

Proposed Global Whistleblower Standard Presents Challenges

The IESBA issued an exposure draft describing how professional accountants should respond when they discover unethical and/or illegal acts in the course of their duties. Intended to encourage accountants to blow the whistle on unethical companies or individuals, some of the changes may conflict with other ethical responsibilities.

Research has repeatedly shown the importance of tip information to the solution of fraud and other criminal cases, but efforts to promote whistleblowing may conflict with ethics requirements contained in codes of ethics guiding professional accountants, such as the *IMA Statement of Ethical Professional Practice* or the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct. In the United States, for example, the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in July 2010 contained provisions to encourage whistleblowing and protect whistleblowers when reporting suspected violations of securities laws, yet these provisions encourage behavior from professional accountants that may conflict with their ethical responsibilities regarding confidentiality.

The International Ethics Stan-

dards Board for Accountants (IESBA), a global organization that works to facilitate the convergence of the ethics standards used by professional accountants throughout the world, maintains the *Code of Ethics for Professional Accountants* (COEPA). On August 22, 2012, IESBA issued an exposure draft (ED) titled "Responding to a Suspected Illegal Act" that would modify COEPA to outline the types of situations where a professional accountant would have an ethical responsibility to blow the whistle. But some of the proposed changes create potential conflicts for accountants.

Varied Whistleblowing Practices
Systems to encourage whistleblowing and protect whistleblowers dif-

fer around the world, and some countries have more refined structures in place than others. But as governments work to reduce the instances of fraud, their legislative efforts create ethics challenges for accountants.

As a part of the implementation of the whistleblower section of Dodd-Frank, for example, the U.S. Securities & Exchange Commission (SEC) established an Office of the Whistleblower (OW) to work with whistleblowers, handle their tips and complaints, and help determine the awards for individuals who provide information that leads to a successful enforcement action. The final whistleblower regulations, which became effective in August 2011, enable the SEC to pay substantial cash bounties to eligible whistleblowers who "voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action." The bounty payment is unique in the world as it creates a very significant motivation for people to ignore internal procedures and ethical boundaries in order to claim cash.

Dodd-Frank defines circum-



stances when bounties may be paid to auditing, legal, and compliance personnel and when they can be protected from retaliatory acts if they had a reasonable belief that whistleblowing was necessary:

- ◆ To prevent substantial injury to the financial interests of the company or its shareholders, or
- ◆ That the company was about to impede an investigation of the misconduct, or
- ◆ That 120 days had passed since the whistleblower reported (or officials already knew about) the possible violations.

Under Dodd-Frank, accountants in industry, employees engaged in internal auditing or compliance processes, and auditors engaged in an independent audit of the financial statements of a public company can be compensated as whistleblowers. The SEC realizes this causes a potential conflict of loyalty to employers and/or clients. In its adopting release for the Dodd-Frank regulations, the Commission noted, “We believe it is in the public interest to accept whistleblower submissions and to reward whistleblowers—whether they are officers, directors, auditors, or similar responsible personnel—who give us information that allows us to take enforcement action to prevent substantial injury to the entity or to investors.”

In the United Kingdom, the Public Interest Disclosure Act of 1998 sets forth substantial legal protections against employer retaliation on workplace whistleblowers. The subject matter for disclosures is broad and includes information about crimes, miscarriages of justice, failure or likely

failure to comply with any legal obligation, endangering the health or safety of any individual, damage to the environment, and information tending to show any matter falling within any one of the preceding subjects has been, is being, or is likely to be deliberately concealed. Similar whistleblower protection laws exist in Australia, the Netherlands, and other countries, but the payment of cash bounties to whistleblowers is believed to be limited to the U.S.

In the past, a number of countries have precluded or severely

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limited the use of whistleblower hotlines, such as those prescribed by the Sarbanes-Oxley Act, because the practice is viewed as inconsistent with societal norms of data protection or existing law. For example, guidance as to the appropriate way to implement some of the SOX provisions in France was put in place as recently as December 2010. In a German case in July 2011, the European Court of Human Rights ruled that German case law relating to suppression of whistleblowing violated the right to freedom of expression.

Changes to COEPA

The IESBA aims to help make sense of the varied practices and deliver a set of ethical standards

for professional accountants around the world. The “Responding to a Suspected Illegal Act” exposure draft addresses what the IESBA calls a necessity for all professional accountants to respond to unethical acts as well as suspected illegal acts.

For unethical acts that aren’t potentially illegal, the ED requires professional accountants to identify threats that are created by such acts, evaluate their significance, take steps to address them, and, if appropriate, to terminate the client relationship or employment. This approach describes the same actions that are prescribed by COEPA for resolution of other ethical conflicts accountants face.

The ED also provides detailed guidance concerning suspected illegal acts, including confirming or dispelling the suspicion and discussing the matter with the appropriate level of management and higher, if appropriate. If the response by the client or employer isn’t appropriate, and if the professional accountant believes that the suspected illegal act is of such consequence that disclosure would be in the public interest, then he or she would have an ethical requirement to disclose the acts if the entity hasn’t self-reported. Guidance as to what is in the public interest is defined as what a reasonable, informed third party would conclude.

According to the ED, an auditor with an audit client would be required to make disclosure directly to an appropriate authority. A professional accountant working in a business or providing nonaudit services to a nonaudit client would be required to dis-

close the matter to the entity's external auditor, if any. In certain circumstances, the accountant would have a right, but not a duty, to disclose certain illegal acts to an appropriate authority and would be expected to exercise that right.

The ED requires a professional accountant to consider any applicable legal or regulatory requirements and to comply with the requirements and consider whether it's appropriate to terminate the relationship with the client or resign from the employing organization. Termination or resignation isn't a substitute for disclosure to an appropriate authority.

The ED also describes the exceptional circumstances where the professional accountant wouldn't be required or expected to exercise the right to disclose the matter. These cases are limited to

circumstances where an informed third party would conclude the consequences of disclosure are so severe they justify nondisclosure, such as threats to physical safety of the professional accountant, not just the loss of income.

These changes create a challenge because they conflict with other legal requirements and professional codes of ethics for accountants. The *IMA Statement of Ethical Professional Practice*, for example, states that members have a responsibility to "keep information confidential except when disclosure is authorized or legally required." This concept reflects the fact that a management accountant has a loyalty to his or her employer that should be overturned only in serious cases of potential damage. And AICPA Ethics Rule 301—Confidential Client Information states unequiv-

ocally: "A member in public practice shall not disclose any confidential information without the specific consent of the client."

Another interesting addition in the ED involves the Professional Behavior section of COEPA. The section describes how a professional accountant has the responsibility to avoid any action that may discredit the profession, and the ED adds an example of that behavior: being "associated with a client or employing organization that acts unethically."

Later on, the ED also adds that professional accountants in business shouldn't "knowingly engage in any activity that:

- ◆ Would be incompatible with the professional accountant's responsibility to act in the public interest.

- ◆ A reasonable and informed

continued on page 61

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Ethics

continued from page 15

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third party would be likely to conclude, weighing all the specific facts and circumstances available to the professional accountant at that time, impairs or might impair integrity, objectivity or the good reputation of the profession.”

Examples of that behavior included in the ED are improper earnings management or balance sheet valuations.

The IESBA’s exposure draft represents a worldwide ethics challenge to professional accountants—both auditors and those working in business—particularly where it conflicts with other standards of ethics. An October 2010 article in the *Journal of Accountancy* points out that there are many similarities between the AICPA and IESBA codes, but it also states that “some differences are significant.” And compared to the IESBA code, the *IMA Statement* is believed to be likely more useful and lead to more ethical behavior than the approach taken by the IESBA (see the March 2012 column, “IMA Ethics Code Compares Favorably to Global Code”). Readers should respond to us with comments on the IESBA exposure draft. **SF**

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