IESBA Exposure Draft: Responding to Non-Compliance with Laws and Regulations

3 September 2015

CA House 21 Haymarket Yards Edinburgh EH12 5BH
enquiries@icas.com +44 (0)131 347 0100 icas.com

Direct: +44 (0)131 347 0234 Email: jbarbour@icas.com

INTRODUCTION

The ICAS Charter requires its committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and to 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.

ICAS welcomes the opportunity to comment on the IESBA Exposure Draft: 'Responding to Non-Compliance with Laws and Regulations'. The ICAS Ethics Committee has considered the Exposure Draft and I am pleased to forward their comments.

Any enquiries should be addressed to James Barbour, Director, Technical Policy.

Key Points

1 Objectives of Sections 225 and 360 and Interaction with Applicable Legal Requirements

We are supportive of IESBA's objective to improve the clarity of the Code of Ethics for Professional Accountants and believe that the current proposals are an improvement from IESBA's original proposals that were previously exposed in August 2012. However, we believe there is considerable work still to be done and we highlight the main areas in this section which contains our key points.

Outreach and Stakeholder Engagement
We believe that IESBA should be praised for the level of outreach and stakeholder feedback it has sought in relation to this complex topic which has undoubtedly had a positive development on the revised proposals.

Objectives of Sections 225 and 360
We note that the Board sets out the objectives of these new sections as follows:

(i) To ensure that PAs do not turn a blind eye to identified or suspected NOCLAR and that they do not, through their actions or inaction, bring the profession into disrepute;
(ii) By alerting management or, where appropriate TCWG, to seek to:
  (a) Enable them to rectify, remediate or mitigate the consequences of the NOCLAR or suspected NOCLAR; or
  (b) Deter the commission of the NOCLAR where it has not yet occurred; and
(iii) For PAs to take such further action as may be needed in the public interest.

We are supportive of the substance of these objectives; however, in relation to the second of these, we have serious concerns as to how this may operate in conjunction with applicable "tipping off" procedures in the EU.

We note and appreciate the inclusion of the following wording in paragraphs 225.10 and 225.33 (abridged in paragraph 360.10 – see further comment below)

"In some jurisdictions, there are legal or regulatory provisions governing how professional accountants should address non-compliance or suspected non-compliance with laws and regulations. The professional accountant shall obtain an understanding of those provisions and comply with them, including any prohibitions on alerting ("tipping-off") the client prior to making any disclosure, for example, pursuant to anti-money laundering legislation."

However, we believe there is a risk that users could fail to note the content of these paragraphs and rather refer directly to the more specific guidance contained within later sections, such as paragraphs 225.12 to 225.16 "*Obtaining and understanding of the matter",* thereby missing this critical message. For example, Paragraph 225.12 states the following: *"If the professional accountant suspects that non-compliance with laws and regulations has occurred or may occur, the professional accountant* ***shall*** *discuss the matter with the appropriate level of management and, where appropriate, those charged with governance"* which in isolation directs the user of the Code to discuss the matter with management, or those charged with governance, without alerting them to possible "tipping off" prohibitions.

As we move towards the use of an electronic code, we believe this risk may be exacerbated.

We therefore believe that the content of paragraph 225.12 should be amended as follows:

"**Subject to the content of paragraph 225.10,** *if the professional accountant suspects that non-compliance with laws and regulations has occurred or may occur, the professional accountant shall discuss the matter with the appropriate level of management and, where appropriate, those charged with governance."*

Similar amendments should also be made to paragraphs 225.16 and 225.35. We note that an approach similar to what we are suggesting has been adopted at paragraph 360.16: "If non-compliance has occurred or may occur, the professional accountant shall, **subject to paragraph 360.11**, discuss the matter….. "

We do however observe that paragraph 360.16 should also refer to paragraph 360.10 as well as paragraph 360.11.

We also note the following:

Paragraph 360.10

Paragraph 360.10 is an abridged version of paragraphs 225.10 and 225.33 stating only the following:

"In some jurisdictions, there are legal or regulatory provisions governing how professional accountants should address non-compliance or suspected non-compliance with laws and regulations. The professional accountant shall obtain an understanding of those provisions and comply with them."

We question why IESBA has opted to exclude "*including any prohibitions on alerting ("tipping-off") the client prior to making any disclosure, for example, pursuant to anti-money laundering legislation"* from the last sentence of this paragraph.

We understand that not all professional accountants in business may have responsibilities under anti-money laundering legislation; however, we believe that it would be helpful to still include similar wording to ensure that consideration is given to any anti-money laundering provisions which may be in place in the professional accountant's particular sector.

We would therefore suggest that paragraph 360.10 could read as follows:

"In some jurisdictions, there are legal or regulatory provisions governing how professional accountants should address non-compliance or suspected non-compliance with laws and regulations. The professional accountant shall obtain an understanding of those provisions and comply with them, including any prohibitions on alerting ("tipping-off") *the relevant party* prior to making any disclosure, for example, pursuant to anti-money laundering legislation."

Further, we recognise that the legal framework in which a PA is operating may be subject to change and therefore we believe it is advisable that all PAs should be directed to determine their legal responsibilities in the jurisdiction in which they are operating.

Paragraphs 225.29 and 225.45
We believe that a reminder of the content of section 225.10 is also required in these paragraphs i.e. as the final sentences of these paragraphs are currently worded as follows: "The professional accountant shall also consider whether it is appropriate to inform the client of the professional accountant's intentions before disclosing the matter."

Paragraphs 225.39 and 225.40
Whilst supportive of the substance of what the content of these paragraphs are trying to achieve, we have concerns that it could potentially result in a professional accountant in the EU falling foul of the anti-money laundering "tipping off" provisions.

Paragraph 225.30
We believe that reference should be made here to potential resignation statements that may legally be required of auditors e.g. in the UK, auditors are required to deposit a statement of circumstances.

2 Applicable Legal Framework

Obtaining Legal Advice or Consulting Other Sources
We are fully supportive of the Board's acknowledgement in Paragraph 66 of the Explanatory Memorandum that the need for legal advice, particularly in relation to possible courses of action, cannot be overemphasized. However, we would argue that the suggested paragraphs 225.26 and 360.25, are actually more suggestive in tone and do not communicate the need for legal advice with the same vehemence.

Permission vs Requirement
We are supportive of a "permission" approach as opposed to a "requirement" approach in terms of overriding confidentiality under the Code to disclose identified or suspected NOCLAR to an appropriate authority. We are supportive of the Board's assessment that it is not appropriate to carry forward the original Exposure Draft proposal for the Code to *require* auditors to disclose identified or suspected NOCLAR to an appropriate authority in the relevant circumstances.

Legal protection
There needs to be legal privilege or protection for those who report – 'a safe harbour'. The suggestions within the Exposure Draft may be reasonable in theory, but could be extremely difficult to carry out in practice, particularly in certain jurisdictions. There are aspects that one would be unable to apply in certain jurisdictions.

Role of IFAC/IESBA
We note that if governments are genuinely serious about tackling these issues, the G20 and G8 need to be taking the lead. There is a need for a genuine level playing field between the disclosure obligations placed on professional accountants and those placed on others providing services of the same or a similar nature.

IFAC and appropriate regulatory bodies need to seek to get governments around the globe to ensure that such legal protection frameworks do exist. The onus cannot all be placed on the professional accountant.

3 Scope of the Revised Proposals

PIEs and Non-PIEs
As issues of NOCLAR could arise in any entity, we agree with IESBA's proposed approach that there should be no differentiation between the requirements for public interest entities (PIEs), and non-PIEs.

Examples of Laws and Regulations Addressed
Whilst noting the explanation in paragraph 27 of the Explanatory Memorandum we question why "insider trading" should specifically be captured by the proposals. Breaches of any law could have a significant impact on the reputation of an entity.

Matters not Addressed
We are not convinced that the proposed changes cover situations where the professional accountant may be acting in a sub-contracted role, that is, where the employing organisation makes use of sub-contracted labour. Additionally, in terms of section 360, are non-executive directors (NEDs) within the scope of this guidance? NEDs, in the UK, are not normally classified as "employees". Is the intention to define "employing organisation" within the revised Code? Paragraph 36 of the Explanatory Memorandum states: "The revised proposals are intended to cover only situations where the PA has a direct (contractual) relationship with a client (such as through an audit or other assurance engagement or the provision of non-assurance services), or for PAIBs, where there is an employment relationship." We are not convinced that NEDs are captured, nor are professional accountants engaged on a sub-contract basis.

Further, we note the following:

Paragraph 225.2
What if the act is committed by a sub-contractor, acting in the role of an employee but not actually an employee? Some companies nowadays have very few employees by subcontracting most of their operations. Additionally, what about other parties acting/engaging on behalf of the particular client? Does the scope of the proposals recognise the changing nature of business in certain jurisdictions?

Paragraph 360.8
We would reiterate that those in "employment roles" but not actually employees should be within the scope of this section. The same comment applies to paragraph 360.9.

Paragraph 360.14
Again, we believe this should refer to "contractual" and not "employment" responsibilities. Additionally, this could capture matters uncovered on other companies' premises, for example, a supplier – is this the scope that is intended? Should it not refer to "by the entity" with whom he is contracted.

Paragraph 360.31
As per our point above in relation to paragraph 360.14, again the scope of this could be read as being beyond the scope of the employing organisation.

Clearly inconsequential matters
We support the Board's proposal to scope out matters that are clearly inconsequential as per Paragraph 33 of the Explanatory Memorandum.

Personal Misconduct
Whilst not disagreeing with the suggested approach in paragraph 35 of the Explanatory Memorandum, we would highlight that it is becoming increasingly difficult to differentiate between private and business life.

Other exclusions
We are not convinced that the proposals in paragraphs 36 and 37 of the Explanatory Memorandum "Other exclusions"– as contained in proposed paragraphs 225.8 (c) and 360.8 (c) - are in the public interest. The example given where a PA has been engaged by a client to perform a due diligence assignment on a third party entity and the NOCLAR, or suspected NOCLAR, has been committed by that third party – we would question whether it is in the public interest for a PA to "turn a blind eye" to the third party's behaviour? We would argue that, in applying the Board's own third party test, "a reasonable and informed third party" would have an expectation that such a matter would need to be considered by the PA in order to meet their public interest responsibilities.

We also suggest that the wording of paragraph 360.8 (c) needs amended as it appears to duplicate its scope - we question whether it is currently worded as intended.

We also re-iterate our comments above regarding sub-contractors in relation to paragraphs 225.8(c) and 360.8(c).

4 Amendment of Fundamental Principle

Section 100 - Fundamental Principles
We note the proposed change to the fundamental principle of "professional behaviour". Whilst in this context we understand, and indeed are not opposed to, the proposed change we are slightly concerned at such a change being made without a full scale review of the fundamental principles as a whole.

We are supportive of use of the term "conduct" rather than "action" on the basis that we believe this also captures "inaction". However, does reference in the second sentence of section 150.1 then need to include reference to "actions", as opposed to merely referring to "conduct"?

We would suggest that a more comprehensive review of all of the fundamental principles could be carried out.

5 'Substantive Harm' Threshold for the Determination of Further Action

Paragraph 52 of the Explanatory Memorandum refers to the introduction of a term new to the Code of Ethics which prima facie appears more legalistic in nature, substantively derived from the US legal term "substantial injury". We see no advantage in using this term over "public interest". Whilst this term may be widely accepted and understood in the US, we question whether it will translate easily in other jurisdictions around the globe. We are also not convinced that substituting the word "harm" for "injury" makes any significant difference.

Paragraph 225.21 defines “substantial harm”, however this term is used previously at paragraph 225.7 and not defined there. Whilst not in favour of this concept, if it is used then we would expect to see it defined with reference to its first use in the Code or appropriately cross referenced to paragraph 225.21.

Public Interest

We support the view in paragraph 29 of the Explanatory Memorandum that PAs should have regard to the wider public interest implications of any matter in terms of the potential substantial harm to stakeholders, whether in financial, or non-financial, terms. However, as noted above we have concerns that it is proposed that a new conceptual term “substantial harm” be included in the Code without proper due process and consideration as to whether it is fit for purpose.

6 Preclusion of Disclosure if it would be Contrary to Laws and Regulations

We note that paragraphs 225.27 and 360.26 state: “Disclosure would be precluded if it would be contrary to law or regulation.”

Is the inclusion of such a definitive statement in the public interest? What if the matter would affect the lives of many members of the public? We believe that this statement should not be so definitive. We would prefer wording to the effect that “Except in very rare situations where the professional accountant believes that disclosure would be in the public interest, disclosure would normally be precluded if it would be contrary to law or regulation.” This would allow the professional accountant to exercise professional judgment if ever faced with such circumstances. It does not, in our view, establish an obligation, or indeed even an expectation, that a professional accountant would make a disclosure. Indeed, a professional accountant would need to feel very strongly about the impact of the given circumstances to breach a legal requirement. It would be essential that legal advice is sought, and it may result in the same conclusion to not disclose; however, the professional accountant would at least have the option to do so.

7 Flowcharts and Diagrams

We would also like to note that we believe that the flowcharts and diagrams in the Explanatory Memorandum are helpful. We therefore believe there would be merit in including similar in the Code or related supplementary guidance or training material.

8 Emphasis on the Auditor

There appears to be greater emphasis placed on the auditor than other professional accountants. We understand that regulators will undoubtedly have pushed for this to be the model adopted. However, the duty of care owed by the auditor in the UK, and indeed in many other jurisdictions, is limited by case law to the shareholders as a body. The need to consider the public interest applies equally to all professional accountants, there is no increased consideration explicitly required of the audit profession.

Whilst we do not oppose the compartmentalisation of professional accountants into four categories, we do question whether the increased emphasis on the auditor of the proposals is justified. Additionally, we believe that the proposals still underestimate the “tipping off” provisions which apply in the EU. They will render much of the content of these proposals very difficult to apply.

9 Documentation

We question whether “encourage” is the right word when it comes to documentation for Senior Professional Accountants in Business and Other Professional Accountants in Business. In order to better protect the individual, we would recommend that circumstances and conclusions be documented, and therefore would prefer the use of a stronger word than “encourage”, for example “advise”.

We also believe it may be advisable to encourage documentation in circumstances where a professional accountant, of whatever category, concludes that an identified or suspected non-compliance with laws and regulations is <u>not</u> a significant matter. For clarity, we are not proposing the documentation of matters which are “clearly inconsequential”. We believe that it is advisable for a professional accountant to document such matters regardless of whether it has been deemed significant. A lack of documentation may affect any future defence he is required to put up.

Responses to the Specific Questions

General matters

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?

1 Interaction with "Tipping Off" Requirements

We still harbour concerns as to how IESBA's proposals will interact with the EU Anti-Money Laundering "tipping off" requirements. We appreciate that efforts have been made in the proposals to provide greater clarity on this specific aspect but we still believe that more work is required to remove our concerns.

We are supportive of IESBA's decision to include content in paragraphs 225.10, 225.33 and 360.10 highlighting that in certain jurisdictions (e.g. the EU) there are legal or regulatory provisions governing how professional accountants should address non-compliance or suspected non-compliance with laws and regulations. However, we do question whether this content should be more upfront, that is, included at the start of Sections 225 and 360 – please see 2 below for further discussion.

We also have concerns that paragraphs 225.12, 225.16, 225.35 and 360.16 may be read out of context. This concern may be exacerbated if an electronic code becomes the authoritative version. We therefore propose inclusion of the following wording at the beginning of these paragraphs: "Subject to the content of paragraph 225.10….." The amendments to 225.35 and 360.16 would of course refer to paragraphs 225.33 and 360.10 respectively.

2 Clarification of Relationship Between the Code and Applicable Legislation

As noted above, paragraphs 225.10, 225.33 and 360.10 of the proposed revisions to the Code state the following (abridged in paragraph 360.10):

"In some jurisdictions, there are legal or regulatory provisions governing how professional accountants should address non-compliance or suspected non-compliance with laws and regulations. The professional accountant shall obtain an understanding of those provisions and comply with them, including any prohibitions on alerting ("tipping-off") the client prior to making any disclosure, for example, pursuant to anti-money laundering legislation."

It therefore becomes apparent from these paragraphs that if local law is stricter than the Code, then one would comply with the local law; but, if there is no law, then one would comply with the Code. However, we believe that it would be helpful if this was clarified at the outset of the new sections - perhaps in the introductory paragraphs of Proposed Sections 225 and 360.

In reality, therefore, if there are already local laws in place, the Code is likely to be of little relevance as it will be the local laws which must be followed. The proposed new sections are more likely to be useful when there are no laws in place.

3 Preclusion of Disclosure if it would be Contrary to Laws and Regulations

We note that paragraphs 225.27 and 360.26 state: "Disclosure would be precluded if it would be contrary to law or regulation."

Is the inclusion of such a definitive statement in the public interest? What if the matter would affect the lives of many members of the public? We believe that this statement should not be so definitive. We agree that disclosure should ordinarily be precluded if it would be contrary to law or regulation. However, we do not believe that the Code should preclude the ability of a professional accountant to make such a disclosure if they believe that such an action was warranted in the public interest. Obviously a professional accountant would need to feel very strongly about the impact of the given circumstances to breach a legal requirement.

See further discussion in our response to Question 7 (d) below.

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?

As noted above, where there are no legal or regulatory requirements to report identified or suspected NOCLAR to an appropriate authority, the guidance may be helpful, however the practicalities of actually implementing the Code may be particularly difficult for the professional accountant in such an environment.

There needs to be legal privilege or protection for those who report – 'a safe harbour'. The suggestions within the Exposure Draft may be sensible in theory, but could be extremely difficult to carry out in practice, particularly in certain jurisdictions. There are aspects that one would be unable to apply in certain jurisdictions.

We also believe there is a responsibility on IFAC to promote the need for appropriate safe harbour provisions to become the norm in jurisdictions. If governments are genuinely serious about tackling these issues, the G20 and G8 need to be taking the lead. There is a need for a genuine level playing field between the disclosure obligations placed on professional accountants and those placed on others providing services of the same or a similar nature.

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.

ICAS falls into the latter of the categories mentioned. It may therefore be better to receive comments from those more directly impacted, such as auditors. Our views on this matter will depend on the extent to which the points we raise are addressed in the final document.

Specific matters

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

Whilst we agree with much of what is proposed (subject to our concerns on "tipping off"), there appears to be greater emphasis placed on the auditor than other professional accountants. We understand that regulators will undoubtedly have pushed for this to be the model adopted. However, the duty of care owed by the auditor in the UK, and indeed in many other jurisdictions, is limited by case law to the shareholders as a body. The need to consider the public interest applies equally to all professional accountants, there is no increased consideration explicitly required of the audit profession.

Whilst we do not oppose the compartmentalisation of professional accountants into four categories, we do question whether the increased emphasis on the auditor of the proposals is justified. Additionally, we believe that the proposals still underestimate the "tipping off" provisions which apply in the EU. They will render much of the content of these proposals very difficult to apply.

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

Relationship with ISA 250
Whilst it is questionable from a public interest perspective that IESBA has decided not to pursue its earlier tentative conclusion that PAs should be free to disclose matters that are outside of the PAs expertise, we are content with the new proposed approach being linked to the scope of International Standard on Auditing (ISA) 250.

That said, we do note the attempt made to alter the scope artificially to facilitate the inclusion of insider trading regulations.

We also support the wording that has been included at paragraphs 225.7 and 360.7 to explain where the proposals go beyond the requirements of ISA 250 (wider public interest implications).

Other exclusions

We are however not convinced that the proposals in paragraphs 36 and 37 of the Explanatory Memorandum "Other exclusions" "– as contained in proposed paragraphs 225.8 (c) and 360.8 (c) - are in the public interest. The example given where a PA has been engaged by a client to perform a due diligence assignment on a third party entity and the NOCLAR, or suspected NOCLAR, has been committed by that third party – we would question whether it is in the public interest for a PA to "turn a blind eye" to the third party's behaviour? We would argue that, in applying the Board's own third party test, "a reasonable and informed third party" would have an expectation that such a matter would need to be considered by the PA in order to meet their public interest responsibilities.

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

We are reasonably comfortable with the four categories, although we note that there appears to be a greater responsibility placed on auditors than the other categories of professional accountant, and there may also be practical difficulties in establishing the boundaries between "Senior Professional Accountants in Business" and "Other Professional Accountants in Business". A more detailed discussion follows below.

Emphasis on the Auditor

Under UK legislation, the auditor owes a duty of care to shareholders as a "class" therefore, whilst it can be alluded that the auditor has more of a public interest role than those of other categories of PA listed, we are not convinced that this is conceptually sound. We therefore have certain concerns in relation to the conceptual approach being adopted by IESBA which appears to place considerable emphasis of responsibility on the audit engagement partner, even in circumstances where the matter has not been uncovered by the audit team. There will also be considerable issues regarding how the communication of information will be hindered by tipping off requirements. In terms of the accountancy firms, this may be another indication of the need for IESBA to push for an Ethics Partner type approach (as we have in the UK).

We note in particular the guidance in Paragraph 72 in relation to the Required Responses for Senior PAIBs: "They should alert the external auditor, if any pursuant to their duty or legal obligation to provide all information necessary to enable the auditor to fulfil the auditor's responsibilities (See Paragraphs 360.17-18)"

And also the guidance in Paragraph 74 of the Explanatory Memorandum in relation to PAs in public practice providing services other than audits which requires that: "If the client is also an audit client of the firm, communicate the matter within the firm so as to enable the engagement partner for the audit to be appropriately informed about it and for the latter to determine how it should be addressed in accordance with proposed Section 225 (see paragraph 225.39)"

Both of these paragraphs would appear to indicate that the responsibility of the PA in public practice, and the Senior PAIB, is relinquished if the matter is reported to the audit engagement partner. We would question why it should always become the audit engagement partner's responsibility to determine what further action, if any, needs to be taken.

We are not convinced that there should be greater responsibility placed on auditors. We are not sure that it should always be the auditor's responsibility to report – perhaps someone in the firm such as an Ethics Partner – but not always the auditor.

"Senior" and "non-senior" professional accountants in business

Whilst we note the description and are supportive of greater expectations being placed on "Senior professional accountants in business" (i.e. "..directors, officers or senior employees able to exert significant influence over, and make decisions regarding, the acquisition, deployment and control of the employing organization's human, financial, technological, physical and intangible resources") it will be difficult on occasion to determine the boundary between "senior" and "non-senior" professional accountants in business.

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?

Paragraph 52 of the Explanatory Memorandum introduces the new term "substantial injury" to the Code of Ethics, which prima facie appears more legalistic in nature, substantively derived from the US legal term "substantial injury". We see no advantage in using this term over "public interest". Whilst this term may be widely accepted and understood in the US, we question whether it will translate easily in other jurisdictions around the globe. We are also not convinced that substituting the word "harm" for "injury" makes any difference.

(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?

We agree with the implementation of the "third party test" where auditors would be required to take into account whether a reasonable and informed third party, weighing all the specific facts and circumstances available at the time, would be likely to conclude that they have acted appropriately in the public interest (see paragraph 225.25). We believe this is an important aspect of meeting obligations with regard to the public interest.

(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?

We agree with the proposals, subject to the tipping off provisions which could cause considerable difficulties as noted earlier.

Further, Paragraph 49 does not take account of statements that need to be made when the auditor resigns in the UK. A "notice of resignation" must be accompanied by a statement of circumstances (Section 519 Companies Act 2006) or stating that there are none. A person ceasing to hold office as auditor who fails to comply with this section commits an offence.

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

We are generally supportive of the approach set out in paragraphs 57 and 58 of the Explanatory Memorandum reflected in paragraphs 225.27 to 225.29 of the Code.

However, with regard to paragraph 59 of the Explanatory Memorandum, whilst we are supportive of the general concept that the Code does not override laws and regulations we do question whether it is in the public interest to include the statement that "Disclosure would be precluded if it would be contrary to laws and regulations" as per paragraph 225.27, and 360.26, of the Code. We would prefer wording such as: "Except in very rare situations where the professional accountant believes that disclosure would be in the public interest, disclosure would normally be precluded if it would be contrary to laws and regulations."

We are also supportive of IESBA's revised position as set out in paragraph 60 of the Explanatory Memorandum not to establish a *requirement* to disclose identified or suspected NOCLAR to an appropriate authority.

We also agree with paragraphs 64 and 65 of the Explanatory Memorandum.

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?

We would agree that for PAs in public practice providing services other than audits, it would be reasonable to ask them to consider whether to communicate the matter to the network firm so as to enable the engagement partner for the audit to be informed about it. Similarly, if the PA is performing a non-audit service for an audit client of the firm it seems reasonable that they communicate the matter within the firm so that the engagement partner is informed.

However, who is then responsible for deciding whether further action is needed? It is noted in paragraph 360.18 that the Senior Professional Accountant in Business "shall also disclose the matter to the employing organisation's external auditor, if any, pursuant to the professional accountant's duty or legal obligation to provide all information necessary to enable the auditor to perform the audit."

Once the auditor is informed – where does the duty lie in terms of whether any further action is needed, or whether it should be reported to an appropriate authority?

Does the responsibility always end with the external auditor? As noted earlier, it does not appear reasonable that the PA in public practice can relinquish all responsibility once they have informed the audit engagement partner.

Also, if the network firm is in a different legal jurisdiction this could become very complicated.

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

We would question whether "encourage" is the right word when it comes to documentation for Senior Professional Accountants in Business and Other Professional Accountants in Business. In order to better protect the individual, we would recommend that circumstances and conclusions be documented, and therefore would prefer the use of a stronger word than "encourage", for example "advise".

We also believe it may be advisable to encourage documentation in circumstances where a professional accountant, of whatever category, concludes that an identified or suspected non-compliance with laws and regulations is <u>not</u> a significant matter. For clarity, we are not proposing the documentation of matters which are "clearly inconsequential". We believe that it is advisable for a professional accountant to document such matters regardless of whether it has been deemed significant. A lack of documentation may affect any future defence he is required to put up.

This may be covered within the documentation paragraphs relating to auditors but is definitely not the case for those providing non-audit services or indeed for professional accountants in business. We would therefore suggest something along the lines of the following:

"225.49 Where the professional accountant concludes that an identified or suspected non-compliance with laws and regulations is <u>not</u> a significant matter, the professional accountant is encouraged to document:

- The matter.
- The results of any relevant discussions with management, those charged with governance or personnel of the entity.
- How the professional accountant is satisfied that the professional accountant's objectives under this section have been met."