



December 17, 2012

Mr. Ken Siong
Technical Director
International Ethics Standards Board for Accountants
International Federation of Accountants
545 Fifth Avenue, 14th Floor
New York, NY 10017 USA

Dear Mr. Siong:

**Re: August 2012 Exposure Draft,
Responding to a Suspected Illegal Act**

I am writing on behalf of the Public Trust Committee (PTC) of the Canadian Institute of Chartered Accountants (CICA) in response to your request to comment on the Exposure Draft (ED) entitled, *Responding to a Suspected Illegal Act*. The CICA together with the provincial, territorial and Bermuda Institutes of Chartered Accountants and Ordre of Chartered Professional Accountants (CPA) of Quebec, represents a membership of approximately 97,000 professional accountants and 16,300 students in Canada and Bermuda.

The CICA conducts research into current business issues and supports the setting of accounting, auditing and assurance standards for business, not-for-profit organizations and government. It issues guidance on control and governance, publishes professional literature, develops continuing education programs and represents the Canadian CA/CPA profession nationally and internationally. The PTC is responsible for overseeing the regulatory structures and processes across provincial jurisdictions in Canada. The PTC's goal is to achieve consistency between provincial CA/CPA bodies in Canada and to make sure that the processes and standards in Canada meet or exceed the international standards.

We thank you for the opportunity to provide our comments on the ED. Our responses are provided in two parts; the first addresses our overall General Comments and the second is addressed to the Request for Specific Comments.

General Comments:

In general, we support the principle that when a professional accountant discovers acts of such consequence that disclosure would be in the public interest, and is not satisfied that an employer or client has appropriately responded and addressed the situation, the accountant should override the principle of confidentiality and, in effect, "blow the whistle" with respect to those acts. However, we believe that an obligation for disclosure must be accompanied by appropriate legislation that protects the "whistleblower" from retaliatory action. We also believe that additional clarity and guidance is required to assist the professional accountant in judging whether an act is of such consequence that disclosure is necessary. Finally, we understand that there may be jurisdictions where such disclosure requirements could contradict certain provisions of existing legislation, as is the case in the province of Quebec within Canada. We note that membership in IFAC requires compliance with IFAC standards, unless local law does not permit such compliance, but we believe that these particular provisions of the Code, if adopted as written, may merit a specific special exception.

Need for whistleblower protection:

As noted above, we believe that the adoption of disclosure requirements by IFAC member bodies must be preceded by a level of whistleblower protection for the professional accountant which can only be achieved by legislation or jurisprudence. Many member bodies may be located in jurisdictions where such extensive whistleblower protection does not exist. If these provisions of the Code are adopted as drafted, without recognition of the need for appropriate whistleblower protection for professional accountants, it may not be realistic to expect such member bodies to be able to remain compliant.

Scope of acts to be disclosed:

We believe that more guidance and clarity is required to describe the “certain suspected illegal acts” that are to be disclosed. As currently proposed, disclosure applies to those suspected illegal acts that the professional accountant believes are of such consequence that disclosure would be in the public interest. However, the interpretation of what constitutes such a suspected illegal act will differ among jurisdictions, legislators, regulators, professional accountants and the public itself. At one end of the spectrum, in some jurisdictions, there is a legal requirement to report money-laundering activities. Presumably, this reporting requirement has been legislated because legislators in these jurisdictions have determined that such activities are so clearly contrary to the public interest that specific “whistle-blowing” legislation was necessary. It could be argued that if the legislators believed that other activities were equally as contrary to the public interest, they would introduce similar whistleblowing legislation in relation to those activities as well. At the other end of the spectrum, one could argue that any activity that contravenes legislation is, by definition, contrary to the public interest, and therefore should be reported.

We recognize that the accounting profession has a responsibility to act in the public interest and that this proposal attempts to achieve additional public protection. Leaving the decision to legislators as to what suspected illegal acts a professional accountant must report may be seen to be abdicating that responsibility. On the other hand, attempting to define such suspected illegal acts in a broad manner that can be applied across multiple jurisdictions is an extremely difficult exercise; the resulting lack of clarity leaves the professional accountant, the body that regulates the professional accountant and the public with uncertainty, inconsistency and possibly, unenforceability. It is important that, if the profession is to take on this responsibility properly, we must be clear in our expectation of the matters that are to be reported in our own and other jurisdictions. Therefore, we believe that additional guidance and greater clarity in determining what constitutes a “suspected illegal act of such consequence that disclosure would be in the public interest” is fundamental to evaluating the proposed disclosure requirements.

We note that the proposal limits disclosure to those suspected illegal acts that affect the client’s financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant.

There may be other suspected illegal acts that have much greater potential to affect the public to which a professional accountant may become privy during the course of providing professional services. For example, the professional accountant might discover information related to violations of environmental protection legislation, which may have more adverse impacts on the public than matters restricted to those within the expertise of the professional accountant. It is not clear whether the proposal intends that the professional accountant would be required to disclose such suspected illegal acts because such acts, although not financial in nature, may have financial impacts.

Possible economic consequences:

There may be possible economic consequences that impact public interest considerations as well. Protection of the public supersedes economic consequences to the professional accountant, but in practical terms, the professional accountant factors such considerations into all professional decisions. The inability of the professional accountant to obtain reasonable protection from adverse financial (or other) consequences would restrict the availability of services required by the financial reporting system, an outcome that would not serve the public well.

For example, the cost and availability of professional liability insurance may be adversely impacted should successful claims arise in relation to (good faith) disclosure of suspected illegal acts. It is also not clear whether current insurance would provide coverage for such claims. The possible impact on the financial reporting system of outrageously priced or unavailable professional liability insurance could be significant and should not be overlooked.

Suggested alternate framework:

The issues related to a requirement for a professional accountant to override confidentiality and disclose suspected illegal acts are clearly complex. The development of an enforceable, yet all-encompassing description of such acts that are “of such consequence that disclosure would be in the public interest” may not be possible until such a disclosure requirement has been allowed to “mature” as a standard. In the meantime, we suggest the following framework as one possible alternate approach:

- Clearly, in jurisdictions where there exists legislation that requires disclosure of specific acts or matters, professional accountants are required to override confidentiality and disclose such acts or matters – the Code cannot override these legislated requirements but could remind professional accountants that such disclosure requirements may exist and must be met.
- Where a requirement to disclose is not legislated with respect to a specific act or matter, but appropriate whistleblower protection is afforded by other relevant legislation, professional accountants should be required to disclose the act or matter to an appropriate external authority, after appropriate escalation within the client or to the external auditor.
- Where a requirement to disclose is not legislated with respect to a specific act or matter and no appropriate whistleblower protection exists, professional accountants should have the right (but without the expectation or obligation), after appropriate escalation within the client or to the external auditor, to override confidentiality and disclose the act or matter if they are acting in the good faith belief that such disclosure is necessary to serve the public interest in the circumstances.
- These disclosure requirements would apply to all professional accountants, whether in public practice or in business. However, we note that there may be cases where a professional accountant, whether in public practice or in business, is acting in a fiduciary capacity. In some jurisdictions, such professional accountants may require an exception from a reporting requirement in order to comply with legal requirements applicable to fiduciaries. Such exceptions should be made only where a fiduciary is subject to legal requirements that contradict a requirement to report and only where the substance of the relationship creates the fiduciary responsibility, irrespective of its form.
- Member bodies should be encouraged to work with legislators to enact whistleblower protection for all such disclosures, if such protection is not already provided.

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?*

Comment: We agree with the principle that professional accountants should be required to discuss suspected illegal acts with the appropriate level of management and then escalate the matter to the extent the response is not appropriate. However, we do have some concern, as described above, with the extent to

which, to whom and in what circumstances, escalation of the matter beyond the client or employer is necessary and whether appropriate whistleblower protection exists. One area of concern is the potential for differences in what constitutes an “illegal act” between jurisdictions, particularly where the professional accountant’s association is with a client or employer with international operations. In particular, which jurisdiction’s laws are to be applied and how broadly do they apply across borders to the entire entity?

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?*

Comment: We understand that there may be situations where a professional accountant should at least have a right to override confidentiality and disclose certain illegal acts to an appropriate authority. We are concerned that even the potential for such a right (not to mention a requirement, in some cases) to disclose could undermine the trust relationship that is necessary between both an employee and employer and between an auditor and audit client. However, if we understood more clearly which matters must be disclosed, our concerns with respect to the importance of such trust relationships might be outweighed by the need for public protection.

We also suggest that it may be appropriate to include a reminder to professional accountants (or perhaps reminders in several places) that when faced with such situations, it is always prudent to obtain legal advice. While legal advice does not excuse a professional accountant from complying with the exercise of sound professional judgment in determining what acts are to be disclosed, it can assist the professional accountant to take steps to mitigate risk while still complying with disclosure requirements.

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?*

Comment: As noted above in our general comments, the interpretation of what constitutes a suspected illegal act “of such consequence that disclosure would be in the public interest” will differ among jurisdictions, legislators, regulators, professional accountants and the public itself.

It is also possible that the interests of one segment of the public may be adverse to the interests of another segment of the public, which requires the professional accountant to judge which interests are to be served. Shareholders or employees are one public segment whose interests could be seriously harmed if the professional accountant discloses information in order to protect the interests of another segment of the public, who might otherwise suffer equal, more or less harm.

It would be very helpful if greater clarity was provided as to what the profession believes would constitute a suspected illegal act of such consequence that disclosure would be in the public interest. Perhaps this could be accomplished through the addition of some examples or supplementary guidance. Or perhaps, as we have suggested in our general comments, consideration might be given to establishing different disclosure requirements for different suspected illegal or other acts, with stricter requirements applying to acts that can be described with more certainty.

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?*

Comment: We do not agree that the disclosure standard should differ based on the nature of the service, the client or whether the professional accountant is an auditor, other service provider, or employee. We acknowledge that the auditor may be perceived to have “higher” responsibility to the public, may have easier access to those charged with governance and may be in a better position to escalate an issue to that level (which may or may not resolve the matter). However, on the basis that the “non-auditor” professional accountant is truly concerned that the public is at risk and has exhausted whatever escalation is available, then public protection should still be the overriding concern and the “non-auditor” professional accountant should have the same disclosure obligations as a professional accountant who is an auditor.

On a more technical note, as proposed, the disclosure standard applies differently to “auditors” and “non-auditors”, but it is not clear whether “audit” is intended to include professional accountants who provide review or other assurance services.

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?*

Comment: We agree that, in principle, 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.

However, we temper that agreement with a caution that it is very important to further develop and clarify what those reportable suspected illegal acts are and in so doing carefully consider the possible “chilling effect” of such a disclosure requirement on the trust relationship.

In addition, our comment is based on the proposed alternate framework that includes appropriate whistleblower protection.

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?*

Comment: We 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, unless the professional accountant is acting as a fiduciary, as noted above. We note that the professional accountant in this situation may have a “dual” path for escalation, one within the professional services firm and another within the client; it might be helpful to highlight this “dual” path. This situation is also an example where the professional accountant may encounter issues with differences in laws in different jurisdictions, and guidance on dealing with such situations would be helpful.

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?*

Comment: We disagree that disclosure should be limited to those acts that affect the client's financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant. As noted above, we believe that there may be other matters that have greater potential impact on the public interest than financial matters. The process for escalation of such "non-financial" matters would not likely be dissimilar, although it may be even more important to obtain legal advice in such situations.

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?*

Comment: We believe that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm should first attempt to escalate the matter within the client but if unsuccessful, should be required to disclose the suspected illegal act to the entity's external auditor, if any, unless the professional accountant is acting as a fiduciary, as noted above. Such information is likely to be necessary in order for the auditor to properly fulfill the audit function. In addition, the information may have an impact on the auditor's assessment of the continuance of the client relationship. We note, however, that the circumstances in which such a professional accountant is unable to escalate the matter within the client are likely to be limited.

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?*

Comment: We 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 disclose the matter to an appropriate authority, after exhausting other possibilities, unless the professional accountant is acting as a fiduciary, as noted above. However, we believe that such a professional accountant should have the same disclosure requirement as is required of an auditor, on the basis that if the "non-auditor" professional accountant is truly concerned that the public is at risk and has exhausted whatever escalation is available, then public protection should still be the overriding concern. In short, there should be a responsibility to disclose to the auditor because the auditor "needs to know" and to disclose to the appropriate authority in order to address public protection.

In addition, our comment is based on the proposed alternate framework that includes appropriate whistleblower protection.

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?*

Comment:. We disagree that disclosure should be limited to those acts that relate to the subject matter of the professional services being provided by the professional accountant. As noted above, we believe that there may be other matters that have greater potential impact on the public interest than those matters which are limited to the professional services being provided. The process for escalation of such “unrelated” matters would not likely be dissimilar, although it may be even more important to obtain legal advice in such situations.

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?*

Comment: On the assumption that having “doubts about the integrity of management” means that the matter has not been appropriately addressed by the professional accountant’s employer, we 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, for the same reasons as outlined in our response to question 8. However, disclosure outside of the organization (to the external auditor or an appropriate authority) should not be required simply because a professional accountant has unsubstantiated concerns about the integrity of management.

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?*

Comment: We believe that a professional accountant in business should disclose the matter to an appropriate authority, after exhausting other possibilities, unless the professional accountant is acting as a fiduciary, as noted above. However, on the basis that the “non-auditor” professional accountant is truly concerned that the public is at risk and has exhausted whatever escalation is available, then public protection should still be the overriding concern and the “non-auditor” professional accountant should have the same disclosure obligations as a professional accountant who is an auditor.

In addition, our comment is based on the proposed alternate framework that includes appropriate whistleblower protection.

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?*

Comment:. We disagree that disclosure should be limited to those acts that affect the employing organization’s financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant. As noted above, we believe that there may be other matters that have greater potential impact on the public interest than financial matters. The process for escalation of such “non-financial” matters would not likely be dissimilar, although it may be even more important to obtain legal advice in such situations.

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?*

Comment: We agree that in exceptional circumstances that a professional accountant should not be required, or expected to exercise the right, to disclose certain illegal acts to an appropriate authority. However, the professional accountant should be required to have taken measures to support the assertion that a threat was genuine, and not simply be excused from disclosure on the basis of a claim that any such threat existed.

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?*

Comment: We believe that the exceptional circumstances described are appropriate, subject to our response to question 14 and subject to our previous comments with respect to the possible adverse impacts on the financial reporting system if appropriate whistleblower protection is not in place or where local legislation does not permit disclosure of protected information. A professional accountant should not be forced, when having acted in good faith and in compliance with professional standards, into becoming “unemployable” by virtue of being known as a whistleblower.

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

Comments: We agree with the documentation requirements, subject to our response to question 14 and subject to including a specific provision that such documentation is the personal property of the professional accountant which may, in some cases, be subject to solicitor-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?*

Comments: We note that several of the “consequential changes” refer to “unethical” behaviour/acts (for example, 150.1, 210.5) as opposed to “suspected illegal” acts. In addition, there appear to be references to a requirement to resign/terminate (for example, 100.22, 210.5, 300.15,) as opposed to a need to consider whether resignation/termination is necessary (225.3, 225.14, 225.19, 225.20, 225.23, 360.3, 360.10, 360.15). These references appear, at least on the surface, to create some uncertainty as to which provisions apply in what circumstances and we suggest reviewing them for consistency and clarity.

We also note that it is proposed that the final sentence of 100.21 be deleted. We suggest that it might be more helpful to retain the reference to fraud as an example, but refer to the provisions that address suspected illegal acts for further guidance and retain the reference to seeking legal advice.

Paragraphs 200.9 through 200.13 of the Code address changes in professional appointments and refer the predecessor accountant to the client confidentiality provisions (section 140) of the Code. The client confidentiality provisions include proposed amendments which refer to the proposed suspected illegal acts disclosure provisions. However, it is not clear whether the predecessor accountant has a responsibility to

disclose suspected illegal acts to a possible successor accountant in addition to disclosure to an appropriate authority. We suggest that any such obligation should be clarified, preferably within paragraphs 200.9 to 200.13.

The proposed provision requiring the professional accountant to determine the appropriateness of management's response to the disclosure of the suspected illegal act does not sufficiently address the practicalities of doing so when a suspected illegal act is discovered while an audit, for example, is in progress. The proposal states:

“Appropriateness of Action Taken

The proposal requires the professional accountant to determine whether the response of the client or employing organization to the suspected illegal act is appropriate. The determination of whether the response is appropriate will require professional judgment and include a consideration of the nature and magnitude of the matter and factors such as whether:

- The matter has been adequately investigated;
- Remedial action has been taken to address the matter; and
- Appropriate steps have been taken to reduce the risk of re-occurrence, such as for example, additional controls or training.”

According to this requirement, the professional accountant must ensure that all of the above actions have been taken before deciding what next steps he or she should take, including whether to continue with the audit. We suggest that more guidance should be provided as to what actions could be taken or what the next steps may be in such circumstances.

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?*

Our comments with respect to the need for whistleblower protection, possible impacts on professional liability insurance, possible consequences for the financial reporting system, and potential conflict with current legal requirements that may exist to protect information generally and more specifically in the case of fiduciaries, are included with our General Comments.

We are also concerned that there may not have been consideration given to possible risk and liability impacts beyond those that affect professional accountants. There may also be risk and liability concerns for regulators that outweigh the potential public interest benefit in some circumstances. There may be increased risk and liability exposure arising from professional accountants taking civil action against the regulatory body if adequate legal protection from retaliatory action is not provided to them when they whistle blow (whether appropriately or inappropriately). There may be increased risk and liability exposure for the regulatory body arising from members of the public taking civil action against the regulatory body if they believe the professional accountant did not whistle blow because of the professional accountant's exercise of professional judgment in accordance with the provisions of the rules of professional conduct/code of conduct. There also may be increased liability exposure for both the professional accountant and the regulatory body when the regulatory body has been unable to take any disciplinary action against the professional accountant because he or she simply did not discover the possibility of illegal acts or is alleged to not have made sufficient or appropriate inquiries to determine whether there may have been a suspected illegal act.



We thank you for the opportunity to comment on the ED and we commend you for your continuing efforts to improve the requirements of the Code.

Yours truly,

A handwritten signature in black ink, appearing to read 'J Maund', written in a cursive style.

Joanna Maund, FCPA, FCA
Chair, Exposure Draft Working Group – Public Trust Committee