



IESBA Consultation  
'Responding to a Suspected Illegal Act'

14 December 2012

## Responding to a Suspected Illegal Act

I refer to the above IESBA Exposure Draft and I am pleased to provide the comments of the ICAS Ethics Committee below.

As the Institute's Charter requires, the Ethics Committee must act primarily in the public interest, and responses to consultation documents etc. are predicated on the essential premise that their conclusions must be consistent with the public interest. Our Charter also requires us to represent our members' views and protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

### Key Comments

- Whilst we appreciate the underlying rationale behind these proposals we have major concerns in relation to them. Our primary concern is that we do not believe that the matters which the proposals are seeking to address should be dealt with in the IESBA Code of Ethics. To seek to introduce such proposals as they stand in the IESBA Code of Ethics without appropriate legal protection appears to be misguided. Legal protection is a prerequisite in relation to whistleblowing. In that respect we believe that IESBA and IFAC should lobby the G20 countries to encourage the development of high level global principles which could assist jurisdictions in forming their own national whistleblowing legislative frameworks.

**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?**

We are not supportive of such a requirement being introduced. There is also the possibility in certain circumstances of a potential conflict with national anti-money laundering requirements in certain jurisdictions, particularly in relation to any "tipping off" requirements that are in place. We also refer you to our primary concern stated above.

**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?**

In principle, yes, but this depends on whether a breach of the fundamental principle of confidentiality would be deemed to be in the public interest in the given circumstances and indeed whether the applicable legal framework permitted such an action. As we have highlighted above, these proposals cannot be considered in isolation from the applicable legal framework.

Regardless of how well intended these proposals might appear, interaction with law, particularly in jurisdictions where there is anti-money laundering legislation, is undoubtedly going to be complicated. Ultimately, it is the applicable legal framework that must prevail and currently in this respect this fact is not sufficiently taken account of in the draft proposals.

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

We agree with the proposed required threshold. However, there are significant issues related to this:

- (i) we would reiterate that the applicable legal framework needs to permit such reporting and provide a safe harbour for doing so.

- (ii) whilst in theory this is the right threshold to be applied, there is unfortunately no globally agreed definition of 'public interest'. Therefore, interpretation of what is in the public interest will vary significantly between cultures and between individuals. This in itself is a significant issue.

**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?**

We are not supportive of a different standard. The fundamental principles of the IESBA Code of Ethics apply equally to all professional accountants, whether they be in audit or otherwise. Although the Code provides additional independence requirements for those giving audit and other assurance opinions because of the nature of those opinions this fact is not relevant to the matter in question re that of overriding the fundamental principle of confidentiality. Therefore, we do not believe that such a distinction is appropriate. All professional accountants should be on an equal footing in terms of assessing whether an override of the fundamental principle of confidentiality would be in the public interest.

**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?**

No, we believe that the auditor should have the right to do so (as opposed to an obligation) where they believe that such an override of the fundamental principle of confidentiality would be in the public interest and the legal system permits such an action to be taken but should not be required to do so. The matter should then be left to the professional judgement of the auditor re the action to be taken. We would not be supportive of any potential change to the Code of Ethics establishing a more onerous obligation on auditors.

**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?**

Yes, we believe that they should have the same obligation but that this should merely be a right as opposed to a requirement to do so.

**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?**

We do not agree with the limited proposed scope. If the public interest is the determining factor then we believe that the scope should be extended to cover any suspected illegal acts which the professional accountant uncovers.

**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?**

We are not supportive of this approach which would place another burden on auditors. Such an approach would not be possible in certain jurisdictions where such disclosure is prohibited by professional confidentiality, secrecy or privilege requirements. Additionally, the proposals are not clear as to what would then be expected of the auditor.

**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?**

We are supportive of the professional accountant having the right to do so where they feel that such disclosure would be in the public interest and where an appropriate legal protection framework for whistleblowing is in place, but we do not support the proposal that they should be expected to exercise this right. Such an approach is effectively introducing a requirement to report.

**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?**

No, we believe that the scope should be wider than that proposed. We refer you to our response to question 7 above.

#### **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?**

We are not supportive of this approach. Please refer to our comments to question 8 above.

**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?**

We are supportive of the professional accountant in business having the right to do so where they feel that such disclosure would be in the public interest and where an appropriate legal protection framework for whistleblowing is in place, but we do not support the proposal that they should be expected to exercise this right. Such an approach is effectively introducing a requirement to report.

**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?**

No, we believe that the scope of the requirement should be wider. Please refer to our response to question 7 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?**

Yes. There will always be exceptional circumstances where it would not be appropriate to expect a professional accountant to exercise a right.

**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?**

The exceptional circumstances, as described, appear appropriate. However, please note our primary concern above.

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

We believe that the proposed documentation requirements are reasonable. However, we do have concerns that this approach might be moving the code away from its current position where it generally advocates documentation in the interests of the professional accountant but does not actually require it to be done.

**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?**

We are not supportive of the proposed changes in light of our comments above.

**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 IESBA?**

The impact on shareholders needs to be assessed. This is a very important constituent group because ultimately they are the true client of the audit process.