

# Supplement A to Agenda Item 2

**Note:** This supplement has been prepared for information only. A comprehensive summary of the significant comments received on the August 2012 exposure draft (ED), [Responding to a Suspected Illegal Act](#), and the Task Force's related analysis of significant issues were presented at the March 2013 IESBA meeting. As the ED proposals have been comprehensively revised in light of the significant comments on the ED, no attempt has been made to respond to each individual comment from respondents. All comment letters on the ED can be accessed [here](#).

**Please consider the environment before printing this supplement.**

## ED *Responding to a Suspected Illegal Act*—Compilation of General Comments

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1.	ACCA <sup>1</sup>	<p>ACCA welcomes the opportunity to comment on the exposure draft setting out proposed changes to the Code of Ethics for Professional Accountants ('the Code'). The proposed changes are intended to set out appropriate responses of professional accountants to the discovery of suspected illegal acts, and we recognise and support the public interest in professional accountants responding appropriately.</p> <p>However, while supporting the underlying sentiment, we do not support the specific proposals. We recognise that a professional accountant must respond to widely-held expectations to 'blow the whistle' on clear violations of the law, but that such a response must be within the applicable legal framework. There are, of course, jurisdictions in which the proposed changes to the Code would appear to conflict with local legislation and, in such cases, the Code states that the law will prevail (paragraphs 100.1 and 470.7(c)). The drafting of the provisions might nevertheless lead to confusion in jurisdictions in which the law prohibits breaches of confidentiality, and confusion due to the different expectations upon professional accountants working in different jurisdictions.</p> <p>In jurisdictions in which professional accountants might be expected to breach confidentiality, because there is no legal prohibition, the accountant may be vulnerable to civil action when meeting expectations placed upon them as set out in the proposals.</p> <p>The most balanced and effective means of achieving the appropriate ethical behaviour of professional accountants is by way of detailed guidance outside of the Code. We suggest that sufficient detail and explanation may not be provided within the conciseness that a code requires. Throughout the exposure draft, the following issues arise repeatedly:</p> <ul style="list-style-type: none"> <li>• Prior to a trial taking place, the professional accountant can never be sure that an illegal act has been committed. Therefore, acts can only be regarded from the level of suspicion throughout the Code.</li> </ul>

<sup>1</sup> For a list of abbreviations, see Appendix 1 to the March 2013 IESBA [agenda material](#).

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		<ul style="list-style-type: none"> <li>• Legislation in some jurisdictions will prohibit the reporting of suspected illegal acts; in others, there will be no such prohibition, and so there will be different expectations upon professional accountants, who will be expected to report if, in their opinion, the public interest requires it. The Code cannot provide any protection for such professional accountants against a potential threat of litigation.</li> <li>• The proposed additions to the Code provide no guidance concerning the relative significance of the suspicion or the act. This is of particular concern in jurisdictions in which the professional accountant would be exposed to liability.</li> <li>• In jurisdictions in which legislation requires the reporting of certain suspicious activities to appropriate authorities, there are likely to be restrictions on ‘tipping off’ those responsible (eg EU anti-money laundering legislation). The internal reporting structure proposed in the exposure draft may, on occasions, appear to breach the ‘tipping off’ prohibition. Although (as noted already) the Code states that, in such circumstances, the law shall prevail, we are concerned that there is scope for confusion such that instances of ‘tipping off’ may occur more frequently.</li> <li>• Although professional accountants and professional bodies must strive to act in the public interest, the understanding of public interest will differ between individuals but, more significantly, between different cultures.</li> <li>• Matters to be disclosed are not clearly set out within the exposure draft, and clearly they are to be based on personal judgement. In addition, in many jurisdictions, the appropriate authority to which disclosure should be made is not clearly identifiable.</li> </ul> <p>A further advantage of containing external reporting requirements within legislation is that it may then apply to a range of professionals, and not simply professional accountants who are bound by the Code. Apart from creating a ‘level playing field’ for professionals, this would remove the ability of wrongdoers to conceal their illegal acts by engaging alternative (perhaps unregulated) professionals. This is surely in the public interest</p>
2.	AICPA	<p>The Exposure Draft discusses circumstances where a professional accountant shall or has a right to override the fundamental principle of confidentiality and disclose a suspected illegal act by a client or employer to an appropriate authority. Specifically, we understand that the IESBA is seeking to address the fact that, while the principle of confidentiality properly recognizes that candid communications between professional accountants and their clients or employers are desirable and enhance the ability of accountants to provide high-quality services that benefit the public, it might also discredit the profession if an accountant who suspected an illegal act by his or her client or employer did nothing or knowingly allowed his or her services to be used in furtherance of a client's misconduct.</p> <p>We welcome the IESBA's consideration of ways in which the current standards in the Code might be strengthened to provide guidance in situations that may give rise to such tensions. Indeed, the AICPA has long supported professional standards designed to promote the public interest that address accountants' responses to suspected illegal acts. Most recently, the AICPA's Auditing Standards Board has addressed this issue as part of SAS No. 122, Clarification and Recodification, which is effective for audits of financial statements for periods ending on or after December 15, 2012. In particular, Section 250 of SAS No. 122, Consideration of Laws and Regulations in an Audit of Financial Statements, is converged with no substantive differences with International Standards on Auditing (“ISA”) 250,</p>

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		<p>Consideration of Laws and Regulations in an Audit of Financial Statements, issued by International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC).</p> <p>We do have concerns, however, with some of the IESBA's proposals in the Exposure Draft. As discussed in more detail below, we do not believe that the response to the tensions identified by the IESBA should place a professional accountant at risk of violating his or her legal or contractual duties of confidentiality to a client or employer or impose a potential responsibility on a professional accountant in the Code to disclose suspected illegal acts to an external authority. We believe that such an obligation should only be required of an accountant by a national regulator, pursuant to a law or regulation that also incorporates "safe-harbor" provisions that protect the accountant from potential liability for allegedly unauthorized or unjustified disclosures.</p> <p>Instead, under our proposed solution, the IESBA might provide guidance that, in appropriate circumstances, a professional accountant should be expected to:</p> <ul style="list-style-type: none"> <li>• report suspected illegal acts to the appropriate levels of management of a client or employer, and possibly to those charged with governance, if management's response is not timely and appropriate;</li> <li>• consider disclosure to the external auditor, provided that such disclosure would not violate any legal or contractual confidentiality or non-disclosure requirements applicable to the engagement;</li> <li>• encourage the client or employer to disclose the matter to an appropriate authority; and</li> <li>• consider his or her continuing relationship with the client or employer if the client or employer fails to address the professional accountant's concerns.</li> </ul> <p>We elaborate on the specific circumstances that should give rise to such obligations in greater detail below. In our view, such guidance would be timely and useful to professional accountants. However, as noted, any mandatory "reporting out" to external authorities should only be required pursuant to a national law or regulation that is carefully tailored to the specific circumstances in that jurisdiction and accompanied by appropriate liability safe-harbor and whistleblower protections.</p> <p>Accordingly, we have noted below specific aspects of the Exposure Draft that we believe warrant further consideration by the IESBA in order to mitigate the risk of potential conflicts with existing laws and regulations; provide additional clarity to accountants as to the circumstances that may give rise to reporting obligations; and avoid unintended consequences and disruption to the markets for professional services. These observations are also consistent with our proposed solution, which we ask the IESBA to consider.</p>
3.	APESB	<p>APESB supports the general principle that professional accountants must act in the public interest. However, APESB does not support the proposal to require a professional accountant to breach the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate authority where there is no legal or regulatory protection afforded to the professional accountant. Instead APESB believes that a professional accountant should have the right to disclose a suspected illegal act when it is in the public interest to do so and the</p>

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		<p>Code should provide guidance to assist the professional accountant to make such a determination.</p> <p>We recommend that IESBA considers the need for a balanced approach that assists governments and regulators in identifying suspected illegal acts whilst not requiring a professional accountant to act in a 'quasi' regulatory role and in doing so become subject to increased risk of civil or criminal litigation.</p> <p>There are a number of areas of legislation in Australia which require mandatory disclosure in situations concerning suspected illegal acts, for example the Corporations Act 2001 requires an external auditor to report any suspected breaches of the Corporations Act 2001 to the Australian Securities &amp; Investments Commission (ASIC).</p> <p>In Australia there is no legal protection afforded to professional accountants by the Code and while compliance with the Code may be argued as a legal defence, this may not be sufficient support in a court of law. The proposed revisions to the Code mandate disclosure of confidential information and yet do not afford legal protection to the professional accountant from the potential adverse consequences of such a disclosure.</p> <p>Another major area of concern is the likely impact of the proposed changes on the accounting profession, particularly on Small and Medium Practices (SMPs). The obligation to disclose confidential client matters in the SMP environment to the appropriate authorities may threaten the professional accountant's role and standing as a trusted advisor to these clients. There is a risk that these proposed requirements could deter clients from seeking professional advice to address compliance issues, as the professional accountant would have, under the proposed revisions, an obligation to report suspected illegal acts.</p> <p>Finally, there may be unintended negative consequences as a result of requiring professional accountants to disclose suspected illegal acts in circumstances where clients or employers have subsidiaries in foreign jurisdictions. This is particularly true where subsidiaries are in emerging economies where the judicial systems may not be robust or where there are severe penalties including capital punishment. Disclosures that have relatively minor consequences for alleged perpetrators in Australia may, in contrast, lead to more severe penalties for employees or related parties of Australian subsidiaries in other jurisdictions.</p>
4.	APPC	<p>This submission provides a high level overview of the positions of the APPC member firms and professional bodies on the ED. The ED has been discussed at meetings of the APPC's Regulatory Monitoring Working Group and its Independence Task Force.</p> <p>The ED proposes changes to the Code of Ethics for Professional Accountants (the Code) to address the circumstances where a professional accountant in public practice or business shall, or has a right to, override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate external authority.</p> <p>APPC members support IESBA's mission to serve the public interest by setting high- quality ethical standards and other pronouncements for professional accountants worldwide. However, we do not support the ED in its current form.</p> <p>Our major concern is that creating a requirement for professional accountants to breach confidentiality when encountering a suspected</p>

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		<p>illegal act, without adequate protections against the consequences of such disclosure, exposes the professional accountant to potential criminal and civil liability, as well as retaliation.</p> <p>Accordingly, the creation of mandatory obligations to report suspected illegal acts should be left to the legislatures in each individual jurisdiction which have the power to provide effective legal protections for professional accountants when performing such a “whistleblower” role.</p> <p>Whilst in principle we would support the Code providing professional accountants with the right to breach confidentiality to disclose a suspected illegal act to appropriate external authorities, in practice there are significant impediments that we consider would make this unworkable and continue to pose serious potential risks for professional accountants choosing to take such action. Again such matters should be left to legislators with knowledge of the specific regulatory needs within their jurisdiction and ability to afford protection.</p> <p>It is understood that many of the individual members of the APPC have or are making their own submissions to IESBA on the ED either in their own right or through their international networks. Please refer to those individual submissions to ascertain the specific views of each respective member of the APPC on the ED and for more detailed comments.</p>
5.	Assirevi	<p>Assirevi welcomes the initiatives aimed at making auditing more effective and, in this regard, thanks the IESBA which, through its invitation for comments, has prompted an undoubtedly useful and constructive debate on the response of auditors to suspected illegal acts.</p> <p>Based on the characteristics and role of this Association, we have examined the Exposure Draft solely from the point of view of the professional accountant in public practice called upon to provide auditing or other related services.</p> <p>Therefore, Assirevi would like to state at the outset that our examination of the Exposure Draft has found a number of significant issues that should, in our opinion, be considered in more depth by the IESBA.</p>
6.	BDO	<p>We welcome and support the IESBA's efforts to promote the public interest through improving standards and guidance for all professional accountants on how to respond when encountering a suspected illegal act. In particular, we agree, with certain reservations as detailed below, with the IESBA's proposals regarding the disclosure of suspected illegal acts to management and the escalation, where appropriate, to those charged with governance.</p> <p>We do not, however, agree that the IESBA should be requiring, in any instances, professional accountants to disclose suspicions of illegal acts to external authorities. The main reasons for this are:</p> <ul style="list-style-type: none"> <li>• The mandatory reporting of illegal acts (suspected or actual) should be addressed by local law or regulation. There are many reasons why this approach is desirable, which we expand on below in the answers to your specific questions; however, fundamentally, and as recognised by the Organisation for Economic Cooperation and Development in its 2010 study prepared for the G20, for such disclosure to be effective in practice, there must be appropriate safeguards available to the whistleblower. These safeguards cannot be delivered by the IESBA; rather, they are only capable of being provided through legislation and jurisdictional regulation, which is already the case</li> </ul>

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		<p>in many jurisdictions where there are reporting obligations to enforcement authorities.</p> <ul style="list-style-type: none"> <li>Professional accountants are generally not legal experts. The assessment as to whether something is an illegal act is often complex and incapable of being determined without significant further investigation, which requires applicable legal expertise. This problem is further compounded by the fact that a determination is required of the importance of the suspected illegal act in the context of the public interest, a criterion that is not sufficiently clear for practical application. Without statutory protection against legal exposure that professional accountants could face if, in hindsight, they were incorrect in their determinations, we believe that any requirement imposed by the IESBA to disclose to external authorities would likely have little chance of being adopted by member bodies. This would seriously undermine the success of the proposals.</li> <li>There is significant public interest value in clients being able to discuss issues with professional advisors in confidence and, indeed, in many jurisdictions this is recognised by the legislation of professional privilege. There is a real risk that the proposals as written will undermine the necessary auditor-client relationship, particularly in the absence of stringent criteria for determining matters that are disclosable to external authorities, as there are many jurisdictions that have such disclosure requirements (e.g., Section 10A under the Securities Exchange Act of 1934).</li> </ul> <p>While we have the aforementioned concerns with the proposal, we believe that the public interest can still be served by the IESBA providing guidance for the professional accountant (1) to report suspected illegal acts to management and potentially to those charged with governance and (2) to encourage the client or employer to report these matters to an appropriate authority.</p>
7.	CAI	<p>The issue that the ED is highlighting is important and complex. AAC supports the general principle of ‘public interest reporting’. Such a principle is relevant not just to the accounting and auditing professions but to the many different professions, such as lawyers, bankers and tax advisors, that provide third party advice to clients. However, our support is conditional on there being a framework for reporting that is common across jurisdictions and provides the necessary legal underpinning which would include appropriate legal protections against breaches of duties of confidentiality, as well as common and agreed understandings of what constitutes the ‘public interest’ and the nature of matters that fall to be reported.</p> <p>Examples of the imposition of whistleblowing obligations elsewhere include efforts of the European Union at implementing across Member States the numerous Recommendations of the Financial Actions Task Force aimed at combatting money laundering and terrorist financing. An example of the difficulties with such a measure is the implementation of the various Anti-Money Laundering Directives within the European Union. However, in spite of such requirements being included in various EU Directives, implementation among EU Member States has, we believe, been inconsistent in terms of the nature of professions within the scope of these legal instruments and the nature of suspicions or offences that fall to be reported.</p> <p>Individual jurisdictions have also chosen to introduce their own ‘whistleblowing legislation’ on auditors and accountants, and others. In Ireland, in recent years, a number of legal enactments, including company law and criminal justice legislation, have imposed various</p>

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		<p>reporting obligations on external accountants, auditors and others which have themselves led to implementation difficulties particularly with regard to overlapping reporting obligations, duplicative reporting, and inconsistent ‘thresholds’ at which a reporting obligation is triggered<sup>1</sup>. In 2010, this issue led Ireland’s Company Law Review Group (‘CLRG’), a statutory body, to consider the plethora of reporting obligations on auditors and accountants. Its conclusions are contained in chapter 5.2 of its Annual Report for 2011<sup>2</sup>. For convenience, the appendix to this letter contains the Recommendations of the CLRG in respect of the current whistleblowing obligations on the profession in Ireland. While there are difficulties with such obligations, the one common feature is that legal protection is provided for those making such reports.</p> <p>While remaining sympathetic to the underlying intention, we do not believe that it is appropriate for IESBA to seek to impose whistleblowing obligations on the profession in this manner. Our own experience in Ireland has demonstrated the complexities involved in this issue. Indeed, IESBA could be seen as acting beyond its own remit by attempting to impose requirements which are more appropriately decisions of democratically elected legislatures which are also in a position to provide the necessary legal protection for whistle blowers. An alternative approach might have been for IESBA to explore how the Code of Ethics might adopt an approach that ‘encouraged’ reporting in the public interest, rather than the current proposal which creates complex and possibly insurmountable difficulties.</p> <p>It would be more appropriate therefore for IESBA to engage with relevant global regulatory bodies and agencies with a view to exploring how to take forward a principle of reporting in the public interest by relevant professions.</p> <p>In light of the fundamental issues identified above, we have decided not to respond to the individual questions raised in the consultation paper.</p>
8.	CARB	<p>Initial Comments</p> <ol style="list-style-type: none"> <li>1. CARB is committed to the principals based approach adopted in the IFAC Code of Ethics (the Code). The Code does not have legal status and consequently cannot provide accountants with the legal protection necessary if they were to ‘whistleblow’. We do not believe that the Code of Ethics is the correct vehicle for placing accountants under an obligation whilst offering them no protection. We believe that it is more appropriate for IESBA to issue guidance for accountants where they had a legal obligation to report. Whistle blowing obligations should properly be the preserve of statute.</li> <li>2. Where a statutory obligation to report suspected illegal acts exists, it applies to a wide group of people, not just professional accountants. To place an obligation over and above the legal obligations could have a number of serious, unintended consequences. For example, many of the services provided by a professional accountant are not reserved to them but could be carried out by persons who are not a member of an accountancy body or who are members of the legal profession. In the face of additional non-statutory reporting obligations, such as those proposed, clients could decide to transfer their business to these individuals or firms.</li> <li>3. The introduction of reporting obligations in the Code could inhibit members of management and audit committees from holding a free and open dialogue with their auditor where there is a possibility their auditor may report a matter when they are not legally obliged to do</li> </ol>

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		<p>so.</p> <p>4. CARB is committed to acting in the public interest. In the Exposure Draft IESBA have stated that a professional accountant would be required to report matters in the public interest. Whilst recognising that it is not practicable to provide a precise definition of the public interest we are concerned at the very considerable scope for different interpretations the current proposal provide. We believe it is essential that greater clarity is provided by, for example, setting out that the intention is that only very serious/major matters fall within the scope of the proposals and by providing guidance on the type of matters, which due to their nature, are likely to give rise to a report.</p> <p>5. Where the Code does continue to address the reporting of the suspected illegal acts other than those where there is a statutory obligation, the Code should make clear that in egregious cases of suspected illegal acts the professional accountant should have a right to report rather than an obligation to report, and they should be relieved of the obligation of confidentiality.</p> <p>6. We believe that the Code should make it clear that in all circumstances where the professional accountant is considering making a report, that before doing so they seek legal advice.</p>
9.	CCAB	<p>By way of a preliminary point the CCAB bodies suggest that IESBA lobby the G20 nations to encourage global principles which could form the basis of development national legislation along the lines proposed in the consultation also giving protection in law to those who blow the whistle</p>
10.	CCMC	<p>The CCMC recognizes the vital role external audits play in capital formation and supports efforts to improve the effectiveness of auditors. As such, we appreciate the opportunity to comment on the International Ethics Standards Board for Accountants (“IESBA”) Exposure Draft on Responding to a Suspected Illegal Act (“the Proposal”) issued on August 22, 2012. The CCMC strongly believes that lawbreakers should be caught and punished. However, the Proposal should be modified to reflect the predominant role of national legal authorities and to avoid adverse consequences that may degrade information gathering needed for transparent and relevant financial reports.</p> <p>The IESBA’s expressed objective in promulgating the Proposal is to mitigate illegal acts, including fraudulent financial reporting, by modifying confidentiality standards to impose new and special duties on professional accountants for disclosing suspected illegal activities. These duties would include a de facto requirement for external auditors to disclose suspected illegal acts to an appropriate external authority if, in the auditor’s judgment, the suspected illegal act is of such consequence that reporting would be in the public interest and the entity has not self-reported.</p> <p>Mitigating illegal acts is an important public policy issue. However, the Proposal’s approach to doing so is problematic at best. For example, the Proposal runs counter to the whistleblower provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act passed by the U.S. Congress in 2010 and the 2009 recommendations of the Organisation for Economic Co-operation and Development (“OECD”) to strengthen efforts to prevent, detect, and investigate foreign bribery. After extensive deliberation and due process, OECD recommended that member countries should:</p>



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		<ul style="list-style-type: none"> <li>Require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies;</li> <li>Encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports; and</li> <li>Consider requiring the external auditor to report suspected acts of bribery of foreign officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports, reasonably and in good faith, are protected from legal action.</li> </ul> <p>The OECD recommendations recognize that national legislators and regulators are best positioned to impose and, therefore, should be the source of any requirements for the external reporting of suspected illegal activities to authorities. Yet, at its core, the Proposal represents mandated whistleblowing for auditors and other professional accountants. But again, it is legislators and regulators that have the authority to establish mandatory whistleblowing requirements and to provide the necessary legal protections to accompany such requirements, which the IESBA acknowledges that it cannot do.</p> <p>Further, from an entity perspective, the OECD recommendations recognize that the primary responsibility for addressing illegal acts, including the obligation to disclose suspect illegal activity, resides with management and those charged with governance. Placing special burdens on professional accountants—whether external auditors or those in public practice providing non-audit services to companies that are not audit clients or those in business employed by companies—including to override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate external authority, is misplaced and unworkable. The Proposal will have detrimental unintended consequences for audit quality and the relationship of professional accountants with the entities that they provide services to or that otherwise employ them. Thus, the Proposal does not advance investor protections or serve the public interest generally.</p> <p>Finally, the Proposal has a number of requirements that lack guidance or otherwise involve vague or impractical notions. For example, the Proposal requires the professional accountant who suspects an illegal act to take reasonable steps to confirm or dispel that suspicion. However, the Proposal fails to provide guidance for doing so, including guidance on materiality for determining which suspected illegal acts would be the focus of further efforts. In addition, the Proposal fails to fully appreciate the limitations on the expertise of professional accountants to confirm or dispel suspicions of illegal activity. The expertise of lawyers would be needed to do so. Thus, considering these two issues, the Proposal appears to be creating a dynamic whereby professional accountants would need to seek legal advice in any and all circumstance of suspected illegal activity regardless of nature or magnitude.</p> <p>Accordingly, the CCMC respectfully suggests that the proposal be modified so that in appropriate circumstances, a professional accountant should be expected to:</p> <ul style="list-style-type: none"> <li>Report suspected illegal acts to the appropriate levels of management of a client or employer, and possibly to those charged with governance, if management's response is not timely and appropriate;</li> </ul>

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		<ul style="list-style-type: none"> <li>Consider disclosure to the external auditor, provided that such disclosure would not violate any legal or contractual confidentiality or non-disclosure requirements applicable to the engagement;</li> <li>Encourage the client or employer to disclose the matter to an appropriate authority;</li> <li>Such an obligation should only be required of an accountant by a national regulator, pursuant to a law or regulation that also incorporates “safe-harbor” provisions that protect the accountant from potential liability for allegedly unauthorized or unjustified disclosures consider his or her continuing relationship with the client or employer if the client or employer fails to address the professional accountant’s concerns; and</li> <li>Consider his or her continuing relationship with the client or employer if the client or employer fails to address the professional accountant’s concerns.</li> </ul>
11.	CICA	<p>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.</p> <p>Need for whistleblower protection:</p> <p>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.</p> <p>Scope of acts to be disclosed:</p> <p>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</p>

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		<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>Possible economic consequences:</p> <p>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.</p> <p>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</p>

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		<p>significant and should not be overlooked.</p> <p>Suggested alternate framework:</p> <p>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:</p> <ul style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> <li>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.</li> <li>Member bodies should be encouraged to work with legislators to enact whistleblower protection for all such disclosures, if such protection is not already provided.</li> </ul>
12.	CICPA	In general, we believed that the proposed changes are helpful for professional accountants to respond to a suspected illegal act, and therefore, to act in the public interest.
13.	CIMA	<p>General Approach:</p> <p>We welcome and support IESBA's endeavours to review and enhance the relevance of the code of ethics for the global profession, particularly if this also helps to reinforce confidence in the ethical infrastructure of business in such a way that future financial crises may be</p>

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		<p>averted.</p> <p>We also believe it must be recognised, however, that an ethical code is but one component or driver of responsible business practice and that in respect of suspected illegality, 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.</p> <p>Level of Suspicion:</p> <p>We would suggest that this definition needs expanding to provide more guidance on what might constitute a reasonable level of suspicion as well as what steps taken to dispel that suspicion might also be considered reasonable to ensure compliance with the code.</p> <p>Appropriateness of Action Taken:</p> <p>We would suggest that further guidance on this aspect of the proposal would be helpful to ensure consistency of approach.</p> <p>Effective Date:</p> <p>It is noted that IESBA intends to finalise the revisions to the code in the second half of 2013 and that only a relatively short transition period is considered appropriate once the final standard has been approved. The proposals do, however, raise important issues, some of which it may not be possible to resolve quickly. With that in mind, an incremental approach to the introduction of changes may be more appropriate, so that the impact analysis could be expanded and the matters relating to risk and enforcement given further consideration.</p>
14.	CIPFA	<p>On the general issues, however, we are not convinced that accountants necessarily have a 'right' to disclose a suspected illegal act. The word 'right' seems to us to indicate either that there is some form of intrinsic right associated with a particular action – rather like a human right – or alternatively that there is an acquired right, normally awarded through some form of legislation. On the assumption that the draft deals with a situation where no awarded rights are in force, this leaves the question whether an intrinsic right exists, which would be a difficult argument to prove.</p> <p>We are also concerned that it is necessarily left to the judgment of the accountant involved whether or not a particular act is illegal, and whether any remedial action is sufficient. We feel that there is insufficient guidance to the individual, and that those wishing to ensure compliance may be prompted to err on the side of caution, to the detriment of client confidentiality.</p> <p>We understand that the response from the CCAB will cover the detailed issues relating to 'tipping off' under the UK Anti Money Laundering legislation. Additionally, we have seen a draft version of the proposed response from the IFAC PAIB Committee, and we will not repeat the</p>

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		<p>points made there.</p> <p>We note the differences between the requirement on an auditor, and on a contractor providing non audit services. The more limited requirements in the second case seem to us to be illogical – we believe that a public interest argument would point to a requirement for any illegal act to be reportable.</p> <p>However, we note the comment on page 9 of the draft, that as the IESBA is not in a position to provide protection from retaliation, it would be inappropriate to widen the requirement beyond the scope of the subject matter of the assignment.</p> <p>For this reason, we are particularly concerned about placing additional requirements on accountants working in organisations</p>
15.	CNCC-CSOEC	<p>First of all, we would like to highlight that the membership of the two French accountancy bodies comprises exclusively members in public practice. And therefore, we have no responsibility regarding the professional conduct of professional accountants operating in business or industry.</p> <p>Secondly, we draw your attention on the fact that in France, according to a long lasting legislation, statutory auditors are subject to a disclosure requirement. When a statutory auditor in the course of the conduct of an audit becomes aware of a breach of the law, subject to criminal sanctions, he is required by law to report the fact to the Public Prosecutor, and, if it applies, to Tracfin (anti money laundering supervisory authority). Moreover, depending on the nature of the audited entity, the auditor has also a reporting obligation to certain regulatory bodies such as : AMF (The French security regulator) and the ACP (banking supervisory authority. According to this legal framework, the Public Prosecutor is the only appropriate authority which has the right to determine if the act is illegal or not. Any failure of reporting in due time can be subject to criminal sanctions. On the one hand, such a reporting framework is very stringent and demanding for the auditor. On the other hand, it is also protective for the auditor essentially because it avoids any risk of legal liability. Such a mechanism is workable and practicable only because it is prescribed and limited by a clear legal framework. Please note also that although a breach of law (subject to criminal sanctions), identified by the auditor, is discussed with the appropriate level of management, such breach must be reported to the Public Prosecutor.</p> <p>This reporting obligation (to the Public Prosecutor) applies exclusively to auditors and not to professional accountants in public practice providing services to non-audit clients. Therefore, compliance with the provisions proposed in the ED would give rise to a violation of confidentiality (professional secrecy) which in our country is subject to criminal sanctions. Given that the Code is not a legal instrument and hence cannot provide for protection with respect to the professional accountant liability, there might be also serious potential consequences if after disclosure of a suspected illegal act, no occurrence of an illegal act is determined.</p> <p>Finally, one cannot ignore that the proposed disclosure requirement suggested by the ED would create serious competition issues between the professional accountant being subject to the provisions of the Code and other services providers outside of the profession.</p> <p>From a more general perspective, the Code contains fundamental principles which apply to all professional accountants. Accordingly, one</p>

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		<p>can reasonably ask: is the Code the right place to do more than encouragement? Moreover, we draw your attention on the fact that professional accountants are confronted regularly with money laundering as explained above for which in many countries (and definitely for all member states in the EU) there is already major and very prescriptive legislation.</p> <p>A right or an obligation to report in the Code would create a very significant interaction with national laws and would lead to a very complex application particularly in cross-border situations. There are many layers of confidentiality for example ethical, data protection, banking secrecy, legal privilege which can vary very significantly from country to country and may create different consequences particularly in terms of legal liability of breaching these. We also disagree with the notion of public interest as a criteria related to the right of disclosure. It is not clear what the public interest is all about. The recently issued IFAC framework is not particularly helpful in this respect. We do not think that auditors and accountants can be "judges" of the public interest in the case of suspected illegal acts based on which external reporting to public authorities is to be performed. We strongly believe that auditors and accountants are prepared to contribute to the public interest but not to judge on it.</p> <p>We would like to highlight that when a reporting requirement is prescribed by law, the reporting circumstances are well defined and accompanied by confidentiality and legal liability protection. This is not the case in the ED. Only reporting requirements are prescribed but not the confidentiality and liability protection.</p> <p>Consequently, for all the rationale exposed above, we believe that the provisions proposed by the ED are extremely complex and to some extent could create difficult and dangerous situations for the accountancy profession.</p> <p>We recognize and agree that auditors should play a specific role regarding illegal acts, but, according to our experience, such matters should be dealt with in legislation or regulation and not in an international Code of Ethics for professional accountants. Professional accountants in public practice should only comply with International Standards on Auditing or other applicable audit standards and legal requirements imposed in their respective jurisdiction. Accordingly, we believe that IESBA should publish a policy statement encouraging law makers to include these matters into their own domestic legislation. Indeed, such legislation could provide for the protection of the auditor against allegations of breach of confidentiality, legal liability and also mitigate any potential physical threats. All essential safeguards which cannot be offered by a Code.</p>
16.	CNDCEC	<p>We appreciate the proposals contained in the document and commend IFAC for having addressed this complex and delicate issue. Together with the considerations and impact analysis on the accountancy profession, we believe that it is worthy to examine how the issue is treated in ethics regulation of other legal professions. This is proposed in order to consider whether the accountancy profession would compete on a level playing field when providing non-audit services, namely in the tax fields. It seems appropriate that all the professionals be subject to the same requirements when providing same or similar services.</p> <p>As to the right to override confidentiality and disclose certain illegal acts to an appropriate authority we suggest to reconsider the provisions where the professional accountant has a right to disclose and at the same time it is foreseen that he/she 'is expected to</p>

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		<p>exercise this right'. In this way the right is in fact transformed in a duty. In our view the circumstances indicated do appear as appropriate and at the end it's not clear if it is a right, an encouragement or a rebuttable presumption</p> <p>We also suggest that, in each of the cases considered there be a reference to consideration of applicable legal requirements on professional secrecy and on data protection. In this perspective, we suggest to add in par. 225.2 before or after "... the accountant shall comply with those requirements." the following words: "notwithstanding the obligation to observe all relevant legal requirements on professional secrecy and on data protection...." "</p>
17.	CPA Au	<p>CPA Australia does not support the imposition of a requirement to override confidentiality and disclose a suspected illegal act in the absence of a regulatory framework which would offer protection. As it is not possible for the Code to provide such protection, we are of the opinion that a requirement to disclose should only be imposed by an appropriate legal framework that offers protection simultaneously from civil and criminal liability and protection from retaliation.</p> <p>The imposition of a requirement to disclose (a positive duty) that may be of high risk, cost and have other severe consequences requires that consideration is given not only to the act and its consequences but also to the capacities of the person who is required to make the disclosure. Such attention is not required when imposing negative duties (duties not to harm). Generally, there is little support for imposing general positive duties, such as the ones proposed in this exposure draft that require the consideration of every suspected illegal act and of everyone that may be affected, particularly when such duties will potentially be harmful for those upon which they are imposed. This does not mean that professional accountants do not and should not disclose suspected illegal acts but they should exercise their right to do so, based on their professional judgement.</p> <p>CPA Australia is of the opinion that the intended and unintended consequences of the proposed amendments to the Code need to be considered more adequately. The Explanatory Memorandum (EM) and the Impact Analysis assert that the public interest will be better protected and commentary is provided of how these changes are expected to promote the public interest. We believe a considered analysis is required of the negative and positive consequences (to the extent that they can be identified and assessed) of the proposed requirements. The likely effect these proposals will have on the relationship between professional accountants and their clients or employers needs to be evaluated. We understand that our members play an important role in educating their clients and organisations to improve their legal compliance and ethical behaviour. They also are fundamental in introducing systemic changes to reduce risks of illegal activities. The impact these proposals will have on our members' ability to fulfil these roles needs to be understood and a more accurate assessment of the possible consequences ascertained. The effect of possible erroneous disclosures should also be considered in evaluating the impact on the public interest.</p> <p>We encourage IESBA to consider the moral and legal implications of the imposition of the requirement to disclose a suspected illegal act, as well as how the proposed changes align with the Code's framework which is principles and professional judgement based. There is a difference between offering guidance on how to deal with threats to the fundamental principles and, as is happening in this case, offering</p>



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		<p>prescriptions when the fundamentals of confidentiality and the public interest may conflict (when there is an actual dilemma). The imposition of the requirement to disclose, in all circumstances except when threats to physical safety exist, extends beyond ethical behaviour into the realm of altruism. According to the proposal the requirement to disclose overrides any other duties and obligations professional accountants may have and we question whether it is appropriate for the Code to do that.</p> <p>We are of the opinion that the Code should provide guidance on what professional accountants should consider when making professional judgements that may require them to override confidentiality in order to act in the public interest. We are concerned that the approach adopted in the proposed changes, which expects altruistic behaviour, could undermine the authority and acceptance of the Code.</p> <p>Given the inability of the Code to afford protection and the lack of adequate consideration of the consequences of the proposed requirements for the profession, the professional accountant and the public interest, CPA Australia does not support the imposition of a mandatory requirement to override confidentiality and disclose a suspected illegal act on any professional accountants. We are of the opinion that IESBA should develop guidance on how the right to override confidentiality could be exercised in order to make a public interest disclosure.</p>
18.	DT	<p>We support the IESBA's initiative to consider the Code's provisions regarding the fundamental principle of confidentiality and the actions the professional accountant should take when suspecting an illegal act. We believe that additional practical guidance beyond what is currently contained in Section 140 of the Code would be beneficial to professional accountants and in the public interest. However, the standard as proposed in this ED goes far beyond providing practical guidance.</p> <p>We believe the standard as proposed is fundamentally flawed in mandating circumstances when suspected illegal acts must be reported by the professional accountant to an "appropriate authority" or to the entity's external auditor. The proposal also provides that in certain circumstances, the professional accountant has a right to disclose a suspected illegal act to an appropriate authority. However, as explained more fully below, because the proposed revisions to the Code expressly provide that the professional accountant is expected to exercise that right, a de facto requirement is created. Consequently, references in our response to the mandatory requirement to disclose includes the de facto requirement created where the professional accountant has a right to disclose the matter to the appropriate authority and is expected to exercise that right. We do not believe any mandatory reporting requirements – whether express or de facto – are appropriate for the reasons stated below.</p> <p>We support an approach whereby the Code would provide practical guidance on the steps the professional accountant should consider when encountering a suspected illegal act, which may include communicating the matter to the client's management or the professional accountant's employer, including when appropriate, to those charged with governance. Such guidance would not include any requirement for the professional accountant to report a suspected illegal act to an appropriate authority. We strongly believe the obligation to disclose a suspected illegal act to an appropriate authority lies with management and those charged with governance, not with the professional accountant.</p>

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		<p>The IESBA should not include in the Code mandatory requirements to disclose suspected illegal acts to an appropriate authority or the external auditor.</p> <p>We are strongly supportive of the efforts in many countries to reduce fraud and other illegal behavior by adopting what are commonly referred to as “whistleblowing” provisions. We believe such enforcement efforts by governments to improve compliance with laws and regulations are prudent. However, in our view, the imposition of requirements on professional accountants to disclose suspected illegal acts best rests with national legislators and regulators who are in a better position to consider such requirements in the context of their legal systems and regulatory regimes. To the extent legislators and regulators deem it necessary to impose whistleblowing requirements on auditors, or even more broadly on all professional accountants, they should adopt laws and regulations containing such requirements, along with appropriate protections. The IESBA should not be used as a vehicle to try to accomplish this and cannot, in our view, be effective in doing so.</p> <p>Significantly, the Organisation for Economic Co-operation and Development (“OECD”) issued an anti-bribery recommendation in 2009 designed to strengthen efforts to prevent, detect and investigate foreign bribery. The adoption of the OECD Recommendation occurred after a working group (1) reviewed the existing OECD Anti-Bribery Convention , (2) met with “more than 30 representatives of civil society, the private sector, multi-lateral institutions and the legal profession” , and (3) reviewed comments on a consultation paper received from 35 interested stakeholders. Of particular relevance here are the following recommendations made by the OECD concerning disclosure by the external auditor of suspected acts of bribery:</p> <ul style="list-style-type: none"> <li>• Member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies.</li> <li>• Member countries should encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports.</li> <li>• Member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports reasonably and in good faith are protected from legal action. (emphasis added)</li> </ul> <p>The 34 OECD member countries and five non-member countries - Argentina, Brazil, Bulgaria, Russia, and South Africa - agreed to put in place new measures to reinforce their efforts to prevent, detect and investigate foreign bribery consistent with the 2009 OECD Recommendation.</p> <p>It is striking to compare and contrast not only the extent of the OECD and IESBA research and consultation processes, but also the OECD’s fundamentally different approach from that followed in the proposed standards issued by the Board. Most importantly, the OECD recommends member countries consider requiring disclosures by the external auditor to external authorities only if the auditor is provided</p>

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		<p>the necessary legal protections.</p> <p>The IESBA cannot provide professional accountants with the necessary legal protections against the potential consequences of disclosure of suspected illegal acts.</p> <p>Many countries have improved compliance with laws and regulations by adopting provisions either encouraging or in some cases mandating that certain matters be reported. Auditors in particular are required under certain circumstances to report suspected illegal acts in a number of countries, including the US, UK, and South Africa, among others. Accompanying these requirements are often legal protections the Board is simply unable to grant.</p> <p>The Board recognizes there may be “exceptional circumstances” where the professional accountant would not be required to disclose the suspected illegal act, but they are very limited and ineffective in dealing with our fundamental concerns. Proposed paragraph 225.14 provides that “[w]here the consequences of disclosure for the professional accountant or others are of a commercial nature, such as the potential loss of a client or income, this would not constitute exceptional circumstances.” Thus, it seems the Board did not intend this exception to cover concerns about the potential litigation costs the professional accountant might face as a result of complying with the proposal’s requirements that lack any legal protections.</p> <p>Professional accountants will rarely know with certainty that an illegal act has in fact taken place. As a result, under any mandatory reporting regime, professional accountants will be required to potentially spend significant time investigating suspected illegal acts and then report acts that while suspected, may in the end turn out not to have violated the law. Without adequate legal protections, this will expose professional accountants to damage claims from such reporting. Some jurisdictions tend to be more litigious than others. In such jurisdictions , clients, shareholders or the subject of the report, who may believe the professional accountant caused harm by disclosing a suspected illegal act that perhaps turns out not to be, may sue the professional accountant for damages. Professional accountants might also be sued for failing to identify or report to an appropriate authority a suspected illegal act. The threat of litigation would not seem to qualify as an “exceptional circumstance” contemplated under paragraph 225.14; yet the cost and associated burden of defending against such lawsuits could be quite significant, as could be the brand damage involved in the process.</p> <p>Notwithstanding these concerns, we appreciate that the professional accountant in public practice who provides audit services must comply with International Standards on Auditing (“ISA”). In particular, ISA 250, Consideration of Laws and Regulations in an Audit of Financial Statements, covers the actions an auditor must take when a suspected illegal act has been identified. We fully support this standard which is designed to determine that the auditor acts in the public interest. Moreover, in our view, the IAASB is better positioned to determine what steps are appropriate for auditors when encountering a suspected illegal act and the Code should not go beyond what is required of auditors under the ISAs.</p> <p>The proposal places investigatory requirements on professional accountants that are inappropriate.</p> <p>As noted, we agree with the requirements set forth in ISA 250 that auditors must follow when non-compliance or suspected non-</p>

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		<p>compliance with laws and regulations has been identified. However, under the proposal, all professional accountants identifying a suspected illegal act, must take steps “to confirm or dispel the suspicion” and subsequently determine the appropriateness of the response by management. The proposal does not address many challenges that could prevent the professional accountant from meeting the investigatory requirements, including but not limited to:</p> <ul style="list-style-type: none"> <li>• The professional accountant may be asked to undertake investigations without having the requisite expertise or experience to perform.</li> <li>• The professional accountant may be required to report an act that he or she was not able to reasonably evaluate, which may expose the professional accountant to liability from which the professional accountant is not protected.</li> <li>• The data source of the issues in question may be protected by legal privilege.</li> <li>• The professional accountant is not an attorney and yet the proposed standard calls for legal interpretations. Illegal acts are not defined in the ED and would therefore require an understanding of local, national and international laws and regulations.</li> <li>• The professional accountant may no longer be involved with the engagement by the time that management completes its evaluation and response.</li> <li>• The evaluation of management's response may require a legal interpretation of the steps taken and it is not clear who would provide that interpretation.</li> </ul> <p>The proposal fails to provide practical guidance on key concepts.</p> <p>The proposal provides that the professional accountant who suspects an illegal act is required to “take reasonable steps to confirm or dispel that suspicion.” If the professional accountant cannot dispel the suspicion, the professional accountant is required to discuss the matter with the appropriate level of management, escalating the matter if necessary. If the professional accountant determines the illegal act “is of such consequence that disclosure to an appropriate authority would be in the public interest”, the professional accountant is required to advise the client to disclose the matter. The proposal elaborates on these requirements; however, we find the commentary unhelpful, as the professional accountant is left with the challenge of answering many questions, including the following:</p> <ul style="list-style-type: none"> <li>• What are considered “reasonable steps”?</li> <li>• How can the suspicion be dispelled without the expertise of a lawyer?</li> <li>• Is the level of suspicion required to be totally dispelled before the professional accountant can conclude that disclosure to management is unnecessary?</li> <li>• Must any suspected illegal act be investigated and communicated to management, regardless of materiality or significance?</li> <li>• When is a suspected illegal act “of such consequence” that disclosure is required?</li> <li>• How can a determination be made as to what is in the “public interest” when the views of reasonable and informed third parties may</li> </ul>

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		<p>differ?</p> <p>The proposal also fails to address what we believe will likely be significant cross-border complexities given the confidentiality and privacy laws in many countries. It will result in inconsistent application and risks, even with respect to reporting a particular suspected illegal act.</p> <p>As noted, we support the Board's undertaking of a project to provide practical guidance when a professional accountant encounters a suspected illegal act; however, for the guidance to be helpful and provide for consistent interpretation and application, much greater clarity is required.</p> <p>The proposal sets de facto requirements to disclose that are inappropriate.</p> <p>Under the proposal, when a professional accountant providing professional services to a non-audit client has notified the external auditor of a suspected illegal act and the response continues to be inappropriate, the accountant has a right to disclose the matter to an appropriate authority but "is expected to exercise this right in order to fulfill the accountant's responsibility to act in the public interest." Similar language is contained in the proposal applicable to public accountants in business. We object to these provisions for several reasons.</p> <p>First, by stating that a professional accountant is expected to act a certain way, a de facto standard is potentially created. The burden shifts to the professional accountant to justify why he or she did not exercise the right to disclose. Second, the assumption in these requirements is that the public interest served by public reporting trumps all other interests in all circumstances. Certainly the professional accountant should in all cases consider the public interest, which is particularly relevant when the professional accountant provides assurance services, along with other interests. However, other interests the professional accountant should consider may be equally as or more important than the public interest, such as the duty to the client, contractual arrangements, and compliance with laws, regulations and professional standards.</p> <p>The proposal overturns the long-standing duty of confidentiality without due consideration of the consequences.</p> <p>Professional accountants in public practice have long had a duty to their clients of maintaining confidentiality, as covered in Section 140 of the Code. Professional accountants in business have had a similar duty to their employers. The proposed changes to the Code could, in our view, have a dramatic impact on the relationship between professional accountants and their clients or employers, as the case may be. Moreover, the change could result in harming rather than helping the public. For example, a client may be less forthcoming when providing information to the professional accountant for fear such information will be disclosed externally. This consequence would be of particular concern in the case of audit services where candid communications between the client and the auditor are essential. Such an outcome could negatively impact audit quality and the quality of financial reporting, which would not be in the public interest. Although it is difficult to anticipate the consequences of this proposal on the client/employer relationship with the professional accountant, we believe they could be significant. The Board does not seem to have given sufficient consideration to the impact of making such a significant change to the professional accountant's duty of confidentiality.</p> <p>Another example of where the proposed changes to the Code could have a dramatic impact on the relationship between professional</p>

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		<p>accountants and their clients is when forensic accountants are hired to investigate suspected illegal acts. In these cases, forensic accountants are often retained through an attorney in order to preserve attorney-client privilege and perform certain procedures and factually report observations. The professional accountants typically do not make judgments about the suspected illegal acts or whether the “response to the matter is appropriate”. These judgments are made by the engaging attorney. The proposed changes to the Code could not only impact the scope of the work that professional accountants currently perform, but they could also result in situations where the professional accountants could be required under the Code to disclose privileged information, which would conflict with ethical responsibilities that attorneys have with respect to their clients and may be inconsistent with the very purpose of the forensic engagement.</p> <p>The proposed changes potentially create conflicts between the professional standards with which many professional accountants must comply.</p> <p>The proposed changes to the Code, if adopted, will likely create conflicts with the confidentiality and privacy laws, regulations, rules or standards in the countries in which professional accountants practice. The Board might argue that this is a non-issue because of language in the Preface and paragraph 100.1 of the Code, providing that if a member body, firm or professional accountant is prohibited from complying with certain parts of the Code by law or regulation, they shall comply with all other parts of the Code. However, the need to comply with provisions of the Code is only waived in the case of conflicts with law or regulation.</p> <p>Moreover, there are various situations where it provides no protection at all. Consider for example the case where a professional accountant belongs to more than one professional body, including one which happens to be a member body of IFAC (e.g., an accountant who is also a lawyer, valuation specialist, forensic auditor, internal auditor, or management accountant). This is not uncommon for professional accountants, particularly those providing a wide range of non-assurance services. To the extent the other professional body has adopted ethics standards, it is highly likely such standards include a duty of confidentiality to the client, thereby creating a conflict with the standards of the IFAC member body that adopts the IESBA’s proposal. The professional accountant would be put in the position of violating other professional standards to which he or she is subject in order to comply with the IESBA’s proposal. The exception for situations where there is a conflict with law or regulation would not be applicable.</p> <p>Moreover, the Preface provides:</p> <p>“Some jurisdictions may have requirements and guidance that differ from those contained in this Code. Professional accountants in those jurisdictions need to be aware of those differences and comply with the more stringent requirements and guidance unless prohibited by law or regulation.”</p> <p>In our example, how is the professional accountant who encounters a suspected illegal act to decide which is the more stringent requirement – the confidentiality requirement imposed by the “non-IESBA” professional standards that the professional accountant is required to comply with or the proposed IESBA requirement to override the confidentiality provision and disclose a suspected illegal act to an appropriate authority or the external auditor? Such a conflict would put the professional accountant in an untenable position.</p>

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		<p>If adopted as proposed, there may be a detrimental impact on convergence.</p> <p>The IESBA's stated objective in its Terms of Reference "is to serve the public interest by setting high-quality ethics standards for professional accountants and by facilitating the convergence of international and national ethics standards, thereby enhancing the quality and consistency of services provided by professional accountants throughout the world and strengthening public confidence in the global accounting profession." Clearly, convergence of international and national ethics standards is a key objective of the IESBA and we share the view that convergence of international and national ethics standards is highly desirable.</p> <p>Given our understanding of the diversity of views on this proposal, we believe that it is possible that some member bodies of IFAC (and possibly a significant number) will decide not to adopt the proposal to require disclosure of suspected illegal acts to an appropriate authority or the external auditor for many of the reasons stated above. We understand that the exposure draft process affords member bodies with the opportunity to express their views. We urge the Board to carefully consider these views before finalizing standards that if not adopted by member bodies, would hinder rather than foster convergence.</p> <p>The IESBA has failed to comply with "IFAC's Standards-Setting Public Interest Activity Committees Due Process and Working Procedures"</p> <p>In promulgating international standards, IFAC's standards-setting bodies, including the IESBA, must follow certain due process and working procedures. Before commencing a project, a proposal is prepared based on research and on appropriate consultation within the Board. Consideration must be given to the costs and benefits of the anticipated output of the proposed project. We believe the IESBA has failed to follow the required due process procedures for several reasons.</p> <p>The project proposal adopted by the Board and the objective of the project posted on the IFAC website state as follows:</p> <p>This project will include:</p> <ul style="list-style-type: none"> <li>(a) Revisions to Section 140 Confidentiality to provide additional practical guidance to professional accountants on how to respond when encountering a suspected fraud or illegal act;</li> <li>(b) A new section in Part B to provide practical guidance for professional accountants in public practice on how to respond when encountering a suspected fraud or illegal act; and</li> <li>(c) A new section in Part C to provide practical guidance for professional accountants in business on how to respond when encountering a suspected fraud or illegal act.</li> </ul> <p>We note that the ED goes well beyond providing practical guidance. We don't believe adopting mandatory requirements for reporting suspected illegal acts to appropriate authorities or the external auditor can be equated with providing additional guidance for professional accountants when encountering such acts. Thus, the outcome of this project seems to go far beyond its stated scope.</p> <p>We believe that should the Board desire to continue exploring mandatory reporting to external parties, it needs to conduct a true impact analysis, addressing costs and benefits of mandatory versus permissive whistleblowing provisions, as well as a study of the whistleblowing</p>

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		<p>provisions that exist in many countries. We do not believe the explanatory memorandum contains evidence that sufficient research and analysis had been completed to support the proposal.</p> <p>We also believe the Board needs to seek input from many “appropriate authorities” before considering a standard that would ostensibly require action on their part to respond to such reporting. The proposal appears to be based on the assumption that appropriate authorities desire such reporting and have the processes and procedures in place for dealing with information disclosed by professional accountants. We believe there may be many cases where the authorities would not welcome such disclosures and/or do not have the resources to deal with such reporting. Therefore, by mandating disclosure of suspected illegal acts, the Board may be creating an expectation gap between what the public expects will be done by the appropriate authority with the disclosed information on suspected illegal acts and what in fact will be done.</p>
19.	EAIG	<p>As European audit regulators we consider it important to pursue continuing improvement of standard setting for the audit profession. Our comments in this letter reflect those matters on which we have achieved a consensus amongst the above mentioned audit regulators; however, they are not intended to include all comments that might be provided by individual regulators and their respective jurisdictions.</p> <p>We support the Board in their efforts to address the issue of the response of the auditor to a suspected illegal act, with a view of promoting international convergence in audit practices. Our comments refer to the parts of the Exposure Draft that deal with the role of the independent auditor.</p> <p>As audit regulators we welcome the position that the Board has taken that it is in the public interest that suspected illegal acts are appropriately responded to by the auditor, which may include reporting of such acts. Therefore it should be clear that the provisions on confidentiality applicable to auditors are not intended to prevent auditors from reporting adequately on suspected illegal acts.</p> <p>We are of the opinion that the proposed provisions on the process before coming to the determination to report need more specificity and clarity. We feel the Board should improve these provisions as to clarify the process, the expectations and the responsibilities in order to ensure these provisions are enforceable.</p> <p>Further, we think it is important to highlight within the Code that the auditor is expected to obey to any national law and regulations on dealing with suspected illegal acts, and that the provisions in the Code are not intended to force the auditor in breaking the law. On the other hand the Code could specify more in detail the steps to be taken by the auditor in order to fulfill his legal duties.</p> <p>From our perspective, it should be further clarified how the provisions in the proposed new sections of the Code would fit together with other provisions currently in the Code, for instance those on the potential effects of being associated with clients that act unethically (Ref. section 150 of the Code).</p> <p>Similarly, the relation of the proposed new sections in the Code with the auditing standards from the IAASB, such as ISA 240, 250, 580 and 700 could be explained. In this context it would for instance be relevant to clarify whether and how Suspected Illegal Acts also cover</p>



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		<p>instances of Fraud as defined in ISA 240.</p> <p>We agree with the Board's notion that, depending on the severity of the suspected illegal act, it may be inappropriate for the Auditor to continue the engagement. Terminating the professional relationship should not be imposed for jurisdictions where auditors are not allowed to do so. We think that the Code should acknowledge that withdrawal is not an option in some jurisdictions, in which the auditor should be required to consider the impact of the Suspected Illegal Acts on his opinion.</p>
20.	EFAA	<p>The ED proposes significant changes to sections 225 and 360 of the IESBA Code of Ethics ("the Code") with little explanation as to why these changes are warranted. Whilst an Impact Assessment has been provided we believe that there would be value in IESBA clearly explaining why changes in the Code were warranted in this regard and to this degree. That is to say, what problem is this ED addressing?</p> <p>As a general point it seems that this ED addresses much larger issues than those normally encountered by SMEs or SMPs. We say this because:</p> <ul style="list-style-type: none"> <li>• the ED and its accompanying Impact Assessment and Press Release are very much focused on the concept of the Public Interest and the consequences of non disclosure being harmful to individuals and society;</li> <li>• the IESBA SME / SMP WG has already reported (preliminary report of June 2011) on the specific challenges of the Code in respect of SMEs and SMPs. Within the report it was noted that "resource constraints, including lack of time, funds and qualified individuals available to provide direction and advice, often inhibit the ability of professional accountants in SMEs and SMPs to develop a knowledge and understanding of the Code";</li> <li>• the escalation procedures in the Code are more appropriate to medium-sized and larger accounting firms because in a small or sole practice there is very little or no opportunity to escalate;</li> <li>• the proposed changes to the Code could add significant and disproportionate requirements to SMEs and SMPs; and</li> <li>• we believe that the ED has failed to consider the special relationship of the SMP as the trusted adviser of the SME. Through this relationship the SMP may well have day to day contact and therefore very detailed knowledge of the SME. This would place the SMP in a position that the much larger firms and networks will not likely face and could possibly place a disproportionate burden on the SMP professional accountant.</li> </ul> <p>We have further concerns about the ED where it requires the professional accountant to use his judgment in terms of what is required when information comes to light that was not "acquired as a result of professional and business relationships". In which circumstances would this be the case? The ED states that "a professional accountant's rights and responsibilities with respect to disclosing such acts (personal misconduct) would be the same as for any other member of society. We have difficulty in agreeing with this sentiment, as we believe that the professional accountant when acting in that capacity should always act with integrity and exercise professional behaviour.</p> <p>Lastly, we do not believe that confidentiality can be restricted to certain pieces of information. We do not think that the fact that information comes through one channel, not another, should cause a professional accountant to act in a different manner.</p>

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		<p>General approach and drafting</p> <p>In general we are of the opinion that this ED would have benefited from being drafted in a “think small first” or building block approach. This is because the vast majority of services provided by professional accountants in practice are non-audit services provided to companies that do not require by law or do not voluntarily commission an audit.</p> <p>In this regard, an SMP reader of the Code providing non-audit services to an SME client has to read the entire section to understand what they must do. If a “think small first” or building block approach had been used an SMP would have been able to read their appropriate section first.</p> <p>We also believe that such an approach could offer a practical solution to combatting what are general Code issues with respect to complexity and length. These issues have already been brought to the attention of IESBA through the report of the IESBA SME/SMP Working Group.</p> <p>On a further note, it may be that a flow chart that encapsulated the required steps would be worthy of further consideration.</p> <p>Definitions</p> <p>The ED is built on the premise that any reporting of a suspected illegal act would ultimately arise if it were deemed to be in the “public interest”. We are not aware of the existence of a widely accepted definition of the term “public interest” and therefore we anticipate that there will be a significant difference in how the “public interest” is ultimately determined and in how this standard is therefore applied in practice. In our opinion this is a fundamental issue.</p> <p>We are concerned about what would constitute a “suspected illegal act” and as a result we are of the opinion that the term should be clearly defined. This is because the ED requires the practitioner to make a determination of whether the act could ultimately be found to be illegal in a court of law. As the Code requires the professional accountant to exercise competence it rightly deters the accountant from attempting such a determination without commensurate legal skills, which few accountants possess. For example, tax avoidance is not illegal yet tax evasion is. The final determination of whether an act was evasion or avoidance can often only be made after a complicated and lengthy legal process. As it is not clear in the ED what constitutes a “suspected illegal act” it is not clear in the aforementioned example what a professional accountant should do.</p>
21.	EY	<p>We support the overall objective of increasing auditors’ responsibilities for the reporting of illegal acts. Indeed, we believe that laws and regulations should require the auditor to report certain illegal acts to appropriate authorities in carefully-drawn circumstances, and further believe that the existing Code’s confidentiality provision should not prevent this from happening.</p> <p>However, the Exposure Draft adopts a different approach. It would require auditor whistleblowing even in the absence of a legal framework for doing so, which would mean, among other things, that auditors who report illegal acts would not have legal protections that are typically afforded by statute or regulation. In addition, the proposal includes whistleblowing provisions for accountants performing non-audit</p>

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		<p>services, something that would be a major change from existing practice.</p> <p>Moreover, the proposal raises a number of interpretive issues. Confidentiality is a core element of the accounting profession; our clients expect it, and we depend upon it in order to obtain information necessary to conduct effective audits and perform other services. If any changes are made to strip away longstanding confidentiality protections they should be done carefully and cautiously. It is important, therefore, that the words used in any revised standard be carefully chosen and clearly understood. If the proposal were to go forward there are numerous changes that would need to be made to clarify its requirements.</p> <p>The IESBA requested comments on several areas of proposed changes to the Code and presented 18 specific questions. We will address each question individually, but our views are summarized below.</p> <ul style="list-style-type: none"> <li>• We support an illegal act reporting requirement for accountants providing audit services, but this objective can only be achieved through changes to laws or regulations, not through changes to the Code.</li> </ul> <p>We support illegal act reporting requirements for auditors. As auditors, we understand the important public role we serve. Auditors who uncover illegal acts should be required in specific circumstances to see that appropriate responsive remedial actions are taken by management and the board and, if not taken, to inform appropriate authorities. Such a requirement exists today for auditors in some jurisdictions. Our experience is that such provisions have generally achieved their desired objectives and have thereby served the broader public interest.</p> <p>For example, in 1995 the United States Congress added Section 10A to the Securities Exchange Act to require auditor reporting to the SEC of likely illegal acts that have a material effect on the issuer's financial statements where the company, including its board or audit committee, has failed to take timely and appropriate remedial action. This requirement has assisted auditors in urging boards of directors and management to take potential illegal acts seriously, such as through conducting an internal investigation. As a result, it has helped protect investors against fraud.</p> <p>Other countries also have requirements for auditors established through statute or regulation, with similar positive results. For example, the Singapore Companies Act requires reporting to a regulator where, among other things, the matter is not "adequately dealt with" by the company's directors after it has been brought to their attention.</p> <p>We do not believe changes to the Code should or can be the mechanism for establishing such auditor reporting requirements. The responsibility of auditors to report possible illegal acts to government authorities involves complex and difficult issues. It is for this reason that it is an area appropriately addressed through legislatures or government rule-making authorities, who are positioned to give careful attention to jurisdiction-specific legal issues, to assess competing legal and professional interests, and to provide the protections and legal frameworks needed to make such requirements operable.</p> <p>Accordingly, we support efforts to change laws in jurisdictions to require illegal-act reporting by auditors in specified circumstances where such requirements do not exist now. In our view the profession should actively support such legislative changes. IFAC could be</p>

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		<p>particularly influential in this dialogue. Indeed, IFAC might assist in developing a model statute or guidelines that could be the basis for national laws in this area.</p> <ul style="list-style-type: none"> <li>The proposal should not require an accountant performing a non-audit service for a non-audit client to disclose suspected illegal acts to government authorities</li> </ul> <p>The proposal goes much further than requiring an accountant performing a non-audit service to make a disclosure to the client's external auditor: it also provides a "right" of disclosure to government authorities and the accountant is "expected" to exercise that right. This is an unprecedented proposal -- we have examined the laws in a number of major jurisdictions and can find nowhere that such a sweeping requirement exists in law.</p> <p>There is a fundamental difference between auditors and other professional accountants and the duties and expectations attached to each. We acknowledge and embrace the role that auditors play in maintaining trust in financial reporting. Shareholders and other stakeholders place reliance on audit reports, and this reliance creates a responsibility beyond that owed to client management. Auditors have both an opportunity and a public responsibility to contribute to the deterrence and identification of financial reporting fraud or illegal activity.</p> <p>In contrast, non-audit services are discretionary, deriving from a company's need for specialized services and/or advice. For example, we might assist a non-audit client in developing its internal audit or internal control processes in order to improve its risk management environment, or we might help a non-audit client in strengthening its finance function. Or our forensic accountants might assist a company in performing an internal investigation, performing services such as analyzing a company's financial data, conducting interviews of management, and so on. Accountants are particularly well-suited to uncover fraud or other wrongdoing and to determine the financial statement impact of such improprieties. Such investigations are typically conducted under a legal privilege – that is, the client's legal counsel rather than the client itself retains the firm's forensic accountants. But few lawyers would want to run the risk of the accountant's disclosure of potentially illegal acts to governmental authorities, so the proposal would likely harm, not serve, the interests of the investing public.</p> <p>There are good reasons that companies often turn to accounting firms to provide these sorts of services. We are bound by the Code's fundamental principle of Professional Competence and Due Care, which requires "the professional accountant to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional services based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards." The Code reflects the public expectations associated with non-audit professional engagements – that is, that the accountant must deliver competent services and assist the client in making sound choices. Other service providers may not be governed by any sort of professional standards.</p> <p>Accordingly, we do not believe the Board should disrupt traditional expectations for an accountant providing non-audit services. If such a fundamental change were to be considered, it should be by legislators or government rule-makers, after receiving broad input from a range</p>

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		<p>of constituencies. We recognize that, unlike the audit context, the proposal would provide a “right” rather than requirement that the accountant providing non-audit services report a suspected illegal act. But the proposal also states that “the accountant is expected to exercise this right in order to fulfil the accountant’s responsibility to act in the public interest.” This statement seems to convert the “right” into something akin to an obligation. Moreover, even without this statement, the existence of a right would undoubtedly lead to situations where the accountant’s judgment would be called into question, after the fact, as to why he/she failed to exercise this right. Thus, we do not believe there is a meaningful difference in this context between a right and a requirement.</p> <ul style="list-style-type: none"> <li>• Changes in auditor whistleblowing requirements cannot be made without changes in applicable law because the Board cannot provide necessary legal protections</li> </ul> <p>One of the principal reasons we think changes in this area need to be made by legislators is that the Code would leave professional accountants vulnerable to litigation or retribution in jurisdictions where appropriate legal protections do not exist. Legislators, by contrast, can provide appropriate legal protections.</p> <p>Section 10A is a useful prototype. In establishing auditor illegal act reporting requirements the U.S. Congress included a “safe harbour” with protection from retaliation afforded to those who make such disclosures. Other jurisdictions have done the same. For example, Article 26 of the Netherlands Audit Firms Supervision Act provides: “The external auditor who has made a notification . . . is not liable for the damage suffered by a third party as a result, unless it can be made plausible that, considering all facts and circumstances, a notification should not in all reasonableness have been made.”</p> <p>The IESBA lacks authority to establish protective mechanisms, so the proposal if adopted would expose the accountant to considerable risk if the illegal-act report later turns out to be inaccurate. We note that we expressed concerns about this same issue in 2008 in response to a Consultation Paper for the review of the OECD Anti-Bribery Instruments. We stated:</p> <p>A reasonable auditor will always ask “what are the consequences if I am wrong” in reporting something that seems suspicious but, in the end, is not an act of bribery. At a minimum the company will be required to pay often substantial sums for legal and other fees in connection with any investigation. Experience has shown that these can often run into hundreds of thousands of dollars or euros even if the investigation is closed without any action being taken. Corporate or individual reputations will have been called into question and perhaps never completely cleared of suspicion by the mere fact of an allegation of wrongdoing. Companies or even individuals may conclude that they have a legal claim against the auditor for making a report which, in the end, is not substantiated as an act of bribery. For these reasons we believe that it is appropriate to afford external auditors a legal “safe harbour” regarding any reporting which the auditor makes reasonably and in good faith. The United States, for example, has done so [citing Section 10A].</p> <p>In response, the OECD concluded in 2009, in its recommendation on anti-bribery measures, that member countries should ensure that auditors who reasonably and good faith report law violations be protected from legal action.</p> <ul style="list-style-type: none"> <li>• Although Section 140.7 of the Code makes clear that the Code cannot override local laws such as confidentiality laws, the result would</li> </ul>

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		<p>be considerable confusion and uncertainty about an accountant's obligations if the proposal were adopted</p> <p>The Code cannot override local law; without question, legal obligations trump professional standards. Indeed, Section 140.7 of the Code states that accountants are not required to do something that is "prohibited by law." Many jurisdictions have statutory confidentiality requirements, so it may be the case that the IESBA's mandatory reporting proposal, if adopted, would result in no real changes in such jurisdictions. But, in fact, the juxtaposition of the proposed IESBA Code with statutory confidentiality protections would result in considerable confusion.</p> <p>A look at the laws in Germany and the United States shows why this is so. Germany has strict confidentiality obligations imposed by law on the auditor. But these obligations have exceptions for "severe breaches" or "severe infringements" of certain legal provisions, in which case illegal-act reporting is required. See 1 § 29 Abs. 3 KWG (Banking Act); 2. § 341k i.V.m. § 321 Abs. 1 S.3 HGB (Commercial Code). So in Germany when the auditor learns of a potential illegal act he would need to decide whether this "severity" exception would allow him to comply with the Code's reporting requirement; because of the different standards used in the Code ("public interest", and no materiality threshold) this would not be an easy process.</p> <p>As a further example, many states in the United States have adopted the following statutory language:</p> <p>Except by permission of the client or the authorized representatives of the client, a person or any partner, officer, shareholder, or employee of a person shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional accounting services or professional accounting work rendered to the client by the person. Such information shall be deemed confidential. However, nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed . . . by the standards of the public accounting profession in reporting on the examination of financial statements . . .</p> <p>Exactly what is meant by the italicized language is unclear, and it has not been the subject of any significant court interpretation. An auditor could not be certain whether the Code's reporting requirement would be prohibited by local law in jurisdictions that have adopted this provision.</p> <p>Moreover, it would be unfortunate if the Board were to adopt a rule that could not be implemented because of applicable legal restrictions. The IESBA's objective is to facilitate the convergence of international and national ethics standards; no such convergence would be possible in this area unless changes in laws were first obtained.</p> <ul style="list-style-type: none"> <li>• A number of elements in the Exposure Draft should be clarified or amended</li> </ul> <p>In addition to the concerns discussed above, there are a number of specific issues raised by the language in the proposal. The proposal would require that the auditor report "suspected" illegal acts if "the suspected illegal act is of such consequence that disclosure to an appropriate authority would be in the public interest, there is an appropriate authority to receive the disclosure, and the matter has not been disclosed." This language would need to be modified and clarified.</p>

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		<p>First, the proposal refers to “suspected” illegal acts. While we agree that the threshold of “suspected” may be appropriate when investigating and escalating within the entity, for reporting purposes we are concerned that it is a low threshold, and urge the word be replaced with “likely” or a similar word.</p> <p>Second, the proposal uses a “public interest” standard as the basis for reporting. This will be very difficult to apply, particularly since the proposal does not include any sort of materiality threshold. We do not believe this is a workable standard in this circumstance.</p> <p>Third, the proposal may be interpreted as imposing an auditor-reporting requirement even where the client has taken remedial measures. Where a client has taken appropriate steps in response to a potential illegal act, the Code should be clear that reporting should not be required.</p> <p>Fourth, the proposal would impose an unmanageable range of governmental bodies to which a report must be made. It states: “The appropriate authority to which to disclose the matter will depend upon the nature of the suspected illegal act; for example, a competition regulator in the case of a suspected cartel and a securities regulator in the case of suspected fraudulent financial reporting in a listed entity.” Apparently, auditors would be expected to report “suspected” illegal acts to trade regulators, environmental regulators, communications/broadcast regulators, food and drug safety regulators, and a host of others. We believe that the authorities to whom reporting should be made would be limited to those with direct jurisdiction over financial statement reporting issues.</p> <ul style="list-style-type: none"> <li>• We acknowledge that our proposed approach described above would not address a fundamental concern that gave rise to the Exposure Draft – namely, that the Code should not prevent auditors from disclosing illegal acts; we urge the Board to issue a consultation paper on this topic</li> </ul> <p>We understand that the principal reason for the IESBA’s undertaking of this project was a concern expressed by IOSCO and others that auditors should not be able to “hide behind” the Code’s confidentiality provisions as a basis for not disclosing illegal acts to appropriate authorities. We appreciate this concern, and we recognize that our proposed approach, which would primarily rely on legislative actions rather than changes in the Code, would not satisfy this concern.</p> <p>We have two observations in this regard. First, we would support a change in the Code so to allow reporting to the external auditor as discussed above.</p> <p>Second, and perhaps more significantly, we would also support the issuance of a consultation paper to address how a narrow and precise exception to the Code might be developed for auditors in this area. As discussed above, we think illegal-act disclosures should be required by legislators rather than by the IESBA. But the Board could consider developing an exception modelled on confidentiality exceptions that exist for other professionals, such as for psychiatrists, where disclosures of otherwise confidential information are sometimes statutorily permitted to avoid serious or imminent harm to third parties. For example, some professional bodies in Canada have created an exception for discretionary disclosure of potential “criminal” acts which limit the disclosure right to instances of very serious harm or wrongdoing ..</p> <p>We would be pleased to work with the Board in developing such a tailored standard. Any change in the Code along these lines would need</p>

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		<p>to include a materiality standard and would need to make clear that disclosure is a right rather than a requirement.</p> <p>Conclusion</p> <p>We support the objective of requiring auditors to report illegal acts in certain specified circumstances but believe such a requirement should be addressed through local law or regulation. The profession, including IFAC, should actively support enactment of laws to establish “whistleblower”-reporting legal frameworks for auditors. These efforts should focus on audits, where there exists a public reporting responsibility and a set of duties owed to the investing public, and not on other types of services performed by accountants. Due to the scope of our concerns outlined above, we respectfully urge the Board to reassess its approach, including giving consideration to the issuance of a consultation paper that would focus on development of a right for auditor illegal-act reporting in precise circumstances.</p>
22.	FAOA	<p>In general we welcome the approach to establish within the Code of Ethics, depending on the individual case, the duty, respectively right, of a professional accountant to discuss acts he or she believes are illegal with those charged with governance, or to report them to the relevant authority. Swiss law is acquainted with a multistage approach. It would also be possible for the professional accountant to inform the shareholders of the entity before reporting to the authorities (see paragraph 2.2 below).</p>
23.	FAR	<p>FAR welcomes this opportunity to comment on the exposure draft. FAR would like to underline that FAR finds guidance for its members on how to respond to a suspected illegal act helpful and essential.</p> <p>FAR supports the proposal that a suspected illegal act should be reported to an appropriate level within the client entity.</p> <p>The IESBA approach that an acceptance to act in the public interest should also include disclosure of suspected illegal acts to an appropriate authority can at first seem logical. FAR's opinion, however, is that disclosure of illegal acts outside the client entity is such a delicate matter that it must be dealt with by national legislation and cannot be based solely on professional regulations.</p> <p>Thus, FAR opposes any regulation on professional ethics that provides for overriding the fundamental principle of confidentiality. FAR does not find that it lies in the role of a professional institute to instruct its members to disclose illegal acts to anyone outside the entity of the client. Such a disclosure risks coming into conflict with national law, which in FAR's opinion would hardly be acceptable in most jurisdictions. In many jurisdictions there would be no guarantees for a professional accountant, who overrides the fundamental principle of confidentiality, that invoking a professional duty based on the ethical rules put down by a professional institute would protect him or her against damage claims raised by the client. FAR is of the opinion that any rules providing that a professional accountant reports to anybody outside the client go beyond the scope of ethical professional conduct and thus fall under the scope of national legislation.</p> <p>In Sweden, and presumably in other national jurisdictions, legislation on disclosure of suspected illegal acts is already in place. As far as Swedish legislation is concerned, FAR notes that the rules proposed by the IESBA do not correspond to Swedish national legislation. This is most certainly also the case in other jurisdictions that already have such legislation in place. In the choice between national legislation and rules put up by a professional institute, it is highly unlikely that a national court would choose the latter.</p>



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		<p>In article 225.11, the proposal designates what an “appropriate authority” for disclosure might be. If the national legislation does not provide for such disclosure there is a risk that such an “appropriate authority” is not ready to handle a disclosure from a professional accountant. This also speaks against any professional rules that anticipate national legislation on the subject.</p> <p>It is also important to avoid overlapping regulations between the different standard setting boards of the IESBA, as both ISA 240 and ISA 250 contain standards that have impact on the subject of dealing with suspected illegal acts</p>
24.	FEE	<p>FEE has fully subscribed to the objectives and requirements already included in the International Standard of Auditing (ISA) 250 on “Consideration of Laws and Regulations in an Audit of Financial Statements” which includes having to respond appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the audit. The latter includes reporting non-compliance to those charged with governance, reporting non-compliance in the auditor’s report on the financial statements and reporting non-compliance to regulatory and enforcement authorities resulting from legal responsibilities of the auditor.</p> <p>We therefore recognise that the auditor needs to respond to stakeholders’ expectations to, within the applicable legal framework, “blow the whistle” on clear violations of laws and regulations having a material impact on financial reporting on matters within the remit of the auditor. However, we do not support the overall and detailed proposals in the ED as explained in our main arguments under the “General comments” below.</p> <p>Underlying the ED is the critically important notion that suspected fraud or other illegal activity by companies [or individuals] must be addressed by company management and those charged with governance and that the accountancy profession should play an integral role in communicating its findings to them. We could not endorse that notion more strongly. While the ultimate goal of addressing illegal activity is therefore one we fully embrace, we believe that the goal is not best achieved through the proposed amendments to the Code. Attempting to impose requirements in this important area through the Code, we strongly believe would be unworkable, would have severe negative unintended consequences for all market participants, including the accountancy profession, and would not advance the laudable goal of addressing suspected illegal activity. We suggest that the IESBA requests appropriate institutions (e.g. G20, IOSCO, etc.) to stimulate governments to develop legislation to achieve the overall objectives of this IESBA initiative.</p> <p>Despite our significant concerns with the proposals, we are also providing our responses to the questions which are posed in the ED’s request for specific comments and we have included these as an Appendix to this letter.</p> <p>We understood that the original project proposal was about providing professional accountants with guidance on how they may react on suspected fraud and illegal acts, but now we are confronted with a proposal that, if finally adopted, would result in a broad range of requirements to be applied by professional accountants in public practice and in business. We do not believe that the measures proposed to address the issue are adequate to be dealt with in a Code for Professional Accountants. The Code is not a legal instrument, and, therefore, unlike those jurisdictions that do have “whistle-blower” legislation in place, cannot provide for protection with respect to the liability of professional accountants in public practice or to the employment situation and personal safety of public accountants in business.</p>

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		<p>Such protection would be particularly necessary, because the proposals relate to suspected illegal acts.</p> <p>Furthermore, we doubt whether the IESBA or the Code are able to ensure that the public interest is served by imposing the proposed specific measures. These would be likely to achieve the opposite result in that people would be more cautious when communicating with the accountant in the first place. We therefore suggest that, provided that there are safeguards, such matters should be dealt with in legislation, but not in a Code for Professional Accountants. Where a suspected illegal act is judged by the courts not to be illegal, only legislation can provide for protecting the accountant against legal and other consequences such as, allegations of a breach of confidentiality, and potential physical threats. In addition, legislation will take into account national judicial and cultural specifics, where a Code cannot.</p> <p>Additionally, when setting up requirements that apply with respect to the provision of professional services, it would be more appropriate if they were constructed in a way that equally applies to all professions which members are potentially in a position to respond to suspected illegal acts, but not solely to professional accountants, in particular when they provide the same or similar types of services. Whilst a legislative framework may achieve this, the Code, as it applies to a certain group of professionals only, does not provide for a level playing field for professionals as such, and would therefore adversely affect members of IFAC member bodies. In this respect, we also note that accountants in business who are not members of an IFAC member body would not be subject to the requirements proposed by the ED.</p> <p>Under the proposals in the ED, each and every violation of a law or regulation constitutes an illegal act having the same significance as far as its initial consequences are concerned. However, there appear to be circumstances where the effect of a violation could be considered as not being significant to the public interest. There are no clear and unequivocal guidelines in the Code under which circumstances a potential illegal act is significant or not. Such guidelines, however, can probably not be provided, as violations of all "laws and regulations" would constitute an illegal act. However, this should not be compensated by leaving it up to the accountants and auditors to have to determine the significance, especially in a legal context. As a result a very wide range of (often) minor suspected illegal acts for (often) very small entities would be caught by the proposals to report suspected illegal acts internally or possibly externally. It could be questioned whether this is really in the public interest at large.</p> <p>Cross-border-issues /No consistency for all audit and non-audit service providers</p> <p>The proposal to require in certain circumstances from professional accountants disclosure regarding a suspected illegal act to an appropriate authority would not need to be complied with in countries where such disclosure is prohibited by professional confidentiality, secrecy or privilege requirements. As prescribed in section 100.1 of the Code for Professional Accountants, a professional accountant is not required to comply with certain parts of the Code if there is a conflict with an existing law or regulation. As such legal prohibitions do not exist in other jurisdictions, professional accountants in those jurisdictions would have to comply with the requirements proposed. The ED does not address how to deal with situations with respect to cross-border engagements, including group audit situations.</p> <p>Regarding the disclosure of illegal acts, we note that anti-money laundering legislation (AML) is already in place at EU level by means of a</p>

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		<p>Directive that is to be implemented by EU member states into their national laws (currently under review). The AML requirements are not only applicable to auditors and accountants (professional accountants in public practice) but also to other professionals, such as lawyers, bankers, etc. The AML provides for legal protection and limits the scope of the required investigation of the suspected illegal act by the professional.</p> <p>Issues with applicability, scope and likely effectiveness</p> <p>In our view, the ED does not provide sufficient justification and/or differentiation as regards the requirement to disclose suspected illegal acts for professional accountants providing non-audit services to an audit client or a client that is not an audit-client, or professional accountants in business. With respect to public accountants providing audit services, FEE fully subscribed to the objectives and requirements included in ISA 250 on “Consideration of Laws and Regulations in an Audit of Financial Statements”. Whilst auditors can be seen as being entrusted with a public interest role when performing audits, and, it can at least be argued, also have this role when providing non audit services to their audit clients, it is difficult to justify a disclosure requirement in connection with the provision of non-audit services to non-audit clients. The latter is a contractual arrangement for which it would be difficult to argue that the “public interest” consideration would have equal weight to that of an audit engagement.</p> <p>We also note that one of the main reasons for putting the proposals forward was argued to be that they would be in the public interest. FEE fully recognises the importance of the public interest for the credibility of the accountancy profession. However, there is no clear definition and common understanding of “public interest”. For instance, the IFAC Public Interest Framework is considered to be primarily process-driven. FEE is concerned that – without robust criteria as to what constitutes the public interest – requiring the individual professional accountant to determine whether the reporting of a particular individual suspected illegal act is or is not in the public interest will lead to inconsistent application. In addition, subjective and cultural differences cannot be properly dealt with in a global Code and will also lead to inconsistent application.</p> <p>The scope of the proposals is very broad (for instance, it covers intentional and unintentional illegal acts). Therefore, the subject matters that could possibly fall under the proposed requirement to be reported are much too wide, as not defined precisely and to be determined based on judgement and not based on clear criteria.</p> <p>In quite a number of countries, there is no dedicated competent authority to report to.</p> <p>In addition, there may be a number of practical difficulties arising from the proposals as well as unintended consequences, including difficulties in trying to identify a “suspected” illegal act and understanding what is an illegal act, as well as what is a “suspicion” and how to make the assessment.</p> <p>Other general comments</p> <p>In addition, we note that there might be potential unintended consequences if after disclosing a suspected illegal act no occurrence of an illegal act is determined, especially when no liability stipulation is determined in case of misjudgement or misinterpretation by the</p>

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		<p>professional accountant.</p> <p>We would like to note that this FEE comment letter has been prepared by the FEE Ethics Working Party that consists of practitioners and experts from our member bodies, with assistance of some other FEE groups. Any individual with membership of both the FEE Ethics Working Party and IESBA has not participated in the discussions, drafting and approval of this FEE comment letter to avoid any real and perceived conflicts of interest.</p>
25.	FRC	<p>We agree that how to respond to suspected illegal acts is an important consideration for professional accountants, and that there can be circumstances where the principle of confidentiality may be appropriately overridden subject, as indicated in the exposure draft, to compliance with any applicable legal or regulatory requirements. However, we have some comments on the proposals in the exposure draft, in particular in relation to the proposed role and responsibilities of the external auditor.</p> <p>ISA 250 addresses the auditor's responsibility to consider laws and regulations in an audit of financial statements. There are a number of areas where considerations under ISA 250 overlap with those set out in the exposure draft, for example:</p> <p>Proposed paragraph 225.5 in the exposure draft and paragraph 18 of ISA 250 which both relate to action to be taken on becoming aware of suspected illegal acts;</p> <p>Proposed paragraphs 225.6 and 225.7 in the exposure draft and paragraphs 19 and 22 of ISA 250 which relate to discussing the matter with the appropriate level of management and those charged with governance; and</p> <p>Proposed paragraphs 225.10 and 225.11 in the exposure draft and paragraph 28 of ISA 250 which relate to reporting suspected illegal acts to parties outside the entity.</p> <p>We would consider it unhelpful if there were to be requirements addressing the same issues in two separate sets of standards that may both be applicable to auditors that, whilst not apparently contradictory, are also not fully consistent. We recommend that the IESBA works with the IAASB in taking forward its initiative to ensure that there is co-ordination of the finalisation of the ethical requirements with the ISAs</p> <p>With respect to the specific proposals in the exposure draft, we welcome the proposal that auditors should be alerted to actual or suspected illegal acts that may be material to the financial statements. However, it is not appropriate for the external auditor to be established as the default party to which a professional accountant should disclose any concerns in circumstances where that accountant is unable to escalate the matter within the entity or has doubts about the integrity or honesty of management and there is no established mechanism for reporting such matters such as an ethics hotline (as proposed in paragraph 360.6). Whereas doubts about the integrity of management may be relevant to the auditor's role, this proposed requirement also risks the auditor having to deal with vexatious reports and/or matters that are not relevant to the audit of the financial statements and are outside the auditor's expertise. Further, having to deal with reports that are not relevant to the audit may detract the auditor's focus from matters that are relevant. It is not appropriate to extend the role and responsibilities of the auditor in this way, through an ethical code, rather than through law or regulation.</p>

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		<p>Further, we question why under paragraph 360.8, which addresses disclosure to an appropriate authority in the public interest where the employing organisation does not make adequate disclosure, the professional accountant is required to disclose the matter to the external auditor but not direct to the authority. This could have adverse consequences such as an unacceptable delay in the authority being informed as the external auditors will need to undertake their own investigations before reporting to that authority. If an appropriate regulatory or enforcement authority exists the professional accountant's obligation should be to disclose concerns direct to that authority rather than use the auditor as a conduit. It would, however, be helpful if the auditor were informed of any such reports, or other concerns considered relevant to the audit of the financial statements. This could be addressed by requiring the professional accountant to disclose these more limited matters to the auditor, subject to the professional accountant not breaching any legal, regulatory or contractual confidentiality requirements.</p> <p>When a professional accountant determines that the suspected illegal act is of such consequence that disclosure to an appropriate authority directly would be in the public interest the professional accountant should make such disclosure, subject to complying with any relevant legal and regulatory requirements. This should apply regardless of whether "the subject matter of the illegal act falls within the expertise of the professional accountant". If the professional accountant has doubts as to whether making a report is appropriate they may seek legal advice. Paragraphs 225.13, 225.19 and 360.9 should be amended to reflect this.</p> <p>We also question the proposal in paragraph 225.9 that, when determining whether [management's] response to a matter is appropriate, the professional accountant shall consider factors such as, inter-alia, whether "appropriate steps have been taken to reduce the risk of re-occurrence". The auditor may not have the necessary skills or experience to assess the 'appropriateness' of steps taken to avoid repeat offences.</p>
26.	FSR	<p>We are pleased to submit the following comments. Because we would not support such an amendment to the Code of Ethics we did not find it necessary to answer each specific question in the ED.</p> <p>We fully concur in the ideas that all relevant parties should fight against violations of law and regulations in the corporate world. However, we do not find it appropriate and workable to put the measures indicated in this ED into the Code of Ethics for Professional Accountants. Such measures belong to legislation.</p> <p>We participate in the Ethics Working Party of Federation des Experts Comptables Europeens (FEE) and therefore we have followed the preparation of the draft comment letter from FEE, which we support. Like FEE we do not support the overall and detailed proposals in the ED.</p> <p>The ED would introduce a broad range of requirements to be applied by professional accountants in public practice as well as in business. We do not find that these requirements (burdens) to be imposed to public accountants would be proportionate with the potentially effect (benefits).</p> <p>In any event, we find it would not be appropriate introducing specific requirements only for professional accountants (members of IFAC</p>

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		<p>bodies) and not for other professionals since this would not ensure a level playing field for professionals. A negative consequence would be that clients or other people would be more cautious when communicating with professional accountants – contrary to other professionals - and maybe they would be encouraged to acquire professional services from other professionals, thereby not being sure to acquire the best possible service for that particular assignment. We refer to the joint international efforts to set up measures against money laundering and financing of terrorism. Those measures are dealing with different kind of professionals – including also lawyers, bankers etc. – and regardless of whether they are members of their relevant professional bodies or non-members. Also consultancy firms operating in the same professional areas as professional accountancy firms should be covered. Moreover, the issue of cross-border engagements would be much better handled through a similar (harmonized) regulation across borders and this would only be ensured through such international efforts to promote national regulation and enforcement.</p> <p>We agree, of course, that a suspected fraud or other illegal act must be addressed and that preventive measures should be developed and provided.</p> <p>Suspected fraud or other illegal activity should be addressed by the management and those charged with governance of the company.</p> <p>Also the statutory auditors should play a role, which they already do in many countries – e.g. in Denmark.</p> <p>Such measures should be addressed by legislation, and such legislation should be promoted by international institutions like G20, IOSCO and the European Commission besides national authorities in the same way as protective measures against money laundering and financing of terrorism. In contrast to such measures, the Code of Ethics is not a legal instrument. Therefore, the Code of Ethics can not provide protection e.g. against lawsuits from clients, which might be injured by the auditor's reporting of securities to the authorities. Such protection should be in place, especially because the reporting is not only dealing with ascertainable facts, but (also) regarding suspicion of illegal acts.</p> <p>We find that the proposals in the ED are confusing and therefore we fear that they will not be workable in practice unless further guidance is provided.</p> <p>We have noticed that a professional accountant is not required to comply with a particular part of the Code of Ethics if there is a conflict with an existing law or regulation, cf. section 100.1 of the Code, and we have specifically noticed that national legislation overrule the Code in matters of responding to a suspected illegal act, cf. section 225.2 and 360.2 in the ED. However, there will still be a lot of confusion regarding when to fulfill or not specific requirements in this part of the Code of Ethics and there will be several practical difficulties arising from the proposals.</p> <p>One example is the scope of suspected illegal acts to be reported. We find that the wording “suspected illegal act” is very broad, and so would be the disclosure requirement, unless a clarification is elaborated on section 225.11 (regarding “in the public interest”) and on section 225.13 (regarding “directly or indirectly affect the client’s financial reporting”).</p> <p>Another example is the threshold of materiality, since we believe that very small and trivial illegal acts should not be reported to an authority</p>

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		<p>as they are of no relevance to the public interest.</p> <p>Furthermore, according to current Danish legislation the auditor only has to respond, if the auditor “realizes” the crime (which we believe is a higher level of probability than “suspects”) and has reason to assume that the crime concerns significant sums or is otherwise of a serious nature. Such clarifications on the scope are missing in the ED.</p> <p>Legislation already in place in Denmark</p> <p>For your information the Danish Act on Approved Auditors and Audit Firms – Act No. 468 of 17 June 2008 – already requires (section 22):</p> <p>Reporting on Financial Crime</p> <p>S. 22. If the auditor realizes during the performance of assignments in pursuance of Section 1 (2) and (3) that one or more members of the company’s management commit or have committed financial crimes in connection with the performance of their managerial duties, and if the auditor has reason to assume that the crime concerns significant sums or is otherwise of a serious nature, the auditor shall immediately notify each individual member of the management hereof. The notification shall be entered in the auditors’ records if the auditor keeps such records. If the management has not documented to the auditor within 14 days at the latest that it has taken the necessary steps to stop any ongoing crime and to remedy the damage that the alleged crime has caused, the auditor shall immediately notify the Public Prosecutor for Serious Economic Crime about the assumed crimes. Sentence 1 and 3 shall not apply to circumstances that are covered by the rules in the Danish Act on Preventive Measures against Money Laundering and Financing of Terrorism.</p> <p>(2) If the auditor finds that notification of the members of the management will not be a suitable measure for the prevention of continued crime, the auditor shall immediately notify the Public Prosecutor for Serious Economic Crime of the assumed financial crimes. The same shall apply if the majority of the company’s members of the management are involved in or have knowledge of the financial crimes.</p> <p>(3) If the auditor resigns from his or her position, cf. Section 18 (2), and this is a result of the auditor having reason to assume that there is a situation as described in (1), first sentence, the auditor shall immediately notify the Public Prosecutor for Serious Economic Crime hereof and of the reasons for the auditor’s resignation from his or her position.</p> <p>Also the Danish Act on Preventive Measures against Money Laundering and Financing of Terrorism and the rules on the auditors report on financial statements stipulate obligations to report on financial crime.</p> <p>Furthermore, the act defines the duty of professional secrecy – by reference to the Danish Criminal Code. However, the professional secrecy is overruled in those situations, where the auditor is not required to report in his/her auditor’s opinion, in the auditor’s long-form report or directly to members of the management or the Public Prosecutor for Serious Economic Crime.</p>
27.	GLW	<p>1. PAGE 7: INSERT A NEW SECTION headed “Risks” BEFORE “Appropriateness of Action Taken”: with the following suggested:</p> <p>“Professional accountants need to be on their guard in obtaining evidence of illegal acts. An investigator and his/her family may be subject to physical threat in a minority of cases. Studies of white-collar crime have indicated a sub-set of perpetrators have convictions for violent</p>

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		<p>crime including murder. It may be preferable to appoint a forensic specialist in cases involving significant sums of money, and/or to have an experienced police officer accompany investigators. Professional accountants need to exercise caution in discussing evidence, and ensure detailed and up to date records of progress are maintained in a safe place on a daily basis. Interviews may be dangerous in pushing interviewees to provide the truth. Regular contact with a senior support person is important. Increasing trade and operations in developing countries with poor records for corruption are likely to exacerbate risks for professional accountants seeking to explain anomalous transactions. In these countries, the police and legal systems may not provide adequate protection to investigators.”</p> <p>COMMENT: Whilst destruction of evidence and collusion in denial are probably more common responses to a fraud investigation, the studies cited below indicate a sub-set of violent white-collar criminals exist; the threat of fraud detection motivates a few to kill; and that sadism may be involved. Whilst security measures may not be within the scope of the Standard proposed, it is suggested that it is appropriate and necessary to warn professional accountants who wish to clarify their suspicions of fraud.</p> <ul style="list-style-type: none"> <li>• Brody GB &amp; Kiehl “From white-collar crime to red-collar crime” (Journal of Financial Crime Vol 17 No 3, 2010 pp 351-364 Emerald Group Publishing Limited): study of 6 cases of murders in association with white-collar crime; concluded some white-collar criminals do kill and that preparation of investigators may prevent them from becoming victims.</li> <li>• Perri JD Lichtenwald G “A Proposed Addition to the FBI Criminal Classification Manual: Fraud-Detection Homicide” (The Forensic Examiner Winter 2007 pp 18-30) 2007: Report on 27 homicide cases associated with white collar crime: recommended a new FBI Manual sub-classification of white collar criminals who are violent.</li> <li>• Weisburd D Waring E &amp; Chayet FE “White Collar Crime and Criminal Careers” (Cambridge University Press Cambridge 2001): reported 24.5% of a sub-set of 465 repeat offenders (part of a sample of 968 white collar crime convictions), had a record of violence; and only 15% of the same sub-set limited themselves to white-collar crimes.</li> </ul> <p>2. PAGE 7: ADDITION TO SECTION “Appropriateness of Action Taken”, AT END:</p> <p>“It is important to distinguish facilitation payments from bribery and fraud. In the latter cases, and if the family or person of the professional accountant is deemed to be at extreme risk, the most appropriate action may be cessation of enquiries and no further direct action.”</p> <p>3. PAGE 7: CHANGES TO SECTION “Disclosure in the Public Interest”:</p> <p>AT END:</p> <p>“In the event that an investigation is stopped due to perceived threats to the professional accountant and/or his/her family, it needs to be considered that the existence of threats is itself a matter of public interest, maybe requiring some disclosure in order to protect others in the future. (See Circumstances involving Threats, below).”</p> <p>4. PAGE 8: CHANGE TO SUB-SECTION “Types of Suspected Illegal Acts to be Disclosed”: Delete second and third last paragraphs starting ‘For professional accountants...’ and ending “...such engagements’, as they add nothing to the dot points above.</p>



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		<p>Delete last para “For other categories...member of society” as it implies a professional accountant in business is in the same position as a member of the public, which is not correct. A professional accountant in business is likely to be part of the management team.</p> <p>Add a last paragraph:</p> <p>“In the event that a professional accountant discovers or suspects significant illegal acts outside his/her professional expertise, the accountant would be expected to liaise with his/her professional association. If the legal position is not obvious and the situation appears to be a serious threat to the public interest, then it may be necessary for the professional association to obtain confidential advice, possibly on a hypothetical basis. If the illegality is sustained and it is seriously in the public interest, then resignation from the engagement or employment would seem appropriate.”</p> <p>5. PAGE 10: CHANGE TO FIRST PARAGRAPH: LINE 5: add “adequately, in the opinion of the professional accountant.” so sentence ends “...and the entity has not self-reported adequately, in the opinion of the professional accountant.”</p> <p>6. PAGE 11: ADDITION TO SECTION “Documentation”: last paragraph line 4: add “, and safeguarding critical copies in a safe place,” after “...maintaining such documentation”</p> <p>7. PAGE 14: CHANGES TO SECTION “SECTION 225: Responding to a Suspected Illegal Act”:</p> <p>Include definition of “Illegal Act”, “Public Interest”, “Audit Client”, and “Facilitation Payments” in Definitions Section of Code</p> <p>8. PAGE 14: CHANGES TO “SECTION 225: “Responding to a Suspected Illegal Act”:</p> <p>Para 225.2: Delete the entire paragraph “If a professional accountant...pending disclosure”. Substitute the following:</p> <p>“If a professional accountant in public practice identifies a suspected illegal act or activity, the accountant shall ascertain:</p> <ul style="list-style-type: none"> <li>• Does the act or activity effect financial reporting?</li> <li>• Is the act or activity in a subject within his/her professional expertise?</li> <li>• What are the applicable legal or regulatory requirements?</li> <li>• What are the professional requirements and guidelines?</li> <li>• What is the effect on the public interest of the act or activity?</li> <li>• What are the possible risks to him/her-self and staff and family?”</li> </ul> <p>COMMENT: the above dot points all represent issues to consider; it is not a simple black or white case of “Is it illegal?”</p> <p>9. PAGE 15: CHANGE TO PARAGRAPH 225.10: Delete the existing paragraph and substitute the following:</p> <p>“If a professional accountant or the engagement audit partner determine:</p> <ul style="list-style-type: none"> <li>• An act or activity has been detected that appears in their opinion to be a breach of applicable legal or regulatory requirements;</li> </ul>

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		<ul style="list-style-type: none"> <li>• The act or activity affects financial reporting;</li> <li>• The act or activity is in a subject within his/her professional expertise;</li> <li>• Disclosure or further disclosure is legally required or clearly important to the public interest; and</li> </ul> <p>“Then the professional accountant or the engagement partner for the audit shall ordinarily document formal advice to the audit committee of the entity, or others of equivalent authority within the entity. The advice may include advice to clarify the legal position, and recommendations as to action within a stated time frame:</p> <ol style="list-style-type: none"> <li>1. “In the opinion of the professional accountant or the engagement partner for the audit, the matters need further investigation (maybe by forensic specialists) to clarify the extent of the illegal act or activity, with a statement in confidence by the entity with a copy to the auditor, or alternatively directly by the auditor with a copy to the entity, to appropriate governance authorities and government authorities that this is in process; or</li> <li>2. “In the opinion of professional accountant or the engagement partner for the audit, the matters should be disclosed, or further disclosed, forthwith to the appropriate governance authorities and government authorities, either by the entity with a copy to the auditor, or alternatively directly by the auditor with a copy to the entity.</li> </ol> <p>“In other circumstances the professional accountant or the engagement audit partner may formally advise the audit committee or equivalent others that the situation is likely to be high-risk for any investigators, that it is necessary to employ police support, and that formal statements to governance authorities and government authorities should be made on progress.</p> <p>“If the professional accountant or the engagement audit partner does not have confidence in the integrity and competence of the governing authorities of the entity, in which an illegal act or activity is strongly suspected, then the appropriate action is resignation from the engagement.”</p> <p>COMMENT: It is preferable that the ED contains one “operating section” which is an overall guide to the situation.</p> <p>The proposal in the IESBA ED that the professional accountant or the engagement audit partner have a responsibility of reporting illegal acts direct to appropriate authorities is not supported, for the following reasons:</p> <ul style="list-style-type: none"> <li>• It is important that risks to the investigating staff and their families are primarily considered, as endeavours to clarify the issues will lead to stress on those committing the illegal acts or activity, if they are aware of the investigation. This awareness is likely to lead to destruction of evidence and obstruction of the investigation, but may also result in violent action including murder.</li> <li>• As pointed out in the US Public Company Accounting Oversight Board AU Section 317 on “Illegal Acts by Clients”, accountants and auditors are not lawyers, and specific legal advice may be required as whether a suspected illegality is in reality a breach of legislation.</li> <li>• Legislation is often capable of alternative interpretations, and a court may take an alternative view to legal counsel that an internal illegality justifies breach of confidentiality with a client.</li> </ul>

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		<ul style="list-style-type: none"> <li>Reporting to government authorities may entail unacceptably high risks for the professional accountant or the audit engagement partner in developing countries. Government authorities may not provide adequate protection to foreigners.</li> <li>The professional accountant or the engagement audit partner need to report to an audit committee or equivalent but may need to have the freedom to not commit to reporting to government authorities if, for example, the governing authorities for an entity wish to maintain its good name, and a detected fraud whilst illegal has not affected the public interest, and stakeholder investments have not been affected, and the perpetrator has been cooperative and returned all the funds, etc.</li> </ul> <p>10. PAGE 15: CHANGE TO PARAGRAPH 225.11: Line 1: add “or further disclosure” so it reads “...disclosure or further disclosure...” Line 4: add “further” before “disclosure”.</p> <p>11. PAGE 15: CHANGE TO PARAGRAPH 225.12: Transfer this entire paragraph as explanation of the term “Appropriate Authority” to a Glossary section</p> <p>12. PAGE 16: CHANGE TO PARAGRAPH 225.13: start with “If in the opinion of the professional accountant or the engagement audit partner,”</p> <p>A third dot-point is advocated here, to be fair to the client:</p> <ul style="list-style-type: none"> <li>“Management action reported to have been taken in response to the matters being raised.”</li> </ul> <p>13. PAGE 16: CHANGE TO PARAGRAPH 225.14: Rather than referring to “exceptional circumstances” it is preferable to refer to “situations of high risk”. The studies mentioned in 1 above indicate violence is not so exceptional in cases of fraud.</p> <p>14. PAGE 18: CHANGES TO SECTION “SECTION 360: “Responding to a Suspected Illegal Act”:</p> <p>Include definition of “Illegal Act”, “Public Interest”, “Audit Client”, and “Facilitation Payments” in Definitions Section of Code</p> <p>15. PAGE 18: CHANGE TO PARAGRAPH 360.2: delete this paragraph and replace it with the following:</p> <p>“If a professional accountant in business determines:</p> <ul style="list-style-type: none"> <li>An act or activity has been detected that appears in his/her opinion to be a breach of applicable legal or regulatory requirements;</li> <li>The act or activity affects financial reporting;</li> <li>The act or activity is in a subject within his/her professional expertise;</li> <li>Disclosure or further disclosure is legally required or clearly important to the public interest;</li> </ul> <p>“Then the professional accountant in business shall ordinarily document a request to the appropriate executive management of the entity. The request may include a request to clarify the legal position, and recommendations as to action within a stated time frame:</p> <ol style="list-style-type: none"> <li>1. “In the opinion of the professional accountant in business, the matters need further investigation (maybe by forensic specialists) to clarify the extent of the illegal act or activity, with statements on progress to the auditor and to the audit committee; or</li> </ol>

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		<p>2. “In the opinion of professional accountant in business, the evidence as collected and countermeasures taken or planned should be disclosed forthwith to the auditor and to the audit committee, with recommendations on disclosure to appropriate governance authorities and government authorities.</p> <p>“In other circumstances the professional accountant in business may formally advise the appropriate executive management that the situation is likely to be high-risk for any investigators, that may be necessary to employ police support, and that formal statements to governance authorities and government authorities should be made on progress.</p> <p>“If the professional accountant does not receive a satisfactory response from executive management within a reasonable time that an investigation is being made, or corrective action being taken, then the professional accountant shall consider:</p> <ul style="list-style-type: none"> <li>• “Referral to the audit committee and the internal auditor;</li> <li>• “Use of an ethics hot line if it is available;</li> <li>• “Referral to the external auditor, if other avenues are unsuccessful.</li> </ul> <p>“If the professional accountant in business does not have confidence in the integrity and competence of the executive management of the entity, in which an illegal act or activity is strongly suspected, then the appropriate action is resignation from the entity. The professional accountant should obtain confidential advice in this respect from his/her professional association, and possibly from lawyers on his/her own account.”</p> <p>COMMENT: It is preferable that the ED contains one “operating section” which is an overall guide to the situation.</p> <p>The proposal in the IESBA ED that the professional accountant simply discloses direct, as indicated in the last 3 lines of existing 360.2, is not supported, for the following reasons:</p> <ul style="list-style-type: none"> <li>• It is important that risks to the investigating staff and their families are primarily considered, as endeavours to clarify the issues will lead to stress on those committing the illegal acts or activity, if they are aware of the investigation. This awareness is likely to lead to destruction of evidence and obstruction of the investigation, but may also result in violent action including murder. Reporting to entity management may entail unacceptably high risks for the professional accountant if the management could be part of the illegal activity, and it is unlikely in the beginning at least that the extent of the illegal activity and the persons involved are known.</li> <li>• The professional accountant is part of the management team of the entity: he/she will likely play a direct part in countermeasures to remedy the situation.</li> <li>• He/she needs to have the freedom to not commit to reporting to the external auditor if, for example, the governing authorities for an entity wish to maintain its good name, and a detected fraud whilst illegal has not affected the public interest, and stakeholder investments have not been affected, and the perpetrator has been cooperative and agreed to an orderly repayment plan, etc.</li> <li>• Governance authorities for the entity, and Government authorities, may not provide adequate protection to foreigners in developing</li> </ul>

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		<p>countries.</p> <p>16. PAGES 29-33: CHANGES TO “Appendix: Impact Analysis”</p> <p>COMMENT: As it is at present this section is not felt to be a useful reference point for a stressed professional accountant facing a crisis with personal threats and haemorrhaging cash flows. It would be preferable for there to be 3 clear and distinct sections with tables or flowcharts summarising the text for ready reference:</p> <ul style="list-style-type: none"> <li>• Professional accountant in public practice providing services to an audit client</li> <li>• Professional accountant in public practice providing services to a non-audit client</li> <li>• Professional accountant in business.</li> </ul>
28.	GTI	<p>Grant Thornton supports IFAC’s mission to serve the public interest and the Board’s objective to strengthen the Code by putting forth a framework addressing suspected illegal acts. Accountants should behave ethically in all instances, and should indeed help expose wrongdoing and suspected illegal acts to the appropriate authorities. We believe the most appropriate way to accomplish this goal is two-fold:</p> <ul style="list-style-type: none"> <li>• The Board should provide all professional accountants with the right to disclose a suspected illegal act to an appropriate authority if, in the professional accountant’s judgment, the suspected illegal act is of such consequence that disclosure would be in the public interest and the professional accountant would not breach confidentiality under the Code. The Board should further provide guidance as to when a suspected illegal act could be of such consequence that disclosure would be in the public interest.</li> <li>• National authorities should enact laws and regulations, within the context of their existing legal infrastructures, setting out frameworks for the reporting of suspected illegal acts, which would contain appropriate protections for accountants who report those suspected illegal acts. These frameworks would ideally be as consistent as possible across different countries, which is why we favor guidance from the IESBA.</li> </ul> <p>We believe that approaching the issue of reporting suspected illegal acts in the above manner would satisfy the Board’s goal of having a framework for addressing the reporting of suspected illegal acts, without the negative consequences of the Board’s current proposal. Our primary and very significant concern with the Board’s proposal is that it would require a professional accountant to disclose a suspected illegal act to an outside entity without providing appropriate protections to accountants who make such a disclosure. Without such protections, provided by law or regulation, the professional accountant may be subject to adverse criminal or civil liability, as well as other forms of retaliation.</p> <p>We further believe that our suggestion is an appropriate and balanced way forward, and it would build upon existing legal and regulatory structures. Most notably, accountants in some countries already report suspected illegal acts to the appropriate authorities, as there are various nations that require reporting of illegal acts. We understand of course that these laws are not uniform, but we would note two</p>

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		<p>things in this regard.</p> <p>First, there should be an acknowledgement of differences in national laws on this subject, as various countries have different legal structures and organizations. , we believe that the Board can play a significant role in harmonizing disparate national frameworks, to the extent practicable, by promoting uniform guidance on when disclosure is appropriate. IFAC member bodies could also encourage legislators or regulators in their country to adopt a framework incorporating the IESBA's guidance, but with all of the necessary protections that only national laws can provide.</p> <p>In providing such guidance in the Code, the Board should state clearly that based on professional judgment, the professional accountant would have the right to breach confidentiality and disclose the suspected illegal act to an appropriate authority. The Organisation for Economic Co-operation and Development (OECD) has set forth criteria when individuals should make such disclosures. We recommend the Board review these protected disclosures.</p> <p>We believe this approach will aid IFAC in its mission to serve the public interest and allow the Board to achieve its objective to strengthen the Code by putting forth a framework that contains balanced guidance for addressing suspected illegal acts that will enhance the profession. We believe that guidance by the Board, coupled with appropriate national legislation or regulation, is the only appropriate way forward for the Board in our view. The following are a few specific reasons why we believe the Board should not require a professional accountant to disclose a suspected illegal act as set forth in the exposure draft:</p> <ol style="list-style-type: none"> <li>1. Lack of whistleblower protection legislation</li> </ol> <p>Whistleblowing protection legislation that provides effective legal protections and clear guidance on reporting procedures encourages and facilitates the reporting of “illegal, unethical or dangerous” activities. Having effective protection for whistleblowers supports an open culture and environment where individuals are aware of how to report such activities and also have confidence in the reporting procedures.</p> <p>The Board's exposure draft discusses disclosing suspected illegal acts that are in the public interest without taking into consideration the lack of whistleblower protection for the professional accountant. Furthermore, the proposal fails to consider some common barriers to disclosing illegal, unethical or dangerous activities such as:</p> <ul style="list-style-type: none"> <li>• Legal and ethical requirements to maintain confidentiality</li> <li>• Libel and defamation laws</li> <li>• Confusion over what acts must be considered and reported</li> <li>• Confusion over who should receive the reports and what should be done with reports in countries that have strict privacy laws</li> <li>• Cultural perceptions, and</li> <li>• Burden of proof on the professional accountant to demonstrate that the disclosure was permissible, especially when breaching confidentiality</li> </ul>

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		<p>One of the key findings in the G20 Anti-Corruption Action Plan (Action Plan), which provides guidance and best practices on implementing protection for whistleblowers, was that “encouraging the whistleblowing on acts of suspected corruption is essential in safeguarding the public interest and promoting a culture of public accountability and integrity. As a result, the encouragement of whistleblowing must be associated with the corresponding protection for the whistleblower.” The Board is unable to provide these legal protections that would achieve such encouragement to report suspected illegal acts.</p> <p>In April 2012, the OECD issued the CleanGovBiz toolkit (toolkit). The toolkit provides guidance on the implementation of the G20 Anti-Corruption Action Plan, including a priority checklist that provides guidance based on the best practices and guiding principles of the G20 Action Plan, which discusses:</p> <ul style="list-style-type: none"> <li>• Comprehensive and clear legislation in place to protect from retaliation, discriminatory or disciplinary action when disclosure is made in good faith and on reasonable grounds of certain suspected acts of wrongdoing or corruption to competent authorities</li> <li>• Clear definitions on the scope of protected disclosures and persons afforded protection</li> <li>• Clearly defined procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, with procedures for the whistleblowers to follow up his or her report and</li> <li>• Effective remedies and sanctions for retaliation that are clearly outlined</li> </ul> <p>Without such established processes in place, the professional accountant will find that the appropriate authority does not have the necessary infrastructure to support investigation and resolution of the issues. The OECD notes that the lack of trust in the ability or willingness of the authorities to investigate the report is one of the biggest deterrents to reporting wrongdoings. Many countries are actively looking to implement and effectively apply these best practices and guiding principles in accordance with their respective legal systems. Translating this guidance and best practices into legislation creates a formal mechanism under which whistleblowers can disclose acts of wrongdoing while taking into account obstacles of disclosure such as civil or criminal liability or breach of confidentiality. We support such legislation, and believe the Board and IFAC should likewise be vocal in support of national legislation as part of their public interest responsibilities.</p> <p>In summary, we are supportive of the G20 recommendations and the OECD guidance, and we believe whistleblower protection for professional accountants is essential in reporting suspected illegal acts. The absence of appropriate whistleblower legislation for professional accountants will unnecessarily expose the professional accountant to potential legal peril as well as possible retaliation.</p> <p>2. Conflict with anti-money laundering legislation</p> <p>Many countries have established anti-money laundering legislation to prevent, detect and report money laundering activities. The exposure draft requires the professional accountant to discuss a suspected illegal act with management and escalate the matter to higher levels of management if needed. This requirement is a contravention of certain anti-money laundering laws, which include prohibitions on alerting</p>

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		<p>(tipping off) the client to the pending or actual investigation. The tipping off prohibitions in many anti-money laundering laws can be complex and prescriptive; resulting in difficulty reconciling the relevant legal or regulatory requirements with the proposed exposure draft.</p> <p>Furthermore, noncompliance with anti-money laundering requirements by a professional accountant could result in the professional accountant being subject to sanctions; including fines and imprisonment.</p> <p>3. Incompatibility with forensic accounting engagements</p> <p>The proposed exposure draft also creates a concern in forensic accounting engagements that result from actual or anticipated disputes or litigation and are performed under “attorney-client” privilege. Under such privilege, a client has the privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her attorney. Such privilege protects communications between attorney and client that are made for the purpose of furnishing or obtaining professional legal advice or assistance.</p> <p>If a professional accountant is hired by a lawyer to perform a forensic engagement subject to “attorney-client” privilege, it would not be feasible for the professional accountant to disclose a suspected illegal act that is in contemplation of or in actual legal proceedings. Not only would requiring the professional accountant to disclose a suspected illegal act in these circumstances put the professional accountant in jeopardy of violating the law, but it would also effectively prevent accounting firms from offering these types of services to clients, which we believe would not be in the public interest.</p> <p>4. Disincentives for global acceptance of the Code</p> <p>The objective of the IESBA is to serve the public interest by setting high quality ethical standards for professional accountants and by promoting the adoption of a single set of ethical standards around the world, thereby enhancing the quality and consistency of services provided by professional accountants. However, we believe that countries may be hesitant to adopt the Code (particularly the provisions proposed by the exposure draft) due to the cultural, societal, legal and regulatory differences that exist. Therefore, the proposal may hamper IFAC’s objective to further enhance the quality of the profession and ensure greater consistency worldwide. We believe hindering this objective is not in the public interest.</p> <p>***</p> <p>While we agree that disclosure of a suspected illegal act to an appropriate authority is in the public interest, we believe that the requirement for a professional accountant to disclose should arise only from a national legal or regulatory requirement, and we note that a number of regulators have already established procedures and specific laws and regulations which govern disclosure of suspected illegal acts, including breaching confidentiality. We are supportive of disclosure in these circumstances because it does not place the professional accountant in conflict with other ethical standards or legal or regulatory obligations regarding confidentiality.</p> <p>While Grant Thornton supports the Board’s efforts to put forth a framework for addressing suspected illegal acts, we believe the proposal is</p>



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		too prescriptive and fails to take into account common barriers to disclosure, the differences in cultural perceptions, the differences in legal systems and the legal uncertainties surrounding protected disclosure, and domestic laws. Instead we suggest the Board issue guidance as to when a suspected illegal act could be of “such consequence” that disclosure would be in the public interest. In these situations, and based on professional judgment, the professional accountant would have the right to breach confidentiality and disclose the suspected illegal act to an appropriate authority.
29.	HKICPA	<p>HKICPA acknowledges that it is of paramount importance for the accountancy profession to accept the responsibility to act in the public interest and a professional accountant's responsibility is therefore not exclusively to satisfy the needs of an individual client or employer. However, we have substantial concerns on whether the proposals will result in the imposition of fair and equitable requirements to professional accountants, especially in the absence of adequate statutory protection for whistle-blowers. We understand that such statutory protection is not commonplace around the world.</p> <p>The proposed requirement may also create the impression that a professional accountant is a "policeman" or "informant" and this may jeopardize the relationship between professional accountants and their clients or employers and promote mutual mistrust. For the professional accountants in business ("PAIB"s), this would directly affect their competitiveness as compared with someone other than a professional accountant. Without appropriate statutory whistle-blowing protections in place, there is a possibility that the PAIBs, especially for those who are more senior and influential in society, who do not need an accounting qualification will terminate their professional accountant qualification in reaction to the potential effect of the proposals.</p> <p>We also consider it may not be equitable to impose requirements, to the extent proposed, to professional accountants where comparable requirements are absent for lawyers, engineers, medical practitioners and other professionals. This proposal may discourage the next generation from entering the accounting profession, which could jeopardize the ongoing development and sustainability of the profession.</p>
30.	IBR-IRE	<p>The view of the Board of the IBR-IRE on the ED can be summarized as follows:</p> <ul style="list-style-type: none"> <li>the proposed provisions are in our opinion jeopardizing the necessary trust between the auditor and his client; if the confidentiality is not guaranteed, the auditor, who has no judiciary power or competence to obtain information, may not receive the information by the audited entity that is necessary to perform the audit;</li> <li>there may be a number of practical difficulties arising from the lack of definition of e.g. a “suspected” illegal act and a “suspicion” which may render it difficult to make a proper assessment;</li> <li>our current national legislation, that contains the professional secrecy, is in line with the Financial Action Task Force (FATF) Recommendations;</li> <li>each violation of the Belgian Company Code needs to be mentioned in the auditor's report, which is made public even if not specifically addressed to the “appropriate authority”.</li> </ul>

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		<p>Furthermore, compliance with the provisions proposed in the ED would give rise to a violation of the auditor's duty of confidentiality (professional secrecy) under Belgian law.</p> <p>In sum of what is set out above, the board of IBR-IRE is of the view that the national legislator has the exclusive competence to deal with the issues addressed in the ED. Soft law cannot and should not override national hard law.</p> <p>The Belgian law contributes to a favourable environment for the audit quality. When fraud is detected, the board of directors and, in certain circumstances, the general meeting of shareholders and the public through the audit report, are informed according to the ISAs.</p>
31.	ICAA	<p>The Institute feels strongly that it is inappropriate for the exposure draft to propose placing an obligation on professional accountants to breach confidentiality, and therefore the Institute is unable to support the exposure draft in its current format.</p> <p>A professional obligation to breach confidentiality raises the following major concerns:</p> <ul style="list-style-type: none"> <li>• The absence of any legal protections for the accountant provided by this Code.</li> <li>• The risk of actionable consequences arising from such disclosure, particularly where suspicions turn out to be erroneous.</li> <li>• The consequent erosion of the trusted advisor relationship which is at the heart of the accounting profession, which in our view would negatively impact the public interest.</li> </ul> <p>The Code of Ethics for Professional Accountants by its nature is not able to provide accountants with any form of legal protection, particularly as the Code will be utilised across many and various legal jurisdictions. However, in the context of responding to a suspected illegal act, the need for legal protections is in our view most acute, as evidenced by the protections built into whistleblower and anti-money laundering legislation in various jurisdictions. In the absence of those protections, we consider that it is not appropriate for the Code to oblige accountants to breach confidentiality.</p> <p>We do however support the identification of the accountant's right to breach confidentiality in certain circumstances, and feel that it is appropriate for the Code to address this.</p> <p>The Institute believes that there is value in the IESBA providing guidance to professional accountants, expanding on the existing indication in Section 140 of the Code that disclosure is permitted where there is a legal or professional right or duty to disclose. We therefore encourage the development of principles-based provisions which clarify the issues that a professional accountant needs to identify and consider, where they believe they have grounds to exercise a professional right to disclose a suspected illegal act, and provisions which identify appropriate steps to take in that context. While a professional accountant may in certain circumstances have a legal duty to breach confidentiality, we reiterate our strongly held view that a professional duty should not be imposed.</p>
32.	ICAEW	<p>We believe that it is wholly right and proper for the IESBA code of ethics (the code) to encourage disclosure of actual or suspected illegal acts where the public interest in disclosure would outweigh the professional duty of confidence. There is a clear public interest in those who perpetrate illegal acts being brought to account. However, that decision must be a matter of professional judgement for the professional</p>

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		<p>accountant: circumstances and the factors involved in the assessment are highly variable and frequently complex.</p> <p>We cannot support the inclusion of an absolute requirement to disclose, within a global code of ethics. While the proposal might seem to be in the public interest at first sight, once the practicalities and complexities of real life are recognised, it is likely not to achieve its aim and, indeed, to have unintended consequences. For example:</p> <p>There is also a public interest in potential clients and employers being able to confide in the professionals whose services they need. If it is generally thought that professional accountants would be required to disclose suspected illegal acts, those who would intentionally break the law will withhold information, making the accountant's job more difficult, or will use the services of others, who do not have a disclosure obligation. Those who have strayed inadvertently will hesitate to confide in the professional accountant, thus reducing the likelihood of the illegal act being avoided or at least mitigated.</p> <p>Reporting a suspected illegal act that turns out not to be the case could leave open the accountant to significant legal liability. It is therefore potentially likely that a significant amount of work would need to be undertaken by the professional to establish the likelihood that the suspected illegal act has actually taken place. This might tip off the perpetrator.</p> <p>The reporting of illegal acts is addressed by many countries' national laws, requiring particular disclosures in particular circumstances. Legislators make national public interest decisions when determining these required disclosures. The interaction of these requirements with a requirement in the code will make application very complex, especially in cross-border situations. There are many differing cultural attitudes as to whether public interest can transcend the law and many layers of confidentiality (eg ethical, data protection, banking secrecy, legal privilege) and different implications of breaching these. In law, the reporting circumstances are well defined, take into account the likely authorities to be reported to and what action they could take, and are often attached to confidentiality protection.</p> <p>The decision must remain with the professional accountant. Determining whether something is or is not in the public interest is very complex- ICAEW has recently published a paper Acting in the public interest: a framework for analysis which illustrates the issues involved. Only the professional involved is going to be in a position to be able to make the assessment as to whether disclosure would override the duty of confidence to the potential client or employer, that is inherent in the fundamental principle of confidentiality.</p> <p>In preparing this response we carried out our own consultation and received responses from members engaged in a wide variety of activities. One uniform feedback to us was in respect of the obligation applicable to professional accountants other than those providing services to audit clients: respondents were unclear as to the intent behind being given a right to disclose, which the code then observes they would be 'expected to exercise'. This appears to be attempting to impose an obligation and the relevant wording needs to be addressed.</p> <p>As well as further discussion on when the accountant might consider an override of the duty of confidence, we would support the inclusion in the code of guidance for professional accountants as to what not to do in the face of suspected illegal activity. For example, it could clarify that a professional accountant cannot assist the client or employer in carrying out illegal acts, cannot merely turn a blind eye to</p>

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		<p>suspected significant illegal activity (including resigning an audit without comment) and should consider if and how the matter should be reported internally to the organisation.</p> <p>As noted above, we do not agree with the inclusion of an absolute requirement to report to authorities, within a global code of ethics, as we believe it will be counter-productive. We have proposed an alternative approach to guidance. In that context, a number of the detailed questions posed in the IESBA consultation paper become irrelevant. However, we have answered each question to assist in informing IESBA, should it adopt a closer approach to that currently proposed.</p>
33.	ICAI	<p>We are fine with the changes proposed by IESBA with regard to '<i>Responding to a Suspected Illegal Act</i>'. There might be an editorial modification: the word '<i>accountant</i>' used in the various sections of the exposure draft (e.g. 225.2, 225.3, 225.5, 225.6, 225.8 etc.), may be replaced by '<i>professional accountant</i>' for clarity (since '<i>professional accountant</i>' has been defined in the Code of Ethics, but '<i>accountant</i>' has not been defined anywhere in the draft.)</p> <p>Further, as per the Indian scenario, disclosure may be made only either with the consent of client or if the law requires so. The provisions of the domestic law may be noted as hereunder:</p> <p><b>A: (For professional accountants in practice):</b></p> <p><u>Item (1) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949</u></p> <p><i>a chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he —</i></p> <p><i>(1) discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client or otherwise than as required by any law for the time being in force;</i></p> <p><b>B: (For professional accountants in business):</b></p> <p><u>Item (2) of Part-II of the Second Schedule to the Chartered Accountants Act, 1949</u></p> <p><i>A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—</i></p> <p><i>(2) being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment except as and when required by any law for the time being in force or except as permitted by the employer;</i></p>
34.	ICAP	<p>The foregoing conclusions prescribe conditions where the professional accountant either has an '<i>obligation</i>' to, or is given a '<i>right</i>' to, override the fundamental principles of confidentiality and disclose a suspected illegal act at different appropriate levels, where professional accountant determines that doing so is in '<i>public interest</i>'.</p> <p>The proposed changes are expected to result severe theoretical and conceptual changes to the ethical requirements which might eventually impact the professional accountant's public image adversely. The professional accountants going forward may erroneously be considered detectives or law enforcement investigators, which in fact is beyond their key roles. All Professional Accountants are neither</p>

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		<p>necessarily the qualified Forensic Reviewers nor should be considered the experts in all the legal disciplines. Overriding the confidentiality principle would in most of the cases entail vigorous legal counseling due to a number of expected conflicts with the local laws of a given jurisdictions. The professional accountant will have to observe if the local laws, and their expected usage, <u>directly or indirectly</u> prohibit deviating from confidentiality principle and the circumstances where the professional accountant may be exposed to legal consequences in overriding the confidentiality requirements.</p> <p>Although all illegal acts presumably have a consequence on the financial reporting, yet, the professional accountants especially those in public practice may discover certain illegal acts which may not be having significant grave financial impacts and as such may not be affecting their core assurance responsibilities. Further, as the professional accountant should not be considered to have all legal expertise, there may be many illegal acts on which the professional accountant may not be in a position to raise questions or make conclusions.</p> <p>While defining and refining the ethical responsibilities of professional accountants globally, there is also a need to consider the economic, legal and other issues faced by the professional accountants that vary considerably from jurisdiction to jurisdiction. There are no two opinions that the Professional Accountants should be ethical, elegant and disciplined and follow best moral practices in safeguarding the public interest, however, making such disclosures at an escalated level can result in continuing legal consequences for the professional accountant even if a fatal reaction is considered to be remote. This would necessitate for every professional accountant in practice or business to obtain specific and general indemnity insurance covers and hire the services of full time legal advisors which of course would be devoid of economic justification for the professional accountants in majority of the cases. A number of economies are going through a phase of rigorous recession where unemployment is the biggest menace for the governments. The conclusion taken by ED that <u>“commercial consequences to the professional accountant or others are not sufficient ground to warrant justification for not disclosing”</u> sounds ethical and principled, however, it does not take into account the economic and sentimental truth where a competent, ethical and complaint professional accountant would make not only a loss of his job, rather a loss of his entire career, on making disclosure of the suspected illegal happenings. Such a professional accountant working in emerging and small economies would get a media fame and every next employer would avoid recruiting him regardless of his abilities. As per findings of Transparency International very few countries are free of severe corruption. Corruption in itself is an awful illegal act but at a number of jurisdictions the speed moneys and bribes have become the cost of doing business and an unavoidable reality for the entrepreneurs and businesses. ED does not appear to have properly taken into account such bitter business realities on the globe, specially the emerging economies.</p> <p>While fully acknowledging and appreciating that the best ethical practices must be followed without a fail, I fear that the ED would cause over-assertive requirements which would result in frequent legal complications, invoke recurring proceedings under defamation laws in certain jurisdictions, ruin the watchdog image of the professional accountant thereby labeling the professional accountant as ‘James Bond’, and create a huge trust deficit for the professional accountants specially in advisory roles. This would not only result in specific job and career loss incidents, rather would generally divert the client confidence towards other service providers which going forward would be detrimental to the accountancy profession in itself in a world of the survival of the fittest only.</p>

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		<p>We believe, the obligatory requirements of disclosures of suspected illegal acts at escalated level should be narrowed down, and there should be more extensive guideline material in the ED with respect to the conditions where professional accountant has either an obligation or a right to report the illegal acts. A wider study should be carried out about variant legislative requirements at different jurisdictions and all the possibilities should be taken into account before concluding the ED.</p> <p>The ED should provide further clarity and definitive basis to determine and conclude that what exactly is the 'Public Interest'. Further, there should be more extensive guidelines as to identifying and establishing a 'suspected illegal act' which can affect the 'public interest'.</p>
35.	ICAS	<p>As the Institute's Charter requires, the Ethics Committee must act primarily in the public interest, and responses to consultation documents etc. are predicated on the essential premise that their conclusions must be consistent with the public interest. Our Charter also requires us to represent our members' views and 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.</p> <p>Key Comments</p> <ul style="list-style-type: none"> <li>Whilst we appreciate the underlying rationale behind these proposals we have major concerns in relation to them. Our primary concern is that we do not believe that the matters which the proposals are seeking to address should be dealt with in the IESBA Code of Ethics. To seek to introduce such proposals as they stand in the ISEBA Code of Ethics without appropriate legal protection appears to be misguided. Legal protection is a prerequisite in relation to whistleblowing. In that respect we believe that IESBA and IFAC should lobby the G20 countries to encourage the development of high level global principles which could assist jurisdictions in forming their own national whistleblowing legislative frameworks.</li> </ul>
36.	ICJCE	<p>The ICJCE does not subscribe to several of the proposals in the Exposure Draft, in spite of the fact that we acknowledge that the initiative underlying the proposals is that the auditor should expose clear violations of laws and regulations having a material impact on financial reporting on matters within the remit of the auditor.</p> <p>The ICJCE has subscribed to the objectives and requirements included in the International Standard of Auditing (ISA) 250 on "Consideration of Laws and Regulations in an Audit of Financial Statements" which include having to respond appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the audit. The latter includes reporting non-compliance to those charged with governance, reporting non-compliance in the auditor's report on the financial statements and reporting non-compliance to regulatory and enforcement authorities resulting from legal responsibilities of the auditor.</p> <p>Although we share the notion that suspected fraud or other illegal activity by companies or individuals must be addressed by company management and those charged with governance, and that the accountancy profession should play a role in communicating its findings to them, we believe that the proposed changes to the Code are not the best way to achieve the goal of addressing illegal activity, we believe that it would be better that the IESBA recommends to the appropriate institutions to encourage governments to produce legislation to</p>

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		<p>achieve the objectives proposed by IESBA.</p> <p>The Code is not a legal instrument and thus we believe it is not adequate to regulate the proposed measures. This regulation should be a matter for legislation, attending to the specific circumstances of each nation and provided that there are safeguards. In addition, a legislative framework would allow for the proposed measures to be applied to all professions which members are potentially in a position to respond to suspected illegal acts, and not only to professional accountants. Moreover, the regulation of these measures through the Code would imply that the accountants in business who do not belong to an IFAC member body would not be subject to the requirements proposed by the Exposure Draft.</p> <p>We can also mention that there are circumstances where the effect of a violation of a law or regulation could be considered as not being significant to the public interest, but the Code does not include guidelines to know under which circumstances a potential illegal act is significant or not, and probably such guidelines could not be provided. It does not seem reasonable to leave it to the accountants and auditors to determine the significance.</p> <p>Another matter is that, as prescribed in section 100.1 of the Code, a professional accountant is not required to comply with certain parts of the Code if there is a conflict with an existing law or regulation of the country in which he or she operates, therefore, the proposal to require in certain circumstances professional accountants disclosure of a suspected illegal act to an appropriate authority would not need to be complied with in countries where such disclosure is prohibited by professional confidentiality, secrecy or privilege requirements. Moreover, the Exposure Draft does not address how to deal with situations with respect to cross-border engagements, including group audit situations.</p> <p>We have to note also that, from our point of view, the Exposure Draft does not provide sufficient justification and as regards the requirement to disclose suspected illegal acts for professional accountants providing non-audit services to an audit client or a client that is not an audit-client, or professional accountants in business.</p> <p>The ICJCE recognises the importance of the public interest for the credibility of the accountancy profession, but the Code does not include a clear definition and common understanding of “public interest”, and we think it is not reasonable to require the individual professional accountant to determine whether the reporting of a particular individual suspected illegal act is or is not in the public interest. What is more, if this issue was to be regulated in the Code national subjective and cultural differences could not possibly be taken into account.</p> <p>Other objections to the Exposure Draft are that the scope of the proposals is too broad, that many countries don’t have a competent authority to report to, and the practical difficulties arising from the proposals, such as the identification of a suspected illegal act and the understanding of what an illegal act is.</p>
37.	IDW	<p>We agree that it is in the public interest for there to be robust mechanisms to effectively address serious illegal acts perpetrated by entities and individuals in relation to accounting that affect the financial statements they publicise or could otherwise have a serious impact on the public. We also do not dispute that, in certain specific circumstances, professional accountants may have a role to play in this regard.</p>

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		<p>However, whilst we appreciate the intentions behind the initiative, we do not agree that the ED's proposals to change the Code are an appropriate way to address the role of professional accountants with regard to illegal and unethical behavior on the part of those entities and individuals who engage or employ professional accountants as auditors or in any other professional capacity.</p> <p>As we explain in more detail below in this letter, without an effective legal system that has both the power and the resources to effectively deal with suspected illegal acts the proposed actions on the part of professional accountants will be, at best, misplaced, and, at worst, harmful. In our opinion, IESBA is, therefore, not the appropriate body to deal with this issue, rather this is a matter that should be dealt with in national legislation.</p> <p>As discussed in more detail below, we also do not believe that the approach proposed in the ED is appropriate, since various aspects of the proposals are highly problematical from both a practical and a legal viewpoint. We also express our concerns as to the impact these proposals would probably have on the role of professional accountants in general, and on auditors in particular.</p> <p>As far as we are aware, France is the only country within Europe to have established a legal responsibility for an auditor to inform state authorities upon having detected certain criminal acts. In all other European Member States, and Germany in particular, the auditor has always had a duty to observe strict confidentiality requirements. In point of fact, German Law does not permit an auditor to disclose his or her findings to any third party – not even to any state authorities in any capacity whatsoever. Indeed German law treats any such breach of confidentiality as a criminal act, which carries a penalty of imprisonment for up to three years. All German laws regulating the court proceedings especially Zivilprozessordnung [Civil Procedure Code], Strafprozessordnung [Criminal Procedure Code], Verwaltungsgerichtsordnung [Public Administrative Law Proceedings] et al. include provisions prohibiting an auditor from acting as a witness unless the auditor has first obtained a release from his duty to maintain confidentiality from the audit client. Thus, were the proposals in the ED to be incorporated within the IESBA Code, they could not be adhered to by auditors in Germany because they are subject to prevailing national law. In this context, we also refer to our more detailed comments below under the heading "Legal Provisions as to Client Confidentiality".</p> <p>We therefore note that this one argument regarding the legal situation in Germany is strong enough to completely overrule any disclosure duties stipulated in an IFAC pronouncement such as the IESBA Code of Ethics. Furthermore, introducing the clause "as far as permissible under local law the auditor has the following duties..." does not make any sense when the IFAC is aware that such a provision within the Code would have no regulative power in Germany and other states which have a similar legal environment.</p> <p>Notwithstanding this argument and a number of other major concerns about the ED as stated in the following paragraphs, we have included responses to the individual questions posed by IESBA in an appendix to this letter in order to facilitate IESBA's follow-up work in considering the comments submitted on this proposal.</p> <p>Major Concerns</p> <p>Role and Authority of IESBA</p>



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		<p>In proposing the changes to the Code detailed in the ED, IESBA is attempting to govern an issue that, in any case, must be considered in its entirety. The existence, capacity and effectiveness of the resources and legal framework for reporting, pursuing and penalizing suspected illegal acts to a satisfactory conclusion also need to be taken into account in this context, since there is nothing to be gained from either requiring or expecting individual professional accountants to report suspected illegal acts consistently world-wide, when individual jurisdictions may make insufficient use of the information reported or may not take appropriate measures to prosecute perpetrators. Ensuring such facilities exist to a satisfactory degree at an international level is clearly not within the IESBA remit.</p> <p>In our opinion, it is the legislator in a particular jurisdiction who is the appropriate party to determine provisions concerning the reporting of illegal acts outside of an entity. In contrast to the IESBA, the legislator is also in a position to determine any provisions necessary to ensure adequate whistle-blower protection, release an accountant from any legal confidentiality obligations, establish provisions to prevent inadvertent “tipping-off” of potential perpetrators, and to ensure that there are credible and effective legal recourses available both in terms of the existence of an authority to which the report is to be made, the professional accountant and the party suspected of perpetrating an illegal act. Indeed, in our view, in jurisdictions that lack such appropriate regulatory infrastructure, the IESBA proposals will most certainly do more harm than good.</p> <p>One further aspect which IESBA appears not to have considered at all is that of the personal liability of the professional accountant who discloses a suspected illegal act which is subsequently dismissed by the competent authority. Even seemingly well-founded cases i.e., in which evidence has been gathered by forensic accountants and prosecutors view the evidence as being sufficient to bring the case to trial can end with an acquittal. Requiring professional accountants to disclose “suspicions” will mean that the individuals concerned are open to severe liability threats (e.g., defamation), which IESBA has no authority to address.</p> <p>Legal Provisions as to Client Confidentiality</p> <p>We would like to point out that in many civil law countries, including Germany, the law defines the rights and responsibilities of practitioners. Any code of ethics or other professional pronouncements issued by professional organizations or standards setting bodies can only, at most, interpret these legal requirements. Hence, unlike the situation prevalent in most common law jurisdictions, professional organizations or standards setting bodies in many civil law countries such as Germany cannot impose professional requirements on practitioners that go beyond the law.</p> <p>IESBA pronouncements can have no direct impact on the legal situation in individual jurisdictions. Paragraph 225.2 recognizes this, but is merely a “reminder” that professional accountants have to abide by the laws in their jurisdictions in which they are active. To the extent that it reminds a professional accountant of issues such as “tipping-off” it may serve some purpose, as the requirements proposed would otherwise often result in professional accountants “tipping-off” perpetrators of illegal acts. Other than this, a reminder that the law prevails is superfluous.</p> <p>In addition to the provisions in the Code, in many jurisdictions the law specifies that professional accountants are subject to strict client</p>

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		<p>confidentiality. Indeed, client confidentiality is an integral part of professional services, including but not limited to audits, which clients value highly. Professional accountants in public practice often provide a range of services to their clients, such that developing a relationship built on trust in the professional accountant is essentially a cornerstone of the profession.</p> <p>In some jurisdictions the law specifies the circumstances in which professional accountants, tax advisors, or other professionals are required to divulge to the authorities certain specific information of which they become aware during the provision of professional services. As we explain more fully in responding to q.1, determining the situations in which client confidentiality may be breached is highly problematical, and without absolutely clear and firm criteria should not be judged by an individual professional accountant in adhering to the Code. Breaching client confidentiality is, in our view, a matter for law, not ethics.</p> <p>Establishing Whistle-blower Requirements or Expectations within the Code</p> <p>We fully support IESBA developing a robust Code of Ethics aimed at ensuring that the behaviour of each member of the accountancy profession meets high ethical standards, relevant to his or her particular role. We also support the threats and safeguards approach, and accept that IESBA will need to specify a number of circumstances in which a particular threat is deemed as so significant that no safeguards could reduce the threat to an acceptable level; normally discontinuing a client or employer relationship. However, the concept that an accountant should act as a whistle-blower and thus always need to investigate possible irregularities and be required or expected to report suspected illegal acts to an external authority is not a safeguard to the professional accountant's own compliance with any one of the Code's fundamental principles, but a follow-on action taken in the public interest. As such, we do not believe the proposals in the ED fall within the mandate of the IESBA.</p> <p>Impact on the General Perception of the Accountancy Profession as a Whole</p> <p>We are particularly concerned that, were the proposals to become effective, the public perception of the whole accountancy profession would be altered; but not necessarily in the way we presume IESBA intends. In our view, this could have severe repercussions for the accountancy profession and, ultimately, for the financial markets and economies the profession serves.</p> <p>IESBA is proposing that, with certain very drastic exceptions, all professional accountants who are subject to the Code would have to adopt a quasi-legal role in firstly acting as an "investigator", then assuming a role akin to "prosecutor" in deciding whether there are sufficient indications that an illegal act may have been committed, then assessing the public interest implications of the particular case, and then ultimately possibly either becoming whistle-blowers to external authorities (professional accountants who are auditors) or being expected to act as whistle-blowers to the external auditor (professional accountants who are not auditors but providers of professional services/internal accountant employees). As we explain in responding to q.1, there are various issues stemming from the fact that accountants are not generally trained in such matters.</p> <p>Furthermore, as the proposals in the ED lack sufficiently firm criteria to govern the matters that would be reportable under the proposals neither the public nor members of the accountancy profession will be able to form a view of the exact dimensions of the proposed</p>

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		<p>measures. In contrast, most legal provisions governing e.g., money laundering give relatively clear indications as to the nature of the illegal acts to be so reported. This could have wide ranging consequences for the profession, as – without sufficient transparency – some potential clients may be unwilling to take any risk at all that unfounded suspicions or even inadvertent acts on their part could mean that their professional accountants would be required or expected to approach authorities. In short, our concern is that some potential clients may seek to “avoid” professional accountants and chose other sources for certain services or in employee selection. We fear that such a course of action may not be limited to those entities who believe that they may have something to hide, and may not be restricted to particular jurisdictions. Any move towards other less stringently controlled professions or less well-qualified individuals would clearly not be in the public interest.</p> <p>The intended and perceived effectiveness of the proposals will also be impacted by various other factors that would preclude consistent application. For example, not all entities have auditors, not all jurisdictions have an appropriate authority to which an auditor could usefully report and many jurisdictions have established client confidentiality in law, which the Code cannot override. Some, but not all, accountants will use the “right” to report that the Code would provide. Not all those who act as accountants are subject to the Code. For example in Germany the professions of Steuerberater [Tax advisers] and Bilanzbuchhalter [Accounting Technicians who may not provide audit services] are not, and would not be subject to any similar provisions. This would mean that German Public Auditors would be at a serious disadvantage. Of most significance is the fact that the exceptional circumstances in which a professional accountant would not be expected to act, and an auditor not required to act are likely to mean that the most serious or wide-ranging cases, which without question are those that ought to be reported in the public interest will be the very ones not reported. This fact alone certainly calls the effectiveness of the proposals in a global context into question. In this context, we would like to stress that we are in no way questioning the need for such exceptions.</p> <p>Role of an Auditor and Impact on Audit Scope</p> <p>The ED proposes to use the auditor as whistle-blower in all cases (where there is an auditor) as a last resort in the public interest, claiming that this approach will have a potential deterrent effect, resulting in less illegal acts being committed. As we have discussed above, we are concerned that this could make entities more reluctant to engage and employ professional accountants. This could have other unintended consequences, for example, driving a change in behaviour (professional accountants might, whether consciously or not, become less suspicious and those perpetrating illegal acts may develop ever more sophisticated ways of hiding such acts). Neither scenario is desirable in the public interest.</p> <p>By using the auditor as an instance of last resort in this way, the proposals would also force a shift in the auditor’s current role – which is not within the remit of IESBA. Paragraphs 11 and 12 of ISA 200 set forth the overall objectives of the auditor in an audit of historical financial statements, which is ultimately to express an opinion on whether the financial statements are prepared, in all material respects, in accordance with the applicable financial reporting framework. The proposals also go beyond the requirements of ISA 250, which deals with the auditor’s consideration of laws and regulations and the auditor’s reaction to instances of non-compliance with laws and regulations. A</p>

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		<p>number of aspects of the proposals are in direct contrast to the approach taken by the IAASB in this context. For example, ISA 250 explains the inherent limitations of an audit in this context (ISA 250.5), differentiates between different categories of legal provisions (laws and regulations that have a direct effect on the determination of material amounts on the financial statements, those that have no direct effect but compliance with which is fundamental to business or avoiding material penalties (ISA 250.6)) and requires the auditor to consider the need to obtain legal advice in certain situations – but does not require the auditor break client confidentiality. IESBA does not mention inherent limitations nor, as we point out below, does it provide any form of de minimis consideration. Together, these omissions mean that the ED could give the impression that all suspected illegal acts, irrespective of their probable impact will be followed through and potentially may ultimately be reported to the authorities. This is highly unrealistic, and, at best, will lead to an expectations gap and at worst will have serious implications for the accountancy profession.</p> <p>One major difference in the IESBA's and the IAASB's approach, which gives us considerable cause for concern, lays in the fact that the ISAs follow a risk-based approach, looking at material matters, whereas the IESBA essentially takes the opposite approach, in requiring every initial suspicion to be followed up before the professional accountant is required to consider the potential magnitude or public interest implications. Paragraph 225.5 does not even foresee the professional accountant to dismissing matters of a minor or insignificant nature. In addition, whether the reasonable steps to be taken in paragraph 225.5 IESBA is proposing would equate with the concept of reasonable assurance in the ISAs is not clear, as is the level of suspicion that an accountant is required to reach, for example in cases where little firm evidence exists to allay or confirm the suspicion. For example, should the accountant follow the concept of innocent until proved guilty apply in determining whether to report a particular matter?</p> <p>As we explain in our response to q.1, the accountancy profession does not generally have sufficient training, authority or rights of access to facilitate the detection of illegal acts, which, by their very nature, may be perpetrated with the intention of making them difficult to detect. Whilst an audit of financial statements performed pursuant to ISA does require the auditor to exercise professional skepticism throughout the performance of the audit (ISA 200.15), and to perform specific procedures in consideration of the potential for fraud (ISA 240), an audit cannot (and should not) equate to a forensic audit such as might be needed as part of a thorough investigation by the authorities.</p> <p>Accountants in public practice who provide professional services to non-audit clients and individual accountants employed by an entity will generally also not have the forensic accountant's means and authority to pursue any suspicions they may have.</p> <p>Clearly in situations where there is no auditor the proposals will result in an unequal outcome. Given the concerns in many jurisdictions associated with raising thresholds for statutory audits, we are concerned that this is one more factor that could ultimately discourage entities from undergoing audits on a voluntary basis. We do not entirely agree with the views expressed on page 10 of the Explanatory Memorandum as to entities with no external auditor, and are concerned that the public perception may differ, given our concerns explained above as to impact on the profession as a whole.</p> <p>Public Expectations</p>

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		<p>We appreciate that a stated objective of IESBA is to serve the public interest in developing a robust internationally appropriate Code.</p> <p>In our opinion, public expectations in respect of other professional services and accountants employed in business are unlikely to equate fully to those attaching to auditors.</p> <p>Given the public interest element of an audit of historical financial statements, we also appreciate that the public will generally expect an auditor to act in an appropriate manner when, during the course of an audit of financial statements, the auditor becomes aware that an audit client has, in all likelihood, committed an illegal act. Indeed, without a detailed understanding of what an audit involves, the public may expect – or even desire – that all illegal acts will come to the auditor’s attention. Due to the inherent limitations of an audit in this context (see ISA 250.5) this is not necessarily achievable in all audits. We are concerned that the approach the IESBA has taken in developing the proposals may fuel this expectation further.</p> <p>At the same time, the public expects the accountancy profession to act with discretion and respect client confidentiality. This is likely to be an important aspect of professional services that clients value highly.</p> <p>Notwithstanding the fact that we do not support the IESBA pursuing these proposals further, we trust that our comments will be useful in further debate of this issue.</p>
38.	IFAC-PAIB	<p>Clarify the need for the proposed changes</p> <p>The explanatory memorandum does not truly clarify the need for the proposed changes. Section 140.7 of the current Code already provides the overall provision 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.” Does the IESBA have evidence or strong indications that there are issues with the application of this principle? When preparing the impact analysis, did the IESBA also consider the impact if the proposed changes to the Code are not implemented? Improved clarification of, or further research into the need for, this addition to the Code would be welcome.</p> <p>Change “requirement” into “apply or be able to explain”</p> <p>The PAIB Committee is of the view that the proposed changes to the Code are confusing regarding whether disclosing certain illegal acts to an appropriate authority is a right or a requirement. Paragraph 360.1, for example, discusses having a right, whereas paragraph 360.8 uses the prescriptive “shall disclose” construction. Another example is paragraph 360.9 which first states the right to disclose, but then adds that “a professional accountant is expected to exercise this right to disclose in order to fulfill the accountant’s responsibility to act in the public interest.” In practice, an individual would find it hard to identify a significant difference in the Code’s differentiation between “is expected” and being “required” to exercise the “right” to disclose, in particular when the proposed text goes on to state in paragraph 360.10 that only in “exceptional circumstances” would the professional accountant “not be expected” to make the disclosures.</p> <p>Having a right does not generally impose a demand on those who have it. Placing an expectation on how to exercise a right is not</p>

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		<p>consistent with the concept of having a right.</p> <p>The IESBA could take a more principles-based approach to disclosure; that is, along the lines of the familiar governance approach of “apply or be able to explain.” That is, professional accountants should apply the principle to ultimately disclose a suspected illegal act or be able to explain, after the fact if necessary, why they did not. This would also fit neatly with the provision in paragraph 360.15 that “the professional accountant shall document the steps the accountant took to respond to suspected illegal acts.”</p> <p>Allow for cultural or legal differences</p> <p>Taking an “apply or be able to explain” approach to the proposed changes in the Code would also enable greater diversity for culturally sensitive differences, for example, with respect to whistleblowing policies or the reasonable third party test. This would further increase the universal usefulness to professional accountants in business.</p> <p>An “apply or be able to explain” approach would also bolster professional accountants who work in jurisdictions with weak or no whistleblower and witness protection laws. In addition, in some jurisdictions, reporting illegal acts without sufficient evidence can amount to false or malicious reporting and the penalties are extremely punitive. This distinct possibility is noted in the impact analysis in the appendix to the exposure draft, but appears to not be further addressed. Therefore, in our view, if the questionable concept of being expected to exercise a right to disclose is retained, the notion of potentially severe legal consequences for the professional accountant in business should be included as an additional example in paragraph 360.10.</p> <p>Resignation should be last resort</p> <p>Paragraph 360.3 requires the professional accountant in business who identifies a suspected illegal act to consider whether it is appropriate, based on all relevant facts and circumstances, to resign from the employing organization. The PAIB Committee is of the opinion that resignation should be the last resort, as the professional accountant in business should first attempt to appropriately address the matter. In addition, the requirement to resign can place an undue burden on professional accountants in business as it effectively means they would be required to give up their personal income.</p> <p>The requirement to resign could be disproportionate in case of suspected illegal acts, which may be minor offenses. The Code should recognize that suspected illegal acts can have various levels of severity. Professional accountants in business should apply professional judgment, and take account of subsequent steps to be taken, in determining the severity of the act.</p> <p>Therefore, paragraph 360.3 should clearly state that resignation is the last resort. In addition, the PAIB Committee recommends moving this paragraph closer to the end of Section 360 to emphasize that other actions should come first. In this respect, please also see the last sentence of paragraph 360.10 that says: “if the professional accountant does not exercise this right, the accountant shall consider whether to resign from the employing organization.”</p> <p>Comments on the specific questions outlined in the Exposure Draft follow. Our responses are intended to be read as applying to</p>

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		<p>professional accountants in business.</p> <p>We have not responded to questions 4-10 as they refer to matters specific to professional accountants in public practice. Instead, we would like to provide the following more general viewpoint: The PAIB Committee believes a professional accountant in public practice has a moral and professional duty, from a public-interest perspective, to follow up on a suspected illegal act, even when performing non-audit services to a non-audit client. This should take place through the internal governance layers of the client organization until the highest governing body is reached. Ultimately, if all internal options are exhausted and the issue is still not sufficiently resolved, and depending on the type and severity of the suspected illegal act, the professional accountant in public practice has the responsibility and duty, following the same “apply or be able to explain” approach as we recommend for professional accountants in business, to override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate external authority.</p>
39.	IFAC SMP	<p>Maintaining trust in the accounting profession upholding the public interest is of paramount importance and we commend the IESBA on its willingness to tackle this sensitive and complex topic.</p> <p>The contribution of SMEs to global, sustainable economic activity means that they are central to the pursuit of the public interest. SMPs rely heavily on their reputation as trusted business advisers for their (typically) SME clients, providing personalized and high-quality professional services to meet a wide range of client needs.</p> <p>The ED addresses issues that are just as relevant to SMPs as they are to larger firms. It presents a number of challenges to the trusted relationship between SMPs and SMEs and balancing this with the need for the profession as a whole to uphold the public interest is not straightforward.</p> <p>Given the wide range of jurisdictional differences in terms of levels of legal protection available, the existence, approach and rigor of enforcement agencies, and differing notions of the public interest, we have significant concerns that professional accountants and their clients following the proposed new requirements of the Code would in many cases face significant exposure to litigation, with potentially severe consequences. Furthermore, in the absence of an effective legal system that has the power and resources to effectively deal with suspected illegal acts, protect the party reporting such an act and prevent inadvertent “tipping-off” of potential perpetrators, the proposed actions on the part of professional accountants may fail to have the desired effect and, indeed, could even prove detrimental. In short, some jurisdictions may simply not yet be ready to adopt such requirements. On balance, when there are no legal provisions to the contrary in a particular jurisdiction, we believe that the only workable proposals are for the Code to provide for professional accountants, whether they be in business or in practice, to have a right, but not a duty, to report illegal acts and matters in the ‘public interest’ to authorities outside the entity. We believe that ‘rights’ that are expected to be exercised are in fact obligations. Anything more poses a significant risk that the proposals will be widely ignored.</p> <p>These comments and our specific comments below reflect a majority, rather than unanimous, view of the SMP Committee. A minority of members are wholly opposed to the proposals. These members are not a homogenous group and come from jurisdictions at different</p>

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		<p>stages of economic development.</p> <p><i>Rationale</i></p> <p>The proposed new sections 225 and 360 of the Code may add significantly to the obligations of professional accountants, both in respect of existing ethical requirements and law and regulations and it is therefore important that professional accountants have a clear understanding of the rationale behind such additional obligations and their likely benefits. If and when changes to the Code resulting from this ED are agreed, we encourage the IESBA to include an explanation of why the new sections of the Code are proposed in the Basis for Conclusions.</p> <p><i>Presentation</i></p> <p>We are mindful of the issues previously raised by the IESBA's SME/SMP Working Group concerning the complexity and length of the Code, and are encouraged that the IESBA is actively exploring ways in which the Code could be reformatted.</p> <p>We acknowledge the need for the proposed new sections 225 and 360 to fit with the existing format of the Code but these sections could and should convey more succinctly the essence of the proposals. In particular, we believe that if the IESBA were to proceed with this project then there would be scope to make it easier for the reader to focus attention on the requirements, the escalation process, the duties and rights, and the contrast between the different approaches to be followed, depending upon whether the client is an audit client or not. For example, inclusion of a visual aid such as a flow chart or decision tree could neatly encapsulate the substance of the proposals.</p> <p>To help users navigate the various legal considerations which prevail throughout the ED, and which may vary significantly from jurisdiction to jurisdiction, it would be helpful for the proposed new sections to refer to the relationship between the Code and local legal requirements, as set out in the Preface to the Code. Whilst we acknowledge that the Preface holds true over all sections of the Code, the particular subject matter of this ED amplifies the need for the reader to be aware of the content of the Preface. This could easily be done by either a new opening paragraph to sections 225 and 360 or by way of a footnote to both sections, referring the reader back to the Preface.</p> <p><i>Public Interest</i></p> <p>We feel it important to stress the careful balance to be struck between the interests of the public, the client and the professional accountant. We believe that the public interest is best served by a strong economy driven by SMEs having access to the best business advice available to grow their business. SMEs will only seek advice from professional accountants where they can be assured of a trusted advisor relationship where they are free to share information with their advisor and can trust them to maintain confidentiality in their dealings. In this context, we fear that uncertainty about the type of matters as well as the circumstances under which professional accountants would potentially be required to report any suspected illegal acts to external authorities as well as who would carry the costs of such additional work could drive potential clients to seek the services of accountants or other professionals who are not subject to the IESBA Code. If the trusted advisor relationship is broken SMEs and personal clients will not utilize the services of a professional accountant. It is not in the public interest to prompt these clients to second rate business advisors because their professional accountant cannot be trusted with their</p>



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		confidences.
40.	IIA	<p>Definition of Public Interest</p> <p>We support IESBA's continuous effort to raise ethical standards for PAs, as exemplified by the proposed additions and revisions to the Code. We appreciate the issuance of IFAC Policy Position 5, A Definition of The Public Interest, in June 2012. Since "Public Interest" is a key driver for the revision of the Code, we recommend making a reference to this document.</p> <p>Implementation Challenges and Issues</p> <p>We would like to acknowledge the significant practical challenges in implementing the additions (sections 225 and 360) given the diverse legal, regulatory, cultural, corporate, and professional environments in which PAs worldwide operate and exacerbated by varying experience levels among PAs.</p> <p>If a professional accountant in public practice (PAIPP) or a professional accountant in business (PAIB) identifies a SIA, the proposal requires the PA to:</p> <ul style="list-style-type: none"> <li>• Comply with applicable legal and regulatory requirements.</li> </ul> <p>Countries have different laws and regulations that govern PAIPPs and whistleblowing activities. Audit firms and many entities have their own codes of ethics which may align with IESBA's Code. Accounting and auditing professional organizations also have their licensing requirements, codes of ethics and professional standards and regulatory bodies have various expectations. Entities have contractual agreements with PAIPPs and code of conduct for PAIBs that govern integrity and confidentiality of information. It is a complex process to prioritize these requirements, especially when there are conflicts. There may even be a risk of committing an illegal act by reporting a SIA.</p> <ul style="list-style-type: none"> <li>• Take reasonable steps to confirm or dispel that suspicion.</li> </ul> <p>SIAs are serious matters; the suspicion should be confirmed or dispelled by professionals with the appropriate experience in order to deal with the SIA and protect the entity and the PA. Some activities may even be conducted under attorney-client privilege.</p> <p>Often, a PA will not be equipped to confirm or dispel the SIA. They may not have the requisite skills, expertise, and experience. They typically do not have the authority, resources, or access to people, information and systems. Requiring PAs to confirm or dispel the suspicion could put the PA and/or others, including the entity itself, at risk.</p> <p>While 225.14, 225.20, and 360.10 address exceptional circumstances under which PAIPPs or PAIBs are not required to disclose the SIAs, exceptional circumstances do not explicitly contemplate the personal and civil liability of the PAs and financial resources required in the likely scenarios of lawsuits. These risks are far more significant than the commercial risk of losing one client.</p> <p>The Code should include additional discussion and guidance on how PAs should identify and manage these implementation challenges.</p> <p>Smaller Entities</p>

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		<p>PAs at entities with no external auditor or internal auditor would need additional guidance. Page 10 of the Explanatory Memorandum acknowledged that some entities, especially smaller ones, do not have an external auditor. IESBA is of the opinion that due to smaller size, there is a low probability of occurrence of illegal acts with public interest consequence. If the response is not appropriate, the PA would have a right to disclose the SIA to an appropriate authority.</p> <p>We are of the view that PAs may be more vulnerable in a smaller entity because the management team may be more tightly controlled or lack many safeguards available to more mature or larger organizations. In addition, due to the informality of governance, risk management and control, the risk of violation may also be higher. Some privately held entities' products and operations have important public interest implications.</p> <p>Scope of the SIAs</p> <p>The proposed Code focused on three types of SIAs: those that directly or indirectly affect financial reporting, subject matter that falls within the PA's expertise, and those related to the subject matter of the professional services provided. PAs have a wide range of experience levels. We believe that all SIAs recognized by the PA should be reported. The scope should not be limited to these three types. It is important to bring SIAs to the attention of an appropriate internal party such as senior management and TCWG; they have primary responsibilities for confirming or dispelling SIAs, taking corrective actions and evaluating disclosure requirements for confirmed SIAs, and making appropriate disclosures.</p> <p>Primary Methods of Handling SIAs</p> <p>We believe that while the Code applies to PAs, overall responsibility for conformance should be vested with the audit firms and the entities. It appears that the proposed changes would bypass structures put in place to deal with SIAs. For example, many organizations have "whistleblower" procedures and policies and audit firms have established processes to handle SIAs observed on engagements.</p> <p>These structures provide the context to ensure compliance with the Code.</p> <p>We recommend that SIAs be handled through existing SIA reporting (e.g., whistleblower procedures), investigation, escalation and resolution processes established by the entities and the audit firms to the extent possible; the processes should be adjusted where necessary. If those do not exist or are not operating effectively, then the PA should report the SIA to internal audit. An internal audit activity which complies with the IPPF should possess the experience and resources to take the proper next steps to address the SIA. If these options are not available, TCWG should be informed directly by the PA. Any of the aforementioned would be responsible for designating appropriate investigation resources to confirm or dispel the SIAs.</p> <p>We believe the requirement to report SIAs to the external auditor by PAIPP providing services to a non-audit client and PAIB is not appropriate. External auditors are not charged with the responsibility of managing all SIAs for an entity. We have recommended alternatives in our detailed responses.</p>

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		We agree, as a last resort, that the audit firms and PAIBs should have a right to escalate SIAs that meet public interest disclosure criteria to TCWG. The audit firms and PAIBs should override the fundamental principle of confidentiality and disclose a SIA to an appropriate authority if the entity has not made an adequate disclosure within a reasonable period of time. However, protections for various potential violations (e.g., confidentiality requirements) need to be afforded to the PA that took the appropriate actions.
41.	IMA	While the IESBA code and the proposed changes cover professional accountants both in public practice and in business, our comments primarily will refer to the changes related to professional accountants in business ("PAIB"), since IMA is a worldwide professional association of more than 65,000 management accountants representing this area of the profession. Therefore, it is from the perspective of the professional accountant in business that our comments are made.
42.	IOSCO	<p><b><i>The Project</i></b></p> <p>We support efforts to improve the <i>Code of Ethics for Professional Accountants</i> (the Code) so that it provides better guidance to professional accountants in both business and in public practice with respect to the considerations they can and should make if they encounter a suspected illegal act as part of carrying out their employment or engagement responsibilities, respectively. In referencing suspected illegal acts, we believe the Code should specifically mention that illegal acts encompass suspected frauds.</p> <p><b><i>Previous SC 1 Input on the Project</i></b></p> <p>In the context of the IAASB's previous work on the responsibilities of an auditor to consider fraud as part of an audit of financial statements, our predecessor committee, known as SC 1, commented on this subject in a 2004 comment letter to the IAASB. In that letter SC 1 stated that it believed the current Code and its professional obligations of auditors should be reconsidered with respect to balancing the auditors' obligations for confidentiality to the entity it is auditing and its duties in serving the public interest when, during the course of an audit, it encounters fraud at the audit client.</p> <p>We believe that SC 1 was concerned that the client confidentiality provisions of the Code leave the auditor with (only) two "tools" for considering client frauds that it encounters during the course of its financial statement audit work. These two tools are (i) issuance of a modified auditor's report and (ii) resignation from the audit engagement. SC 1 encouraged the IAASB to look beyond these two tools because modification of the auditor's report may not be available if the auditor had access to the necessary audit evidence and the audit client's reporting with respect to the suspected fraud met the requirements of its financial reporting framework. And additionally, the "all or nothing" choices of either continuing with or resigning from the audit engagement present starkly different alternatives.</p> <p><b><i>Current Direction of the Project</i></b></p> <p>For auditors, the overall direction of the Paper seems to swing the pendulum quite far away from their existing obligation of confidentiality. This is because the Paper proposes that, except in the case of anticipated bodily harm, auditors are called to report to regulators those suspected illegal acts that management does not itself report, regardless of whether the auditor's expertise and work has a nexus to the</p>

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		<p>regulator and without regard to the regulator's means to intake, process and/or carry out the enforcement of the laws governing the related matter. In short, under the Paper it seems like the auditor's overall mandate under the Code would go from "report nothing" to "report what management does not report."</p> <p>Our overall comment in response to the Paper's proposed shift in the auditor's role is to re-iterate the overall comment made in SC 1's 2004 comment letter; that is, to call for the proper balance with respect to what the audit firm is both called upon and allowed to do under the Code and/or the ISAs in handling the various scenarios involving suspected illegal acts. Our preference at this time is to ask the IESBA to redeliberate its way to the proper balance as part of piecing together the input it has received on the Paper, versus for us to declare a particular approach as the one that we think should be definitive. Having said this, we may have further thoughts in reaction to the Board's redeliberations.</p> <p><b><i>Redeliberations of the Paper</i></b></p> <p>As a way to discern the best approach to the Code's/ISA's expectations of auditors, as well as the Code's expectations of accountants in business and those accountants providing other professional services, we suggest the IESBA's redeliberations would benefit from including the steps noted below.</p> <p><u>Scope</u></p> <p>Establish whether this project will encompass both suspected illegal acts that an accountant or auditor encounters while the act is being planned (e.g., authorization of an illegal payment that has not yet been made) as well as those that are identified after the act has occurred.</p> <p>Establish whether this project will encompass acts of personal misconduct that are associated with employment (e.g., employees or their close family members selling company shares at inappropriate times).</p> <p><u>Responsibilities of Management and Those Charged With Governance</u></p> <p>Redeliberate the Code's expectations for what an accountant in business should do when s/he encounters a suspected illegal act. Accountants in business are the first line of defense within the accounting profession for handling suspected illegal acts that are discovered at the enterprise where they work. Further, the responsibility for an entity's compliance with laws and regulations is that of management, as overseen by those charged with governance of the enterprise.</p> <p><u>Responsibilities of the Auditor</u></p> <p>Review how the existence of a suspected illegal act at an audit client affects the auditor's work to complete its audit of the entity's financial statements (e. g., within the typical steps of risk assessment, planning, evidence gathering and verification, sharing information with management and those charged with governance, applying professional skepticism, supporting conclusions regarding the operation of internal controls and whether they can be relied upon, and so forth). In particular, consider the scenarios in which management does not agree with the auditor that a suspected illegal act exists or agrees that it exists but does not agree with what is called for to handle it; that</p>

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		<p>is, the level of fact gathering needed to assess it and its effects on the financial statements and/or whether there are requirements that call for management to report the suspected illegal act to the relevant authorities. This review would inform the IAASB as to whether it should propose any changes to the ISAs, including to ISA 240, <i>The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements</i> and to ISA 250, <i>Consideration of Laws and Regulations in an Audit of Financial Statements</i>.</p> <p>Establish the suspected illegal acts for which the auditor is called to take steps that are incremental to what is called for by the ISAs. For example, at one end of the spectrum is a suspected illegal act in which neither management nor those charged with governance are involved, and for which both management and those charged with governance believe that management has taken the proper steps in handling it. At the other end of the spectrum is a suspected illegal act in which both management and those charged with governance are involved, and for which they do not agree that the matter is in question.</p> <p>Establish what incremental steps the external auditor is called to take beyond those called for by the ISAs. As part of its work to establish the incremental steps an auditor would take, our members believe that the Board should:</p> <ul style="list-style-type: none"> <li>A. Revisit the role of the "public interest" filter, since it seems that it would be in the public interest for any suspected violation to be subjected to the appropriate handling.</li> <li>B. Make clear that reporting to the appropriate authority would not be considered a breach of the Code and that the auditor should comply with legal obligations even if such duties may be in conflict with professional obligations, such as the obligation for confidentiality of client information.</li> <li>C. Require the auditor to consider whether resignation from the engagement is also necessary. This determination should be made after the appropriate consultations both at the local engagement team level and escalation within the audit firm.</li> <li>D. Require the predecessor auditor to notify a successor auditor of the suspected illegal act—prior to the latter's final acceptance of the engagement—so that the successor auditor understands the risk of accepting the engagement.</li> <li>E. Establish the timing for the situations in which auditors are involved in the reporting of suspected illegal acts to appropriate authorities.</li> <li>F. Call for the auditor to re-assess the integrity of management.</li> </ul> <p><u>Responsibilities of Professional Service Providers</u></p> <p>Establish what incremental steps an audit firm should take if the matter is discovered in providing a non-audit service to an audit client.</p> <p>Establish any incremental steps beyond those taken by management and those charged with governance that an audit firm should take if the matter is discovered in providing a non-audit service to a non-audit client.</p> <p><b><i>Interaction with the IAASB's Work on Auditor Communications</i></b></p> <p>We realize that the IAASB's current project on auditor communications is targeted at improving what an auditor communicates as a result of completing the audit of an entity's financial statements. Depending on the timing, the IESBA could coordinate with the IAASB's</p>

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		<p>conclusions from this project and/or establish the incremental steps noted above relative to the existing ISA requirements for auditor reporting.</p> <p><b>Resources</b></p> <p>Our members have a variety of experiences with “whistleblowing” and the reporting of and handling of reported suspected illegal acts, including frauds. These experiences include determining how best to draw upon the skills, incentives and resources of management, of those charged with governance, and of outside parties (such as auditors and securities regulators) in the handling of suspected illegal acts. Our members would be pleased to discuss their experiences with representatives of the IESBA if the Board would find this helpful.</p>
43.	IRBA	<ol style="list-style-type: none"> <li data-bbox="430 548 1906 727">1. The proposed amendments to the IESBA Code of Ethics for Professional Accountants (the “IESBA Code”) are drafted in the context of “professional accountants in public practice providing professional services to an audit client” and “professional accountants in business”. Our responses are provided in the context of requirements that the IESBA Code might seek to impose on professional accountants in public practice (in South Africa – this applies to registered auditors) appointed to perform audits and provide other professional services to any entity.</li> <li data-bbox="430 743 1906 889">2. Consequently, our specific comments are restricted to the proposed amendments to sections: 100, 140, 150 and 210 and the proposed new section 225 as they pertain to professional accountants in public practice providing professional services to an audit client. Accordingly we do not comment on the proposed amendments to sections 300 and 360 of the IESBA Code as we have no jurisdiction to regulate professional accountants in business. Our more general comments follow.</li> </ol> <p><i>Legislated requirements vs. Code requirements</i></p> <ol style="list-style-type: none"> <li data-bbox="430 946 1906 1198">3. We have a concern that, unless individual jurisdictions have established legal processes for professional accountants in public practice who becomes aware of a “suspected illegal act”, to report the suspected illegal act to an appropriate regulator that has the power and authority, in the circumstances of the suspected illegal act reported, to investigate and take enforcement action against those involved, the proposed amendments to the Code, may not be implemented or enforceable. We appreciate that this concern is acknowledged on pages 8 and 9 of the Explanatory Memorandum where factors supporting a “right to disclose” rather than a “requirement to disclose” are presented. As a regulator, the IRBA supports the proposal in principle, for auditors in public practice, to have a requirement to report suspected illegal acts but has reservations with regard to some of the proposed changes to the Code.</li> <li data-bbox="430 1214 1906 1416">4. It is advisable for any such legislation to incorporate protective mechanisms for professional accountants in public practice who report such suspected illegal acts in good faith, and which are not reported maliciously. Where such protective mechanisms is not incorporated into legislation, professional accountants who report suspected illegal acts, potentially face litigation from their audit clients against those professional accountants reporting suspected illegal acts resulting in considerable legal costs involved and possible threats to the personal safety of individual professional accountants. The proposed amendments to the IESBA Code cannot offer any legal protection for a professional accountant or auditor who reports a suspected illegal activity and it is unlikely that any</li> </ol>

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		<p>Code of Ethics can provide such protection or indemnity if not addressed by relevant legislation in the jurisdiction.</p> <p>4.1. We are aware that in our jurisdiction, where the auditor responsible for the audit engagement has a statutory responsibility to report reportable irregularities to the IRBA for onward reporting to the relevant Regulator, the indemnity provision contained in the Public Accountants' and Auditors' Act, 1951 that preceded our current Auditing Profession Act, 2005 (the Act) was removed. In spite of the statutory responsibility that an auditor has, that is brought to the attention of all audit clients in the auditor's engagement letter, auditors who identify and report reportable irregularities frequently experience pressure from audit clients, either by way of threats of litigation, of the firm being removed as the auditor, or the individual auditor being removed as the engagement partner responsible for the engagement, and undue harassment of the auditor and the engagement team completing the audit.</p> <p>4.2. Concerns are expressed that whistleblowing legislation in different jurisdictions may not provide adequate protection for auditors or professional accountants reporting suspected illegal activities to an appropriate regulator.</p> <p><i>Nature and materiality of the suspected illegal act</i></p> <p>5. The nature of "suspected illegal acts" that are to be reported need to be more clearly defined, as the basis suggested is very broad. Any enforcement action by an appropriate regulator will almost certainly be only in respect of those suspected illegal acts that have caused, or are likely to cause, material financial loss to the entity, or any partner, member, shareholder, creditor or investor of an entity in relation to his or her or its dealings with that entity. The nature and materiality of the impact of a suspected illegal act will form the basis for determining the possible impact on the public interest. The appropriate response by an auditor is set out in the reporting requirements in ISA 250 (paragraphs 25 to 28) which address the appropriate disclosures in the audited financial statements and onward reporting by the auditor to an appropriate regulator. The IESBA Code should align its provisions with ISA 250. Such reporting by a professional accountant or auditor may give rise to legal action being taken by the appropriate regulator, or aggrieved persons, against the parties involved.</p> <p>5.1. Non-compliance with the myriad of legislation and requirements by any entity does not necessarily amount to an intentional "suspected illegal act", but may result in fines or penalties being levied which, if material, may affect disclosures in the financial statements; and</p> <p>5.2. In the case of global companies operating in many different jurisdictions, the complexity of the laws and regulations applicable to an audit client are such that the professional accountant may be unaware of suspected illegal acts by the entity and where the suspected illegal acts arise from sophisticated intentional illegal acts by management, or those charged with governance, may be extremely difficult for a professional accountant or auditor to detect at an audit client of the firm or network firm.</p> <p><i>Parties involved in suspected illegal acts</i></p> <p>6. The question of "who" is suspected of being complicit in a suspected illegal act at an entity is also of relevance, whether the</p>

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		<p>individual/s are at a management level, those charged with governance, or a lower level employee is an issue. Different categories of employees, or those charged with governance in an entity, may have a greater or lesser responsibility and authority for taking action to detect and prevent suspected illegal acts by the entity, by management or any other individual employed by the entity. Generally management will be expected to take appropriate action against other employees involved in suspected illegal acts.</p> <p>6.1. For example, where an entity has controls in place to detect suspected illegal acts, and discovers an employee suspected of being so involved and management (including for e.g. a professional accountant in business acting as the CFO) takes action promptly on discovery to sanction the employee and recover any losses that might be incurred, it seems unnecessary to suggest that such suspected illegal acts have to be reported by the auditor to any appropriate regulator. Where, however, management takes no action to sanction the employee or recover losses incurred, they may be regarded as condoning the actions of the employee and negligent in performance of their fiduciary responsibilities. In such circumstances, the auditor who becomes aware of the suspected illegal act and believes the actions are intentional and material, has a responsibility to communicate with those charged with governance and considers the material effect on the financial statements and whether to communicate to regulatory and enforcement authorities.<sup>2</sup></p> <p>6.2. Where the professional accountant, or auditor, suspects that management, or those charged with governance, are complicit in the suspected illegal acts, this is clearly more serious, with the inherent risk of override of preventative controls and combined with the possible impact of material financial loss caused to the entity or any partner, member, shareholder, creditor or investor. Knowledge of a suspected illegal act at an audit client may come to the professional accountant's, or auditor's knowledge, from any source, internal or external to the entity. In such circumstances a professional accountant appointed as the auditor complies with the requirements in ISA 250 (paragraphs 22-28) and any additional legislative requirements to report to an appropriate regulator.</p> <p>7. A further consideration is the nature of professional services provided by the professional accountant. Where an audit of financial statements is conducted in accordance with IAASB International Standards on Auditing (ISAs), or the applicable auditing standards in various jurisdictions, it may reasonably be expected that the auditor complies with ISA 250, has an "audit knowledge" of the client and where he or she "has reason to believe that a material suspected illegal act has, or is likely to have, occurred", considers whether it might materially affect the audited financial statements.</p> <p>7.1. Where a professional accountant provides other professional services to an audit client, that are permitted in terms of the independence requirements if the IESBA Code, the services provided may be of such a nature that the professional accountant may have little or no chance of detecting a suspected illegal act. Where those services are provided by professional staff at the</p>

<sup>2</sup> The auditor's responsibilities to respond appropriately to instances of non-compliance with laws and regulations by the entity, that may include suspected illegal acts, are clarified in ISA 250 *Consideration of Laws and Regulations in an Audit of Financial Statements*. ISA 250 (paragraphs 22 to 28) provide guidance in reporting of identified or suspected non-compliance, including to those charged with governance, disclosure in the auditor's report on the financial statements and reporting to regulatory and enforcement authorities.



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		<p>audit firm who are not professional accountants, they may not have sufficient understanding of the audit client to recognise a suspected illegal act that has, or is likely to have, occurred, or be able to identify the possible parties who are suspected of being complicit in the suspected illegal acts.</p> <p><i>Requirements for auditors and independent reviewers to report irregularities</i></p> <p>8. Individual registered auditors appointed to perform an audit of any entity, who are satisfied or has reason to believe that a reportable irregularity, as defined in the Act has taken place or is taking place in respect of that entity, have a statutory duty in terms of section 45 of the Act to send a written report of the reportable irregularity to the IRBA without delay after detecting the irregularity and determining that it is reportable.</p> <p>8.1. The first reportable irregularity report must contain sufficient detail of the reportable irregularity to enable identification of the appropriate regulator responsible for enforcement of such irregularity (suspected illegal act) for onward transmission by the IRBA to that regulator. The auditor is required to submit a copy of the first reportable irregularity report to a full board of management, including those charged with governance, within 3 days of submitting the report to the IRBA. The auditor then provides management with a reasonable opportunity to respond to the report. Thereafter the auditor sends a second report to the IRBA within 30 days after the first report to confirm: whether the reportable irregularity is or is not continuing, or the suspicions are unfounded and the suspected reportable irregularity did not exist. The Act also provides that an auditor, who “fails to report a reportable irregularity that he or she is satisfied or has reason to believe has taken place or is taking place”, may be subject to a fine or imprisonment or both.</p> <p>8.2. The Act also contains requirements where the second report indicates the reportable irregularity is regarded as continuing, for the auditor’s report on the financial statements of the entity to include under a separate “<i>Report on other legal and regulatory requirements</i>” the fact that a reportable irregularity has been reported to the entity. The reportable irregularity reported must be appropriately dealt with by management in the audited financial statements including steps taken by management to address the irregularity disclosed. If this is not done, the auditor is required to disclose information regarding the nature of the reportable irregularity in their auditor’s report. This requirement seeks to address concerns regarding non-disclosure to the public.</p> <p>8.3. Since the introduction of section 45 in the Act effective from 1 April 2006, the IRBA has received approximately 1200 reportable irregularity reports annually. In this way, the IRBA is viewed as contributing to the broader regulatory enforcement mechanisms in the country.</p> <p>8.4. We note the view expressed on page 8 of the Explanatory Memorandum regarding the assumed “low probability of occurrence of illegal acts in smaller entities and expectation that such instances would be rare”. The IRBA’s experience is to the contrary, where approximately 80% of reportable irregularities reported by auditors have been in respect of smaller companies, owner managed businesses and trusts, mainly regarding contraventions of provisions of the Companies Act and often accompanied by</p>

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		<p>income tax or VAT non –compliance, or fraud, or involving misappropriation of employees’ tax deductions or VAT charged not paid to the tax authorities.</p> <p>8.5. The IRBA will consider the final amendments to the IESBA Code for adoption, to the extent considered appropriate, as the Code cannot override the requirements of the Act.</p> <p>9. The South African Companies Act, 2008 and Regulations, similarly require a professional accountant, including any auditor, who performs an independent review of a company’s financial statements, that is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of that company, to report without delay to the Companies and Intellectual Property Commission (CIPC). CIPC exercises their enforcement mechanisms in dealing with reportable irregularities received, which are defined in the Regulations as:</p> <p>9.1. “Any act or omission committed by any person responsible for the management of a company, which:</p> <p>9.1.1. Unlawfully has or is likely to cause material financial loss to the company, or to an member, shareholder, creditor or investor of the company in respect of his or her dealings with that entity, or</p> <p>9.1.2. Is fraudulent or amounts to theft; or</p> <p>9.1.3. Causes or has caused the company to trade in insolvent circumstances.”</p>
44.	JICPA	<p>We understand that the ED attempts to address a difficult issue of responding to suspected illegal acts for professional accountants. However, when considering how to apply the proposed requirements in practice, there are a number of issues that are unclear and difficult to fully understand, and as such, some concerns or reservations have aroused over the proposed requirements. Specifically, we believe that it is important for the IESBA to reflect on the prevailing laws and regulations of some jurisdictions, before trying to introduce a requirement for professional accountants to disclose certain suspected illegal acts to an appropriate authority. We, therefore, generally do not agree with the requirements proposed in the ED and, believe that the proposed requirements should all be reconsidered.</p> <p>Specific concerns or reservations that aroused during our discussion of the ED are set out below in our responses to the questions raised in Request for Specific Comments of the ED.</p> <p>In addition to our specific comments to the questions raised in the ED, we would also like to suggest the IESBA to clarify what is meant by the “level of suspicion” with regard to suspected illegal acts. Depending on the interpretation of the level of suspicion, we believe that a professional accountant’s response to the requirement of disclosing suspected illegal acts would vary, and therefore, the IESBA needs to clarify its intended level of suspicion when referring to suspected illegal acts. In our understanding, the intended level of suspicion proposed in the ED is equivalent to that of a “suspected fraud” as set forth in ISA 240, thus, fairly high. If this is true, then the IESBA should clearly state that the level of suspicion mentioned in the ED should be understood to be equal to that specified in ISA 240. Our comments below have been made on the basis of this view.</p>

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		Furthermore,, with regard to paragraph 225.5, which requires an accountant to take reasonable steps to confirm or dispel the suspicion, there are no specific references as to what has been envisaged by the term “reasonable steps.” Therefore, we believe that IESBA should identify or illustrate the kinds of steps that are expected to be taken by professional accountants.
45.	KACR	<p>We are concerned that imposing additional external reporting obligations on auditors may conflict with confidentiality requirements. The confidentiality principle creates an environment where management of audited companies can openly discuss with auditors all aspects of their business. We consider it a very important underlying contributor to the audit quality. New additional external reporting obligations could negatively impact the auditor's communication with management.</p> <p>We understand the nature of this proposal, but with them the we know that there already exist sufficient and adequate professional standards for auditors and also national jurisdiction, which protect the public interest in this area. In our view, any external reporting is the primary responsibility of management and those charged with governance. If the auditor suspects illegal acts, auditing standards require him/her to report to those charged with governance, and it is their responsibility to act further. If their response is considered inadequate by the auditor, the auditor need to consider modification of its audit report, resignation, etc depending on the circumstances.</p>
46.	KICPA	<p>We support the commitment of International Ethics Standards Board for Accountants (Hereinafter, “IESBA”) to developing and promoting high-quality ethical standards for professional accountants.</p> <p>We agree with the basic view of IESBA that one of the most important professional responsibilities of a professional accountant is to act in the public interest and that the professional accountant is expected to fulfill the responsibility to act in the public interest.</p> <p>However, with all due respect, KICPA would like to request IESBA to revisit and discuss the proposed changes and need for such changes, considering several factors that are described below in detail, including effectiveness of the requirement to override confidentiality that is likely to be undermined by discrepancies in local regulatory structures and judicial systems; potential turmoil in the capital market that is likely to be caused by the disclosure of wrong information; the professional accountant facing increased exposure to litigation; lack of consistency caused by different judgments used to make the determination as to whether disclosure would be in the public interest; and disproportionateness in terms of cost-benefit analysis.</p> <p>First, as highlighted in the Exposure Draft of IESBA, the requirements to disclose illegal acts are normally established by laws and regulations. It's because the professional accountant who has disclosed such illegal acts should be provided with protective mechanism under laws and regulations. Furthermore, the important concepts covered by the Exposure Draft of IESBA, such as the definition and scope of ‘suspected’ illegal act and the details and subjects of the professional accountant's responsibility to maintain confidentiality, are differently prescribed and enforced by local laws/regulations and judicial systems.</p> <p>In Korea, the professional accountant's duty to maintain confidentiality is prescribed by Certified Public Accountant Act and Act on External Audit of Stock Companies. So, even though the Code prescribes the professional account's requirement to disclose suspected illegal act,</p>

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		<p>the disclosure of suspected illegal act may constitute non-compliance with Certified Public Account Act or Act on External Audit of Stock Companies.</p> <p>As such, we believe that it makes sense and more effective for local laws and regulations to prescribe and enforce the requirement for the professional accountant to disclose suspected illegal act. Therefore, it is recommended to leave this matter to local laws and regulations, as it wouldn't be effective otherwise. It is not appropriate for the Code to establish this matter when it can't provide the professional accountant with protective mechanism.</p> <p>Second, the mere fact that a certain suspected illegal act is disclosed to an authority can cause a severe shock to the capital market, e.g. drop in share price, even when it is not confirmed yet that the suspicion is correct. Given that, potential turmoil in the capital market that can be caused when such suspicion is found to be ungrounded can be damaging to the public interest.</p> <p>Third, as highlighted in the Exposure Draft of IESBA, it is unclear how the determination that a matter is in the public interest should be made and what is deemed to be in the public interest will vary from person to person. The subjective judgment required to make this determination could result in inconsistent results. In this regard, imposing the disclosure requirement is not likely to bring about the deterrent effect in addressing illegal act. Also, this isn't likely to result in enhanced consistency by establishing the procedure to handle suspected illegal act. As a result, unlike what is described in the IESBA's Analysis of Overall Impact, it is expected to be a limited positive impact on the public interest.</p> <p>Fourth, as discussed at IESBA meeting, the professional accountant may not have access to all the information needed to be able to confirm or dispel the suspicion that an illegal act was committed and, in this circumstance, requiring the professional accountant to disclose suspected illegal act may lead to an increase in disclosures of an erroneous nature. And when a suspected illegal act that is disclosed is found to be ungrounded, the concerned professional account will face increased exposure to litigation.</p> <p>Furthermore, in case an auditor, in professional judgment, decides not to disclose suspected illegal act of an entity and, in hindsight, an illegal act is found to have been committed, there is a high risk of the auditor being held accountable for his professional judgment used to decide not to disclose such illegal act, due to the expectation gap between users of audit report and auditors about audit engagement.</p> <p>Fifth, as such, the changes proposed by IESBA increases the responsibility and burden of the professional accountant and auditor significantly while it is unclear as to whether they can bring about a positive impact on the public interest, e.g. deterrent effect on the client or employing organization or enhanced trust of general investors thanks to a consistent handling process, and the extent of such positive impact, if any, is unlikely to be significant enough to offset related costs to be incurred.</p> <p>As described above, KICPA has fundamental concerns about IESBA's Exposure Draft. With all due respect, we ask IESBA to re-consider the aforementioned aspects and the need to revise the Code.</p> <p>In case IESBA intends to revise the Code as described in the current Exposure Draft, we request you to take into account our answers in</p>

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		response to your request for specific comments.
47.	KPMG	<p>It is firstly important to emphasise that we support the principle that accountants should act in the public interest. This principle is long established and sets the tone for the existing IESBA Code of Ethics, which states right at the outset that “A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest” (100.1). Therefore, in placing the requirement to act in the public interest at the centre of the proposals, the IESBA does no more than follow the precepts of the existing Code.</p> <p>We also recognise that the aim of the proposals is to help professional accountants apply this principle to suspected illegal acts identified during the course of their duties. However, we have significant concerns because we believe that in many cases the proposed requirements in respect of disclosure are incapable of being effectively implemented in the Code. While we believe that the duty of confidentiality and the duty to disclose are both matters of public interest, it must be recognised that many countries have legislative requirements that determine when disclosure is appropriate and have laws that conflict with the Code’s proposed requirements. Accordingly, we believe that disclosure requirements can only be effectively implemented through local laws and regulations.</p> <p>Further, professional accountants who comply with the requirements of the Code, in the absence of local laws, will have no protection for good faith disclosures as this is something which can only be provided through legislation. The Code is not an instrument of law; it therefore is not capable of providing any legal shield for accountants involved in good faith disclosures. In the absence of such protection, the consequences on accountants could be far-reaching. Disclosure by the accountant is a last resort when the entity has failed to respond adequately and, in such situations, retaliatory action by the entity (and possibly others, such as shareholders) is a possibility. This action may go beyond claims for breach of contract and include charges of negligence, defamation, breach of employment obligations and associated litigation. It may also extend to attacks on the accountant’s reputation through the media and, in the case of the accountant in business, termination of employment. This is likely to be the case, particularly where the suspected illegal act on which the disclosure is based cannot be proved in court.</p> <p>We also have a number of other concerns about the proposals relating to their ability to be consistently implemented:</p> <ol style="list-style-type: none"> <li>1. The existence of an “appropriate authority”. A factor which will influence the effectiveness of the proposals in different countries is the existence of an “appropriate authority” for receiving disclosures. In some countries there may be no such authority which would be trusted or competent to handle appropriately matters disclosed to it, while in others there could be a wide range of suitable authorities, such as law enforcement agencies, tax authorities and regulators. We note that in countries with established mechanisms for reporting of illegal acts there is almost always a specific authority named for reporting purposes.</li> <li>2. The application of the proposals to services on third parties. Accountants are frequently retained to provide services for clients which involve obtaining information about third parties. Examples include due diligence services carried out for a client who is contemplating the acquisition of a business, or intellectual property audits carried out on licensees. It is not clear how the proposals are supposed to be applied in situations of this type when a suspected illegal act is identified in the entity which is the subject of the accountant’s</li> </ol>

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		<p>investigations rather than in the client itself.</p> <p>3. The impact of the proposals on choice of service provider. We are concerned that the proposals may discourage entities from engaging accountants to provide (non-audit) services in favour of practitioners from other professions who are not under the same responsibility to disclose suspected illegal acts. Examples include forensic accountants who undertake investigations into suspected illegal acts, where entities are likely to engage service providers who have no requirement to make disclosures, and tax advisors, where an entity might prefer to engage a tax lawyer rather than an accountant to avoid the risk that the confidentiality of the relationship may be breached by the accountant. Such an outcome may not be in the public interest as the accountant may be best placed to provide the highest level of service to the client.</p> <p>4. Impact of proposals on non-accountants. The workforces (including partners) of many larger accountancy firms include practitioners of other professions such as lawyers and actuaries. Such professionals are required to comply with their own ethical standards, including standards on confidentiality and professional secrecy. Where such standards conflict with the requirements imposed by the proposals, such professionals, and in particular auditors with dual qualifications, are placed in a potentially difficult position.</p> <p>5. The lack of consideration of the role of management. In our view, a key issue that is missing from the proposals (and cannot be addressed by the Code in any case) is the role of management. The primary onus for addressing a suspected illegal act rests with an entity's senior management and those charged with governance. If the public interest is served by disclosing a matter, this should be primarily the responsibility of senior management and those charged with governance. Without any obligation on management or those charged with governance, there is, in effect, no legal mechanism by which the accountant can apply pressure on management to investigate and disclose an issue.</p> <p>Conclusion and recommendations</p> <p>Given the significant concerns we have noted above, we do not believe it is appropriate for the Code to impose disclosure requirements on professional accountants. We believe that disclosure requirements can only be effectively implemented through local laws and regulations as this will ensure that the requirements:</p> <ul style="list-style-type: none"> <li>• Are aligned with other local laws and regulations that relate to the public interest, e.g. confidentiality laws, auditor privilege laws, money laundering laws, existing laws relating to disclosure, governance requirements, etc.</li> <li>• Provide appropriate protection when individuals apply requirements and make good faith disclosures in the public interest.</li> <li>• Identify an appropriate authority to whom professional accountants are able to confidently disclose relevant matters.</li> <li>• Apply to all individuals providing specified services, not just professional accountants, thus resulting in an even playing field.</li> </ul> <p>In terms of the Code itself, we suggest that, rather than imposing a set of prescriptive steps, it includes guidance both for auditors and other accountants on the action they should consider taking in the event they identify a suspected or actual illegal act during the course of their</p>

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		<p>work. Of course, any such action involving disclosure of a suspected illegal act would need to be considered against the backdrop of local laws and regulation.</p> <p>We also recommend that IESBA works closely with governments and regulators, and engages closely with industry and other interested parties to influence appropriate changes in local laws and regulation.</p> <p>We note that all our below responses are subject to the comments made in our covering letter. In particular, we think that the requirements in the Code in respect of disclosure, even for auditors, are incapable of being effectively implemented. Disclosure requirements can only be effectively implemented through local laws and regulations.</p> <p>We suggest that, rather than imposing a set of prescriptive steps, the Code includes guidance both for auditors and other accountants on the action they should consider taking in the event they identify a suspected or actual illegal act during the course of their work. Of course, any such action involving disclosure of a suspected illegal act would need to be considered against the backdrop of local law and regulation.</p>
48.	KRESTON	<p>Kreston International members recognise the need to respond both to stakeholders' expectations and in respect of audits to comply with International Standard of Auditing (ISA) 250 on "Consideration of Laws and Regulations in an Audit of Financial Statements" in relation to suspected illegal acts. This includes responding appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the audit. The latter includes reporting non-compliance to those charged with governance, reporting non-compliance in the auditor's report on the financial statements and reporting non-compliance to regulatory and enforcement authorities resulting from legal responsibilities of the auditor.</p> <p>Member firms may also be subject to local law and regulatory requirements for example under tax law or money laundering regulations that can impose detailed reporting requirements. It is recognised that the auditor and professional accountant has a significant role within this area. However, local regulations and legal protections for auditors and professional accountants will vary considerably. This may produce conflicts between any revised Code and national law which will result in inconsistent application.</p>
49.	MIA	<p>The Institute acknowledges that IESBA's intention underlying the proposals is that the auditor needs to respond to stakeholders' expectations to "blow the whistle" to competent authorities on clear violations of laws and regulations having a material impact on financial reporting on matters within the remit of the auditor. Yet we do not support most of the overall and detailed proposals in the ED as explained in our main arguments under the "General comments" below.</p> <p>Despite our significant concerns with the proposals, we are also providing our responses to the questions which are posed in the ED's request for specific comments and we have included these as an Appendix to this letter.</p> <p>The MIA is not commenting on IESBA's impact assessment and on the proposed changes to the existing sections of the Code.</p> <p>General comments</p>

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		<p>Our main concern is that we do not believe that the matters which the proposed changes are attempting to address should be dealt with in a Code for Professional Accountants. As a Code is not a legal instrument, it cannot provide for protection with respect to the professional accountants' liability, especially as the proposals relate to suspected illegal acts. We propose that, provided that there are safeguards, such matters should be dealt with in legislation and not in a Code for Professional Accountants. Such legislation could provide for the protection of the accountant against legal and other consequences of suspected illegal acts not judged in court to be illegal acts, against allegations of breach of confidentiality and for mitigation of any potential physical threats, safeguards which cannot be offered by a Code.</p> <p>The main rationale put forward by the IESBA for the proposals is that the new requirements would be in the public interest. However, from the proposals it is not clear what the public interest is, and auditors/accountants cannot be "judges" of the public interest in the case of suspected illegal acts based on which external reporting to authorities is to be performed, which is eventually for the public courts to decide. Furthermore in many cases, an accountant is not in a position to make subjective judgements about whether a matter is in fact illegal.</p> <p>We think that bringing to the auditor's attention information about suspected illegal acts from other accountants who provide other unrelated services to the company and requiring the auditor to then make judgments about the other accountants' information, not only blurs the important lines about what the auditor is auditing but also puts the auditor in a fundamentally unfair position about being the "watchdog" over potentially all aspects of a company's business – whether within the auditor's role and responsibilities or not. It unreasonably extends the auditor's responsibility from what is revealed by the audit process to what is revealed by an accountant outside the firm and at any time.</p> <p>The proposal effectively creates a two-tiered ethical system. Indeed, if the company engages an accounting firm to render non-audit services, they will have to adhere to the additional responsibilities imposed by the ED. If in the other hand the same entity engages others, like non-certified / non-chartered consultants, they will be have no such ethical impositions. We think that this will be conducive to creating an uneven playing field that will ultimately place accountants at a competitive disadvantage.</p>
50.	Mazars	<p>In our comment letter in response to the IESBA Strategy and Workplan 2010-2012 in June 2010 we stressed the need for a pause in ethics and independence standards setting following the adoption and implementation of the completely Revised IESBA Code of Ethics for Professional Accountants of July 2009.</p> <p>Nevertheless, we were, and still are, supportive of adding (practical) guidance for professional accountants when dealing with illegal acts, but not additional requirements.</p> <p>In that context, we are supportive of the IESBA's desire to provide further guidance to professional accountants on the interpretation of Section 140 of the Code of Ethics, Confidentiality, and the circumstances set out therein where a professional accountant may disclose confidential information.</p> <p>We are not convinced, however, that the IESBA's approach to require disclosure in certain circumstances where disclosure is not required</p>



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		<p>by law is appropriate.</p> <p>In particular, we are not persuaded that the balance of the arguments set out in the section within the Explanatory Memorandum entitled Requirement or Right to Disclose naturally leads to a conclusion that there should be a requirement to disclose in circumstances when the law does not already require it.</p> <p>The document notes that the determination of what is 'in the public interest' may vary from person to person but makes no attempt to reconcile the 'public interest' with a legal duty to report. We consider that it could be dangerous for a professional accountant to be required by the Code to make their own decision on what is in the public interest in a situation where the public interest in disclosure is not already reflected in a legal requirement to do so. Indeed the interaction between the proposals in the Exposure Draft and national laws would likely lead to complex application, particularly in cross-border assignments.</p>
51.	MG	<p>Among other matters, the IESBA Exposure Draft addresses circumstances where a professional accountant is required to override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate authority. We believe it is in the public's interest for the professional accountant to report suspected illegal acts to the appropriate levels of management of a client, and to those charged with governance if management's response is not appropriate and timely. Per paragraph 225.13 of the Exposure Draft, however, if the entity has not made an adequate disclosure within a reasonable period of time, after being advised to do so, the professional accountant or the engagement partner for the audit would be required to disclose to the appropriate authority suspected illegal acts that directly or indirectly affect the client's financial reporting and suspected illegal acts the subject matter of which falls within the expertise of the professional accountant. For the reasons stated below, we do not agree that a professional accountant should be required to disclose suspected illegal acts to an appropriate authority in the manner dictated by the Exposure Draft.</p> <p>General Comments</p> <p>1. Conflict of Law</p> <p>In the United States (US), there are state laws that recognize that a professional accountant has a general duty of confidentiality with respect to information provided by its clients and information gathered from its clients in the course of providing professional services. For example, most states have confidentiality statutes or regulations that prohibit CPAs from voluntarily disclosing client or employer records or information to third parties, including regulatory authorities, without client consent.</p> <p>There are also US federal laws and regulations related to the duty of the professional accountant to keep client information confidential. For example, the United States Congress has passed legislation that imposes civil and criminal penalties on tax preparers who knowingly or recklessly disclose to third parties information furnished to them in connection with the preparation of tax returns. These penalties would only be waived in certain, very narrow, circumstances. For example, these narrow circumstances provide a right (not a requirement) for the professional accountant to disclose violations of criminal laws to government authorities, however the exceptions do not give the professional accountant the right to make any disclosure of suspected violations of other laws (i.e., civil or administrative laws) to</p>

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		<p>government authorities or any other third party.</p> <p>The proposed requirement to disclose suspected illegal acts to appropriate authorities and to external auditors would, in many instances, conflict with existing confidentiality requirements under U.S. federal and state laws. This conflict would place the professional accountant in the position of being forced to choose between violating the law or violating the Code of Conduct. Therefore, we believe it should not be IESBA, but rather the appropriate legislative bodies in each jurisdiction who should decide whether to impose a requirement on or grant a right to a professional accountant to make such disclosures.</p> <p>2. Safe Harbor</p> <p>We believe the proposed draft, if enacted, will result in a significant increase in lawsuits by audit clients against professional accountants and their firms. The proposed draft acknowledges the IESBA's inability to create a safe harbor for those accountants who report a suspected illegal act to the proper authority, akin to Section 10A(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j-1(c). See IESBA Explanatory Memorandum at 9. Yet it provides a standard of care requiring that “[w]hen making a disclosure to an appropriate authority, the professional accountant shall act reasonably, in good faith and exercise caution when making statements and assertions.” See IESBA Proposed Additions § 225.15. The natural result of this construct is that, nearly every time an accountant reports an illegal act to an authority as required under the proposed code, the audit client will assert a claim of bad faith in private litigation unless the applicable jurisdiction has its own safe harbor provision. Not only will this result in firms expending additional time, money and resources defending such lawsuits, but will likely have the unwanted consequence of some accountants waiting until they are absolutely certain that an illegal act has been committed before reporting it to the authorities. Therefore, we believe the decision to disclose a matter to an appropriate authority ordinarily should lie with management and those charged with governance, not the professional accountant. Additionally, as stated above, it should not be IESBA, but rather the appropriate legislative bodies in each jurisdiction who should decide whether to impose a requirement on or grant a right to a professional accountant to make such disclosures, accompanied by appropriate protective mechanism for the professional accountant.</p> <p>3. Regulator Role</p> <p>The quality of an audit is built on the integrity, competence, objectivity and independence of the professional accountant. A professional accountant providing audit services clearly must be without bias with respect to the audit client otherwise the auditor would lack the impartiality necessary for the dependability of the audit findings. Independence does not imply that the auditor would have the attitude of a prosecutor, but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to creditors and those who may otherwise rely (at least in part) upon the independent auditor's report, as in the case of prospective owners or creditors. Requiring the professional accountant to disclose suspected illegal acts to the appropriate authority would, in reality, put the professional accountant in a “regulator” role. Placing the professional accountant in a regulator role changes the impartial position of the auditor and may make the client more inclined to withhold information, or be less forthcoming. The withholding of information will</p>

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		<p>have a detrimental impact of the ability of the auditor to gather sufficient appropriate evidence to support an opinion on the financial statements and will harm the quality of the services provided.</p> <p>4. Confirming or Dispelling Suspicion</p> <p>Per paragraph 225.5 of the Exposure Draft, if a professional accountant in public practice providing professional services to an audit client of the firm or network firm acquires, or receives, information that leads the accountant to suspect that an illegal act has been committed by the audit client, or by those charged with governance, management or employees of the audit client, the accountant must take reasonable steps to confirm or dispel that suspicion. In doing so, the professional accountant may not have access to all the information needed to be able to confirm or dispel the suspicion that an illegal act was committed (either due to the withholding of information by the client or the professional accountants lack of legal expertise), and this may lead to an increase in disclosures of an erroneous nature.</p> <p>5. Disclosure in the Public Interest</p> <p>Paragraph 225.10 of the Exposure Draft states, “If the professional accountant or the engagement partner for the audit determines that the suspected illegal act is of such consequence that disclosure to an appropriate authority would be in the public interest, there is an appropriate authority to receive the disclosure, and the matter has not been disclosed, the accountant or the engagement partner for the audit shall advise the entity that the matter should be disclosed to the appropriate authority.” We believe that what is deemed to be in the public interest is a vague concept and will vary from person to person. Additionally, it is unclear how the determination that a matter is in the public interest should be made. The subjective judgment required to make this determination could result in a wide range of conclusions and produce inconsistent results.</p> <p>Accountants are more familiar with the concept of materiality, so disclosing matters that have a material effect on the financial statements may be a more concrete threshold for disclosure than reporting a suspected illegal act if it is in the public interest. For example, the U.S. Securities and Exchange Commission only requires the auditor to report illegal acts under Section 10A of the Securities Exchange Act of 1934 if the illegal act has a material effect on the financial statements of the issuer.</p> <p>6. Appropriate Authority</p> <p>Paragraph 225.12 provides an imprecise definition for appropriate authority: “An appropriate authority is one with responsibility for such a matter.” Although it is clear that the appropriate authority to which to disclose the matter will depend on the nature of the suspected illegal act, it is not clear exactly which authority would be appropriate. A professional accountant providing professional services to an audit client may not have the requisite knowledge to determine who would be considered the appropriate authority for the disclosure of certain illegal acts.</p> <p>7. Professional Accountants Providing Nonattest Services</p> <p>Per the Exposure Draft, a professional accountant providing non-audit services to a client that is not an audit client and a professional</p>

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		accountant in business would be required to disclose suspected illegal acts to the entity's external auditor. There are rules, regulations and laws in the United States that would make such disclosure illegal, see General Comment No. 1 above. However, if IESBA decides to move forward with this proposal it would be beneficial for the external auditor to be informed of such a suspected illegal act in a timely manner.
52.	NASBA	<p>We want to express our respect and appreciation for IFAC taking the initiative to explore the responsibilities of all professional accountants to protect the public interest by requiring an appropriate response to suspected illegal acts. We support your on-going efforts to strengthen the requirements of the IESBA <i>Code of Ethics for Professional Accountants</i> (the Code).</p> <p>The public's expectations of the accounting profession are both a compliment and yet a burden. The profession is regarded by the public as a trusted gatekeeper. Accordingly, in recent years and especially after the financial crisis, the public has increased its demands for greater transparency and heightened standards of behavior from professional accountants.</p> <p>The Code deals with the ethical behavior of professional accountants. Generally, this covers the integrity, objectivity, professional competence and due care, confidentiality and professional behavior of accountants, and not the behavior of third parties. For the first time in our collective memory, the Exposure Draft calls for an extension of a professional accountant's and a firm's responsibilities to make judgments about the behavior of parties over which the accountant has little or no control. This is a subtle shift which we believe may be at the root of the difficulty with the solutions presented.</p> <p>This new construct places at risk the confidence of clients and employers and the willingness of management to communicate with both their external and internal accountants. Indeed, the fundamental principle of client or employer confidentiality and its interplay with the public interest is brought into question and forms the source of considerable tension for all parties involved if the accountant is required to disclose a suspected illegal act. That determination hinges on whether the act is of such grave consequence that disclosure is in the public interest.</p> <p>The behavior of professional accountants is inevitably caught between certain aspects of these competing interests and tensions, resulting in ethical dilemmas that may be difficult, or even impossible, for the accountants to fully resolve in every situation. As a result, certain aspects of the Exposure Draft may be operationally unworkable in some jurisdictions.</p> <p>Within NASBA and the BOAs there are a range of views and expressions of concern over certain aspects of the Exposure Draft revolving around the:</p> <ul style="list-style-type: none"> <li>• Fundamental responsibility of accountants to protect the public interest and society in general;</li> <li>• Degree to which confidentiality is intrinsic to the client/accountant relationship;</li> <li>• Role of professional standards in the context of extant laws and regulations; and,</li> <li>• Potential for an accountant acting in good faith to be put in harm's way due to no fault of his or her own.</li> </ul> <p>Many of our concerns stem from our perception of a lack of clarity in the Exposure Draft regarding definitions of terms, including "public</p>

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		<p>interest” and in the implementation of the proposed standard. Further, we believe the focus in the Exposure Draft should be solely on situations involving public interest entities (PIEs).</p> <p><b>Scope of the Proposed Standard</b></p> <p>Since the proposal is directed at significant suspected acts that may impact or have impacted the public interest, the focus should be appropriately scoped on material matters of significant consequence and probability of occurrence. We believe the discussion in the following sections could ease the tensions described above and therefore should be considered.</p> <p><b>Public Interest</b></p> <p>The Exposure Draft is clearly aimed at protecting the public interest, yet “public interest” is not defined in the proposal. In June 2012, <i>IFAC Policy Position 5</i> was issued, which very broadly defines the public interest.<sup>3</sup> The IFAC definition is followed by eight pages of discussion, illustrative of the difficulty of the task.</p> <p>While we too have our own notion of what the “public interest” means, we freely acknowledge that there are many other views, none necessarily authoritative. Since the Exposure Draft itself is silent on what is meant by public interest and the status and authority of the IFAC policy position is unclear, there would likely be confusion in implementing a final standard.</p> <p>One might surmise, upon reading the Exposure Draft, that should only acts having “such consequence that disclosure would be in the public interest” be considered, a reasonable starting point would be acts involving PIEs.<sup>4</sup> Apparently this was not a matter of consideration in drafting the proposal. If the scope of the proposal were limited to significant matters impacting solely PIEs, it might help bring into balance concerns over breaches of confidentiality. This would be particularly the case in jurisdictions requiring, by law or regulation, the discussion or reporting of suspicions to appropriate clients, employers and potentially external regulatory authorities.<sup>5</sup></p> <p><b>Materiality</b></p> <p>We note that there is no explicit discussion of materiality in the Exposure Draft. Since the proposal is directed at matters of consequence to the public interest, this is an area needing further development. Accountants are quite capable of understanding materiality concepts relating to financial statements. Here, of course, the frame of reference is not necessarily limited to matters that might influence financial statements, but extends to those that might impact the public interest which, as stated above, is not a clear concept.<sup>6</sup> Since the factors entering into the IFAC public policy definition of the public interest vary from society to society, the related materiality measures will vary also, making application of materiality all the more problematic.</p>

<sup>3</sup> The definition reads as follows: “IFAC defines the public interest as the net benefits derived for, and the procedural rigor employed on behalf of, all society in relation to any action, decision or policy.”

<sup>4</sup> See *IESBA Code, Definitions – public interest entity*

<sup>5</sup> n the U.S. there are such extant laws and regulations. Please refer to footnotes 7 and 8.

<sup>6</sup> We note in the recent financial crisis that public interest losses were not caused solely by the result of misstated financial statements or substandard disclosures including an absence of attention to the ability of an entity to continue as a going concern..

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		<p><b><i>Suspicion Threshold</i></b></p> <p>The Exposure Draft refers throughout to a “suspected” illegal act. In the audit of U.S. private entities, auditors are responsible to detect and report to management and potentially those charged with governance (TCWG) the possibility certain illegal acts may have occurred.<sup>7</sup> Similarly, in the audit of U.S. public entities, auditors are responsible to determine whether it is “likely” that an illegal act has or may have occurred and discuss with management and potentially notify TCWG and externally, the SEC.<sup>8</sup></p> <p>The proposed standard puts forth a threshold requiring only a reasonable level of suspicion. In our view, the proposed standard should be more specific and address the probability an illegal act may occur, or may have occurred. We do not believe suspicion alone should be the triggering event to set in motion the other requirements proposed. Considering the seriousness of breaching confidentiality, the threshold for reporting an illegal act should be greater than a contingency. Accordingly, we suggest the bar be set high, rising to a <i>likely</i> level.</p> <p><b><i>Applicability to Individual Professional Accountants and Accounting Firms</i></b></p> <p>We understand the intended scope of this standard applies to all accounting firms and professional accountants engaged in public practice as well as those professional accountants employed in business.</p> <p>We do not believe that the level of service rendered to a client or employer should govern disclosure requirements. Rather, disclosure requirements should be based on critical knowledge of an illegal act and the firm’s or accountant’s ability to disclose such information in a timely manner to prevent harm to real or potential victims. The question here is whether there is a duty to the public as a result of the trust the public places in the professional accountant. We believe this duty is defined by existing laws and regulations governing professional accountants providing services principally to PIEs, as determined by duly appointed legislatures.</p> <p>When an illegal act is identified by accountants in public practice, the obligation to escalate the discussion rests with the accounting firm and not the individual professional accountants, who can be numerous and located in multiple jurisdictions. As long as the individual accountant does not subordinate his or her judgment to the firm, we believe the standard should recognize the disclosure obligation rests with the firm rather than the individual accountant. However, individual accountants have a responsibility to voice and, if necessary, document their disagreement in the event of their firm’s failure to escalate when escalation is warranted.</p> <p><b><i>Legal Expertise of Accountants</i></b></p> <p>The proposal is very broad in its consideration of illegal acts, covering violations of laws and regulations involving civil, administrative and public policy matters, all the way to those that may result in criminal charges. It should be acknowledged that accountants are not experts in the law, although they are typically more familiar with legal concepts governing financial matters than the average person. We believe the standard should specifically address these realities. Further, we believe the expectation for disclosure should be limited to those that</p>

<sup>7</sup> AU-C Section 250, *Consideration of Laws and Regulations in an Audit of Financial Statements*

<sup>8</sup> U.S. Securities Exchange Act of 1934, Section 10A, *Audit Requirements*

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		<p>fall within the subject matter expertise of the professional accountant.</p> <p>Section 360.13 of the proposal mentions seeking legal advice on protection afforded by legislation, but we would suggest the proposal also include wording advising accountants to seek appropriate legal or confidential outside expert<sup>9</sup> counsel if needed to form conclusions as to whether an act might actually be illegal, and /or assessing the threshold level of suspicion, under relevant laws and regulations.</p> <p><b><i>Duty and Right to Disclose</i></b></p> <p>All professional accountants have a duty to comply with laws and regulations in their respective jurisdictions. This is particularly the case when an illegal act is identified that can reasonably be expected to result in victims incurring substantial losses. Consequently, the accountant truly faces ethical dilemmas of dramatic proportions considering acts of “such consequence that disclosure would be in the public interest.”</p> <p>However, we are concerned about the possibility a private-sector standard setter might enact a duty, having the effect of law, without having the legal authority to do so. In that regard, we are concerned disclosure obligations might cause professional accountants to breach client or employer confidentiality causing the accountant to be out of compliance with applicable laws or regulations. Breaches may damage the relationship between the accountant and his or her clients or employers and stifle candid discussions that might otherwise lead a client to make appropriate disclosures on their own.</p> <p>Conversely, if the professional accountant withholds knowledge that could have prevented or brought to light an act in a timely manner so as to prevent a crime, the accountant could be accused as a co-conspirator. Consequently, to disclose or not is a dilemma the professional firm or accountant faces that requires careful analysis and judgment. Of course this dilemma is not new and will continue regardless of the outcome of your final deliberations. We believe it is questionable whether all, or even most, situations can be adequately addressed to fully balance the matter of confidentiality with the duty to the public interest.</p> <p>National and local legislatures enact laws setting forth both duties and rights which are outside of the authority of private-sector standard setters. With respect to rights, we are unaware of other private-sector standard setters’ efforts to create rights. The Exposure Draft discusses circumstances when there is an <i>expectation</i> that the accountant exercise the right to disclose. This expectation blurs any distinction between a “duty” and a “right.” In summary, an attempt to create rights is moving into uncharted territory and we advise curtailing any such effort and focus on an affirmative duty to respond.</p> <p><b><i>Independence</i></b></p> <p>The Exposure Draft does not address circumstances when responding to a suspected illegal act might affect independence. When issues arise involving the legality of behavior, the relationship between a professional accounting firm engaged in public practice and attest clients can be strained to the point where communication may be inhibited and the firm and management placed in adversarial positions. The</p>

<sup>9</sup> Professional membership organizations at the national or local level often have experts on staff that regularly consults on difficult ethical issues.

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		<p>significance of such pressures on independence could result in a requirement that the firm must withdraw from the engagement to avoid impairment of its independence.<sup>10</sup> We believe the proposal should acknowledge the impact that an appropriate response by an attest firm could have on independence, and provide guidance.</p> <p><b>Other Considerations</b></p> <p>There are other situations where existing laws and regulations have requirements limiting or requiring disclosure:</p> <p>Forensic or litigation support situations subject to attorney - client privilege;</p> <ul style="list-style-type: none"> <li>• Tax laws and regulations that may bar disclosure; and,</li> <li>• Knowledge required to be conveyed to or between internal or external auditors.</li> </ul> <p>We believe the Exposure Draft needs to expand on these and possibly other disclosure situations and provide unambiguous guidance and examples.</p> <p>Many entities have hotlines to encourage reporting of illegal acts. Also, some jurisdictions have recently adopted or are considering adoption of whistleblowing provisions that afford certain protections. The Exposure Draft surprisingly does not address the use of hotlines or whistleblowing protections. For accountants at junior levels, it may be difficult to escalate a discussion of illegal acts without the availability of hotlines or whistleblowing protections. We believe properly sanctioned use of hotlines and whistleblowing provisions may be an appropriate means for some professional accountants to discharge their duty to respond.</p>
53.	NBA	<p>The NBA welcomes the opportunity to comment on the exposure draft: Responding to a Suspected Illegal Act. Providing guidance to professionals on how to respond to a suspicion of an illegal act is worthwhile but also challenging. We agree with the Code of Ethics (CoE) A100.1 when it states: 'A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest.' And it is our opinion that responding to suspected illegal acts is in the public interest therefore we fully support IESBA in choosing such an important project.</p> <p>Nevertheless we have concluded in discussing this exposure draft with professional accountants that the intention of the proposals is not well understood by reading these proposals. It should be clear that these proposals to respond to illegal acts in a professional manner, are written in the context that:</p> <ul style="list-style-type: none"> <li>• local law precedes the code of ethics;</li> <li>• ultimately a judge has to decide if a certain act is illegal, and thus that a professional accountant will only have suspicions;</li> <li>• professional accountants are not expected to respond in a manner that might endanger their own wellbeing;</li> <li>• local culture might influence the way in which professional accountants will implement this part of the code;</li> </ul>

<sup>10</sup> This circumstance would be comparable to the adverse interest threats in the actual or threatened litigation discussions in IESBA Code Sections 290.231 and 291.159.



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		<ul style="list-style-type: none"> <li>the third party test is applicable and thus that the response might differ based on the role and responsibility of an accountant in business;</li> <li>there is a materiality perspective in responding to the different types of illegal acts (for instance: suspicions of speeding by a company driver would be a suspicion of an illegal act but might not lead to a response from a professional accountant);</li> <li>quitting your job is an ultimate remedy. The decision to quit someone's job should, if possible, be taken in consultation with others. In many cases it is worthwhile to search for legal counsel.</li> </ul> <p>Especially in the area of responding to a suspected illegal acts where living up to the code in certain areas of the world might lead to legal action or even worse, it should be clear that the expectations of the code are limited by the above mentioned principles. Therefore professional accountants can only apply the code when the position of the professional accountant, when responding to a suspected legal act, is regulated and protected by law. If society feels that for professional accountants it is in the public interest to respond to illegal acts it should protect the professional accountants acting. Therefore we encourage IESBA in close cooperation with IFAC to discuss this issue with parties who represent local governments (for instance the G20).</p> <p>This does not mean that IESBA should not work on setting standards in the area of suspected illegal acts for jurisdictions, such as the Netherlands, which have legally regulated expectations from and protection for the professional accountant (and other professionals, for that matter) when he has suspicions of an illegal act.</p> <p>Apart from the context written above that should be better explained we encourage IESBA to provide further guidance on what to do:</p> <ul style="list-style-type: none"> <li>with regards to the different levels of suspicion. In many cases the accountant should investigate and validate his suspicion before discussing this within the organization – this could however prove to be a very extensive and expensive task if the level of validation is not clearly described and restricted ;</li> <li>when it is not possible to sufficiently validate the suspicion;</li> <li>when an organization has its own procedures to respond to suspicions of illegal acts (this could mean that a professional accountant does not get feedback on his declaration of his suspicion), like a whistleblowers procedure that is anchored in the organization;</li> <li>when an internal audit department is involved with respect to the internal re-orting lines, including the whistleblowers procedure, before escalating to the external auditor;</li> <li>to evaluate the internal response which might lead to the conclusion that the professional accountant should report his suspicion outside the normal report-ing lines (eg. the external auditor or legal authorities).</li> </ul> <p>As explained above we feel that the current proposals are to implicit. Therefore this response is written assuming that IESBA will work on a new draft for exposure. We therefore will not respond to the individual questions. If IESBA would like to better understand our position or if we could help IESBA in processing this, we are willing to contribute to this important project to help professional accountants to better</p>

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		respond to illegal acts.
54.	NZAuSB	The NZAuASB supports the general principle that assurance practitioners must act in the public interest, and we can see what the IESBA is trying to achieve with the proposal to provide additional guidance to assurance practitioners on how to respond when encountering a suspected fraud or illegal act
55.	PICPA	<p>The committee supports the objectives of the IESBA as outlined in the explanatory memorandum of the exposure draft. Specifically, the committee agrees that in certain cases the public interest is more important than the obligation to maintain client confidentiality. However, the committee has a number of concerns regarding the requirement that CPAs must disclose suspected illegal acts to third parties. First, many state CPA statutes in the United States include confidentiality provisions that legally prohibit a CPA from disclosing confidential client information. Second, whistleblower protections for CPAs in public accounting do not exist, and it would require legislative action to enact such provisions. Consequently, a requirement to disclose suspected illegal acts could expose a CPA to potential harm through litigation and other retaliatory actions. Third, the committee believes that those CPAs who report illegal acts would experience significant reputational damage that could adversely affect future potential client relationships. Fourth, the committee believes that the requirement to report suspected illegal acts would become an expectation to uncover and report such acts, in essence requiring CPAs to become a police force.</p> <p>On the other hand, the committee supports providing guidance to CPAs who are providing nonaudit services so they can communicate suspected illegal acts to the appropriate level of management. The committee also agrees with providing similar guidance to auditors; however, this guidance is already included within the audit standards.</p>
56.	PKF	<p>We are supportive of the IESBA's continued efforts to develop and improve its Code of Ethics for Professional Accountants ("the Code"). We do not, however, fully support the proposals set out in the ED as explained below and in the responses to the specific questions posed in the ED.</p> <p>We agree that a professional accountant should have a right to override confidentiality in order to report suspicion of illegal acts, either to an appropriate level of management and/or those charged with governance within an organisation or to an appropriate external authority, in the public interest. This should be subject to such reporting not resulting in a breach of local law, and there being statutory protection for the accountant from the consequences of such reporting in the particular jurisdiction, as well as overriding relief in the event of significant personal risk to the accountant. It is not, however, appropriate to impose a requirement or an expectation on a professional accountant to do so in a code of ethics intended for use in many jurisdictions. Whistle-blowing may result in severe consequences for the whistle-blower. Accordingly, such requirements should be determined by law.</p> <p>Jurisdictional prohibitions may result in inconsistent application, which provides challenges to professional accountants in cross-border situations and specifically in group audits. This is not addressed in the ED.</p>

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		<p>Should some of the proposals be adopted, more guidance is required in a number of areas. The scope of the current proposals is too broad. For example, more guidance is required to assist professional accountants to determine what is “in the public interest”, as the term is likely to be interpreted differently in different jurisdictions.</p> <p>No distinction should be made between the responsibilities of professional accountants acting in the capacity of auditor and those that are not, nor on the basis of whether or not the entity is subject to external audit. All professional accountants should be subject to the same rules and requirements and should have the right to override confidentiality in situations where it is appropriate to do so.</p> <p>We do not consider it necessary to limit the right to areas where the accountant may be expected to have particular knowledge or expertise. The accountant should only be expected to report illegal acts that come to his attention in the course of his professional work and such matters should specifically exclude minor misdemeanours and acts of personal misconduct, except where reporting of these matters would be in the public interest.</p> <p>An accountant, having thus reported a suspicion of an illegal act subject to local jurisdictional requirements, should have no further responsibility to pursue the matter or establish the outcome, unless required to do so by their specific engagement terms. The role of the accountant here should be one of ‘whistle-blower’, not one of detective, investigator or prosecutor.</p> <p>We do not consider it appropriate to require professional accountants to report suspicions of illegal acts to external auditors, where the entity is subject to external audit, and auditors should not be required to act on any such reports. This requirement could put the external auditor in a management role that may compromise the auditor’s independence.</p> <p>Our responses to the questions raised in the ‘Request for specific comments’ section of the document follow.</p>
57.	PWC	<p>Underlying the Exposure Draft is the critically important notion that suspected fraud or other illegal activity by companies and their people must be addressed by company management and those charged with governance and that the profession should play an integral role in helping to achieve this aim. PwC could not endorse that notion more strongly. While the ultimate goal of addressing illegal activity is therefore one we fully embrace, we believe that the goal is not best achieved through the proposed amendments to the Code of Ethics for Professional Accountants (“the Code”). We strongly believe that attempting to impose requirements in this important area through the Code is unworkable in important respects, would have significant negative unintended consequences for all market participants, including the profession, and would not advance the laudable goal of addressing suspected illegal activity.</p> <p>Set out below is a summary of our primary concerns regarding the proposed addition of Sections 225 and 360, followed by the alternative course we believe is better suited to address suspected illegal activity and achieve the important goal of increasing the profession’s sensitivity to, as well as involvement in, helping management and those charged with governance in addressing such activity. We expand on our reasons in attachment 1 that follows.</p> <p>Summary of our primary concerns</p>

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		<p>Our concerns about the proposals fall into two general categories. First, we believe the proposals are too complex, create uncertainty about how the requirements will be met in practice, cannot provide protection to the professional accountant and therefore are unworkable. Second, we believe that the proposal will not enhance, but rather will be detrimental to, the strength and credibility of the accounting profession, the audit function, and ultimately to the capital markets. We summarize the basis for these concerns below.</p> <ol style="list-style-type: none"> <li>1. The proposals are overly complex, lack clarity, cannot provide protection to the professional accountant and therefore are unworkable.                         <ol style="list-style-type: none"> <li>1.1 A professional code of ethics is not the right place to include such mandatory requirements, particularly as regards breaching client confidentiality and external reporting. The proposals do not and cannot include any whistleblower protection and therefore risk subjecting professional accountants to untenable personal and firm risk for both reporting and failing to report to an appropriate authority. The potential harm to companies, their people, and their shareholders from a professional accountant reporting suspected illegal activity either prematurely or, in hindsight, on an inadequate basis presents significant but unwarranted potential exposure to all accounting firms and professional accountants, whether in professional practice or in industry.</li> <li>1.2 The proposed threshold for reporting to an appropriate authority "suspected illegal acts of such consequence that disclosure...would be in the public interest" is too broad, too vague, and too susceptible of a wide range of interpretations to make it workable. Rather than giving the professional accountant leeway in deciding what to report, the proposed standard instead could lead to different accountants making very different judgments, not only potentially opening the door to significant liability but also importantly creating uncertainty and fundamental unfairness to companies and their shareholders resulting from the potential for different results for different companies with different accountants but based on similar facts and circumstances.</li> <li>1.3 Other standards for conduct in the proposal are equally impracticable. For example, the level of suspicion trigger is confusing. At what point a professional accountant must take reasonable steps to confirm or dispel suspected illegal activity is undefined and not specified. Nor is any guidance provided as to what is appropriate evidence to confirm or dispel the suspicion of illegal activity.</li> <li>1.4 The proposals would broaden, unreasonably in our view, the auditor's responsibilities far beyond applicable auditing standards by requiring professional accountants who are auditors to investigate any suspected illegal act of which they become aware (i) through the performance of the audit, (ii) through disclosure by a professional accountant employed by their audit client or (iii) from anyone in a professional accounting firm performing non-audit services for the entity. This is unlike Section 10A of the US Securities and Exchange Act of 1934 ("Section 10A"), for example, which limits the auditor's responsibility to information arising from the audit. Beyond broadening the auditor's audit responsibilities, the proposal would also increase the expectation gap about the role of the auditor, and undoubtedly and perhaps significantly expand costs because of the investigatory work that would necessarily be required. The scope of the proposals are overly broad for the additional reason that, by requiring professional accountants to investigate and escalate all suspected illegal acts, without regard to significance or materiality or relevance to the service being performed, they risk significant time and costs being expended in investigating suspicions that may prove to be trivial or inconsequential in nature. We also note that,</li> </ol> </li> </ol>

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		<p>again unlike US Section 10A, this proposal applies both to public and private companies, thereby further compounding these issues.</p> <p>1.5 Potential conflicting responsibilities are not wholly resolved by the current Code's provision in its preface (and paragraph 140.7) that local law and regulation prevail where the provisions in the Code conflict. It must be recognized that what is a conflict is not a clear or easy determination in most instances and puts professional accountants in a continuous conundrum of deciding when there is a potential conflict and if so what obligations prevail. Professional accountants should be well aware of the importance of their obligations to comply with their own laws and regulations with respect to suspected illegal acts. Imposing on accountants different obligations through a cross-border Code potentially compromises their ability to comply with their existing and often complex local obligations. The proposals are certainly unclear on this how this dilemma should be managed.</p> <p>1.6 The proposals disrupt and potentially override the careful balance struck in national regulations and legislation in this area, which have been enacted after weighing the benefits of professional obligations of confidentiality and who should be responsible for reporting potential illegal activity in those jurisdictions. This is a matter for governments and regulators, not professional ethics standards. Moreover, if not all IFAC Member Bodies adopt the proposals, not only will professional accountants have a virtually impossible task of deciding what to do where, it will undoubtedly also harm the overarching goals of convergence and closing the expectation gap.</p> <p>1.7 The documentation provisions are unduly onerous and create unwarranted and unfair risks for companies and their shareholders. The extensive documentation required — persons consulted, responses received, etc. — could seriously undermine the company's ability to obtain the protection of privileges, such as the attorney client and work product privileges, to which they would be otherwise entitled.</p> <p>2. The proposals are detrimental to the strength and credibility of the accounting profession, the audit, and ultimately to the capital markets.</p> <p>2.1 Without a promise of confidentiality, and very clear and unambiguous exceptions that all market participants understand, the effectiveness of what auditors and accountants do is put at serious risk. Confidentiality is one of the bedrocks of the accounting profession. Such a wholesale override of this foundational principle on which the profession is based would undoubtedly have a chilling effect on the essential free flow of information between the company and its auditors which ultimately will hinder, not enhance, the audit process as a whole as well as the ability to identify and respond appropriately to potential illegal activity.</p> <p>2.2 The proposals would fundamentally and inappropriately alter the role of the auditor by requiring the auditor to investigate (as opposed to escalate to appropriate levels) matters unrelated to the audit brought to their attention by those performing totally unrelated non-audit services or who work for the company inside and outside of financial reporting areas - and to which International Auditing Standards do not apply. (It should be noted that having auditors be the recipient of complaints and part of a company's internal whistle blowing procedures could be seen to compromise independence by making the auditors part of the system of internal controls, which is of course a management responsibility.) Such a requirement also risks significantly disrupting the timeliness of financial reporting to the public, as well as a company's own governance - potentially adding significant costs to shareholders of public companies and owners of</p>

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		<p>private ones.</p> <p>2.3 The proposals have the potential for creating significant harm to companies and their shareholders by accelerating reporting of suspicions to authorities, and triggering potentially harmful disclosures and consequences, which may turn out in the end to be entirely without merit. Litigious environments further compound the potential for unwarranted harm.</p> <p>2.4 The proposals could perversely undermine IESBA's goal of addressing illegal acts because they discourage companies from hiring those non-audit professionals who may have the most skill and are most expert in finding them. For example, it would not be surprising if good ethical companies decide that it is prudent not to hire accounting firms to perform forensics investigatory work because of the additional obligations that would be imposed on those firms that would not be imposed on others and the operational uncertainties created by this proposal. Thus, the proposals have the potential to deprive companies of the benefits of accountants' services even when accountants are the best qualified. And if not engaged, the requirements obviously will not be applied. Even if professional accountants were engaged and the proposal did apply, the inability to promise confidentiality could impede the free flow of information and therefore the effectiveness of their work. Either way, IESBA's goals will be undermined.</p> <p>2.5 The Code cannot provide any protection to the individual accountant and thus the proposals create real risks for individuals. This in turn can result in firms having difficulties in hiring and retaining the best people, including audit personnel at a time when the importance of the audit continues to increase and there is a greater focus on audit quality.</p> <p>In addition, we note that the desire to extend obligations on all professional accountants appears to have overtaken the original remit for guidance on this subject. As originally conceived, as we understand it, the project's focus was on providing guidance, not prescribing reporting rules. This is consistent with our related response to the Board's Work Plan and Strategy for 2010-12. Moreover, in extending these provisions to all professional accountants (whether in government, as regulators, in business as well as in public accounting) and going well beyond the provision of guidance, the project has serious and negative implications far beyond what we understand was intended. Guidance means advice and help, not mandatory directives. Rather than providing practical guidance to professional accountants on how best to respond to the discovery of suspected illegal activity within the confines of accountants' contractual, legal and regulatory obligations, this proposal mandates much more - certain investigative steps, the evaluation of public interest and ultimately disclosure potentially either in violation of or inconsistent with professional standards and contractual and existing legal obligations. It does so entirely divorced from parallel obligations on companies, obligations already imposed on independent accountants by national laws and regulations, and without the legal protections that typically go hand-in hand with mandated breaches of important contractual and professional obligations.</p>
58.	RSM	<p>Among other matters, the IESBA Exposure Draft addresses circumstances where a professional accountant is required to override the fundamental principle of confidentiality and disclose a suspected illegal act to an appropriate authority. We believe it is in the public's interest for the professional accountant to report suspected illegal acts to the appropriate levels of management of a client, and to those</p>

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		<p>charged with governance if management's response is not appropriate and timely.</p> <p>However, for the reasons stated below we do not agree that a professional accountant should be required to disclose suspected illegal acts to an appropriate authority in the manner dictated by paragraph 225.13 of the Exposure Draft.</p> <p><b>“Prosecutorial” Role</b></p> <p>The quality of an audit is based on the integrity, competence, objectivity, and independence of the professional accountant. An auditor must be without bias with respect to the audit client otherwise the auditor would lack the impartiality necessary for the dependability of the audit findings. However, independence does not imply that the auditor would have the attitude of a prosecutor, but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to creditors and those who may otherwise rely (in part, at least) upon the independent auditor's report, as in the case of prospective owners or creditors. Being independent with respect to an audit client, therefore, should not place the professional accountant in the role of a prosecutor. Requiring the professional accountant to disclose suspected illegal acts to the appropriate authority would, in reality, put the professional accountant in a “prosecutorial” role and may make the client more inclined to withhold information from, or be less forthcoming with, the accountant.</p> <p><b>Safe Harbor</b></p> <p>Although professional accountants are informed in a general manner about matters of commercial law, they are not legal experts, and thus, may face increased exposure to litigation when potentially incorrectly disclosing a suspected illegal act. Any requirement to disclose a suspected illegal act should be accompanied by regulations that afford safe harbor “whistle-blower” protection for the professional accountant who makes such disclosures in good faith. Such protective mechanisms can only be established by law, and it is not possible for the IESBA to establish protective mechanisms for professional accountants who have to comply with the Code. It is disproportionate to establish a requirement to disclose without providing those who would be required to make the disclosures with any protective mechanisms.</p> <p><b>Confirming or Dispelling Suspicion</b></p> <p>Per paragraph 225.5 of the Exposure Draft, if a professional accountant in public practice providing professional services to an audit client of the firm or network firm acquires, or receives, information that leads the accountant to suspect that an illegal act has been committed by the audit client, or by those charged with governance, management or employees of the audit client, the accountant must take reasonable steps to confirm or dispel that suspicion. In doing so, the professional accountant may not have access to all the information needed to be able to confirm or dispel the suspicion that an illegal act was committed, and this may lead to an increase in disclosures of an erroneous nature. On the other hand, if the professional accountant goes on to make further enquiries of those suspected of an illegal act, this may have the effect of “tipping off” those involved in criminal activity, which could have a detrimental effect on future investigations by the appropriate authorities.</p>

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		<p><b>Disclosure in the Public Interest</b></p> <p>We believe that what is deemed to be in the public interest will vary from person to person, and it is unclear how the determination that a matter is in the public interest should be made, as required by paragraph 225.10. The subjective judgment required to make this determination could result in a wide range of conclusions and produce inconsistent results.</p> <p>The concept of consideration of the public interest is a complex concept and one that is undefined in the Code. Accountants are more familiar with the concept of materiality, so disclosing matters that have a material effect on the financial statements may be a more concrete threshold for disclosure than reporting a suspected illegal act if it is in the public interest.</p> <p><b>Appropriate Authority</b></p> <p>Paragraph 225.12 provides an imprecise definition for <i>appropriate authority</i>: “An appropriate authority is one with responsibility for such a matter.” Although it is clear that the appropriate authority to which to disclose the matter will depend on the nature of the suspected illegal act, it is not clear exactly which authority would be appropriate. A professional accountant providing professional services to an audit client may not have the requisite knowledge to determine who would be considered the appropriate authority for the disclosure of certain illegal acts.</p> <p><b>Professional Accountants Providing Nonattest Services</b></p> <p>Per the Exposure Draft, a professional accountant providing non-audit services to a client that is not an audit client and a professional accountant in business would be required to disclose suspected illegal acts to the entity’s external auditor. It would be beneficial for the external auditor to have knowledge of such a suspected illegal act in a timely manner.</p>
59.	SAICA	<p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>



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		<p>avoidance (not evasion) measure which might or might not be tested in court at a future date by the local tax authorities.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>
60.	SRA	<p>We can inform you, that we agree with the comment letter, provided to you by the NBA.</p> <p>We would like to stress the following:</p> <ol style="list-style-type: none"> <li>1. We believe that any reporting by a professional accountant in public practice to relevant authorities regarding suspected illegal acts should be dealt with in law and not in a Code for Professional Accountants.</li> <li>2. We are concerned regarding the possibility, that based on the proposals, for SME's a wide range of minor suspected illegal acts will have to be reported, both internally and possibly externally. This reporting would tend to be disproportionate. We therefore recommend to limit the reporting requirements in this respect.</li> <li>3. The current proposals should, in our view, be further considered and refined. We therefore recommend to issue a new Exposure Draft on this subject.</li> </ol>
61.	WPK	<p>WPK highly appreciates the further development of the Code of Ethics (hereinafter referred to as "CoE") and the corresponding efforts and work of the IESBA over the past years. However, in the light of the demands on the member organizations in terms of implementation and regulation (including translation) resulting from amendments to the CoE, further amendments to the CoE should be carefully considered.</p>

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		<p>After weighing all positive and negative effects and arguments respectively, we regret being unable to support this project as far as a right or an obligation of the auditor to override confidentiality and to disclose the matter to an external authority is concerned. This would be in conflict with fundamental legal principles and weaken the profession rather than contributing to improving its reputation and growth. We agree on the other hand that the auditor should be required to discuss any findings as to (suspected) illegal acts/fraud with the management and/or supervisory board of the audit client, as already provided in German law.</p> <p>In the following, we would like to provide you with our considerations. We hereby prefer discussing the issues in a single context since responding to the questions of the Exposure Draft one by one would disrupt the issues.</p> <p><b><u>I. General matters</u></b></p> <p>First of all, we would like to note that we would have wished to learn more about the motivation for this project in the background notes. Although the “public interest” and the issues “suspected fraud” and “illegal acts” are mentioned, the precise grounds remain unclear to us. Of particular interest in this context would be if the project is driven by IESBA itself or by requests of the profession or regulators.</p> <p>To our state of knowledge, only few countries do have already a system in place that stipulates an override of confidentiality comparable to that provided for by IESBA. The Explanatory Memorandum does not contain any description in this regard. However, it might be fruitful to learn about the experience of those countries gained in connection with their corresponding regulation. By means of such a process, difficulties, advantages and disadvantages might be identified and discussed in detail as a preparatory step for the decision as to whether such a provision should be implemented into the CoE.</p> <p><b><u>II. Main reasons against an override of confidentiality</u></b></p> <p>When discussing a possible override of confidentiality and justifying it with a public interest, one should bear in mind that confidentiality is a principle that is also in the public interest since it enables the extensive disclosure of facts and circumstances within the relationship of the client and its auditor and therefore contributes to improving the quality of the auditor’s work from which the stakeholders and the public benefit. In contrast, overriding confidentiality runs the risk of creating inappropriate disincentives for the client regarding the disclosure of certain information and circumstances resulting in a decrease of information provided by the client.</p> <p>Moreover, overriding confidentiality might not only influence the aforementioned relationship of the auditor and the client negatively, but it would probably also be in conflict with a German and European legal principle of utmost importance. According to German law and the jurisdiction of the European Court of Human Rights no one is obliged to incriminate him-/herself (principle of nemo tenetur) and there also exist corresponding utilization prohibitions. When overriding confidentiality as provided for in the Exposure Draft, this would de facto mean that the client would contribute to incriminating him-/herself. The axiom of nemo tenetur has a long-standing tradition in Europe and is in our view at least as important as the effects reached by overriding confidentiality.</p> <p>Besides, overriding confidentiality would disrupt the well balanced allocation of responsibilities between the public accountant on the one hand and the client’s management and its supervisory entities on the other hand. The decision as to whether to disclose an illegal act and</p>

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		<p>particularly to carry out corresponding investigations is and should remain a prior-ranking duty of the management and/or its supervisory entities and not the public accountant. In other words, primary tasks of the management and its supervisory entities would be spuriously shifted to the public accountant if an override of confidentiality were set up.</p> <p>Another crucial aspect is that of liability risks. The profession will face increased exposure to litigation if the suspicion turns out to be unfounded. Albeit this aspect is noted in IESBA's Impact Assessment published alongside this Exposure Draft, we would have wished this matter to be discussed in the Explanatory Memorandum itself. It is questionable if these additional liability risks are covered by the current professional indemnity insurance or if they would and could be covered in the future. Yet, according to German law, the maintenance of a professional indemnity insurance covering financial damages arising out of the indemnity risks of exercising the profession, is a prerequisite for being authorized to practice as a public accountant (Section 54 Public Accountant Act, WPO). Although new insurance might be offered for the new risks in the future since the insurance industry might react correspondingly, the insurance premiums will certainly rise. This would not be easy to cope with by the profession, particularly for SMPs who already according to the status quo face serious problems regarding the amount of the insurance premiums. Also important to note in this context is that the European Commission issued a Recommendation concerning the limitation of the civil liability of auditors in 2008 (5 June 2008, 2008/473/EC). Its main purpose was to encourage the growth of alternative audit firms in a competitive market and to respond to the increasing trend of litigation and lack of sufficient insurance cover in this sector. Against this background the already existing various liability risks for the audit profession should basically be limited and not further increased. Hence overriding confidentiality would seem to be counterproductive in this regard.</p> <p>The proposal would require a professional accountant to determinate whether certain suspected illegal acts are of such consequences that disclosure to an appropriate authority would be in the public interest. In our view the precise determination as to whether the disclosure would be in the public interest remains unclear notwithstanding the explanations contained in the Explanatory Memorandum. This assessment is a subjective one and could result in a wide range of conclusions and might vary from person to person. Legal uncertainty for the profession would be the consequence.</p> <p>Besides, we do have doubts if an accountant should be subject to extensive investigation duties as provided for by the Exposure Draft. In our view, such investigations - except for financial reporting issues that will be described in more detail below (III.) - should only be conducted by and subject to (public) criminal and enforcement authorities, respectively.</p> <p>Also noteworthy is that requirements to disclose illegal acts are normally coupled with whistle-blowing protection mechanisms which can only be set up by the legislator but not by IESBA. Since it remains uncertain if such protection would be established, the isolated implementation of a requirement to disclose illegal acts would basically be disproportionate.</p> <p><b>III. <u>Possible statutory override of confidentiality</u></b></p> <p>After having described the main reason against an override of confidentiality, it is to be deliberated in a second step, if they could be overcome due to reasons of higher interest, particularly a public interest.</p>

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		<p><b>In our view an override of confidentiality might only be considered if the suspected illegal act directly or indirectly affects the client's financial reporting in the context of statutory audits.</b> The statutory audit obligation originates from the perception that for certain audits there is a public interest which justifies subjecting certain companies to a corresponding audit requirement. This public interest is also reflected in the fact that to our knowledge the statutory auditor is obliged to undertake investigations in many jurisdictions if there are any indications of illegal acts concerning the financial reporting. It might be consequential to extend this duty to a corresponding reporting requirement towards an external authority. However, as regards the external authority and the corresponding reporting requirement, it is essential that two prerequisites are met: Firstly, the authority shall be <b>a public authority</b> since the public interest is concerned. <b>Secondly, such an authority and the corresponding reporting requirement for the public accountant are to be created and established by the legislator of the jurisdiction concerned to be legitimate and enforceable.</b> In contrast, the regulation of this matter by IESBA appears to fall outside its competence.</p> <p>On the other hand, as regards <b>illegal acts not pertaining to the client's financial reporting, a reporting requirement would be disproportionate</b> since there is no public interest that would justify the override of confidentiality. This is especially true when it comes to <b>voluntary audits</b> since they are not prescribed by law and are basically considered as "private" and not "public".</p> <p><b>IV. Conclusion</b></p> <p>An override of confidentiality might be deemed as appropriate only in exceptional cases. These cases should be limited to illegal acts that pertain to financial reporting in the context of statutory audits. However, such a reporting requirement towards an external authority would have to be set up by the jurisdictions concerned and not by IESBA.</p> <p>Apart from the aforementioned limited cases, an override of confidentiality would be disproportionate given that the benefit for the public would be relatively small in comparison to the burden for the profession. This is especially true considering the fact that illegal acts and their disclosure by the accountant would probably occur only in few and exceptional cases</p>