

14 December 2012

International Ethics Standards Board for Accountants (IESBA)

Email: janmunro@ethicsboard.org

Dear Sir

SAICA SUBMISSION ON THE EXPOSURE DRAFT ON “RESPONDING TO A SUSCEPTED ILLEGAL ACT”

In response to your request for comments on the exposure draft on “*Responding to a Suspected Illegal Act*”, 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,

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Project Director – Assurance and Members’ Advice

OVERALL COMMENTS

The exposure draft expects a level of policing to be done by the professional accountant that cannot be achieved outside of specific legislation requiring professional accountants to do this. Such legislation needs to give the professional accountant in public practice or in business real protection. This protection needs to be tested in court if there is any doubt about its clarity. For any professional accountant to do this reporting publically would threaten their career in most countries. It could also open them to defamation litigation should they be incorrect about the suspected illegal act being illegal and furthermore open them to the danger of being sued under various common law provisions applicable in the country they live in.

In this regard we draw your attention to the first bullet on page 9 of the exposure draft under the heading “*With respect to factors supporting a right, the IESBA considered the following*”. This addresses the matters discussed above, that is the requirements to disclosure illegal acts are normally established by law and anything more is not possible.

There is no definition of the public interest and only if such a definition is very specific indeed could the professional accountant be in a position to even understand when to report these suspected illegal acts. The statement made on page 6 is very broad indeed.

The definition of what an illegal act is as stated on page 6 is too broad. Here illegality could be driven by an opinion about an income tax avoidance (not evasion) measure which might or might not be tested in court at a future date by the local tax authorities.

It could also be opinions about economic sanctions against for example Iran, Israel, Zimbabwe, and North Korea. Opinions are opinions and unless they are tested in court or international courts they remain opinions. Another example that is topical right now is regulator rulings about treating customers fairly and misspelling allegations in the insurance industry (Bank fines for PPI in the United Kingdom recently are an example) and in similar vein money laundering in banks.

Detailed knowledge here is needed as to what the local regulator and legislative reasoning might be and a professional accountant may suspect that the act may be held to be illegal but those views may be without any substance. There may not be any case law or if there is there may still be appeal processes in process via the legal system disputing the original court’s findings. Such views therefore about illegal acts need to be very well informed by legal advice and even then lawyers may express different views on the same act.

The whistle blower is completely unprotected as we would understand the proposed exposure draft and should he or she be proven incorrect it could result at the very least in the professional accountant finding that he or she is unemployed as a result of the whistle blow and at the worst finding all his/her assets have been taken as a result of damages awarded by a court.

Broad principles about this subject are aspirational and idealistic and do not take account of commercial reality. Even legislation needs to take account of materiality because again the professional accountant has to make a judgement when he or she goes public here. The only item on materiality is the statement of bullet 2 page 9 where the word disproportionate

is used and suspicions about a legal system. To even suggest courts are not independent or unable to handle issues will land the chartered accountants in serious political and legal trouble.

RESPONSE TO 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?*

Response:

Yes, we agree that the professional accountant should discuss the matter with the appropriate level of management. Where the appropriate level of management is part of the suspected illegal act, then the professional accountant should discuss the matter with an appropriate level above that person, alternatively the accountant could report the matter to the internal audit (if the internal audit function exist) and the external auditor, if the professional accountant is employed by the organisation or provides non-audit services. This is as far as the reporting/disclosure should go even if no further action is taken. The professional accountant will then need to evaluate whether they want to remain with the organisation or not and this is where this exposure draft becomes too onerous for the profession.

In South Africa, the professional accountant performing the external audit or review assurance function is required by law to follow further steps and this, we believe would be sufficient. For professional accountants not providing assurance, we believe that more guidance should be given on what other steps could be taken by the accountant so as not to put their career and personal wellbeing in jeopardy

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?*

Response:

No, we do not agree that if the matter has not been appropriately addressed by the entity, a professional accountant should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority.

Confidentiality should never be compromised unless the situations identified in Section 140 of the Code have been satisfied. That is:

- Disclosure is permitted by law and is authorized by the client or the employer;
- Disclosure is required by law; and
- There is a professional duty or right to disclosure when not prohibited by law.

Other than the above, we do not support the right to override confidentiality as we believe that this could negatively affect the working relationship between the client and the professional accountant which in turn could affect the quality of the service provided.

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?*

Response:

Yes, we agree, however public interest is not defined in the exposure draft and is therefore subject to interpretation. In order to safeguard the professional accountant, public interest should be defined and steps should be given on how to apply this in the various jurisdictions.

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?*

Response:

Yes, we do believe that the standards should make this distinction. Professional accountants in public practice providing external audit services are regulated by legislation in South Africa and required by law to report unlawful acts or omissions. We believe that this legislation is sufficient in the South African context and we do not support further regulatory impositions on accountants in public practice who provide non-audit 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?*

Response:

Read in conjunction with our responses above, we do not believe that in South African context, it is appropriate for further legislation to compel the external auditor to override confidentially.

Furthermore confidentially should never be compromised unless evidence is absolute and the nature of the dishonesty is severe enough to raise anger in the minds of upstanding citizens.

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?*

Response:

No we do not agree. Where the professional accountant provides other services independence issues would have been resolved firstly. The firm/network would have had to make a decision as to whether they were going to supply the client with other

services and this decision would have been documented extensively. We believe that as the professional accountant subscribes to a code of ethics, they are competent to have made such a decision and should therefore not be forced to have the same obligations as the auditor.

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?*

Response:

Yes we do agree. However, with references to our responses above the professional accountant should make disclosure if required by law.

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?*

Response:

We do agree that the professional accountant should have the option to report the suspicion to the external auditor for further investigation without the fear of being disciplined for breach of confidentiality. However, such an action should be an “option” and not a “requirement”

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?*

Response:

No, we do not agree. We believe that the professional accountant should bring this suspicion to the attention of appropriate management and if the accountant believes it is serious enough and no further action has been taken have the right not an obligation to report it to the internal or external auditors. Forcing disclosure can have serious repercussions for the professional accountant’s reputation and pose a risk to the accountant.

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?*

Response:

Refer to response to question 4.

Yes, we do agree. We do believe that if information comes to that accountant’s attention that is not the subject matter of the professional services being rendered but that is a suspected illegal act, the accountant should report the matter to those charged with governance of the company.

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?*

Response:

We believe that this should be left to the judgment of the professional accountant. It must be stressed here that this should be an option open to the professional accountant and not a requirement in terms of the Code.

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?*

Response:

Yes, we do agree that a professional accountant in business should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority but it should not be an expectation that such a right is exercised unless there is a legal requirement to do so or legal protection for the professional accountant who chooses to exercise this right.

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?*

Response:

Refer to our responses under question 10, 11 and 12.

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?*

Response:

Yes, we agree. Refer to our response to question 12

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?

Response:

Yes, we of the view that they are appropriate.

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

Response:

Yes, we do agree and believe that all decisions with regards to the reporting or non-reporting as required should be documented. This response is given in context to the responses provided above.

We believe that it is a good idea for any documentation kept to be vetted by an attorney as a safeguard against reprisals. One should document reasons for non-action backed up by evidence of real life threats, should exposure occur at a later stage from another source and the accountant would then require this as a justification for non-action.

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?*

Response:

No we do not agree. As indicated in our responses above, we do not agree to most of the proposed changes to the code. In the South African environment we have laws that govern the reporting requirements of auditors which we believe is sufficient. The Companies Act also prescribes certain reporting requirements. We do not believe that imposing further reporting requirements on professional accountants would be in the best interest of South Africa or the profession.

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?*

Response:

Yes, we agree with the impact analysis as presented and that there are other stakeholders that should be considered, however consideration should firstly be given to the comments raised above as the level of stakeholders differ from country to country. In South Africa if chartered accountants are subjected to such onerous reporting obligations and such legislation were to be passed the impact could be that organizations that are not transparent would then not employ chartered accountants as they currently do, but look at other professional bodies to fill such positions. This could very well put the chartered accountant brand in South Africa in jeopardy. We have already seen the diminishing numbers of registered auditors and we would not want to extinguish the chartered accountant profession totally. We should be relying on the chartered accountants who subscribe to a code of conduct and ethics to use their judgment and effect change within organizations and change the culture of non-

compliance rather than leaving them to the mercy of other professional bodies who do not subscribe to the same high standards.