary note 10: Confidential Information	10
Commentary note 11: Competing bidders	10
Commentary note 12: Effective date/transition	10
Commentary note 13: Conflicts arising during professional assignments	11
Commentary note 14: Passing Confidential Information to insurers and legal advisers	11
Appendix A: Sample form for obtaining Informed Consent	12

RICS professional standards and guidance

International standards

RICS is at the forefront of developing international standards. In addition to *RICS Valuation – professional standards*, other international standards are being developed. Working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets, International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Land Measurement Standards (ILMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. Most RICS professional statements link directly to these standards and underpin them. Where that is the case, RICS members are advised to make themselves aware of the relevant international standard(s) (see www.rics.org) and the overarching principles with which the associated professional statement complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with professional statements.

RICS professional statements

This is a professional statement, which RICS members must act in accordance with.

Sections within professional statements that set specific mandatory requirements for members use the word 'must'. Members must not depart from specific mandatory requirements.

Sections within professional statements that set an expectation or recommend best practice advice use the word 'should'. Where members depart from these, they should do so only for justifiable good reason. Where, in the professional judgment of the member, the departure may have a material impact on the surveyor's advice, the client must be informed in writing of the departure and the reason/s for the departure.

Any content that does not use the word 'must' or 'should' is information.

RICS considers that professional statements are technical standards for the purposes of Rule 4 of both the *Rules of Conduct for Members 2007* and the *Rules of Conduct for Firms 2007* (as amended from time to time).

Members should note there may be legal and/or disciplinary consequences for departing from professional statements. When an allegation of professional negligence is made against a surveyor, the court is likely to take account of relevant RICS professional statements in deciding whether or not the surveyor acted with reasonable competence. Failure to act in accordance with professional statements may, accordingly, lead to a finding of negligence against a surveyor. In the opinion of RICS, a

member acting in accordance with relevant professional statements should have at least a partial defence to an allegation of negligence.

In some cases there may be existing national standards that take precedence over professional statements. These can be defined as professional standards that are prescribed in law or federal/local legislation, or are developed in collaboration with other relevant bodies. It is the duty of members to be aware which standards apply.

Members should be up to date and have knowledge of professional statements within a reasonable time of their coming into effect. It is the member's responsibility to be aware of changes in case law and legislation since the date of publication.

Document status defined

RICS produces a range of professional standards, guidance and information documents. These have been defined in the table below. This document is a professional statement.

Publications status

Type of document	Definition	Status
Standard		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	Mandatory.
Professional statement		
RICS professional statement [PS]	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory.
Guidance and information		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice [will be confirmed in the document itself]. Usual principles apply in cases of negligence if best practice is not followed.
RICS guidance note [GN]	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper [IP]	Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

Introduction

RICS Rules of Conduct set an overarching obligation on both members and RICS regulated firms at all times to:

'...act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with its professional obligations.'

Effective identification and management of conflicts of interest is a challenging but essential component of professionalism.

This professional statement, which supports the *RICS Rules of Conduct*, also places an overarching mandatory requirement on all RICS members and regulated firms and specifies RICS' expectations of how compliance with the *Rules of Conduct* should be achieved.

This document is in three parts:

- 1 The RICS professional statement on Conflicts of Interest and Confidentiality sets out RICS' mandatory rules in this area. This section also contains the definitions used in the professional statement.
- 2 Commentary: 'General commentary notes' set out principles as to how RICS expects regulated firms and members to apply the professional statement.
- 3 Commentary: 'Supporting commentary notes' give guidance on how members and regulated firms can meet the obligations set out in Part 1.

Parts 2 and 3 contain guidance, and should be read in conjunction with the mandatory requirements in Part 1.

Part 1: Professional statement – conflicts of interest and confidentiality

In this professional statement defined terms are in bold. For definitions see section 4 of this professional statement.

1 Conflicts of interest

1.1 An RICS member or regulated firm **must not** advise or represent a client where doing so would involve a **Conflict of Interest** or a significant risk of a **Conflict of Interest**; other than where all of those who are or may be affected have provided their prior **Informed Consent**. **Informed Consent** may be sought only where the RICS member or regulated firm is satisfied that proceeding despite a **Conflict of Interest** is:

- (a) in the interests of all of those who are or may be affected and
- (b) is not prohibited by law,

and that the conflict will not prevent the member or regulated firm from providing competent and diligent advice to those that may be affected.

1.2 Every RICS member working independently or within a non-regulated firm or within a regulated firm **must**:

- (a) identify and manage **Conflicts of Interest** in accordance with this professional statement and
- (b) keep records of the decisions made in relation to whether to accept (and where relevant, to continue) individual professional assignments, the obtaining of **Informed Consent**, and any measures taken to avoid **Conflicts of Interest** arising.

2 Confidential information

2.1 RICS members and regulated firms **must** maintain confidentiality of **Confidential Information** unless disclosure is required or permitted by law, or the RICS member or regulated firm concerned can demonstrate that the relevant party consented to the disclosure before it was made.

2.2 Every RICS member working independently or within a non-regulated firm or within a regulated firm **must** provide to every client all the information that is material to that client's professional assignment of which that RICS member has knowledge.

3 Firm systems and controls

3.1 Every RICS regulated firm **must** have in place effective systems and controls appropriate to the size and complexity of their business to enable them to ensure that the firm and its employees are able to manage their compliance with this professional statement.

3.2 RICS members working independently or within non-regulated firms and regulated firms **must** then consider their obligations under paragraph 1.1.

4 Definitions used in this professional statement

4.1 In this professional statement and associated commentary, the key terms have the following meanings.

4.2 '**Conflict of Interest**' means:

- (a) a situation in which the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to act in the interests of a client or other party in a professional assignment conflicts with a duty owed to another client or party in relation to the same or a related professional assignment (a '**Party Conflict**')
- (b) a situation in which the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to act in the interests of a client in a professional assignment conflicts with the interests of that same RICS member/firm (or in the case of a regulated firm, the interests of any of the individuals within that regulated firm who are involved directly or indirectly in that or any related professional assignment) (an '**Own Interest Conflict**')
- (c) a conflict between the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) under paragraph 2.2 to provide material information to one client, and the duty of that RICS member (working independently or within a non-regulated firm) or of a regulated firm under paragraph 2.1 to another client to keep that same information confidential (a '**Confidential Information Conflict**').

4.3 '**Confidential Information**' means: confidential information, whether held or disseminated electronically, verbally or in hard copy.

4.4 '**Information Barrier**' means: the physical and/or electronic separation of individuals (or groups of individuals) within the same firm that prevents confidential information passing between them.

4.5 '**Informed Consent**' means: consent given willingly by a party who may be affected by a **Conflict of Interest**, that party having demonstrated to the RICS member working independently or within a non-regulated firm or regulated firm concerned that the party understands:

- (a) that there is a **Conflict of Interest** or a significant risk of a **Conflict of Interest** and

- (b) the facts known by the RICS member (working independently or within a non-regulated firm or within a regulated firm) or the regulated firm that are material to the **Conflict of Interest** and
- (c) what that **Conflict of Interest** is or may be and
- (d) that a **Conflict of Interest** may affect the ability of the RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to advise or act fully in the interests of a client.

5 Scope and application

5.1 This professional statement applies to all areas of RICS practice and geographies. RICS members working independently or within non-regulated firms will also be expected to be aware of and have regard to, where appropriate, additional guidance in relation to particular practice areas.

5.2 RICS members, whether working within regulated firms or non-regulated firms, **must** comply with this professional statement.

6 Effective date

6.1 This professional statement takes effect from **1 January 2018**. The obligations in paragraphs 1.1, 1.2, 2.1 and 2.2 will apply to all new professional assignments taken on after that effective date. RICS expects firms to use the intervening period post publication to consider and implement the systems requirements in paragraphs 1.2, 3.1 and 3.2 of the professional statement, and in deciding if disciplinary action is needed RICS Regulation will take this into account. Your attention is also drawn in this regard to Supporting commentary note 12.

Part 2: General commentary notes

These commentary notes are advisory in nature, and contain general guidance on how to adhere to the mandatory professional statement.

1 The most important reason for avoiding conflicts of interest is to prevent anything getting in the way of your duty to advise and represent each client objectively and independently, without regard to the consequences to another client, any third party, or your own interests and that the clients and in turn the public can be confident you are doing so.

2 Consumer protection and the development of the profession for public advantage are at RICS' core. Acting in accordance with the Royal Charter should be at the forefront of your considerations at all times. Accordingly, when you are applying it in practice, you should not interpret the professional statement in a narrow or purely technical manner. You should always consider whether your proposed course of action might:

- reasonably be perceived to imply a lack of integrity
- cause embarrassment to your profession or
- mean that you are unable to advise and represent each client objectively and independently.

If there is a material risk of your proposed course of action having such an effect, you **must not** proceed.

3 The Conflict of Interest professional statement does not allow you to choose whether you can proceed despite a Conflict of Interest or a significant risk of one: it prohibits you from proceeding, unless you obtain prior Informed Consent from all affected parties. In respect of Conflicts of Interest that arise after you have taken on an assignment, your attention is drawn to General commentary note 6 immediately below and to Supporting commentary note 13.

4 Where a Conflict of Interest or a significant risk of one exists, you should only consider proceeding with the work (and seek Informed Consent in order to proceed) if you are satisfied that all of the relevant clients' (or other parties') interests will be served by you doing the work (as opposed to another firm doing it). You should not seek Informed Consent in order to proceed because your firm's interests are served by doing so. Obtaining Informed Consent is a process that requires proper consideration, professional judgment, and careful execution with every affected party.

5 One of the greatest challenges in acting with a Conflict of Interest is predicting with certainty what the effect of that Conflict of Interest, even if managed carefully, might have on your ability to advise and represent each client. This uncertainty reinforces the importance of considering carefully whether it is prudent to decline the assignment in question rather than seeking Informed Consent to proceed.

6 Even where a Conflict of Interest (or a significant risk of a Conflict of Interest) does not exist at the outset of a professional assignment, it can arise during the lifetime of a professional assignment. This means that the professional statement **must** be considered and applied – and appropriate records made – not only when new professional assignments are being considered, but also as professional assignments progress. Your attention is also drawn in this regard to Supporting commentary note 13.

Part 3: Supporting commentary notes

These commentary notes are advisory in nature, and contain more specific supplementary content to give practical guidance on how to adhere to the mandatory professional statement.

Commentary note 1: Record keeping

a) All regulated firms are required to maintain records showing their compliance with paragraphs 1.2, 3.1 and 3.2 of the professional statement. This requires records to be maintained showing both:

- (i) consideration and implementation of systems and controls appropriate to the firm and
- (ii) the observance of those systems and controls within the context of individual professional assignments.

b) Individual RICS members within regulated firms do not have to vet or implement the systems and controls of their firms, but they should each satisfy themselves that their own firm has considered its obligation to implement systems and controls under the professional statement.

c) Individual RICS members working within non-regulated firms are subject to the systems and controls requirements of paragraphs 1.2, 3.1 and 3.2 of the professional statement. The nature and extent of their systems and controls should be commensurate with the nature and extent of their regulated work, and the frequency with which they need to make decisions about Conflicts of Interest and Confidential Information.

d) The factors that influence what systems and controls are appropriate for each regulated firm and the level of resource that each firm should commit to these functions include:

- (i) the size of the firm
- (ii) the complexity of the firm's structure and
- (iii) the number of areas of practice in which the firm provides services.

e) As firms and markets change, the effect of the professional statement is that the systems and controls **must** be monitored and updated. Records should be maintained to show that process of monitoring and updating.

f) Regulated firms and individual RICS members working within non-regulated firms may be required to make available for inspection by RICS the records required by paragraphs 1.2 and 3.1 of the professional statement.

Commentary note 2: Party Conflicts

a) The definition of 'Party Conflict' does not just include the situation where the duties owed to different *clients* conflict. It also includes conflicts between duties owed to other parties. For example, a Party Conflict will arise where a duty owed to a client or other party conflicts (or entails significant risk of conflict) with:

- (i) the duty owed to a court or tribunal when acting as an expert witness and
- (ii) the duty of impartiality owed in acting in a situation requiring impartiality, such as an appointment as an adjudicator, arbitrator, mediator or independent expert, or where a statutory decision-making appointment or any other similar appointment is accepted.

b) One way to avoid a Party Conflict arising is to agree with a client, at the instruction stage, restrictions on the scope of the duties/services taken on in the professional assignment. Read the definition of 'Party Conflict' to see how this can be achieved: the answer lies in defining clearly the scope of the duties.

Commentary note 3: Firms

Party Conflicts

a) If a single regulated firm accepts two or more professional assignments in connection with the same transaction, or related transactions, and the respective clients' interests conflict, then there will probably be a Conflict of Interest, or a significant risk of a Conflict of Interest, for the regulated firm (a Party Conflict).

b) This will apply even if different individuals within the same RICS regulated firm act separately on the different professional assignments, because of the fact that the relevant professional duties to the clients are owed by the regulated firm as well as by RICS members.

Multi-disciplinary firms

c) Particular issues under the professional statement arise for regulated multi-disciplinary firms that may provide different services in the same or related transactions.

- (i) The effect of the professional statement is that the risk of Conflict of Interest arising by reason of duties arising in the other services (such as the provision of financial advice) **must** be considered.
- (ii) The systems and controls appropriate for such regulated firms to comply with paragraphs 1.2 and 3.1 of the professional statement are likely to require greater resource and greater sophistication than

for regulated firms of a similar size providing a more restricted range of services.

Commission or success-based remuneration: Own Interest Conflicts

d) In and of itself, there is nothing wrong with a commission or success-based remuneration for individual RICS members, or for regulated firms. However, it is recommended that when a new commission or success-based remuneration arrangement is agreed, careful consideration is given to whether it gives rise to a Conflict of Interest (more specifically, an Own Interest Conflict).

Related firms

e) If two unrelated firms act for two clients in the same transaction with competing interests, neither firm will have a Party Conflict. However, if those two firms are related, an increased risk of a Conflict of Interest arises.

f) The effect of the professional statement is that firms **must** each consider whether their own business and ownership structures give rise to inherent risk of breach of the professional statement. RICS anticipates that Conflicts of Interest are unlikely to arise, simply by way of business/ownership structure, if the following criteria are all satisfied:

- (i) the firms are separate legal entities
- (ii) there are no directors, partners or employees in common between the firms
- (iii) there is no direct or indirect fee sharing between the firms and
- (iv) there is no access to information or common internal data sharing arrangements relating to the area of conflict.

Commentary note 4: Informed Consent

a) Giving Informed Consent is the way in which a party who might be affected adversely by a Conflict of Interest acknowledges the existence of that risk, but instructs a regulated firm or individual RICS member to proceed despite that risk. The affected party can only give Informed Consent if the person explaining the position to them:

- is entirely transparent about any material factors and
- is sure that the party affected understands what they are doing (including the risks involved and any alternative options available) and is doing it willingly.

b) The fact that the affected parties are willing to give Informed Consent does not mean that the RICS regulated firm or individual RICS member working independently or within a non-regulated firm has to proceed. The effect of the professional statement is that in every case, the RICS regulated firm or individual RICS member working independently or within a non-regulated firm **must** still exercise professional judgment and decide whether it is the correct thing to do and be sure that they will not cause professional embarrassment to the regulated firm or individual RICS member by proceeding where there

is a Conflict of Interest. See paragraph 4 of the General commentary notes, and note in particular that:

‘you should only ... seek Informed Consent in order to proceed ... if you are satisfied that all of the relevant clients’ (or other parties’) interests will be served by you doing the work’.

c) In obtaining Informed Consent to a Conflict of Interest (or a significant risk of one) the regulated firm or individual RICS members should consider and discuss with the affected parties:

- (i) all of the matters set out in the definition of Informed Consent and
- (ii) what precautions should be taken in the conduct of the professional assignment to protect them.

d) In seeking to obtain Informed Consent, the effect of the professional statement is that the degree of sophistication and nature of the party concerned **must** be reflected in the information provided in order to be satisfied that the party has understood what they are doing and is giving Informed Consent willingly. A large corporate entity is likely to appreciate more readily the risks involved in giving Informed Consent, whereas a small business or individual person who rarely employs professionals may require greater detail to understand the position.

e) There may be reason to believe that the party affected does not have sufficient understanding of the issues to make an informed decision on the implications of what is required. In such a case, the instruction should be declined, unless the prospective client has taken advice from an independent and suitably qualified professional (for example, a lawyer or an accountant) about the situation before instructing the RICS regulated firm or RICS member working independently or within a non-regulated firm to proceed despite a Conflict of Interest.

f) A decision to proceed with a professional assignment by obtaining Informed Consent should be recorded in the record maintained for that professional assignment for the purposes of paragraph 1.2 of the professional statement.

g) Communications with the affected parties from whom Informed Consent is obtained should also be auditable. This is because in the event of a complaint, an investigation, or a civil claim, the onus will be on the RICS regulated firm and RICS member working independently or within a non-regulated firm to show that Informed Consent was obtained. If such communications are not made in writing, it may be difficult for Informed Consent to be proved, particularly after some time has passed, or if the account of those communications from the RICS regulated firm or RICS member working independently or within a non-regulated firm is contested. Therefore if Informed Consent is obtained in a meeting or by telephone, written communication should be sent as soon as possible afterwards, noting the content and conclusion of the discussion. To avoid risk of criticism, this proof should not only be that *consent* was obtained, but that *Informed Consent* was obtained, as defined in the Definitions section of the professional statement.

h) Appendix A gives an example of the type of document that can be used to obtain Informed Consent from affected clients and other parties. However, it is for the RICS member or regulated firm to decide what type of document to use in each context in order to achieve Informed Consent as defined in paragraph 4.5 of the professional statement. To comply with the professional statement, the explanation given about the Conflict of Interest (or significant risk of it) needs to be fair and accurate, and appropriate given the degree of sophistication of the person signing it, and the party signing it needs to do so freely, demonstrating an understanding of the situation.

i) To comply with the requirements for obtaining Informed Consent, the prospective client **must** be told, and understand, the nature of the competing interest. If it is not possible to achieve that without breaching a duty of confidentiality owed to another client or party, it will mean that the regulated firm and individual RICS members cannot proceed with the new professional assignment.

Commentary note 5: Conflicts where Informed Consent will not [or may not] be enough

a) In a professional assignment that is contentious (or has a reasonable prospect of becoming contentious), Informed Consent is unlikely to be an adequate basis on which to manage a Party Conflict. In a contentious matter, the existence of a Party Conflict will usually mean being unable to proceed with both relevant professional assignments.

b) It will not be possible to overcome the existence of a Conflict of Interest or a significant risk of one by getting Informed Consent where the potential appointment is subject to a specific statutory or regulatory regime.

c) It will not be possible to obtain Informed Consent to an individual RICS member taking professional assignments that conflict with each other.

d) Note also the warning in commentary note 7 about the inherent difficulty in obtaining Informed Consent to an Own Interest Conflict.

Commentary note 6: Information Barriers

a) Agreeing to put an Information Barrier in place may assist a client or other party to give Informed Consent to a Party Conflict, or it may assist in resolving a Confidential Information Conflict; but on its own, an Information Barrier will not be a solution to a Conflict of Interest. Informed Consent **must** still be obtained from all affected parties in order to comply with the requirements in paragraph 1.1 of this professional statement.

b) Save for one situation, consent should be obtained from all parties affected when an Information Barrier is put in place. That is the situation where the conflicting duty for which the Information Barrier is put in place is the duty pursuant to professional statement requirement 2.1 to

protect the Confidential Information belonging to a person or company that is no longer a client of the firm concerned. In that situation, the firm's duty to preserve the past client's confidentiality will remain in place pursuant to paragraph 2.1 of the professional statement (and any applicable common law principles), but RICS will expect the firm to consider whether it is necessary for the firm to contact the past client to seek consent to putting the Information Barrier in place. See Commentary note 10(a) in relation to the enduring duty of confidentiality to past clients.

c) If an Information Barrier is part of a solution that a regulated firm agrees with two or more clients so as to obtain Informed Consent, the onus will be on the regulated firm and the RICS members involved to ensure that it works in practice, not just that it should have worked in theory. This means that before treating this as a solution to a Conflict of Interest, those individuals and the firm should be sure it will work; not merely that they have taken 'reasonable steps'. To do this effectively, they will need to consider and understand the details about how their office works in practice: reporting and management lines, who sits where, the use of typing resource and printers, and access to email and other electronic resources.

d) Because the primary obligations in the professional statement are obligations of individual RICS members as well as regulated firms, it is important that the individuals who are involved in implementing an Information Barrier satisfy themselves individually that the Information Barrier will be effective, rather than delegating that responsibility to colleagues, or to a central management function.

e) Putting an effective Information Barrier in place requires consideration of the position of **all** individuals within the firm who might have access to information: not just those who are RICS members.

Commentary note 7: Own Interest Conflicts

a) While the professional statement does not prohibit a regulated firm or individual RICS members from obtaining Informed Consent to an Own Interest Conflict, the risks (for regulated firms, individual RICS members **and** clients) are often greater where an Own Interest Conflict is concerned. Caution should be exercised therefore in deciding whether to seek Informed Consent, and in obtaining it, in such a situation.

b) The effect of the definition of Own Interest Conflicts (paragraph 4.2(b) of the professional statement) is to confine the potential conflict to the personal interests of only those individuals who are involved, directly or indirectly, in a particular matter; not the personal interests of all individuals in the same firm.

c) The prospect of future work and referrals – from any source – can sometimes present Own Interest Conflicts. The existence (or significant risk) of the Conflict of Interest is enough to mean that paragraph 1.1 of the professional statement is breached: there does not have to be actual harm to anyone's financial interests. This means, for example, that a prospect of future work or

referrals may have to be disclosed, and Informed Consent obtained, before proceeding. If, for some reason (such as confidentiality), the prospective client cannot be told about the prospect of future work or referrals, this may mean the instruction has to be declined.

d) RICS regulated firms should consider how it is best, for their own regulated firm, to maintain records of RICS members' personal interests for the purposes of avoiding Own Interest Conflicts. Personal interests may include financial interests, personal relationships, appointments to public office, management appointments, commercial interests or employment relationships.

Commentary note 8: Valuation work

a) The professional statement applies to valuation work. It is essential in providing a valuation that the valuer is able to act independently and objectively and there is a serious risk that acting with a Conflict of Interest would undermine the valuer's ability to do so.

b) It is beyond the scope of these commentary notes to give practical guidance in relation to the application of the professional statement to valuation work. For further detailed guidance valuers should refer to the RICS 'Red Book' (the *RICS Valuation - Professional Standards Global 2014* and its successor editions) current at the relevant date.

Commentary note 9: Agency

a) A regulated firm that accepts an instruction to act for the seller of a property as the selling agent should exercise caution in accepting an instruction to advise a potential buyer about the same property. There is natural adversity between the seller and the prospective buyer, which creates a Conflict of Interest for the regulated firm, or at least the significant risk of one. It may be possible to overcome this with the use of an Information Barrier and the Informed Consent of both the seller client and the buyer client. However, if the selling agent's firm stands to gain materially if the firm's buyer client's bid is accepted, the selling client **must** be informed clearly when Informed Consent is sought that this is an actual or potential Own Interest Conflict for the selling agent.

b) For UK-based RICS regulated firms and members operating in the commercial property market, additional guidance is available in the RICS professional statement *Conflicts of interest – UK commercial property market investment agency*.

Commentary note 10: Confidential Information

a) The duty of confidentiality is not only confined to clients where there is a current fee-earning relationship, but also to previous clients and even potential clients. The duty to a client is continuous and ongoing. Over time, the potential relevance of information and the potential

for a conflict arising will decrease, but there is no fixed period that can be used to determine whether the duty of confidentiality still creates a conflict with the general duty in a subsequent instruction. The nature and extent of the information held will be a key determinant of whether it is possible to act for another client. In addition, the nature of the original professional assignment and the time that has elapsed since undertaking the assignment will also be relevant.

b) Often, if a new professional assignment has to be declined because of a Conflict of Interest, a regulated firm or RICS member may have learned something from that approach that will be of interest to another client. That information will almost invariably be Confidential Information, and it cannot be passed to the other client, even if that client would be very interested to hear it.

Commentary note 11: Competing bidders

a) Professional statement 1.1 does not necessarily prevent a regulated firm from acting for two or more clients who are competing for the same asset which, if attained by one client, will make that asset unattainable to the other.

b) Legally (and under the definition of Conflict of Interest), acting for competing bidders in that situation does amount to a Conflict of Interest, but professional firms do commonly act for multiple bidders, and the Conflict of Interest can be resolved by:

- each bidder client providing its Informed Consent to the firm acting for other bidders
- ensuring that no individual within the regulated firm acts for, or is responsible for the supervision of the work for, more than one of those clients and
- by putting in place an appropriate Information Barrier.

Obtaining Informed Consent in this situation would not require the regulated firm to provide the identity of the other client(s) to each client (and indeed professional statement 2.1 would prevent the regulated firm from doing so).

c) In this common and straightforward situation, it should be possible for the requirements of the definition of Informed Consent to be met with a form of words much simpler than the form in Appendix A to this professional statement.

Commentary note 12: Effective date/transition

If a regulated firm is already engaged in a professional assignment at the effective date of this professional statement (1 January 2018), this professional statement **would** apply to Conflicts of Interest that arise because of any additional professional assignment(s) that the same regulated firm takes on after the effective date, despite the fact that one of the relevant professional assignments was taken on before 1 January 2018.

Commentary note 13: Conflicts arising during professional assignments

a) If there is an unforeseen 'convergence' of two professional assignments within the same regulated firm because of a development in one of those assignments, the appropriate practical application of the professional statement will usually be to seek Informed Consent before proceeding with the new aspect that would cause the Conflict of Interest.

b) For example, a regulated firm has existing professional assignments:

- with Client A to consult on the continuing development of a site and
- with Client B to find a suitable leasehold or investment asset.

It becomes apparent that Client A's development site might be a suitable asset for Client B. The practical application of the professional statement would be for the regulated firm to seek Informed Consent from both clients to the firm advising Client B about Client A's development site. In order to avoid a breach of professional statement 2.1, an Information Barrier will usually be required in this situation. While Informed Consent is sought, the professional statement does not prevent the firm from continuing its work for Client A, or – save in respect of the particular site – for Client B.

Commentary note 14: Passing Confidential Information to insurers and legal advisers

a) It is recognised that regulated firms have obligations to make disclosure and notifications to their insurers, and that, on occasion, regulated firms may wish to take legal advice about client matters without seeking consent from the client before doing so. At the time this professional statement is published, there is uncertainty, at least in English law, as to whether, in doing so, regulated firms are entitled to pass Confidential Information to their professional indemnity insurers or to external legal advisers (see the UK Court of Appeal's 2010 decision in *Quinn v The Law Society*).

b) RICS recognises that this uncertainty in English law leaves regulated firms at risk of breaching their obligations to insurers or of being unable to take legal advice. RICS recommends as a practical solution therefore that firms include in their terms of engagement a clause providing the client's advance consent to the firm passing the client's Confidential Information to the firm's professional indemnity insurers and legal advisers. (The terms of engagement also provide a good opportunity to seek the client's consent to any additional disclosure of Confidential Information the regulated firm anticipates it may have to make, including, for example, to related entities or third parties who

may require the client's Confidential Information for the purposes of the professional assignment.)

Appendix A: Sample form for obtaining Informed Consent

In considering this sample document, you are referred to the definition of Informed Consent in the Definitions section of the professional statement, and to Commentary note 4.

This sample form for obtaining Informed Consent is a suggestion only: you should consider what the appropriate form is for your situation.

The language used to obtain Informed Consent should be clear, direct and simple.

Note in particular that RICS strongly recommends that you record Informed Consent in writing: see Commentary note 4(g).

To: **[Insert client's name]**

We refer to your recent instruction to our firm to **[insert description of professional assignment for example: advise you about the planning prospects for the land at Block 12, Plunkett's Farm, because you are considering buying it]**.

Thank you for choosing our firm.

We are required by our professional body, the Royal Institution of Chartered Surveyors, to inform you of certain matters before you confirm our appointment.

Your work will be undertaken by me, **[insert name(s)]**, and I will be assisted by **[insert name(s)]**.

I need to make you aware that **[insert description of conflict or risk of conflict, for example: my colleague Mr A is acting as the selling agent for the seller of the land at Block 12, Plunkett's Farm]**.

This means that, in accordance with our professional rules, there is a Conflict of Interest for my firm. There is a 'Party Conflict', which happens when the duty owed by a professional firm to one client conflicts with the duty owed to another client.

In this case, a conflict arises because **[insert explanation of conflict, for example: our duty to you is to ensure that you are fully informed about the planning prospects for the land, even if that means that you decide not to buy it, whereas our duty to the seller is to try to ensure that the sale goes ahead]**.

In this case, we are satisfied that it is in the interests of both you and the **[insert appropriate party, e.g. seller/purchaser/landlord/tenant/etc.]** that our firm should proceed with both professional assignments because **[insert why it is in the CLIENTS' interests to proceed, for example: there are so few firms in the geographical area who are have the necessary expertise]**.

In order to mitigate the effects of the Conflict of Interest, **[insert the mitigating steps taken, for example: Mrs Y and I will be separated from Mr A as we deal with our respective matters by an Information Barrier. This means that [insert mechanics of Information Barrier in this case, for example:] we and our respective team members will keep all information confidential from each other, we will not discuss each other's matters with each other in any way, we will maintain separate physical and electronic files, we will not share computer equipment or printers, etc.]**.

If these precautions are taken, it is our professional view that we are able to accept your instructions to advise you about **[restate nature of professional assignment, for example: the planning prospects for the land at Block 12, Plunkett's Farm]**. However, we recommend to you that you take time to read this letter carefully, and to ensure that you understand it fully. If you do not understand it, we recommend that you send it to your **[solicitors/ accountants/ another professional]** and discuss it with them.

If you are comfortable proceeding to instruct us, please indicate your consent by signing below and returning this letter to us.

Signed:

[Client's name/clients' names. Note – you should ask each client to sign, if, for example, you are seeking consent from a couple.]

Dated:



Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 125,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

With offices covering the major political and financial centres of the world, our market presence means we are ideally placed to influence policy and embed professional standards. We work at a cross-governmental level, delivering international standards that will support a safe and vibrant marketplace in land, real estate, construction and infrastructure, for the benefit of all.

We are proud of our reputation and we guard it fiercely, so clients who work with an RICS professional can have confidence in the quality and ethics of the services they receive.

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