

By Email

3 September 2015

Ken Siong
Technical Director
International Ethics Standards Board for Accountants
International Federation of Accountants
529 Fifth Avenue, 6th Floor
New York
NY 10017

Dear Mr Siong

Responding to Non-Compliance with Laws and Regulations

The Chartered Institute of Management Accountants (CIMA), founded in 1919, is the world's leading and largest professional body of management accountants, with over 227,000 members and students operating in 179 countries, working at the heart of business. CIMA members and students work in industry, commerce, the public sector and not-for-profit organisations of all sizes.

Professionalism and ethics are at the core of CIMA's activities with every member and student bound by the CIMA Code of Ethics which is based upon the IESBA Code. CIMA is pleased to have the opportunity to comment on the above IFAC/IESBA re-exposure draft.

CIMA welcomes and supports the IESBA's endeavours to review and enhance the relevance of the code of ethics for the global profession, particularly as this also helps reinforce confidence in the ethical infrastructure of business. It must be recognised however that an ethical code is but one component or driver of responsible business practice and that, in respect of NOCLAR, a change in any prescriptive dimension of the code designed to address this would need to be balanced by a commensurate level of regulatory policing and enforcement which is arguably more complex.

While we can see the merits of a code demand that better enables accountants to warn of bad or potentially illegal activity in the public interest, this would also require attendant safeguards to be in place- worldwide - in order to provide support and protection to the individuals seeking to fulfil their ethical obligations. This in turn would require acknowledgment and understanding of the many differing legal and cultural contexts within which professional accountants work, and which in some jurisdictions can leave individuals in positions in some instances of significant vulnerability.

General comments

CIMA is not convinced that the proposals in this consultation are justified – it is felt that the duties of the PA are encompassed in the fundamental principles and the extant code. For example, section 140.7 of the current Code already states that the professional accountant “may be required to disclose confidential information [in case of] a professional duty or right to disclosure when not prohibited by law.”

In addition, the more prescriptive a code is, the more danger there is to professional accountants working in jurisdictions that have limited protection for whistleblowers and those that make disclosures of NOCLAR. The ability to make a professional judgement as opposed to following a checklist will benefit these PAs.

There should be more emphasis throughout that the lists provided are examples for guidance and not a replacement for professional judgement.

We hope that these comments and the ones that follow in the Appendix will be of use to the IESBA. As ever, CIMA is happy to engage with the Board and provide any clarification.

Yours sincerely,

Samantha McDonough

Professional Standards Support Manager

Question 1. Where law or regulation requires the reporting of identified or suspected NOCLAR to an appropriate authority, do respondents believe the guidance in the proposals would support the implementation and application of the legal or regulatory requirement?

Yes, CIMA supports this proposal.

Question 2. Where there is no legal or regulatory requirement to report identified or suspected NOCLAR to an appropriate authority, do respondents believe the proposals would be helpful in guiding PAs in fulfilling their responsibility to act in the public interest in the circumstances?

Yes but it should be made clearer that the PA should exercise professional judgement to consider options for action and reach the most appropriate course of action rather than seeking answers from a list.

It is impossible to predict the future and scale of potential harm. Any guidance should enable PAs to make a proportionate and balanced response to any NOCLAR and to respond appropriately to their level of suspicion.

The guidance should also be cross referenced to the duty of confidentiality and the guidance as to when the public interest overrides the PA's duty to employer or client.

Question 3. The Board invites comments from preparers (including TCWG), users of financial statements (including regulators and investors) and other respondents on the practical aspects of the proposals, particularly their impact on the relationships between:

- (a) Auditors and audited entities;**
- (b) Other PAs in public practice and their clients; and**
- (c) PAIBs and their employing organizations.**

CIMA has no specific comment.

Question 4. Do respondents agree with the proposed objectives for all categories of PAs?

It is difficult to address questions 4 and 6 separately as they are fundamentally connected.

There is a danger that these objectives could be confusing for PAs unsure of their position with regard to the categories. Any response to NOCLAR or suspected NOCLAR should be commensurate to the level of responsibility the PA has.

In addition, the actual names of the categories may be misunderstood and inconsistently applied, in particular the distinction between "senior PAIBs" and "other PAIBs" – these are not terms that are widely used in the UK. Job titles in themselves are misleading – it is the scale of operational control and decision making responsibility that is important.

Therefore it is the CIMA view that the fundamental principles should be the primary factor in a PA's decision to act on NOCLAR. Provided that the report is based on a genuine observation of NOCLAR that can be evidenced, then the duty to report should be incumbent on all PAs.

Question 5. Do respondents agree with the scope of laws and regulations covered by the proposed Sections 225 and 360?

Yes however, as emphasised in other answers, the lists at 225.6 and 360.6 should not be regarded as exhaustive. Although they seem comprehensive there will always be times when a situation not covered by the lists will arise and the PA will be required to use professional judgement. CIMA acknowledges that these lists are labelled as examples but further clarification would be useful.

The scope is described in section 225.5 with the list following at 225.6, clearly denoted as examples. In Section 225.7 there is reference to “those laws” which readers may perceive as the list rather than wider laws that may be in the scope by virtue of fitting the description in 225.5. For this reason CIMA recommends the removal of the word “those” to be replaced with “relevant” or simply the removal of “those” with no substitution.

The same recommendation applies to sections 360.5 to 360.7.

Question 6. Do respondents agree with the differential approach among the four categories of PAs regarding responding to identified or suspected NOCLAR?

The terms “senior PAIBs” and “other PAIBs” are not universally understood. For example in the UK the senior PAIB is more generally known as the Chief Finance Officer. These terms may not be easily understood or applied in the many jurisdictions.

There are a wide range of job titles and responsibilities that will depend upon job description and how many other professional accountants are in the employ of a company. Job titles in themselves are misleading – as we suggest in our answer to no 4, it is the scale of operational control and decision making that is important.

Accountants work in a wide variety and size of firm, some as the only PA in a business. The appropriate response may better be linked to the context in which they operate – i.e. role and activities performed rather than seniority which can be a fairly arbitrary designation.

CIMA believes that there should be some explanation that these categories are for guidance only and that it is up to the PAIB to assess the sphere of influence that they have. The right to report NOCLAR should not be restricted to the level of responsibility a PAIB holds.

Question 7. With respect to auditors and senior PAIBs:

(a) Do respondents agree with the factors to consider in determining the need for, and the nature and extent of, further action, including the threshold of credible evidence of substantial harm as one of those factors?

The adoption of a term intended to replace the widely understood “public interest” would be contrary to the interests of the profession and the society it serves. Public interest is a widely used and understood term despite the lack of a consistent definition. It is used by accountancy bodies, regulators and the international media. “Public interest” has a common application that would not be adequately replaced by “substantial harm”. Substantial harm may not be manifested immediately or anticipated as readily as the public interest.

Substantial harm could be viewed as just a part of what is understood or perceived to be covered by public interest. Whilst the difficulties in defining public interest are acknowledged, so is the work and case law that has gone towards a more established definition and understanding. Substantial harm is a term no more well defined, understood or applied consistently.

In addition identification of “substantial harm” suggests a minimum level for action whilst “public interest” encourages a much more proactive consideration of the circumstances.

CIMA recommends that the term “public interest” be retained. The term “substantial harm” may have a place in the guidance as an example of how a NOCLAR issue may be contrary to the public interest.

(b) Do respondents agree with the imposition of the third party test relative to the determination of the need for, and nature and extent of, further action?

CIMA agrees that the imposition of the third party test provides a basis for establishing a framework to ensure the objective and rigorous assessment for determining the need for, and nature and extent of, further action (as detailed in paragraphs 54-56 of the explanatory memorandum).

The application of what is deemed to be a “reasonable and informed third party” is subjective and is likely to lead to inconsistent application. However for a Code with an international application any definition of a third party test is always likely to be subject to the cultural environment.

For example a third party in a country where, for example, facilitation payments or similar may continue to feature and are widely regarded as acceptable business practice would have a different view from an individual from an environment with well-established laws and business practices that are clearly defined, recognised and complied with.

It should be made explicit what the expectation on a third party are for the third party test to be effective – that is, in addition to being well informed in the context of the circumstances the third party would be sufficiently informed of the role and responsibilities of the professional accountant.

(c) Do respondents agree with the examples of possible courses of further action? Are there other possible courses of further action respondents believe should be specified?

The examples of possible courses of action provided do constitute reasonable guidance but it should be made clear that there may be other courses of action and that the PA should use professional judgement in reaching a decision on action. It should be made clear that the possible courses for further action are not an exhaustive list and that professional judgement should be the overriding method of determining a course of action and also the steps to be taken in an appropriate sequence. Progressive escalation of a NOCLAR issue, especially where there is no jurisdictional requirement to simply report, may be instrumental in eliminating a NOCLAR practice on a business and embedding good practice in the future.

In addition, it is not clear why the ED expects all the (initial) actions in the proposed paras. 360.16-360.18 to be taken together. It is CIMA’s view that possible courses of further action should be escalated progressively, up to the point at which the matter is resolved.

(d) Do respondents support the list of factors to consider in determining whether to disclose the matter to an appropriate authority?

The list must be clearly identified as a list of examples. Any list has the effect of being interpreted as a checklist and should not be a substitute for professional judgement.

Whilst providing guidance to PAs on how they may react in instances of NOCLAR or suspected NOCLAR was the intention of the original project proposal, it should be made

explicit that lists are not exhaustive. PAs should not be encouraged to pick their solutions from a list – this may result in picking the best fit from a list but not arriving at the best solution as the best solution would have been reached through application of professional judgement.

There is a wider stakeholder community which may experience the impact of these sections of the code. For example if legal or institutional proceedings were to be taken against a professional accountant following a disclosure of NOCLAR there should be a safeguard against the interpretation of the list as exhaustive and that the PA is encouraged to make a professional judgement.

Question 8. For PAs in public practice providing services other than audits, do respondents agree with the proposed level of obligation with respect to communicating the matter to a network firm where the client is also an audit client of the network firm?

CIMA has no specific comments.

Question 9. Do respondents agree with the approach to documentation with respect to the four categories of PAs?

There are four new categories for PAs to select from and there is no reason why all PAs should not document events, conversations, written communications and anything else that demonstrates their attempts to escalate internally, disclose externally or influence to correct NOCLAR.

CIMA advises (for example in Section 100.22 of its Code of Ethics that “it may be in the best interests of the professional accountant to document the substance of the issue, the details of any discussions held, and the decisions made concerning that issue”.

Similarly, Section 220.13, relating to accountants in public practice, states that: “when disclosure is verbal, or consent is verbal or implied, the professional accountant in public practice is encouraged to document the nature of the circumstances giving rise to the conflict of interest, the safeguards applied to reduce the threats to an acceptable level and the consent obtained”.

For PAIBs, Section 310.5 states that “... the member also should consider documenting the substance of the issue, the parties with whom the issue was discussed, details of any discussions held, and any decisions made concerning the issue”.

Section 340.10 gives safeguards to ensure that threats to the member’s compliance with the “Integrity and Objectivity principles” are eliminated or reduced to an acceptable level. These include “... document his or her understanding of the facts, the accounting principles, auditing standards, or other relevant professional standards involved or applicable laws or regulations and the conversations and parties with whom these matters were discussed”.