

December 15, 2012

International Ethics Standards Board for Accountants
545 Fifth Avenue, 14th Floor
New York, NY 10017

Re: Exposure Draft: *Responding to a Suspected Illegal Act*

To the Members of the International Ethics Standards Board for Accountants:

Grant Thornton International Ltd. (Grant Thornton) appreciates the opportunity to comment on the August 2012, Exposure Draft: *Responding to a Suspected Illegal Act* (ED) approved for publication by the International Ethics Standards Board for Accountants (the IESBA or the Board).

Grant Thornton is a non-practicing, non-trading international umbrella organization and does not deliver services in its own name. Representative Grant Thornton member firms have contributed to and collaborated on this comment letter with the public interest as their overriding concern.

Our views on the reporting of suspected illegal acts and suggestions for the Board

Grant Thornton supports IFAC's mission to serve the public interest and the Board's objective to strengthen the Code by putting forth a framework addressing suspected illegal acts. Accountants should behave ethically in all instances, and should indeed help expose wrongdoing and suspected illegal acts to the appropriate authorities. We believe the most appropriate way to accomplish this goal is two-fold:

- The Board should provide all professional accountants with the right to disclose a suspected illegal act to an appropriate authority if, in the professional accountant's judgment, the suspected illegal act is of such consequence that disclosure would be in the public interest and the professional accountant would not breach confidentiality under the Code. The Board should further provide guidance as to when a suspected illegal act could be of such consequence that disclosure would be in the public interest.
- National authorities should enact laws and regulations, within the context of their existing legal infrastructures, setting out frameworks for the reporting of suspected illegal acts, which would contain appropriate protections for accountants who report those suspected illegal acts. These frameworks would ideally be as consistent as possible across different countries, which is why we favor guidance from the IESBA.

We believe that approaching the issue of reporting suspected illegal acts in the above manner would satisfy the Board's goal of having a framework for addressing the reporting of suspected illegal acts, without the negative consequences of the Board's current proposal. Our primary and very significant concern with the Board's proposal is that it would require a professional accountant to disclose a suspected illegal act to an outside entity without providing appropriate protections to

accountants who make such a disclosure. Without such protections, provided by law or regulation, the professional accountant may be subject to adverse criminal or civil liability, as well as other forms of retaliation.

We further believe that our suggestion is an appropriate and balanced way forward, and it would build upon existing legal and regulatory structures. Most notably, accountants in some countries already report suspected illegal acts to the appropriate authorities, as there are various nations that require reporting of illegal acts.¹ We understand of course that these laws are not uniform, but we would note two things in this regard.

First, there should be an acknowledgement of differences in national laws on this subject, as various countries have different legal structures and organizations. , we believe that the Board can play a significant role in harmonizing disparate national frameworks, to the extent practicable, by promoting uniform guidance on when disclosure is appropriate. IFAC member bodies could also encourage legislators or regulators in their country to adopt a framework incorporating the IESBA's guidance, but with all of the necessary protections that only national laws can provide.

In providing such guidance in the Code, the Board should state clearly that based on professional judgment, the professional accountant would have the right to breach confidentiality and disclose the suspected illegal act to an appropriate authority. The Organisation for Economic Co-operation and Development (OECD) has set forth criteria when individuals should make such disclosures. We recommend the Board review these protected disclosures².

We believe this approach will aid IFAC in its mission to serve the public interest and allow the Board to achieve its objective to strengthen the Code by putting forth a framework that contains balanced guidance for addressing suspected illegal acts that will enhance the profession. We believe that guidance by the Board, coupled with appropriate national legislation or regulation, is the only appropriate way forward for the Board in our view. The following are a few specific reasons why we believe the Board should not require a professional accountant to disclose a suspected illegal act as set forth in the exposure draft:

1. Lack of whistleblower protection legislation

Whistleblowing protection legislation that provides effective legal protections and clear guidance on reporting procedures encourages and facilitates the reporting of “illegal, unethical or dangerous” activities³. Having effective protection for whistleblowers supports an open culture and environment where individuals are aware of how to report such activities and also have confidence in the reporting procedures.

The Board's exposure draft discusses disclosing suspected illegal acts that are in the public interest without taking into consideration the lack of whistleblower protection for the

¹ These include: The United States, China, France, and South Africa.

² Organization for Economic and Co-Operation and Development's CleanGovBiz Toolkit, p. 10-11

³ G20 Anti-Corruption Action Plan, Action Point 7: Protection of Whistleblowers, p.9.

professional accountant. Furthermore, the proposal fails to consider some common barriers to disclosing illegal, unethical or dangerous activities such as:

- Legal and ethical requirements to maintain confidentiality
- Libel and defamation laws
- Confusion over what acts must be considered and reported
- Confusion over who should receive the reports and what should be done with reports in countries that have strict privacy laws
- Cultural perceptions, and
- Burden of proof on the professional accountant to demonstrate that the disclosure was permissible, especially when breaching confidentiality

One of the key findings in the G20 Anti-Corruption Action Plan ⁴(Action Plan), which provides guidance and best practices on implementing protection for whistleblowers, was that “encouraging the whistleblowing on acts of suspected corruption is essential in safeguarding the public interest and promoting a culture of public accountability and integrity. As a result, the encouragement of whistleblowing must be associated with the corresponding protection for the whistleblower.” The Board is unable to provide these legal protections that would achieve such encouragement to report suspected illegal acts.

In April 2012, the OECD issued the CleanGovBiz toolkit⁵ (toolkit). The toolkit provides guidance on the implementation of the G20 Anti-Corruption Action Plan, including a priority checklist that provides guidance based on the best practices and guiding principles of the G20 Action Plan, which discusses:

- Comprehensive and clear legislation in place to protect from retaliation, discriminatory or disciplinary action when disclosure is made in good faith and on reasonable grounds of certain suspected acts of wrongdoing or corruption to competent authorities
- Clear definitions on the scope of protected disclosures and persons afforded protection
- Clearly defined procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, with procedures for the whistleblowers to follow up his or her report and
- Effective remedies and sanctions for retaliation that are clearly outlined

Without such established processes in place, the professional accountant will find that the appropriate authority does not have the necessary infrastructure to support investigation and resolution of the issues. The OECD notes that the lack of trust in the ability or willingness of the authorities to investigate the report is one of the biggest deterrents to reporting wrongdoings. Many countries are actively looking to implement and effectively apply these best practices and guiding principles in accordance with their respective legal systems. Translating this guidance and best practices into legislation creates a formal mechanism under which whistleblowers can disclose acts of wrongdoing while taking into account obstacles of disclosure such as civil or criminal liability or breach of confidentiality. We support such

⁴ <http://www.oecd.org/general/48972967.pdf>

⁵ <http://www.oecd.org/cleangovbiz/50042935.pdf>

legislation, and believe the Board and IFAC should likewise be vocal in support of national legislation as part of their public interest responsibilities.

In summary, we are supportive of the G20 recommendations and the OECD guidance, and we believe whistleblower protection for professional accountants is essential in reporting suspected illegal acts. The absence of appropriate whistleblower legislation for professional accountants will unnecessarily expose the professional accountant to potential legal peril as well as possible retaliation.

2. Conflict with anti-money laundering legislation

Many countries have established anti-money laundering legislation to prevent, detect and report money laundering activities. The exposure draft requires the professional accountant to discuss a suspected illegal act with management and escalate the matter to higher levels of management if needed. This requirement is a contravention of certain anti-money laundering laws, which include prohibitions on alerting (tipping off) the client to the pending or actual investigation. The tipping off prohibitions in many anti-money laundering laws can be complex and prescriptive; resulting in difficulty reconciling the relevant legal or regulatory requirements with the proposed exposure draft.

Furthermore, noncompliance with anti-money laundering requirements by a professional accountant could result in the professional accountant being subject to sanctions; including fines and imprisonment.

3. Incompatibility with forensic accounting engagements

The proposed exposure draft also creates a concern in forensic accounting engagements that result from actual or anticipated disputes or litigation and are performed under “attorney-client” privilege. Under such privilege, a client has the privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her attorney. Such privilege protects communications between attorney and client that are made for the purpose of furnishing or obtaining professional legal advice or assistance.

If a professional accountant is hired by a lawyer to perform a forensic engagement subject to “attorney-client” privilege, it would not be feasible for the professional accountant to disclose a suspected illegal act that is in contemplation of or in actual legal proceedings. Not only would requiring the professional accountant to disclose a suspected illegal act in these circumstances put the professional accountant in jeopardy of violating the law, but it would also effectively prevent accounting firms from offering these types of services to clients, which we believe would not be in the public interest.

4. Disincentives for global acceptance of the Code

The objective of the IESBA is to serve the public interest by setting high quality ethical standards for professional accountants and by promoting the adoption of a single set of ethical standards around the world, thereby enhancing the quality and consistency of services provided by professional accountants. However, we believe that countries may be hesitant to adopt the Code (particularly the provisions proposed by the exposure draft) due to the cultural, societal, legal and regulatory differences that exist. Therefore, the proposal may hamper IFAC’s objective to further enhance the quality of the profession and ensure greater consistency worldwide. We believe hindering this objective is not in the public interest.

While we agree that disclosure of a suspected illegal act to an appropriate authority is in the public interest, we believe that the requirement for a professional accountant to disclose should arise only from a national legal or regulatory requirement, and we note that a number of regulators have already established procedures and specific laws and regulations which govern disclosure of suspected illegal acts, including breaching confidentiality. We are supportive of disclosure in these circumstances because it does not place the professional accountant in conflict with other ethical standards or legal or regulatory obligations regarding confidentiality.

While Grant Thornton supports the Board's efforts to put forth a framework for addressing suspected illegal acts, we believe the proposal is too prescriptive and fails to take into account common barriers to disclosure, the differences in cultural perceptions, the differences in legal systems and the legal uncertainties surrounding protected disclosure, and domestic laws. Instead we suggest the Board issue guidance as to when a suspected illegal act could be of "such consequence" that disclosure would be in the public interest. In these situations, and based on professional judgment, the professional accountant would have the right to breach confidentiality and disclose the suspected illegal act to an appropriate authority.

Grant Thornton would like to thank the IESBA for this opportunity to comment. As always we welcome an opportunity to meet with representatives of the IESBA to discuss these matters further. My contact information is below.

Sincerely,



Kim Gibson
Executive Director – Regulatory Matters
Grant Thornton International Ltd
1 +212 542 9506
kim.gibson@gti.gt.com

Request for specific comments

1. **Do respondents agree that if a professional accountant identifies a suspected illegal act, and the accountant is unable to dispel the suspicion, the accountant should be required to discuss the matter with the appropriate level of management and then escalate the matter to the extent the response is not appropriate? If not, why not and what action should be taken?**

Grant Thornton agrees that if a professional accountant identifies a suspected illegal act, and the accountant is unable to dispel the suspicion, the accountant should be required to discuss the matter with the appropriate level of management and escalate the matter if management's response is not appropriate, where not prohibited by law or regulation.

We recommend, however, that the Board require a professional accountant in public practice providing services to an audit client to discuss suspected illegal acts with the appropriate level of management only when there is a direct or material indirect effect on the amounts in the financial statements. Entities can be affected by laws and regulations that affect their day-to-day operations rather than their financial and reporting functions. Professional accountants may not have sufficient expertise to recognize possible violations of such laws and regulations, making it difficult to take reasonable steps to confirm or dispel a suspected illegal act. Furthermore, the breadth of matters that may be discovered by the professional accountant could involve a plethora of considerations not only outside the expected competence of a professional accountant, but that have no significant impact on financial reporting and the financial statements.

Regarding professional accountants in public practice providing services to a non-audit client, we recommend that the Board require the professional accountant to discuss suspected illegal acts with the appropriate level of management when the suspected illegal act relates to the subject matter of the professional services being provided by the professional accountant.

2. **Do respondents agree that if the matter has not been appropriately addressed by the entity, a professional accountant should at least have a right to override confidentiality and disclose certain illegal acts to an appropriate authority?**

As noted above, Grant Thornton is supportive of amending the Code to provide all professional accountants with the right to disclose a suspected illegal act to an appropriate authority if, in the professional accountant's judgment, he or she believes that the suspected illegal act is of such consequence that disclosure of the act would be in the public interest, and the professional accountant would not be deemed to breach the fundamental principle of confidentiality as defined in the Code.

3. **Do respondents agree that the threshold for reporting to an appropriate authority should be when the suspected illegal act is of such consequence that disclosure would be in the public interest? If not, why not and what should be the appropriate threshold?**

As noted above, Grant Thornton agrees that there could be situations where a suspected illegal act could be of such consequence that to act in the public interest, a professional accountant should have the right to override confidentiality in order to disclose the suspected illegal act to an appropriate authority. We do not support requiring a professional accountant to disclose such a suspected illegal act to an appropriate authority unless there is a legal or regulatory obligation to do so.

Matters specific to professional accountants in public practice (Section 225 of the Code)

4. **Do respondents agree that the standard for a professional accountant in public practice providing services to an audit client should differ from the standard for a professional accountant in public practice providing services to a client that is not an audit client? If not, why not?**

As noted above, Grant Thornton would support the Board providing for the right to disclose suspected illegal acts, coupled with guidance specifying when such disclosure should be made. We believe that such a right to disclose should apply to both professional accountants in public practice providing services to audit clients and also to professional accountants in public practice providing services to a client that is not an audit client.

In addition, we believe that the exposure draft as written does not truly distinguish between the professional accountant in public practice providing audit services and the professional accountant in public practice providing non-audit services because a right to disclose with an expectation to exercise this right is in reality a requirement to disclose. For the reasons stated in the body of our letter, Grant Thornton does not support a professional accountant being required to disclose an illegal act to an appropriate authority, unless there is a legal or regulatory obligation to do so.

5. **Do respondents agree that an auditor should be required to override confidentiality and disclose certain suspected illegal acts to an appropriate authority if the entity has not made adequate disclosure within a reasonable period of time after being advised to do so? If not, why not and what action should be taken?**

As noted above, Grant Thornton supports national laws or regulations requiring auditors to override confidentiality and disclose certain suspected illegal acts in the public interest to an appropriate authority if the entity has not made adequate disclosure within a reasonable period of time after being advised to do so, provided that such laws or regulations contain appropriate protections to those who make disclosure. However, for the reasons stated in the body of our letter, we do not believe that such a requirement should be set forth in the Code.

Rather, we would support the Board providing for a right to disclose suspected illegal acts, coupled with providing guidance specifying when such disclosure should be made.

6. **Do respondents agree that a professional accountant providing professional services to an audit client of the firm or a network firm should have the same obligation as an auditor? If not, why not and what action should be taken?**

Grant Thornton agrees that a professional accountant providing professional services to an audit client of the firm or a network firm should have the same right as the auditor. Please see our response to question 5 for our views as to how this right should be set forth.

7. **Do respondents agree that the suspected illegal acts to be disclosed referred to in question 5 should be those that affect the client's financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant? If not, why not and which suspected illegal acts should be disclosed?**

If a professional accountant has identified a suspected illegal act and there is a legal or regulatory requirement to report the suspected illegal act to an appropriate authority, Grant Thornton agrees those affecting the client's financial reporting function or financial statements should be disclosed.

8. **Do respondents agree that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm who is unable to escalate the matter within the client should be required to disclose the suspected illegal act to the entity's external auditor, if any? If not, why not and what action should be taken?**

Grant Thornton does not agree that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm, and is unable to escalate the matter within the client should be required to disclose the suspected illegal act to the entity's external auditor. The proposal appears to suggest that there is a distinction based on the premise that the professional accountant providing non-audit services will have a more restricted scope to escalate matters within a client's organization. There is an implication that because the audit involves interaction with those charged with governance (but specifically in the context of an audit of financial statements), they will be "closer" to management as a result and therefore will be in a better position to raise and escalate the discussion of a suspected illegal act. If a professional accountant providing non-audit services is not interacting with those charged with governance during their assignment, this should not be viewed as a barrier to requesting access to senior management. It does not seem practical that the auditor should be required to escalate matters related to a suspected illegal act which another accountant has been made aware of.

9. **Do respondents agree that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority and be expected to exercise this right? If not, why not and what action should be taken?**

As previously discussed, Grant Thornton is supportive of providing all professional accountants with the right to disclose a suspected illegal act to an appropriate authority if the professional accountant believes that the suspected act is of such consequence that disclosure of such act would be in the public interest, and the professional accountant would not be deemed to breach confidentiality as defined in the Code.

10. **Do respondents agree that the suspected illegal acts to be disclosed referred to in question 9 should be those acts that relate to the subject matter of the professional services being provided by the professional accountant? If not, why not and which suspected illegal acts should be disclosed?**

Grant Thornton agrees that the suspected illegal acts to be disclosed referred to in question 9 should be those acts that relate to the subject matter of the professional services being provided by the professional accountant because the breadth of suspected illegal acts either reported to or detected by the professional accountant could involve a multitude of considerations that have no significant impact on the services being provided to the client.

Matters specific to professional accountants in business (Section 360 of the Code)

11. **Do respondents agree that a professional accountant in business who is unable to escalate the matter within the client or who has doubts about the integrity of management should be required to disclose the suspected illegal act to the entity's external auditor, if any? If not, why not and what action should be taken?**

Grant Thornton does not agree that a professional accountant in business who is unable to escalate the matter within the client or who has doubts about the integrity of management should be required to disclose the suspected illegal act to the entity's external auditor. We do support the professional accountant in business disclosing such acts when there is a legal or regulatory requirement to do so. We believe when the professional accountant encounters these challenges, they should consult with legal counsel to determine the best course of action on how to deal with the suspected illegal act.

12. **Do respondents agree that a professional accountant in business should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority and be expected to exercise this right? If not, why not and what action should be taken?**

Grant Thornton is supportive of providing all professional accountants, including those in business, with the right to disclose a suspected illegal act to an appropriate authority, if in the professional accountant's judgment, he or she believes that that suspected act is of such consequence that disclosure of such act would be in the public interest, and the professional accountant would not be deemed to breach confidentiality as defined in the Code.

13. **Do respondents agree that the suspected illegal acts to be disclosed referred to in question 12 above should be acts that affect the employing organization's financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant? If not, why not and which suspected illegal acts should be disclosed?**

Grant Thornton agrees that the suspected illegal acts to be disclosed referred to in question 12 should be acts that affect the employing organization's financial reporting and acts the subject matter of which falls within the expertise of the professional accountant in business. In addition, when considering the types of illegal acts that the professional accountant should also consider disclosing to an appropriate authority due to the potential impact on the public interest, the IESBA should consider the OECD list of protected disclosures referenced above.

Other

14. **Do respondents agree that in exceptional circumstances a professional accountant should not be required, or expected to exercise the right, to disclose certain illegal acts to an appropriate authority? If not, why not and what action should be taken?**

As noted in this letter, Grant Thornton does not support amending the Code to require or expect a professional accountant to exercise a right to disclose certain illegal acts to an appropriate authority. Therefore we believe the proposal of exceptional circumstances is not relevant.

15. **If respondents agree that in exceptional circumstances a professional accountant should not be required, or expected to exercise the right, to disclose certain illegal acts to an appropriate authority, are the exceptional circumstances as described in the proposal appropriate? If not, how should the exceptional circumstances be described?**

Please refer to our response to question 14.

16. **Do respondents agree with the documentation requirements? If not, why not and what documentation should be required?**

Grant Thornton generally agrees with the documentation requirements, although we believe that they should be modified as necessary to take into account the suggestions made in our letter that there should not be a requirement to disclose.

We also believe that any documentation requirements must take into account local laws and regulations, including those related to applicable confidentiality laws or legal privileges (such as the attorney client privilege).

17. **Do respondents agree with the proposed changes to the existing sections of the Code? If not, why not and what changes should be made?**

Grant Thornton does not agree with the changes made to section 140 because we believe a professional accountant providing professional services to an audit client should only be required to disclose confidential information when there is a legal or regulatory requirement to do so. In such circumstances the duty of confidentiality may be overridden by statute, law, or a court of law.

Furthermore, we believe the change to paragraph 210.2 referring to “questionable issues associated with the client” would be difficult to put into practice. What is considered “unethical” is greatly influenced by factors such as culture and business practice in a given region. For example, certain activities are viewed as being unethical in one culture/region while acceptable in others. Therefore we believe the Board should consider providing additional guidance or examples as to what constitutes “questionable issues” beyond an illegal act.

18. **Do respondents agree with the impact analysis as presented? Are there any other stakeholders, or other impacts on stakeholders, that should be considered and addressed by the**

Grant Thornton does not agree with the impact analysis as presented for the reasons discussed in our letter.