

Ref #528328

4 September 2015

International Ethics Standards Board for Accountants (IESBA)

Email: [kensiong@ethicsboard.org](mailto:kensiong@ethicsboard.org)

Dear Sir

**SAICA SUBMISSION ON THE IESBA'S EXPOSURE DRAFT, RESPONDING TO NON-COMPLIANCE WITH LAWS AND REGULATIONS**

The South African Institute of Chartered Accountants ("SAICA") is the foremost accountancy body in South Africa and one of the leading institutes in the world. It plays an influential role in a highly dynamic business sector. SAICA currently has 39 956 members of which 32 031 are resident in South Africa and 7 565 are international members.

The objectives of SAICA include the preservation of professional independence of members and SAICA insist upon a high standard of professional behaviour on the part of members, associates and students.

SAICA is an IFAC member body and have adopted the International Ethics Standards Board for Accountants (IESBA) *Code of Ethics for Professional Accountants* as the SAICA Code of Professional Conduct for all members, associates and trainees.

In response to your request for comments on the *IESBA's Exposure Draft, Responding to Non-Compliance with Laws and Regulations*, attached is the comment letter prepared by The South African Institute of Chartered Accountants (SAICA).

We thank you for the opportunity to provide comments on this document.

Please do not hesitate to contact us should you wish to discuss any of our comments.

Yours sincerely,

**Juanita Steenekamp (CA (SA))**  
**Project Director – Governance and Non-IFRS Reporting**

## RESPONSE TO REQUEST FOR SPECIFIC COMMENTS

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?

**Response:**

Yes, SAICA is supportive of the guidance provided, however we recommend that paragraphs 225.24 (further action) and 225.27 (determining whether to disclose the matter) should take into account that local jurisdictions may have more onerous or specific guidance on how to address NOCLAR's and the reporting thereof and these requirements be adhered to if more onerous than the current code."

Both Namibia and South Africa have legislation requiring the Auditor to report certain types of unlawful acts to a regulator in certain circumstances. The auditor in Namibia is required to report a "material irregularity" to the Public Accountants and Auditors Board and in South Africa the auditor is required to report a "reportable irregularity" to the Independent Regulatory Board for Auditors or to the Companies and Intellectual Properties Commission depending on whether the company is subject to an audit or an independent review. Further reporting responsibilities can be found in numerous other Acts within the South African legislative environment, each requiring the auditor to report any irregularities to the respective regulator. These include the Financial Advisory and Intermediary Services Act, Long Term Insurance Act, Short Term Insurance Act, Banks Act and the Collective Investment Scheme Act. These reporting obligations are very specific and not as widely defined as they are in the ED. SAICA believes that the proposals support the implementation and application of our legal or regulatory requirement since they do not restrict our ability to report unlawful acts.

Section 225.10 clearly requires the reporting PA understand the Regulatory duties which must be fulfilled as well as again later in paragraph 225.33.

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?

**Response:**

Yes, SAICA agrees that the proposals will be helpful in guiding PA's to report identified or suspected NOCLAR to an appropriate authority if no legal or regulatory requirements exists, although the subjectivity of applying thresholds such as "clearly inconsequential" and "substantial harm" or "serious adverse consequences" may create inconsistencies in the application of the guidance. The application of the concept of the Reasonable Informed Third Party would however ensure that professional judgement is achieved and applied to each situation.

Acting in the public interest is already acknowledged in the Code of Ethics as a responsibility of the PA in terms of paragraph 100.1 of the Code and it is important to note the difference in the suggested Code as the paragraph 225 will not only apply to Public Interest Entities (PIE) as defined in paragraph 290.25 to 290.26, but to all entities whether they are PIE or not. This is welcomed as it provides a stricter control over NOCLARs. The guidance given is comprehensive and deals with all aspects a PA needs to consider, the documentation that is recommended and the inclusion of consideration for the Reasonable Informed Third Party that is used throughout the Code in relation to judgemental decision making.

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:

**Response:**

- (a) Auditors and audited entities;

The relationship between auditors and audited entities may well be strengthened in that NOCLARs reported to management and/or TCWG will add value to the audit services provided by the PA. An audited entity with the right respect for its function and responsibility in society will welcome the report by the PA in respect to NOCLARs and respond positively. However, entities that are guided by a strong commercial or profit motive, as was particularly visible in the financial sector in recent years, may not so willingly respond appropriately to the requirements placed on the PA in relation NOCLARs. In such an event, the possibility that the PA may report to relevant authorities may convince TCWG and in particular management to become more compliant in respect of laws and regulations. It would be best that the ISA 210 or similar standard be updated (terms of engagement) to provide reference to NOCLAR requirements in the engagement letter, as would a South African RA do in relation to Reportable Irregularities, sets out the PA's obligations in relation to the section 225. Because paragraph 225 may well affect the relationship between the PA and the audited entity, it is recommended that the firm issue guidelines on the process of managing the relationship during an event falling under the ambit of paragraph 225.

Feedback received from the Small and Medium Practices constituency stated the following:

The proposals have a definite impact on the relationship between auditors and audited entities specifically with regards to managing the expectations, explaining the purpose and process of this NOCLAR process to the audited entities and additional, incremental costs.

The above should be addressed formally via the engagement letter, based on our small medium business environment:

- It should set out any responsibilities that auditors and accountants have to report NOCLAR to an appropriate authority.

(This will educate and influence TCWG in the small medium environment to improve their knowledge regarding laws and regulations)

- It should set out the process of communicating the NOCLAR to TCWG, as well as the format and documentation thereof.
- It should clearly state that the effect of any NOCLAR, will be considered when issuing the audit report.
- It should also include a paragraph explaining the potential cost implications of obtaining advice from legal counsel [par 130, pg 27 of the exposure draft]

(b) Other PAs in public practice and their clients;

As is described in the proposed section 225, the relationship between the other PAs in public practice and their clients is not always as onerous as the relationship when assurance services are provided. It is recognised that there will follow serious consequences when a NOCLAR is discovered under non-audit circumstances. Therefore the PA needs to be very circumspect particularly when dealing with clients that are also audit clients of the firm or network firm.

(c) PAIBs and their employing organizations.

The standard in the current form is a guide and the PAIB is not compelled to report if the circumstances do not allow them to do so, it will strengthen the resolve of those who wish to report, and this may well bring some friction as ethical reporting normally does, but only in a case of Public interest, so SAICA supports the proposals for the greater good of societies.

The relationship between a PAIB and his/her employer is far more immediate than that between the PA's clients and in many respects may have a serious effect on the livelihood of the PAIB. Thus the relationship may well be tested to its limits when a PAIB has to respond to NOCLARs, occurring or anticipated to occur. PAIBs need to understand the employer's ethical requirements and reporting obligation and have a strong relationship with TCWG, as he is obliged (shall) disclose the matter to the external auditors. This is particularly applicable to senior PAIBs as they have wider knowledge about the employer, the activities of the employer, the relationship between management and TCWG and the external auditor. The PAIB may decide that it is more appropriate to report the matter on the whistle-blowing line, if available, but to remain anonymous is not always possible. Legal consultation and careful consideration of all factors is recommended so as to avoid harsh personal consequences.

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

**Response:**

Yes, SAICA agrees with the proposed objectives and we are in support of the fact that the Code has built in slight variations based on the extent of public interest responsibilities, and consider the span of influence of the different levels and functions of PA's.

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

**Response:**

Yes, it is comprehensive and it states these are examples and thus not all encompassing. A number of ethical scandals have broken out around access to personal information and acts like the South African Protection of Personal Information Act coming into existence in the future will regulate these risks. Protection of Personal information is a public interest matter. SAICA would also like to suggest that labour laws be included.

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

**Response:**

Yes, SAICA agrees as the differentiation between auditors providing assurance service or non-assurance services to audit clients, as well as PAs providing non-assurance services to clients. The differentiation appears to be clear and unambiguous, mainly, as this distinction has already been employed in the extant version of the code. The categories of senior PAIB and PAIB are not so clearly separated and it requires interpretation to distinguish between them. Particularly in larger organisations there is a depth of PAIBs employed at many various levels of authority and reporting is from one PAIB to the next PAIB at a higher level.

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?

**Response:**

It will always be necessary to employ professional judgement in such matters of occurrences of NOCLAR and therefore auditors and senior PAIBs will need to make use of their judgemental capabilities in dealing with NOCLARs. Additional guidance or examples will not necessarily improve the response from this category of PAs. The ability of making professional judgement is one of the most professionally relevant capabilities of PAs. It should also be considered whether the code should deal with instances where management place undue pressure on the auditor not to report. In our experience this happens where the client threatens to appoint new auditors if the incumbent were to report the non-compliance.

- (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?

**Response:**

Reasonable informed third-party test was introduced into the code in the 2010 version and has proved to be a very useful tool as a test that is respected by PAs as auditors. A PA does require a high degree of skill in judgemental matters, as judgement is involved in just about any matter at financial statements level, the third-party test is useful and reliable in relation to NOCLAR. It could be further elaborated to enhance the ability of regulators to test if the test was adequate and to identify who will be regarded as a "reasonable and informed" third party and to clarify the scope of "acting appropriately in the public interest. There can never be an overemphasis on the request for documentation.

- (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?

**Response:**

SAICA agrees with the examples of possible courses of action listed in section 225.24, section 225.43 and section 360.23. The task force might consider whether there should be an additional course of action listed in section 225.24 which relates to the impact of the consideration of the non-compliance on the PA work effort, for example, the audit/assurance report. This could assist in further aligning this section with ISA250. Additional actions that could also be considered is to lobby support of other stakeholders including employees, managers and other stakeholders potentially implicated by the actions to put pressure on leadership.

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

**Response:**

SAICA agrees with the external factors listed in section 225.27 but raise a concern about the scoping of that section as far as it relates to the parties that may be subject to potential harm. SAICA again emphasise the need to ensure that an affected stakeholder is not inadvertently excluded from the PA's considerations based on a strict reading of the section that limits the consideration to investors, creditors and employees and the wider public. SAICA suggests using the following wording "stakeholders, which may include investors, creditors, employees or the wider public". The wording 'wider public' may have been intended to encompass all other parties but it implies in our minds a group of several or numerous individuals that would represent the broader public, and not specific individuals that do not form a collective, but stand in their own right, and are not included in the other categories of investor, creditor or employee. This comment would apply equally to section 360.26.

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?

**Response:**

SAICA agrees that the PA's in public practice providing services other than audits should consider communicating with the network firm but we advise that this should be limited by the proviso that this is not a requirement but is a determination that the PA should make based on the circumstances of the non-compliance. PAs should consider if the legislative environment in the PA's country supports the required level of disclosure outside the country or at all without exposing the PA to additional liability on prosecution. Similar wording such as that used in section 225.27 can be used to give this effect "[consider] whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation".

SAICA believes that this matter should be addressed in ISQC 1, as it is a firm matter that should be clearly regulated and understood in the network environment.

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

**Response:**

Yes, regarding documentation, however use of an established whistle blowing mechanism should not be limited to PAIB who are not senior (refer to pg. 36 of explanatory memo) a Senior accountant and Auditors could use this mechanism to avoid victimisation or exposure. The code should perhaps highlight this mechanism could be used at all levels.

SAICA agrees with the requirements except the limitation of the documentation to only those which the professional accountant concludes is a "significant matter". This appears to be yet another separate measure of significance that relies on the judgement of the PA and could be applied inconsistently in practice. SAICA believes that the code should require documentation of any identification of actual or suspected non-compliance, but with varying levels of effort depending on the circumstances. For instance, should the PA identify an instance of non-compliance that is clearly inconsequential, the PA should document the rationale applied to conclude that it is clearly inconsequential. Should the PA identify a matter that is other than clearly inconsequential then they should be required to document their application of the guidance of the relevant section (225 or 360) and not only those points bulleted in section 225.32, 225.48 and 360.35. This approach will also enhance consistency between the documentation requirements for each of the four categories of PAs.

### **Request for General Comments**

144. In addition to the request for specific comments above, the Board is also seeking comments on the matters set out below:

(a) *PAIBs working in the public sector*— Recognizing that many PAIBs work in the public sector, the Board invites respondents from this constituency to comment on the revised proposals and, in particular, on their applicability in a public sector environment.

**Response:**

In SAICA's view it is definitely applicable to those PAIBs working in the public sector and in some cases more so than to other PAIBs, due to the historic qualified audit reports in those sectors and the extent of corruption in the public sector.

(b) *Developing Nations*—Recognizing that many developing nations have adopted or are in the process of adopting the Code, the Board invites respondents from these nations to comment on the proposals, and in particular, on any foreseeable difficulties in applying them in their environment.

**Response:**

The problem of reporting to regulators in certain less developed jurisdictions is the level of risk of reporting may be higher in terms of danger, these factors will be and should be considered, but in the current form of the standard I believe can be applied adequately to all developing nations. It should be stated that categorically we need to design a code that speaks to the majority of good standing and effective adopters, the exceptions will be handled on a case by case basis.

SAICA believes that it remains important to highlight the necessity to consider the legislative environment in the country in which the PA resides, this consideration could be strengthened in the guidance by including “[consider] whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation” in sections which list factors to consider when determining whether to report an instance of actual or suspected non-compliance to an appropriate Regulator and also to sections which list factors to consider when determining whether additional actions should be taken.

SAICA do believe that the alternative actions available to PAIBs are appropriate where there may not be appropriate regulators to which the PAIB may report.

(c) *Translations*—Recognizing that many respondents may intend to translate the final pronouncement for adoption in their environments, the Board welcomes comment on potential translation issues respondents may note in reviewing the revised proposals.

**Response:**

We foresee no major translation issue for our jurisdiction