

NOCLAR RESOURCES

WEBINAR MATERIAL: 9 DECEMBER 2020

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MODULE 1: INTRODUCTION, BACKGROUND & SHORT SUMMARY

1. INTRODUCTION

Professional accountants might come across situations where they determine, or suspect, that their employing organization or a client is not compliant with laws or regulations. They are then required by the Code of Conduct to take appropriate action, putting the interests of the public first.

NOCLAR (Non-Compliance with Laws and Regulations) addresses breaches of laws and regulations that deal with matters such as fraud, corruption and bribery, money laundering, tax payments, financial products and services, environmental protection, and public health and safety. The proactive role of professional accountants in relation to NOCLAR can lead to an earlier response by management or those charged with governance, thereby mitigating any adverse consequences for stakeholders, or deterring potential NOCLAR for the greater benefit of business (and society).

The Code's fundamental principles of integrity and professional behaviour require accountants to respond to non-compliance with laws and regulations (NOCLAR) by taking appropriate action, putting the interests of the public first.

This webinar will summarise some of the practical resources that are currently available to assist in your NOCLAR dilemmas.

2. BACKGROUND TO NOCLAR

The NOCLAR standard was released by IESBA with an implementation date of 15 July 2017.

This standard sets out a framework to guide auditors and other professional accountants in what actions to take in the public interest when they become aware of a potential illegal act, known as non-compliance with laws and regulations, or NOCLAR, committed by a client or employer.

NOCLAR provides a clear pathway for auditors and other professional accountants to disclose potential non-compliance situations to appropriate public authorities in certain situations without being constrained by the ethical duty of confidentiality. It also places renewed emphasis on the role of senior-level accountants in business in promoting a culture of compliance with laws and regulations and prevention of non-compliance within their organizations.

The standard applies to all professional accountants, including auditors, other professional accountants in public practice, and professional accountants in organizations, including those in businesses, government, education, and the not-for-profit sector. It addresses breaches of laws and regulations that deal with matters such as fraud, corruption and bribery, money laundering, tax payments, financial products and services, environmental protection, and public health and safety.

All of the professional institutes' Codes of Professional Conduct are in line with the IESBA Code (e.g. SAICA, SAIPA, SAIBA, IRBA, etc.) and have been amended to specifically include responsibilities arising from NOCLAR.

3. NOCLAR – SHORT SUMMARY

The following provides a short summary of NOCLAR – in a nutshell!

NOCLAR – definition

- Acts of omission or commission,
- intentional or unintentional,

- committed by
 - a client or
 - the PAs employing organisation, or
 - by TCWG, by management or by other individuals working for or under the direction of a client or employing organisation
- which are contrary to the prevailing laws or regulations

Who does it affect?

- **Professional Accountants (PAs) in public practice**
 - In providing a professional service to a client
 - May encounter or be made aware of NOCLAR
- **Professional Accountants (PAs) in business**
 - In carrying out professional activities for his/her employing organisation
 - May encounter or be made aware of NOCLAR
- **Code also applies to the firm**
 - All individuals within the firm that provides professional services to clients of the firm (even if they are not PAs)
 - Not individuals that do not have client responsibilities
 - “working for or under the direction” means contractors, agents and non-executive directors of the client or employer are included
 - Applies as of 15 July 2017, referring to the point in time the PA encounters or becomes aware of ...
 - N/A to matters already known prior to 15/7, unless early adopted
 - Act committed before 15/7, but PA becomes aware after 15/7?

Approach to follow: In Practice vs in Business

- In Practice
 - Audit of AFS
 - Services other than audit
- In Business
 - Senior PAIBS
 - Other PAIBS

Reasonable expectations of a Professional Accountant

- To recognise NOCLAR, having regard to what should be within the scope of his/her training and experience
- No additional responsibilities to detect NOCLAR
- No increase in the range of laws and regulations (L&Rs) the PA is required to have knowledge of for purposes of
 - performing a given engagement; or
 - the PAs role within the employing organisation

- Not trained lawyers
 - L&Rs that generally relate to a PAs professional training and expertise
 - L&Rs linked to a PAs knowledge in a particular field
 - Not required to have specialised legal knowledge and skills

Per standards – Reasonably expected to know

- Laws and regulations generally recognised to have
 - a direct effect on the determination
 - of material amounts and disclosures
 - in the financial statements
- Other laws and regulations with
 - no direct effect but compliance with which
 - may be fundamental to the entity's business and operations, or
 - to avoid material penalties

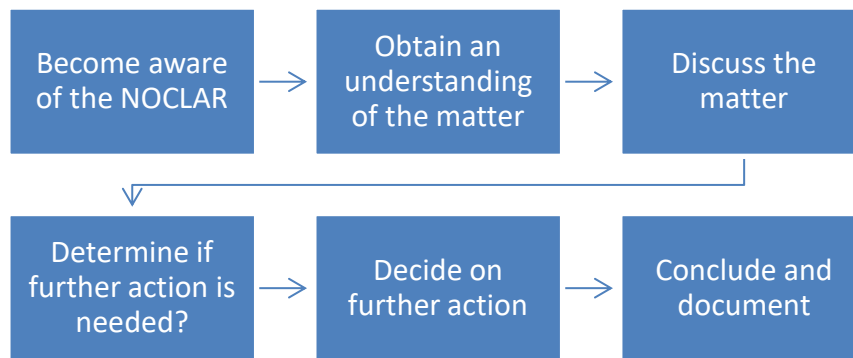
Examples of Laws and Regulations

- Fraud, corruption and bribery
- Money laundering, terrorist financing and proceeds of crime (FICA)
- Securities markets and trading
- Banking and other financial products and services (FAIS)
- Data protection (POPIA & GDPR)
- Tax and pension liabilities and payments (Income Tax, VAT Act, UIF Act, etc.)
- Environmental protection
- Public health and safety (OHSA)

What is excluded?

- Matters that are clearly inconsequential
- Personal misconduct unrelated to the business activities of the client or the employing organisation
- NOCLAR other than by the client or the employing organisation, or TCWG, management or other individuals working for or under the direction of the client or the employing organisation

NOCLAR Process



Give consideration to

- Laws and regulations that address the consideration, disclosure or non-disclosure of NOCLAR, or otherwise deal with the disclosure of information
 - Although certain requirements under the Code may be affected, there may be other requirements that still need to be complied with
- A firm's quality control policies and procedures, or an employing organisation's internal protocols and procedures
- For a given engagement, PAs in practice, must comply with relevant engagement standards and pronouncements

What about when you are prohibited to disclose?

- **Legal privilege**
 - Right to prevent disclosure; applies to communications between an appropriately qualified legal advisor and Client
 - Must be claimed (and other requirements must be met)
 - Specific information is privileged; not general knowledge about an event or incident >>> Assess what is privileged
 - Disclosure of privileged information would be precluded
 - Also consider that the appropriate people at Client are already taking steps to seek to address the matter ...
- Examples of L&Rs that prohibit disclosure
 - Protection of Information Act 84 of 1982
 - And others ... (depends on the nature of the information and the specific circumstances of a possible disclosure)
- **Contractual confidentiality**
 - Freedom to contract, but not contrary to L&Rs
 - Only arises when PA decides to disclose information despite the absence of a legal obligation to do so
 - Higher order considerations in Code related to public interest

- Contract could allow for disclosure to the NOCLAR provisions
 - Such clause protects the client or employer and the PA
- In limited circumstances, the “contrary to public policy “ principle could override a confidentiality clause
 - Determined on a case by case basis ... [remember, PA may decide to consult at any stage]
 - Reporting to prevent manifest and substantial harm

Examples of Statute – General Protection

Protected Disclosures Act 26 of 2000

- Applicable to employees (subject to the requirements of the Act)
- Protection is against ‘occupational detriment’
- The disclosure must be made internally to certain persons, including complying substantially with any internal procedure
- The disclosure must be made in good faith
- Must relate to any conduct of the employer or any employee of the employer where the information shows or tends to show ...
- Can be repeated to an appropriate external party, if
 - The disclosure was 1st made internally; and
 - The internal party failed to take action

Companies Act, section 159

- Protection is immunity from any civil, criminal or administrative liability
- Applies to employees and is also linked to the PDA
- Also applies to other parties – section 159(4). For example
 - Shareholders, directors, prescribed officers, company secretary, suppliers of goods or services
- Applies to disclosures made to ... – section 159(3). For example
 - CIPC, Tribunal, Panel, a regulatory authority, the board, a committee of the company, auditor
- Must relate to information that shows or tends to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, had ...
 - section 159(3)(b)

Which type of PA takes which Actions?

PAs consider internal processes

PAs in business

- Shall consider internal protocols and procedures in determining how to respond to NOCLAR or suspected NOCLAR
- Would not preclude responsibilities in terms of section 360 (this is also linked to contractual obligations discussed earlier)
- May often facilitate an appropriate response

PAs in public practice

- Should consider firm policies and methodologies, but these cannot be less stringent than the Code
- It may be useful to address certain elements of the NOCLAR provisions in the firm's manual [refer to IESBA FAQs (in public practice), Q7]

Appropriate Further Action

Auditors / non-auditor PAPPs / Senior PAIBs

1. Withdraw from the engagement and the professional relationship OR Resign from the employing organisation
2. Disclose the matter to an appropriate authority even when there is no legal or regulatory requirement to do so

Only Senior PAIBs

1. Inform the management of the parent entity of the matter

One or a combination of possible further actions may be appropriate

- In making the decision, the PA may also consider
 - Consulting internally;
 - Obtaining legal advice to understand the various options and their professional or legal implications; or
 - Consulting on a confidential basis with a regulator or professional body

Disclose to appropriate authority??

- Disclosure would be precluded if doing so would be contrary to law or regulation
- Disclosure only becomes a consideration if substantial harm is indicated in the circumstances
- Disclosure also depends on certain external factors
 - Whether there is an appropriate authority
 - Whether there exists robust and credible protection from civil, criminal or professional liability
 - Whether there are actual or potential threats to physical safety

If the PA decides that disclosure is an appropriate course of action

- It will not be considered a breach of the duty of confidentiality under Code
- PA must act in good faith and exercise caution when making statements and assertions
- [For PAIPPs] Consider whether it is appropriate to inform the client of the PAs intentions before disclosing the matter

IN ADDITION, CONSIDER THE FOLLOWING ...

- A PA in public practice (e.g. the auditor or a tax practitioner) providing services to an entity informs the Senior PAIB about NOCLAR at the entity?
- A Senior PAIB informs the PA in public practice who is providing services to the entity about NOCLAR at the entity?
- The PAIBs immediate superior disagrees regarding the evidence concerning the matter. Can the PAIB exit the process at this point?

- What if both the PAIBs superior and TCWG are unwilling to address the identified or suspected NOCLAR? Can the PAIB exit the process at this point?

Disclosure to the entity's External Auditor

- Determine whether disclosure to the entity's external auditor is needed. This is in addition to responding to the matter in terms of the Code

Purpose

- To provide all information necessary to enable the auditor to perform the audit

Relevant factors to consider

- Whether it would be precluded by law or regulation
- Whether there are any restrictions imposed by a regulatory agency or prosecutor
- Whether the external auditor has already been informed
- The likely materiality of the matter to the entity's financial statements

ACTUAL OR POTENTIAL SUBSTANTIAL HARM

- Is an act that results in serious adverse consequences to the entity or to investors, creditors, employees or the general public, in financial or non-financial terms

Examples include:

- Fraud resulting in significant financial losses
- A breach that endangers the health and safety of ...

More examples

- Bribery for purposes of securing large contracts
- A matter that threatens the entity's license to operate
- An act that poses a systemic risk to the financial markets
- Products that are harmful to public health or safety
- Promoting a scheme to evade taxes

Reasonable and informed 3rd party test (RITP)

- Take into account whether a reasonable and informed third party, weighing all the specific facts and circumstances available to the PA at the time, would be likely to conclude that the professional accountant has acted appropriately in the public interest.

Further context

- The PA is required **to exercise professional judgment**
- It is not a hindsight test
- It brings an essential element of objectivity to the PAs evaluation of the matter in the circumstances
- Remember, the PAs overall objectives in terms of the Code

NON-AUDITOR PAPPs: Providing any type of professional service

- Services by a tax practitioner
- Independent review

- Internal control and risk management
- Company secretarial services
- Business consulting or corporate finance services
- Compilation of financial statements
- Any other limited or reasonable assurance engagement
- Corporate recovery services
- Internal audit services
- Information technology services
- (Not exhaustive)

Consider a forensic investigation??

Purpose of the engagement is to investigate the matter

Consider the context of a forensic investigation

- The PA has been engaged as a forensic accountant to investigate certain wrongdoing

Principles that apply

- Objectives under the Code may already be addressed
- Code does not preclude further action in the public interest
- Unless precluded by: Law or regulation or restrictions by a regulatory agency or prosecutor or when legal privilege applies

Could also apply to other engagements

NON-AUDITOR PAPPs: Determine whether further action is needed (and nature and extent)

CONSIDER

- Nature, cause, circumstances and
- extent of the matter

CONCLUDE

- No further action is required
- Further action is required

DOCUMENTATION

- PA is *encouraged* to document

Consider:

Nature, cause, circumstances and extent of matter

- Legal and regulatory framework
- The appropriateness and timeliness of the response of management and, where applicable, TCWG
- Urgency of the matter
- The involvement or management or TCWG in the matter
- The likelihood of substantial harm to the interests of the client, investors, creditors, employees or the general public

DOCUMENTATION

In relation to an identified or suspected act of NOCLAR, the PA is encouraged to document

- The matter
- The results of discussions with ...
- How management and, where applicable TCWG, have responded
- Courses of action considered, judgments made and the decisions that were taken
- How the PA is satisfied that he/she has appropriately considered whether further action is needed in the public interest

AUDITORS: PA becomes aware of NOCLAR

Exceptional Circumstances (OVERRIDE)

- “In exceptional circumstances,
- the professional accountant may become aware of actual or intended conduct
- that the professional accountant has reason to believe would constitute an imminent breach of a law or regulation
- that would cause substantial harm to investors, creditors, employees or the general public.
- Having considered whether it would be appropriate to discuss the matter with management or those charged with governance of the entity,
- the professional accountant shall exercise professional judgment and may immediately disclose the matter to an appropriate authority
- in order to prevent or mitigate the consequences of such imminent breach of law or regulation.
- Such disclosure will not be considered a breach of the duty of confidentiality under Section 140 of this Code.”

MODULE 2: LINKS TO NOCLAR RESOURCES

1. IESBA RESOURCES

IESBA (The International Ethics Standards Board for Accountants) have developed various resources:

IESBA Support & Resources webpage

The [IESBA Support & Resources webpage](#) includes helpful guidance for PAIBs, including a NOCLAR Fact Sheet, IESBA Staff Q&As and videos that explain NOCLAR from a variety of perspectives.

The following PDF documents have already been downloaded for you:

- IESBA_NOCLAR Overview 2017
- IESBA_NOCLAR QA PAIB_Feb2017
- IESBA_NOCLAR QA PAPP_Feb2017

The above documents are available to you as Source Documents

IESBA NOCLAR webpage

Also, the IESBA website includes a comprehensive [NOCLAR webpage](#).

The following **NOCLAR QUICK LINKS** are available to you:

- [Pronouncement](#)
- [Basis for Conclusions](#)
- [At a Glance](#)
- [Press Release](#)
- [Project Page](#)
- [Fact Sheet](#)
- [Videos](#)
- [Responding to Non-Compliance for PAIBs \(Aligned to the Revised and Restructured Code\)](#)
- [Responding to Non-Compliance for PAPPs \(Aligned to the Revised and Restructured Code\)](#)

The majority of the above documents are available to you as Source Documents

IESBA Code of Conduct

The NOCLAR provisions for PAIBs are set out in Section **260**.

The NOCLAR provisions for PAPPs are found in Section **360**.

<https://www.iesbaecode.org/>

The International Code of Ethics for Professional Accountants (including International Independence Standards) ("the Code")

The Code provides a conceptual framework that professional accountants are to apply in order to identify, evaluate and address threats to compliance with the fundamental principles. The Code sets out requirements and application material on various topics to help accountants apply the conceptual framework to those topics, e.g. NOCLAR.

In the case of audits, reviews and other assurance engagements, the Code sets out International Independence Standards, established by the application of the conceptual framework to threats to independence in relation to these engagements.

Most of these documents have already been downloaded and are available to you as Source Documents

2. SAICA RESOURCES

SAICA have issued various helpful resources regarding NOCLAR.

<https://saicaethics.co.za/noclar/>

<https://saicaethics.co.za/noclar-supplementary-material/>

NOCLAR Supplementary Material		
Publish Date	Material Title	Link
November 2020	November 2020: SAICA NOCLAR Frequently Asked Questions (FAQs) by members and associates	Read here
November 2020	SAICA Overview and Summary of the Response Framework in terms of the NOCLAR Provisions of the SAICA Code of Professional Conduct	Read here
July 2018	Examples of legislation in South Africa that contain certain reporting requirements	Read here
July 2018	2018 Illustrative examples of clauses in engagement letters or in employment contracts relating to the professional accountant's NOCLAR obligations	Read here
Nov 2017	SAICA Overview and Summary of the Response Framework in terms of the NOCLAR Provisions of the SAICA Code of Professional Conduct	Read here
Nov 2017	SAICA NOCLAR Frequently Asked Questions (FAQs) for members and associates	Read here
Oct 2017	IRBA Frequently Asked Questions (FAQs) on NOCLAR for Registered Auditors	Read here

All of these documents have already been downloaded and are available to you as Source Documents

Lettie's summary of legislation applicable to NOCLAR clause in engagement letter

NOCLAR clause in Engagement letters.doc

3. IRBA RESOURCES

<https://www.irba.co.za/guidance-for-ras/technical-guidance-for-ras/ethics:-the-rules-and-the-code/noclar>

IRBA FAQ on NOCLAR.pdf

IRBA_Revised Guide for Registered Auditors_Reportable Irregularities in terms of the APA 2015.pdf

Both of these documents have already been downloaded and are available to you as Source Documents

4. OTHER DOCUMENTS PROVIDED TO YOU

Some other helpful resources have been identified for your use.

Most of these documents have already been downloaded and are available to you as Source Documents

Lettie's Working Papers to document RI Considerations
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I have developed 3 working papers to assist your documentation needs:

- RI considerations - AFS not prepared within 6 months
- RI considerations - PIS above 500_no SEC
- RI considerations - Technical insolvency

5. SOURCE DOCUMENTS AVAILABLE TO YOU

There are **21 Source Documents (excluding the 3 RI working papers)** available to you, and can be accessed by logging into your profile.

MODULE 3: RESPONDING TO NOCLAR FOR PAIBs

1. NON-COMPLIANCE WITH LAWS AND REGULATIONS FOR PROFESSIONAL ACCOUNTANTS IN BUSINESS

A distinguishing mark of the accountancy profession is its acceptance of responsibility to act in the public interest. Professional accountants might come across situations where they determine, or suspect, that their employing organization or a client is not compliant with laws or regulations. The Code's fundamental principles of integrity and professional behaviour require accountants to respond to non-compliance with laws and regulations (NOCLAR) by taking appropriate action, putting the interests of the public first.

When a PAIB becomes aware of, or suspects that NOCLAR has occurred or might occur, the PAIB is required to take action on a timely basis, having regard to the nature of the matter and the potential for harm to the employing organization, investors, creditors, employees and the general public.

The PAIB needs to:

- Understand and comply with the Code as well as legal and regulatory provisions in their jurisdiction that differ or go beyond those in the Code (e.g., requirements to report the matter to authorities, or prohibitions on alerting the employing organization that action is being taken).
- Consider any existing protocols and procedures within their organization that offer guidance to address NOCLAR (e.g., ethics and whistleblowing policies).

Examples of relevant laws and regulations include those that deal with:

- Fraud, corruption and bribery
- Banking and other financial products/services
- Data protection
- Environmental protection
- Securities markets and trading
- Money laundering, terrorist financing and proceeds of crime
- Tax and pension liabilities/payments
- Public health and safety.

What about confidentiality?

- Disclosure of NOCLAR to an appropriate authority will not be considered a breach of the duty of confidentiality with respect to the PAIBs employer.
- The PAIB must act in good faith and exercise caution when making statements and assertions.

Obligations of a PAIB are based on role/seniority

The Code recognizes that different roles within an organization come with different levels of influence, authority, and access to information. Accordingly, a higher level of obligation is placed on Senior PAIBs because they are decision-makers who can exert significant influence in their organizations. A Senior PAIB could have the title of CFO or VP of Finance, but more important than a title is the level of influence that the individual exerts. More junior PAIBs who don't have the same degree of influence, have proportionately lower obligations if they become aware of, or suspect NOCLAR.

Consider the following Example

A large international manufacturing company has developed an AI tool to pre-screen candidates for job placements. However, the data being captured by the system is also being sold to a data broker without the knowledge or consent of the interviewees. This is not in compliance with the local jurisdiction's data protection laws. If a PAIB becomes aware of, or suspects, this is occurring or might occur, they have an obligation to take action.

THE SPECIFIC ACTION THAT THE PAIB IS REQUIRED TO TAKE VARIES DEPENDING ON THEIR ROLE AND LEVEL OF SENIORITY.

Senior PAIB:

If the company's CFO overhears a discussion between staff suggesting that the company's system is non-compliant with the law, the CFO should:

- Obtain an understanding of the matter, including the nature and circumstances of the AI system and its use, how data protection laws apply in this context, and the consequences for the organization and stakeholders. For example: What are the impacts for interviewees? Would the company be subject to significant fines or reputational damage?
- Address the matter by discussing it with an immediate superior, such as the CEO, and take steps to:
- Have the matter communicated to those charged with governance, such as the Board of Directors.
 - Launch an internal investigation.
 - Comply with applicable laws and regulations, including reporting requirements, if any.
 - Have the consequences rectified, remediated or mitigated, for example, by disclosing the matter to previous interviewees and providing them with assistance to mitigate any harm caused.
 - Determining a plan will likely benefit from the advice of legal counsel or other experts.
 - Reduce the risk of re-occurrence by advising the CEO that the sale of data should be immediately halted unless informed consent has been achieved and all other legal requirements have been met.

ADDITIONAL STEPS THE CFO MIGHT BE REQUIRED TO TAKE

- Determine whether to disclose the matter to the company's external auditors as part of management's duty to provide relevant audit information.
- Assess the appropriateness of the company's response.
- Exercise professional judgement in determining if further action is needed.
- This involves taking into account whether a reasonable and informed third party would believe that the CFO has acted appropriately in the public interest.

Further action could include disclosing the matter to appropriate authorities, even if there is no legal obligation to do so, and, depending on the situation, resigning from the company. Resigning is not a substitute for taking required actions.

Non-Senior PAIB:

If the issue was suspected by a more junior PAIB (e.g. an accounts receivable clerk) while reviewing documentation on the data broker's file, they would be expected to:

- Seek to obtain an understanding of the matter.
- Address the matter by discussing it with their immediate superior, or the next higher level of authority in the company if the immediate supervisor was involved.

REMAIN ALERT

In case of an imminent breach of a law or regulation that would cause substantial harm to investors, creditors or the general public, the PAIB may decide to immediately disclose the matter to an appropriate authority in order to mitigate the consequences of such a breach.

Where to get Assistance?

The NOCLAR provisions for PAIBs are set out in Section 260.

The [IESBA Support & Resources webpage](#) includes helpful guidance for PAIBs, including a NOCLAR Fact Sheet, IESBA Staff Q&As and videos that explain NOCLAR from a variety of perspectives.

Also, the IESBA website includes a comprehensive [NOCLAR webpage](#).

2. NOCLAR RESPONSE FRAMEWORK

In the [basis for conclusion document issued by the IESBA in July 2016](#), the following NOCLAR Response Framework is applicable from the Appendix:

These 3 flowcharts are available as Source Documents

Overview of NOCLAR Response Framework

NOCLAR Response Framework²³

NOCLAR: Acts of omission or commission, intentional or unintentional, committed by a client [or by the professional accountant's (PA's) employing organization], or by those charged with governance (TCWG), by management or by other individuals working for or under the direction of a client [or the employing organization] which are contrary to the prevailing laws or regulations.

Objectives – All Categories of PAs

In acting in the public interest:

- To comply with the fundamental principles of integrity and professional behavior
- By alerting management or, where appropriate, TCWG, to seek to:
 - Enable them to rectify, remediate or mitigate the consequences of identified or suspected NOCLAR
 - Deter the commission of NOCLAR where it has not yet occurred
- To take such further action as appropriate in the public interest

Scope of laws and regulations covered – All PAs

- Laws and regulations to which ISA 250 applies:
 - Laws and regulations generally recognized to have a direct effect on the determination of material amounts and disclosures in the financial statements
 - Other laws and regulations that do not have a direct effect on the determination of the amounts and disclosures in the financial statements, but compliance with which may be fundamental to the operating aspects of the entity's business, to its ability to continue its business, or to avoid material penalties
- No distinction between public interest entities (PIEs) and entities that are not PIEs

²³ This diagram illustrates only the main elements of the response framework. It does not purport to be comprehensive. For details, reference should be made to the text of the pronouncement.

Senior PAIBs

SENIOR PAIBs

Senior PAIB: Director, officer or senior employee able to exert significant influence over, and make decisions regarding acquisition, deployment and control of human, financial, technological, physical and intangible resources

Overarching Expectations:

- Set the right tone at the top (Section 300)
- Establish appropriate framework to prevent NOCLAR

RESPONSES WHEN ENCOUNTERING OR BEING MADE AWARE OF NOCLAR OR SUSPECTED NOCLAR

Must fulfill professional/ethical responsibilities:

- Raise with superior and TCWG
- Understand and comply with applicable laws and regulations
- Rectify/remediate/mitigate consequences, and reduce risk of re-occurrence
- Seek to deter commission of the NOCLAR if it has not yet occurred
- Determine whether to alert external auditor, if any

Must:

- Assess appropriateness of the response of superiors, if any, and TCWG; and
- In light of that response, determine if further action needed in the public interest

Need for further action, and nature and extent of it, will depend on:

- Legal and regulatory framework
- Urgency and pervasiveness of the matter
- Whether integrity of superiors and TCWG is in doubt
- Likelihood of recurrence
- Credible evidence of actual or potential substantial harm to employing organization or stakeholders

- Apply 3rd party test in determining need for, and nature and extent of, further action:
 - Would reasonable and informed 3rd party, weighing all specific facts and circumstances at the time, likely conclude that PA has acted appropriately in public interest?

Senior PAIBs – Determination of further action needed

SENIOR PAIBs – DETERMINATION OF FURTHER ACTION NEEDED

Courses of further action may include:

- Informing parent entity management in the case of a member of a group
- Disclosing to an appropriate authority even when not required by law or regulation
- Resigning from the employment relationship

- Resignation not a substitute for taking other appropriate actions under the Code

Options available will depend on:

- Law or regulation, e.g., prohibition on disclosure due to confidentiality laws
- Other parts of the Code

- May take legal advice
- May consult within employing organization, with a regulator or with a professional body

- Documentation**
- Encouraged

Section 140, Confidentiality:

- Where, in PA's professional judgment, disclosure of confidential information, without employer's consent, would be an appropriate course of action to comply with ethical requirements

MODULE 4: RESPONDING TO NOCLAR FOR PAPPs

1. NON-COMPLIANCE WITH LAWS AND REGULATIONS FOR PROFESSIONAL ACCOUNTANTS IN PUBLIC PRACTICE

A distinguishing mark of the accountancy profession is its acceptance of responsibility to act in the public interest. Professional accountants might come across situations where they determine, or suspect, that their employing organization or a client is not compliant with laws or regulations. The Code's fundamental principles of integrity and professional behaviour require accountants to respond to non-compliance with laws and regulations (NOCLAR) by taking appropriate action, putting the interests of the public first.

When a Professional Accountant in Public Practice (PAPP) becomes aware of, or suspects, that NOCLAR has occurred or might occur, the PAPP is required to alert management or, where appropriate, those charged with governance.

- The objective is to enable the client to rectify, remediate, or mitigate the consequences of the identified or suspected non-compliance (or deter the commission of the non-compliance if it has not yet occurred).
- The PAPP is also required to take further action as appropriate in the public interest.

Examples of relevant laws and regulations include those that deal with:

- Fraud, corruption, and bribery;
- Banking and other financial products/services;
- Data protection;
- Tax and pension liabilities/payments;
- Environmental protection;
- Securities markets and trading;
- Money laundering, terrorist financing and proceeds of crime;
- Public health and safety.

Some laws and regulations (such as financial reporting or tax laws) might have a direct effect on the client's financial statements. In other situations, the laws or regulations might not impact financial statements, but compliance might be critical to the operating aspects of the client's business, to its ability to continue its business, or avoid material penalties (such as environmental regulations).

Greater Obligations for Auditors

Because of the nature of audit and review engagements and the public's expectations of such engagements, PAPPs providing such engagements have higher obligations than PAPPs engaged in work other than audits and reviews.

Auditors must also comply with ISA 250, which addresses audit-specific requirements for considering laws and regulations.

What about confidentiality?

- Disclosure of NOCLAR to an appropriate authority will not be considered a breach of the duty of confidentiality.

- The PA must act in good faith and exercise caution when making statements and assertions, and consider whether to inform the client.

2. EXAMPLE: CONSIDER THE FOLLOWING SCENARIO:

A technology company has developed and patented a very promising facial recognition system. The product line responsible for the system has run into difficulty as the emerging awareness of bias in its AI algorithms has slowed sales. In desperation, the product manager—the CEO’s protege—has engaged with an outside vendor in a cryptocurrency money-laundering scheme, the proceeds of which are designed to temporarily mask the division’s falling cashflow until the algorithms can be fixed.

The PAPP takes action depending on their role

PAPP on an Audit engagement

If the auditor identifies or suspects NOCLAR after discovering an unusual series of transactions involving cryptocurrency exchanges known to be at higher risk for money laundering, they would need to:

- Obtain an understanding of the matter, including the nature, circumstances, how laws and regulations apply, and the consequences for the client and stakeholders.
- Discuss the matter with the appropriate level of management or, if senior management is determined to be involved in wrongdoing, discuss it with those charged with governance (such as the audit committee).
- Advise management or those charged with governance to:
 - Rectify, remediate, or mitigate the consequences of any non-compliance;
 - Prevent non-compliance if it hasn’t yet occurred;
 - Disclose the matter to an appropriate authority where required by law or regulation or where necessary in the public interest.
- Consider whether management and those charged with governance understand their legal or regulatory responsibilities in the matter.
- Comply with laws, regulations and auditing standards (such as ISA 250).

The auditor would also be expected to:

- Assess the appropriateness of the client’s response and determine if further action is needed in the public interest, taking into account whether a *reasonable and informed third party* would believe that the auditor has acted appropriately.

Further action could include disclosing the matter to appropriate authorities, even if there is no legal obligation to do so and, depending on the situation, withdrawing from the engagement. Withdrawing is not a substitute for taking required actions.

- Document how they fulfilled their responsibilities, including their judgments, actions, and the client’s response.
- Additional requirements apply if the audit is part of a group engagement.

PAPPs engaged in work other than Audits & Reviews

If illegal transactions are identified or suspected by a PAPP providing tax, valuation, or other professional services they would be expected to:

- Seek to obtain an understanding of the matter.
- Discuss the matter with the appropriate level of management or, if they determined that senior management was involved, discuss it with those charged with governance (such as the board of directors).
- Communicate the matter to the auditor, if appropriate. This will depend on consideration of factors such as:
 - Relevant laws and regulations.
 - Whether the audit is being performed by the same firm.
 - Whether the Board has disclosed the matter to the auditor.
- Determine whether further action is needed in the public interest.

Reporting to Authorities

PAs need to understand and comply with legal and regulatory provisions in their jurisdiction, such as requirements to report the matter to authorities, or prohibitions against alerting the organization that action is being taken.

In case of an imminent breach of a law or regulation that would cause substantial harm to investors, creditors, employees, or the general public, the PAPP may decide to immediately disclose the matter to an appropriate authority in order to mitigate the consequences of such a breach.

Where to get Assistance?

The NOCLAR provisions for PAPPs are found in Section **360**.

The [IESBA Support & Resources webpage](#) includes helpful guidance for PAPPs, including a NOCLAR Fact Sheet, IESBA Staff Q&As and videos that explain NOCLAR from a variety of perspectives.

Also, the IESBA website includes a comprehensive [NOCLAR webpage](#).

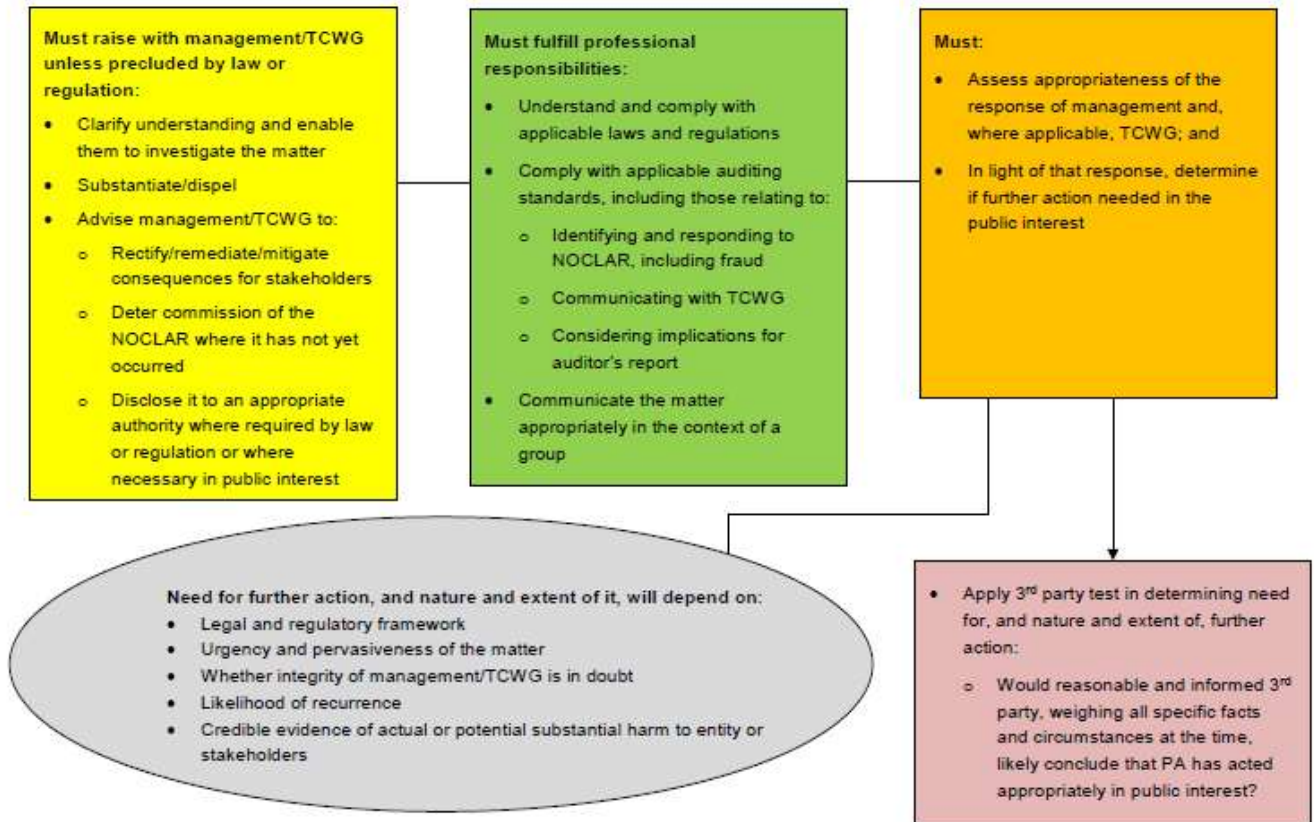
3. NOCLAR RESPONSE FRAMEWORK

In the **basis for conclusion document** issued by the IESBA in July 2016, the following NOCLAR Response Framework is applicable from the Appendix:

These 3 flowcharts are available in the Basis for Conclusions document – which is available as a Source Document

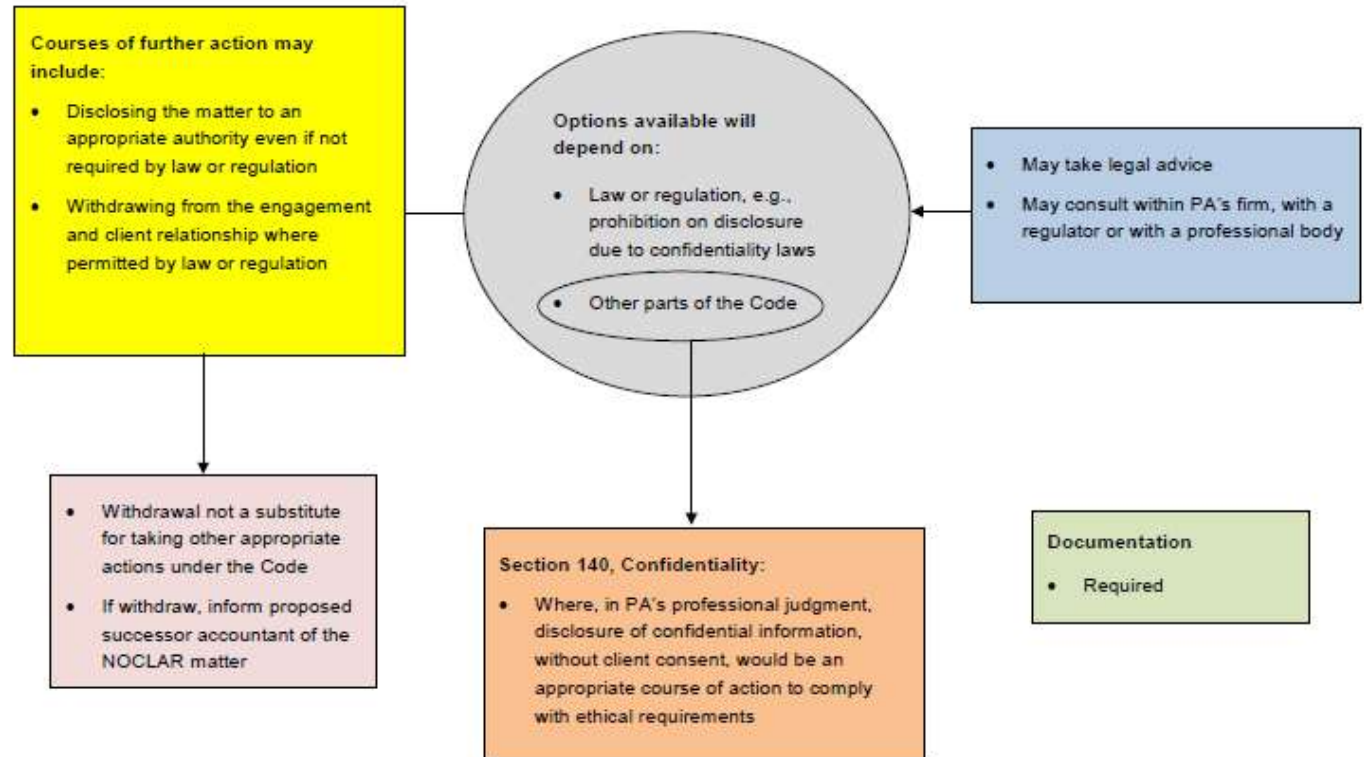
Auditors – Responses when encountering or being made aware of NOCLAR or suspecting NOCLAR

AUDITORS – RESPONSES WHEN ENCOUNTERING OR BEING MADE AWARE OF NOCLAR OR SUSPECTED NOCLAR



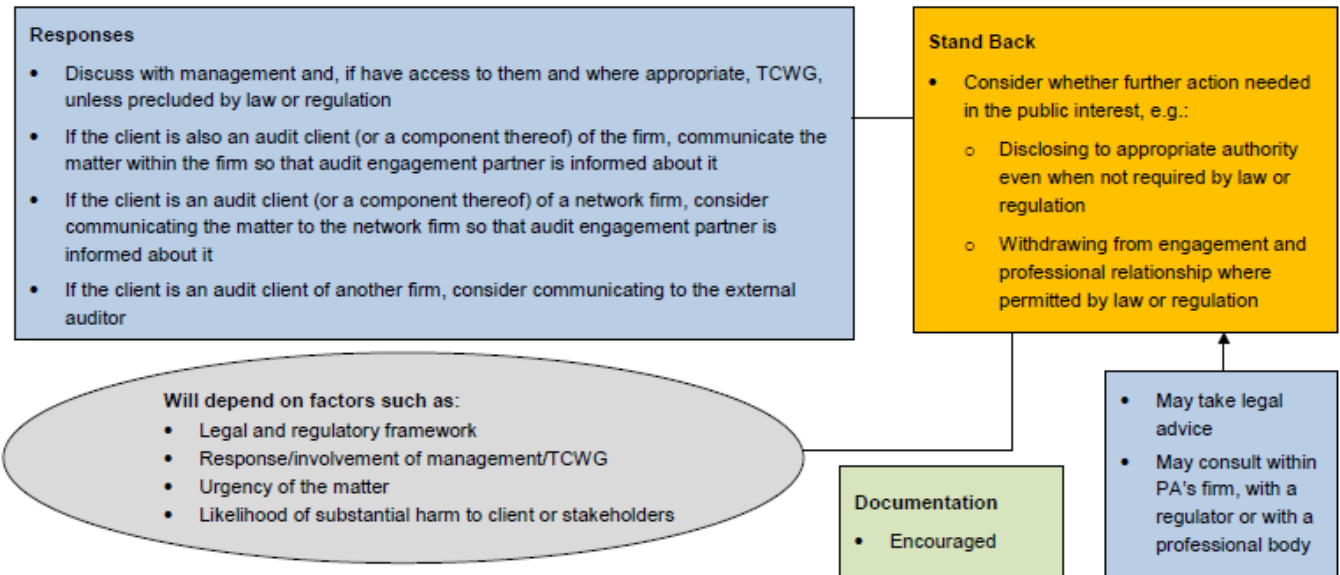
Auditors – Determination of further action needed

AUDITORS – DETERMINATION OF FURTHER ACTION NEEDED

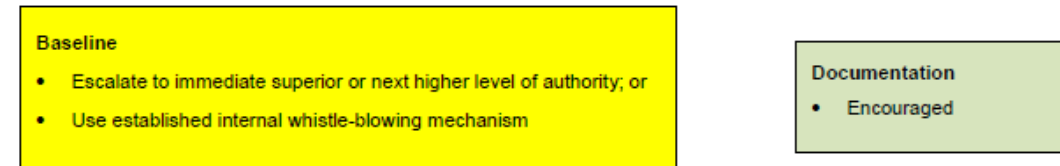


PAAs in Public Practice providing services other than audits

PAAs IN PUBLIC PRACTICE PROVIDING SERVICES OTHER THAN AUDITS



PAIBs OTHER THAN SENIOR PAIBs



MODULE 5: IRBA CASE STUDIES

• 6 IRBA NEWS CASES

1. RI Reporting non-compliance

- A PAYE payment was deferred by a client. The respondent failed to report this matter as a reportable irregularity to the IRBA and also failed to report this matter to those charged with governance of the entity.
- The respondent was sentenced to a fine of R50,000, of which R25,000 has been suspended for three years on condition that the respondent is not found guilty of unprofessional conduct committed during the period of suspension, no costs order and publication by the IRBA in general terms.

➤ *Effectively fined R25 000*

2. ISA non-compliance – procurement

- The respondent in reviewing the audit file failed to detect that the work performed did not appropriately respond to the risk related to procurement in terms of the requirements of International Standards on Auditing.
- In addition, the respondent failed to disclose non-compliance with legislation regarding procurement in the joint audit report of the entity.
- The respondent was sentenced to a fine of R200 000, of which R50 000 has been suspended for three years on condition that the respondent is not found guilty of unprofessional conduct committed during the period of suspension, a cost order of R20 000 and publication by the IRBA in general terms.

➤ *Effectively fined R150 000*

3. Non-compliance with Companies Act, RI reporting and IFRS for SMEs

- The respondent did not identify that advances to a related party entity did not comply with the requirements of the Companies Act and should have been reported as a reportable irregularity to the IRBA.
- In addition, the disclosure on the related party entity in the financial statements was not in terms of IFRS for SMEs.
- Furthermore, the respondent performed both the accounting and audit work for the company in contravention of the Companies Act.
- The respondent was sentenced to a fine of R150 000, of which R75 000 has been suspended for three years on condition that the respondent is not found guilty of unprofessional conduct committed during the period of suspension, no cost order and publication by the IRBA in general terms.

➤ *Effectively fined R75 000*

4. RI and Law Society non-compliance

- The matter arose from a referral by the Inspections Committee.
- The respondent did not document considerations relating to a possible reportable irregularity and noncompliance with the rules of the Law Society regarding the non-payment by the attorney of the interest received on the trust account.

- *The respondent was sentenced to a fine of R80 000, of which R40 000 has been suspended for three years on condition that the respondent is not found guilty of unprofessional conduct committed during the period of suspension, no cost order and publication by the IRBA in general terms.*

➤ *Effectively fined R40 000*

5. Breach of Companies Act

- *The matter was a referral from the Inspections Committee.*
- *A manager of the audit firm prepared the client's annual financial statements while the firm was engaged to perform the audit.*
- *As a result, the respondent breached Section 90(2) of the Companies Act.*
- *The respondent was sentenced to a fine of R80 000, of which R40 000 has been suspended for three years, on condition that the respondent is not found guilty of unprofessional conduct relating to work done during the period of suspension; no cost order; and publication by the IRBA in general terms.*

➤ *Effectively fined R40 000*

6. Breach of Companies Act

- *The matter was a referral from the Inspections Committee.*
- *A consultant of the audit firm prepared the client's annual financial statements while the firm was engaged to perform the audit.*
- *Furthermore, the network firm of the audit firm was appointed as the company secretary of the company for the same period that the respondent was engaged to perform the audit of the annual financial statements of the company.*
- *As a result, the respondent breached Section 90(2) of the Companies Act.*
- *The respondent was sentenced to a fine of R80 000, of which R40 000 has been suspended for three years, on condition that the respondent is not found guilty of unprofessional conduct relating to work done during the period of suspension; no cost order; and publication by the IRBA in general terms.*

➤ *Effectively fined R40 000*

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