

Exposure Draft 05/23: Proposed Technology-related revisions to APES 110 Code of Ethics for Professional Accountants (including Independence Standards)

Review of Submissions - Specific Comments
 Exposure Draft 05/23: Proposed Technology-related revisions to APES 110 Code of Ethics for Professional Accountants (including Independence Standards)

Note: General comments relating to Exposure Draft 05/23 are addressed in a separate table. This table excludes minor editorial changes.

Item No.	Paragraph No. in ED	Respondent	Respondents' Comments	Change made to standard?
1	113.1A1, 113.1 A2, R113.3, 114.1 A1, R114.2, R114.3, 114.3 A3, R114.4, 120.5 A6 - 120.5 A8, 120.13 A3, 200.5 A3, R220.7, 220.7 A1, 300.5 A2, R320.10. 320.10 A1, 520.3 A2, 520.3 A3, 601.5 A2, 920.3 A2, 920.3 A3	CA ANZ	CA ANZ would like to bring two matters to the APESB's attention. First, several changes proposed in the ED ¹ may not be seen as technology-related revisions to the Code. We recommend that the APESB highlight these proposed general changes to the Code in the Basis for Conclusions so that users are made aware that the proposed changes are not exclusively related to Technology.	No. However, the matter will be referred to in the Basis for Conclusions.
2		CA ANZ	¹ Paragraph references - 113.1A1, 113.1 A2, R113.3, 114.1 A1, R114.2, R114.3, 114.3 A3, R114.4, 120.5 A6 -120.5 A8,120.13 A3,200.5 A3, R220.7, 220.7 A1, 300.5 A2, R320.10. 320.10 A1, 520.3 A2, 520.3 A3, 601.5 A2, 920.3 A2 and 920.3 A3,	Refer response to SC1

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3	R114.2(d)	CA ANZ	Secondly, we are concerned that proposed paragraph R114.2(d) when read with reference to the definition of 'Confidential Information' in the glossary is not clear and may be confusing for members as to the intent of proposed paragraph R114.2(d). We have set out our analysis in Appendix 1 .	No
4	R114.2(d), R114.3	CA ANZ	<p>Appendix 1</p> <p>Analysis of proposed paragraphs R114.2(d) and R114.3</p> <p>Relevant paragraphs from the ED</p> <p>Glossary – Confidential Information - “Any information, data or other material in whatever form or medium (including written, electronic, visual or oral) that is not publicly available.” (new proposed definition).</p> <p>R114.2 Subject to paragraph R114.3, a Member shall not:</p> <ul style="list-style-type: none"> a) Disclose Confidential Information acquired in the course of professional and business relationships; b) Use Confidential Information acquired in the course of professional and business relationships for the advantage of the Member, the Firm, the employing organisation or a third party; c) Use or disclose any Confidential Information, either acquired or received in the course of a professional or business relationship, after that relationship has ended; and d) Use or disclose information in respect of which the duty of confidentiality applies notwithstanding that that information has become publicly available, whether properly or improperly. (Part d is a new requirement) <p>R114.3 As an exception to paragraph R114.2, a Member may disclose or use Confidential Information where:</p> <ul style="list-style-type: none"> a) There is a legal or professional duty or right to do so; or b) This is authorised by the client or any person with the authority to permit disclosure or use of the Confidential Information and this is not prohibited by law or regulation. (new requirement) <p>114.3 A1 Confidentiality serves the public interest because it facilitates the free flow of information from the Member’s client or employing organisation to the Member in the knowledge that the information will not be disclosed to a third party. Nevertheless, the following are circumstances where Members might be required or have the duty or right to disclose Confidential Information:</p>	Yes

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			<p>(a) Disclosure is required by law or regulation, for example:</p> <ul style="list-style-type: none"> (i) Production of documents or other provision of evidence in the course of legal proceedings; or (ii) Disclosure to the appropriate public authorities of infringements of the law that come to light; and <p>(b) There is a professional duty or right to disclose or use, when not prohibited by law or regulation:</p> <ul style="list-style-type: none"> (i) To comply with the quality review of a Professional Body; (ii) To respond to an inquiry or investigation by a professional or regulatory body; (iii) To protect the professional interests of a Member in legal proceedings; or (iv) To comply with technical and professional standards, including ethics requirements. (consistent with extant Code) <p>AUST 114.3 A1.1 The circumstances described in paragraph 114.3 A1 do not take into account Australian legal and regulatory requirements. A Member considering disclosing Confidential Information about a client or employer without their consent is advised to first obtain legal advice. (existing application paragraph)</p> <p>114.3 A2 In deciding whether to disclose or use Confidential Information, factors to consider, depending on the circumstances, include:</p> <ul style="list-style-type: none"> • Whether the interests of any parties, including third parties whose interests might be affected, could be harmed if the client or employing organisation authorises the disclosure or use of information by the Member. • Whether all the relevant information is known and substantiated, to the extent practicable. Factors affecting the decision to disclose or use, the information, include: <ul style="list-style-type: none"> ○ Unsubstantiated facts. ○ Incomplete information. ○ Unsubstantiated conclusions. • The proposed means of communicating, the information. • Whether the parties to whom the information is to be provided or access is to be granted are appropriate recipients. • Any applicable law or regulation (including those governing privacy) in a jurisdiction where disclosure might take place and, if different, the jurisdiction where the Confidential Information originates. 	

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			<p>Analysis</p> <p>Our review of the ED has identified that:</p> <ul style="list-style-type: none"> • R114.2(d) does not refer to the defined term Confidential Information as used in points (a) to (c) but refers to “<i>information in respect of which the duty of confidentiality applies</i>”. • The exceptions provided for in R114.3 are only applicable to Confidential Information, therefore R114.3 does not apply to R114.2(d). • Most users of the Code will not differentiate between Confidential Information and “<i>information for which the duty of confidentiality applies</i>”. • IESBA’s Basis for Conclusions on Technology-related revisions to the Code (BoC) provides the following insights. <ul style="list-style-type: none"> ○ R114.2(d) refers to ““<i>information</i>” and not “<i>confidential information</i>,” recognising that once it is publicly available, the information no longer meets the definition of confidential information in the Glossary. Nevertheless, the IESBA reaffirmed that despite such information becoming publicly available, a PA still needs to comply with the principle of confidentiality as the PA has acquired such information in the course of professional and business relationships, unless the conditions for exception set out in new paragraph R114.3 are met.”² ○ “<i>The IESBA reaffirmed that a PA continues to have an obligation to comply with the principle of confidentiality in relation to any information acquired in the course of professional and business relationships.</i>”³ <p>Conclusion</p> <p>With due regard given to the BoC, it appears that the IESBA’s intention is for the exemptions in R114.3 to apply to R114.2, however by using the defined term of ‘Confidential Information’ in R114.3 and explaining in the BoC that R114.2(d) does not refer to ‘Confidential Information’, the intent becomes unclear with respect to when information is confidential and the exemptions that can apply. This will likely lead to our members to apply the Code incorrectly or inconsistently.</p> <p>Our interpretation of R114.2(d) is that if an accountant is in this scenario they should apply the general provisions of the principle of confidentiality, i.e. only disclose information to which the duty of confidentiality applies, if</p>	

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			<p>required by law, regulation or professional duty or with the client's authority. This conclusion is not easily drawn from reading R114.2 and R114.3 of the Code. Should the APESB resolve to retain the drafting as proposed in the ED we strongly recommend that additional application support materials be provided to users of the Code.</p> <p>We will be raising this matter with technical Staff at IESBA as we believe paragraph R114.2(d) and/or R114.3 should be amended to make the IESBA's intent clear to users.</p>	
5		CA ANZ	<p>² Paragraphs 37 and 38 of the IESBA's Basis for Conclusions on Technology-related revisions to the Code.</p> <p>³ Ibid</p>	No
6	R114.2(d), R114.3	CPAA	<p>Confidentiality</p> <p>The Code proposes to include a new definition of confidential information as follows:</p> <p><i>Confidential Information</i> Any information, data or other material in whatever form or medium (including written, electronic, visual or oral) that is not publicly available</p> <p>Proposed R114.2(d) states that where the duty of confidentiality applies to information, the professional accountant must continue to apply this duty, even where the information becomes publicly available.</p> <p>We note that IESBA considered in its Basis for Conclusion that there is a potential conflict between the definition of 'confidential information' and the obligations of R114.2(d), and concluded the duty applies to 'information' and not 'confidential information'. Therefore, when the information becomes publicly available it would no longer meet the new definition of 'confidential information', yet the obligation to comply with duty of confidentiality would still apply to the 'information'.</p> <p>However, the proposed exception in R114.3 only applies to 'confidential information' as per the proposed new definition, meaning the exception would not apply to R114.2(d).</p> <p>We are concerned that as drafted, the proposed new definition of 'confidential information' and its application as proposed R114.2(d) and R114.3 are problematic and should be addressed before being finalised.</p>	Yes

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7	R114.2(d), R114.3	IPA	<p>Subsection 114 – Confidentiality: subparagraph R114.2(d)</p> <p>Subparagraph R114.2(d) proposes that “a Member shall not use or disclose information in respect of which the duty of confidentiality applies notwithstanding that that information has become publicly available, whether properly or improperly”.</p> <p>Although it is difficult to see how this relates to technology-related amendments to APES 110, IPA supports this amendment in the context of information that has become publicly available via improper disclosure. We are unclear as to why an improper disclosure of “information” would not be regarded as a breach of “confidential information”. We find it difficult to understand the logic of the distinction being made regarding “information” and “confidential information”.</p> <p>In the context of information that has been properly disclosed to the public, common law may view that information as public information from the time of its disclosure. It is therefore difficult to understand how an accountant continues to have an ethical obligation to not disclose that information given it is in the public domain.</p> <p>The proposed requirement seems at odds with the obligations relating to “confidential information”. ED05/23 introduces a new definition for “confidential information” being “any information, data or other material in whatever form or medium (including written, electronic, visual or oral) that is not publicly available”. It is unclear why obligations relating to “information” can relate to such information where it is properly disclosed in the public domain, whereas obligations relating to “confidential information” only relate to information not in the public domain.</p> <p>IESBA’s Basic of Conclusions document (paragraphs 37 and 38) adds further confusion. Firstly, there is little distinction between “information” and “confidential information” once it has been publicly disclosed. Secondly, as written, paragraph R114.3 only applies to “confidential information” and not the “information” requirements in subparagraph R114.2(d) which seems at odds with the difference unexplained. We recommend that APESB carefully works through these provisions to assess if their application is fit for purpose and consistent with Australian law. The proposed amendments in subparagraph R114.2(d) appear rushed and not sufficiently considered.</p>	Yes

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8	N/A	CPAA	<p>Proposed Operative Date</p> <p>CPA Australia supports the proposed operative date of on or after 1 January 2025, noting that the professional bodies will require time to engage and support professional accountants understand the new obligations in the Code.</p>	No
9	N/A	IPA	IPA also supports the proposed operative date of 1 January 2025 with early adoption permitted.	No

RESPONDENTS

1	CA ANZ	Chartered Accountants Australia and New Zealand
2	CPAA	CPA Australia Ltd
3	IPA	Institute of Public Accountants