



**WHISTLEBLOWING & CONFIDENTIALITY -
APESB TECHNICAL STAFF PUBLICATION**

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Purpose

This publication was developed by the Technical Staff of the [Accounting Professional & Ethical Standards Board \(APESB\)](#) to assist Members in Public Practice, [Sustainability Assurance Practitioners](#) and Members in Business in effectively applying [APES 110 Code of Ethics for Professional Accountants \(including Independence Standards\)](#) (the Code) when encountering circumstances involving whistleblowing.

In Australia, whistleblower protection is addressed in the [Corporations Act 2001](#) and the [Taxation Administration Act 1953](#) for the private sector, and in the [Public Interest Disclosure Act 2013](#) for the federal public sector, with legislation also in place in each state and territory for the public sector. ~~From 1 July 2019, the private sector whistleblowing legislation was strengthened allowing a broad range of more~~ individuals to be recognised as eligible whistleblowers and ~~providing stronger~~ ~~protections~~ for ~~those eligible whistleblowers in relation to them regarding~~ confidentiality and victimisation.

This Technical Staff publication provides guidance on applying the Code, including the conceptual framework, and other APESB pronouncements, to ~~eight~~ nine scenarios covering a range of different situations relating to whistleblowing. Members ~~and Sustainability Assurance Practitioners~~ are encouraged to consider how the conceptual framework of the Code is applied in the examples and how these concepts could be applied to other scenarios or other services or professional activities the Member ~~or Sustainability Assurance Practitioner~~ may undertake. There are scenarios for ~~both~~ Members in Public Practice ~~(including auditors)~~, [Sustainability Assurance Practitioners](#), and Members in Business.

The scenarios are hypothetical, and any similarities to actual events or circumstances are merely coincidental. The Case Studies are ~~solely~~ intended solely to illustrate the application of the conceptual framework and other APESB pronouncements, ~~to enable~~ Members ~~and Sustainability Assurance Practitioners~~ to identify, evaluate and address threats to compliance with the fundamental principles in the Code created by situations related to whistleblowing and confidentiality. The Case Studies do not provide ~~a guidance on~~ the application of the whistleblower protection legislation. Members ~~and Sustainability Assurance Practitioners~~ are encouraged to seek legal advice to understand their legal obligations and protections in relation to situations involving whistleblowing.

This publication does not amend or override the Code or applicable APESB pronouncements, whose text alone is authoritative. Reading this publication is not a substitute for reading the Code or applicable pronouncements. The implementation guidance is not meant to be exhaustive, and references to the Code and applicable pronouncements should always be made. References to legislation, regulations and standards are to the current versions ~~current~~ at the date of publication of this guide, including as set out in the scope and application sections of relevant standards. This publication does not constitute an authoritative or official pronouncement of APESB.

Introduction

Whistleblower protection legislation in Australia aims to legally protect people who ‘blow the whistle’ about entities that are not complying with relevant laws and regulations (such as tax laws, or finance laws) or about corruption, misconduct or maladministration in the public sector or about significant risks to the environment or to public health and safety.

Prior to the ~~recent~~ changes to legislation in 2018 and 2019 ~~that to strengthen~~ strengthened whistleblower protections in the private sector, whistleblowers could be exposed to significant personal and financial risks. While these laws protect whistleblowers when they disclose certain information to an eligible recipient prescribed ~~by~~under the relevant legislation, the protections ~~only~~ apply only when ~~certain~~ specific criteria are met.

Members and Sustainability Assurance Practitioners are strongly recommended to seek legal advice before utilising whistleblower or public interest disclosure legislation. Members and Sustainability Assurance Practitioners should be aware that there is no obligation to blow the whistle, beyond the disclosure action contemplated under the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* provisions of the Code, which applies in extremely limited circumstances.

There are three key questions Members and Sustainability Assurance Practitioners should consider if the Member or Sustainability Assurance Practitioner wants to use whistleblowing protection:

1. *Are you an eligible whistleblower?*

To be eligible for whistleblower protection, you must be, or have been, in a relationship with the entity you are reporting about. This can include being:

- an employee or former employee;
- a current or former director, company secretary or any other officer of the entity;
- a current or former contractor, employee of a contractor or a volunteer,
- individuals who supply services or goods to the entity (such as a tax or BAS agent or tax (financial) adviser);
- an associate of the entity;
- a trustee, custodian, or investment manager of a superannuation entity; or
- a relative, dependant or spouse of any of the people listed above.

2. *Are you disclosing to an eligible recipient?*

To qualify for protection as a whistleblower, the disclosure must be made to an eligible recipient.

Eligible recipients may include:

- the Commissioner of Taxation (if it assists in the performance of functions and duties under a taxation law);
- the Tax Practitioners Board (if it assists in the performance of functions and duties under the Tax Agent Services Act 2009);
- the Australian Securities & Investments Commission (ASIC);
- the Australian Prudential Regulation Authority (APRA),
- an auditor, or a member of the audit team;
- an actuary; or
- a registered tax agent or BAS agent;

- any other person that is in a position to take appropriate action, such as directors, CFOs or a nominated person within the entity; or
- a medical practitioner or psychologist for the purpose of obtaining medical or psychiatric care, treatment or counselling.

3. Do you understand the protection offered?

If you are an eligible whistleblower, it is illegal for someone to disclose your identity, or information that is likely to lead to your identification.

Whistleblowers are not subject to civil, criminal or administrative liability (including disciplinary action) for making a disclosure and cannot be sued for a breach of a confidentiality clause in a contract.

Application of professional and ethical standards

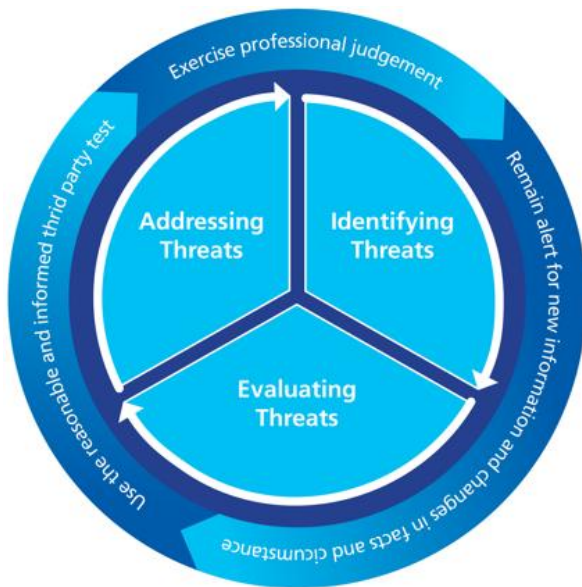
In addition to understanding the protections provided by relevant whistleblowing legislation, Members and Sustainability Assurance Practitioners should understand their own professional and ethical obligations to comply with the Code and other APESB pronouncements.

Members and Sustainability Assurance Practitioners of the Australian professional accounting bodies have a responsibility to act in the public interest. In doing so, Members and Sustainability Assurance Practitioners shall observe and comply with the fundamental principles in Sections 110 and 5110 of the Code:

- Integrity;
- Objectivity;
- Professional Competence and Due Care;
- Confidentiality; and
- Professional Behaviour.

The Conceptual Framework

The Code contains a conceptual framework that specifies a systematic approach for a Member or Sustainability Assurance Practitioner to identify threats to compliance with the fundamental principles, evaluate the threats identified and address any threats by eliminating or reducing them to an acceptable level (paras 120.2 and 5120.2). If the identified threat cannot be eliminated and if safeguards are not available to reduce the threat to an acceptable level, a Member or Sustainability Assurance Practitioner is required to decline or end the professional activity or engagement.



When applying the conceptual framework (para R120.5 and R5120.5), the Member or Sustainability Assurance Practitioner must:

- a) Have an inquiring mind;
- ~~a) b)~~ Exercise professional judgement; and
- ~~b)~~ Remain alert for new information and to changes in facts and circumstances; and
- c) Use the reasonable and informed third party test (described in paras 120.5 A94 and 5120.5 A9).

Step 1 – Identifying Threats

The first step in applying the conceptual framework is to identify facts and circumstances, including professional activities, interests and relationships that might compromise compliance with the fundamental principles (paras R120.6 to 120.6 A4 and R5120.6 to 5120.6 A4). The Code contains examples of different circumstances and relationships that can create threats, which are categorised as follows:

Threat category	Brief description	Code para
<i>Self-interest threat</i>	The threat that a financial or other interest will inappropriately influence a Member's or Sustainability Assurance Practitioner's judgement or behaviour	120.6 A3(a), 5120.6 A3(a)

Threat category	Brief description	Code para
<i>Self-review threat</i>	The threat that a Member <u>or Sustainability Assurance Practitioner</u> will not appropriately evaluate the results of a previous judgement made, or an activity performed by the Member <u>or Sustainability Assurance Practitioner</u> , or by another individual within the Member's <u>or Sustainability Assurance Practitioner's</u> firm or employing organisation, on which the Member <u>or Sustainability Assurance Practitioner</u> will rely when forming a judgement as part of performing a current activity	120.6 A3(b) ₁ 5120.6 A3(b)
<i>Advocacy threat</i>	The threat that a Member <u>or Sustainability Assurance Practitioner</u> will promote a client's or employing organisation's position to the point that the Member's <u>or Sustainability Assurance Practitioner's</u> objectivity is compromised	120.6 A3(c) ₁ 5120.6 A3(c)
<i>Familiarity threat</i>	The threat that due to a long or close relationship with a client, or employing organisation, a Member <u>or Sustainability Assurance Practitioner</u> will be too sympathetic to their interests or too accepting of their work	120.6 A3(d) ₁ 5120.6 A3(d)
<i>Intimidation threat</i>	The threat that a Member <u>or Sustainability Assurance Practitioner</u> will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the Member <u>or Sustainability Assurance Practitioner</u>	120.6 A3(e) ₁ 5120.6 A3(e)

[A circumstance might create more than one threat, and a threat might affect compliance with more than one fundamental principle \(paras 120.6 A4 and 5120.6 A4\).](#)

Step 2 – Evaluating Threats

The second step is to evaluate whether identified threats to compliance with the fundamental principles are at an acceptable level (paras R120.7 to 120.9 A2, [and R5120.7 to 5120.9 A2](#)).

What is an acceptable level?

A level at which a Member or Sustainability Assurance Practitioner using the reasonable and informed third party test would likely conclude that the Member or Sustainability Assurance Practitioner complies with the fundamental principles (paras [120.7 A1 and 5120.7 A1](#)).

The Reasonable and Informed Third Party Test

This test is a consideration by the Member or Sustainability Assurance Practitioner about whether the same conclusions would likely be reached by another party. Such consideration is made from the perspective of a reasonable and informed third party, who weighs all the relevant facts and circumstances that the Member or Sustainability Assurance Practitioner knows, or could reasonably be expected to know, at the time the conclusions are made.

The reasonable and informed third party does not need to be a Member or Sustainability Assurance Practitioner but would possess the relevant knowledge and experience to understand and evaluate the appropriateness of the Member's or Sustainability Assurance Practitioner's conclusions in an impartial manner (paras [120.5 A94 and 5120.5 A9](#)).

Examples of reasonable and informed third parties may include regulators, board members, senior Members in business or public practice or investors.

Factors Relevant in Evaluating Threats

The consideration of qualitative and quantitative factors is relevant to the Member's or Sustainability Assurance Practitioner's evaluation of threats, as is the combined effect of multiple threats, if applicable (paras 120.8 A1 and 5120.8 A1). For example, if multiple threats are identified to auditor independence they are evaluated in aggregate, even if the threats are individually insignificant (paras AUST R400.192.1, ~~and~~ AUST R900.135.1 and AUST R5400.19.1).

The Code sets out examples of factors that are relevant to evaluating threats across most of its sections. Other examples of factors relevant to the client and its operating environment that may impact on the evaluation of the level of a threat can be found in the Code (paras 300.7 A3, ~~and~~ 300.7 A4, 300.7 A4a, 5300.7 A3, 5300.7 A4 and 5300.7 A4a).

Step 3 – Addressing Threats

If threats are evaluated as not being at an acceptable level, the final step in the conceptual framework is to address the threats by eliminating or reducing them to an acceptable level by (paras R120.10 and R5120.10):

- a) Eliminating the circumstances, including interests or relationships, that are creating the threats;
- b) Applying safeguards, where available and capable of being applied, to reduce the threats to an acceptable level; or
- c) Declining or ending the specific professional activity (engagement).

Depending on the facts and circumstances, a threat might be addressed by eliminating the circumstances creating the threat. However, in some situations declining or ending the engagement may be the only way to address the threat, as the circumstances creating the threat cannot be eliminated and safeguards are not capable of being applied to reduce the threat to an acceptable level (paras 120.10 A1 and 5120.10 A1).

The Code defines safeguards as actions, individually or in combination, that the Member or Sustainability Assurance Practitioner takes that effectively reduce threats to compliance with the fundamental principles to an acceptable level (paras 120.10 A2 and 5120.10 A2).

The Member or Sustainability Assurance Practitioner must conclude whether overall the actions they have taken eliminate or reduce the threats to an acceptable level, including reviewing significant judgements made or conclusions reached and using the reasonable and informed third party test (paras R120.11 and R5120.11).

The case studies in this publication follow the systematic approach of the conceptual framework in the Code to assist Members and Sustainability Assurance Practitioners to navigate ~~through~~ the relevant provisions of the Code and other APESB pronouncements when faced with situations involving whistleblowing and confidentiality.

CASE STUDY 1

Substantial underpayment of wages

Issues: Whistleblowing/NOCLAR

Case Outline: A Chief Financial Officer (CFO) of a large proprietary company recently discovered that the company has been substantially underpaying wages over many years, which affects over 150 employees. The underpayment is occurring due to staff being placed on annualised salary contracts that do not adequately cover all ~~the~~ entitlements and allowances ~~that should be paid~~ owed to the employees under the relevant industry award issued by the Fair Work Commission.

The company's financial statements would be significantly impacted due to this error, with the CFO estimating the company would have made a large loss in last year's financial statements, instead of the profitable position ~~which~~that was reported to the Board and the shareholders. The CFO is not able to correct the underpayment without the Chief Executive Officer's (CEO's) or the Board's approval, as the CFO does not have the required delegated authority to process transactions of that dollar amount.

The CFO reported the underpayment to the CEO and the Chairman of the Board and suggested that the company seek legal advice about the impact of not complying with the [Fair Work Act 2009](#)¹ or the industry award and how to remedy the underpayments. Both the CEO and the Chairman expressed concern about the matter, but they have not spoken to the CFO about the issue since and it appears they have not taken any action to address the underpayments.

The CFO is concerned about the CEO and the Chairman's inaction and is assessing the options to disclose this matter to other parties. The CFO reviews the company's whistleblower policy (~~which came into force on 1 January 2020~~) and notes that matters can be disclosed to the Chairman of the Board, the external auditor, ASIC or the ATO. The CFO sends copies of notes and supporting documents to a personal email address, in case supporting information is needed when making a disclosure under the company's whistleblower policy.

After considering all options, the CFO decided to approach the Chairman about this matter again to determine if any action would be taken to rectify the underpayments. When the CFO raised the matter again with the Chairman, the Chairman alleged that the CFO had breached the confidentiality and privacy terms of their employment contract, as work files relating to the underpayment of wages were sent to a personal email address. The Chairman strongly suggested that the CFO should resign.

The CFO is unsure whether there is a legal or professional duty to disclose this matter further or if the CFO would be protected under any applicable whistleblower protection legislation or regulations.



Identifying Threats

Self-interest

There are two self-interest threats created in this scenario. The first relates to the threat caused by the CFO's fear of losing their job. The second is the impact on the CFO's reputation, as the underpayment implies that the CFO is not competent atin their role. These self-interest threats could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

¹ [The intentional underpayment of wages is a criminal offence under section 327A of the Fair Work Act.](#)

Intimidation

There is a threat that the CFO will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Chairman not to disclose the underpayment of wages. These pressures include the potential loss of a job or legal action due to alleged breaches of the CFO's employment contract (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The CFO must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the work environment of the business (paras 200.7 A1 to 200.7 A54), for example:
 - Leadership that stresses the importance of ethical behaviour and the expectation that employees will act ethically (also refer to para 270.3 A3).
 - Policies and procedures to empower and encourage employees to communicate ethics issues that concern them to senior management levels without fear of retribution (also refer to para 270.3 A3 and human resources policies that address pressure). A range of entities, including large proprietary companies, From 1 January 2020, there is are required ment under legislation for a range of entities, including large proprietary companies, to have a whistleblower policy. The policies are required by legislation to protect whistleblowers who meet the necessary criteria.
- The nature of the relationship between the CFO and the CEO and Chairman.
- Whether the company will acknowledge and address the underpayment or whether the company will continue paying employees below the legislated rates.
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there is a breach of professional standards.

As the historical underpayment is not inconsequential (para 260.7 A2) and laws and regulations have been breached, the CFO should follow the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (Section 260).

Therefore, as part of evaluating the threats to compliance with the fundamental principles, the CFO needs to obtain an understanding of the matter (para R260.12), which includes:

- The nature of the NOCLAR and the circumstances in which it occurred;
- The application of the relevant laws and regulations to the circumstances; and
- An assessment of the potential consequences to the employing organisation, investors, creditors, employees or the wider public. This includes the significance of the underpayment amount on the financial statements and whether the business has the financial capacity to correct the historical underpayments or to meet employment conditions at the appropriate level going forward.

While the company should have a whistleblowing policy in place and the CFO might meet the disclosure criteria, the Chairman and CEO do not appear to be adhering to the policy. The level of threats would be heightened in this situation as both the Chairman and the CEO are aware of illegal and unethical behaviour and appear to be pressuring the CFO to not act on the issue.

Discussing the circumstances creating the pressure to breach the fundamental principles with colleagues, those charged with governance or the CFO's professional body (para 270.3 A4) or seeking legal advice if they believe that unethical actions have occurred or if it is likely the unethical actions will continue to occur (para 200.7 A4⁵) are also important considerations to assist in evaluating the level of threats.

Based on an assessment of the factors, including the fact that laws and regulations have been breached, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The CFO must not knowingly be associated with reports, returns, communications or other information where the CFO believes that the information contains a materially false or misleading statement (para R111.2). Therefore, as the CFO is aware that the company's previous reports on financial performance ~~were~~ based on ~~the~~ underpayments and ~~misstate~~ misstatements of employee obligations and entitlements, the CFO must take appropriate actions ~~to seek~~ to resolve the matter (para R220.9⁸). The CFO has raised this matter with the CEO and Chairman. However, as it appears the CEO and Chairman are not going to take appropriate action to address the matter, the CFO will not be able to eliminate the circumstances creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

The CFO, as a senior Member in Business, is required to take action to address NOCLAR. This may mean reporting ~~on~~ the matter in line with the entity's whistleblower policy (or similar policies) ~~of the entity~~ (para R260.9) or communicating the matter to the CFO's immediate superior or to those charged with governance (paras R260.13 and R260.14). In addition, the CFO should determine whether disclosure to the external auditor (if any) is needed (para R260.15). The CFO has raised this matter with both the CEO and the Chairman, but has been unable to obtain their agreement that they will take appropriate action to deal with the underpayment. The CFO could follow the reporting mechanism in the company's whistleblower policy and determine if disclosures should be made to parties other than the Chairman and the CEO.

As the CEO and Chairman have not taken further action, the CFO needs to exercise professional judgement to determine ~~if they need to undertake further action~~ whether further action is required in the public interest (para R260.18). In making this determination, the CFO should consider whether a reasonable and informed person would think the CFO acted in the public interest, as well as taking into consideration the following factors (para 260.17 A1):

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the employing organisation.
- Whether the CFO has confidence in the integrity of the CEO and those charged with governance.
- Whether the NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the company, investors, creditors, employees or the general public.

In this scenario, the CFO is unlikely to have any confidence in the integrity of the CEO and Chairman. It would also be likely that the company would continue with the underpayments, as it appears that they are trying to ~~stop~~prevent the CFO from acting or disclosing the matter outside the company.

The CFO should consider whether to make a disclosure to an appropriate authority even if there is no legal or regulatory requirement to do so. Such a disclosure would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(da\)](#)). However, before making the disclosure, the CFO should consider consulting with their professional body. The CFO should also seek out legal advice, especially as this disclosure relates to employment laws and regulations ~~set out in~~under the [Fair Work Act 2009](#) and associated regulations, which may not be covered by whistleblower protections set out in the [Corporations Act 2001](#).

In determining whether to make disclosure to an appropriate authority under the NOCLAR framework, the CFO should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to the company, investors, creditors, employees or the general public (para 260.20 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken (para 260.20 A3).
- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation (para 260.20 A3).
- Whether there are actual or potential threats to the physical safety of the CFO or other individuals (para 260.20 A3).

As the assessment of the NOCLAR matter is complex, the CFO should consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 260.19 A1).

In making a disclosure under NOCLAR, the CFO shall act in good faith and exercise caution when making statements or assertions (para R260.21).

The CFO must also not allow pressure from the Chairman to result in a breach of compliance with the fundamental principles (para R270.3(a)). However, if the Chairman does exert pressure on the CFO, the CFO could take the following actions to ensure they do not breach the Code:

- The CFO could escalate the matter to those charged with governance and/or the chair of the audit committee (if any).
- Document the processes they have followed to address the threats.

Even if the CFO does not yield to pressure from the Chairman to act unethically, the threats might still not be at an acceptable level, especially ~~as there are given~~ multiple threats to the fundamental principles in this scenario, and ~~there is~~ evidence of non-compliance with laws and regulations. An action that might be a safeguard would be to discuss the matter with the Board of Directors of the entity; however, the CFO needs to ~~apply~~exercise professional judgment to determine ~~if~~whether this will reduce the identified threats to an acceptable level.

Decline or End Professional Activity

If the CFO cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the CFO may need to resign from their position (para R120.10(c)). The CFO will also need to consider applicable legislative reporting obligations and the NOCLAR obligations (which may not be satisfied by the CFO resigning, as he is a Senior Member in Business).

CASE STUDY 2

Inappropriate accounting treatment for revenue

Issues: Whistleblowing/Preparation and presentation of information

Case Outline: The Finance Officer at a small manufacturing proprietary company has noticed that unsubstantiated entries are being made to boost revenue in the current financial period, which are to be reversed in the next period. The increase in revenue does not appear to have a material effect on the financial statements in the current financial period. However, the higher revenue levels mean the revenue target is exceeded, and bonuses will be paid to senior staff.

The Finance Officer has reported this matter to the Finance Manager (the Finance Officer's superior). The Finance Officer has a good relationship with the Finance Manager, ~~with the Finance Manager being a mentor~~ who mentors the Finance Officer to enable the Finance Officer to gain full membership of a professional body. The Finance Manager is the most senior person in the finance area and would be eligible for the bonus payment.

In reviewing the latest draft of the management reports, the Finance Officer realises no changes have been made to the revenue being reported for the current financial period. The Finance Officer is unsure if the Finance Manager has taken any action to review and correct the accounting treatment, or even if the matter has been reported to the Managing Director.

The Finance Officer is not sure whether there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

A self-interest threat is created due to the Finance Officer's fear of losing their job or the loss of support from the Finance Manager, which will inappropriately influence the Finance Officer's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

Familiarity

There is a threat that, due to the mentoring relationship between the Finance Manager and the Finance Officer, the Finance Officer will be ~~overly~~ accepting of the approach undertaken by the Finance Manager. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(d)).

Intimidation

There is a threat that the Finance Officer will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Finance Manager not to disclose the inappropriate accounting treatment being used for revenue. The Finance Manager will receive a financial benefit if the current accounting treatment is maintained, which may be perceived as an intimidation threat with the intent to pressure the Finance Officer not to take any further action (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Finance Officer must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the work environment of the business (paras 200.7 A1 to 200.7 A54), for example:
 - Leadership that stresses the importance of ethical behaviour and the expectation that employees will act ethically (also refer to para 270.3 A3).
 - Policies and procedures to empower and encourage employees to communicate ethics issues that concern them to senior management levels without fear of retribution (also refer to para 270.3 A3 and human resources policies that address pressure).
- The nature of the relationship between the Finance Officer and the Finance Manager, and with the Managing Director (qualitative factor).
- The intent of the Finance Manager ~~in not changing~~ **is not to change** the accounting treatment for revenue, including the extent to which the inappropriate accounting treatment impacts the Finance Manager's compensation.
- Whether there is a breach of applicable laws and regulations, and, if so, the significance of the breach.
- Whether there is a breach of professional standards.

Based on the facts in this scenario, the accounting treatment may not be a breach of laws and regulations and it does not materially impact the financial statements. Accordingly, the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 260) may not be applicable.

As this is a small proprietary company, it is not required to have a whistleblower policy in line with whistleblower protection legislation. However, there may still be policies the Finance Officer should follow. Discussing the circumstances creating the pressure to breach the fundamental principles with the Finance Manager, the Managing Director, those charged with governance or the Finance Officer's professional body may also be of assistance in evaluating the level of threats (para 270.3 A4).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The Finance Officer must not knowingly be associated with reports, returns, communications or other information where the Finance Officer believes that the information contains a materially false or misleading statement (para R111.2). Therefore, the Finance Officer must not be associated with the incorrect accounting treatment for revenue and should take appropriate actions ~~to seek~~ to resolve the matter (para R220.98). The Finance Officer could follow up with the Finance Manager to clarify whether there are valid reasons for the Finance Manager's position to allow the accounting treatment to be applied. However, as the Finance Officer is not responsible for setting the accounting treatment to be followed or the bonus targets, the Finance Officer will not be able to eliminate the circumstances creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

If the Finance Manager does not provide the Finance Officer with any valid reasons for the continued use of the accounting treatment, the Finance Officer could raise this matter with the Managing Director or other directors on the Board. If applicable, the Finance Officer could also consider whether it would be appropriate to consult with the external auditor about the accounting treatment (para 220.98 A2).

If the company has a whistleblower policy, the Finance Officer could use it to determine if there is an appropriate reporting mechanism. The policy may allow disclosures to be made to individuals within the company or other individuals or organisations, such as the external auditor (if applicable) or a regulator.

The Finance Officer must not allow pressure from the Finance Manager to result in a breach of compliance with the fundamental principles (para R270.3(a)). Further, as the Finance Manager is subject to the Code, they must not place pressure on the Finance Officer that they know, or have reason to believe, would result in the Finance Officer breaching the fundamental principles (para R270.3(b)).

However, if the Finance Manager does exert pressure on the Finance Officer, the Finance Officer could take the following actions to ensure they do not breach the Code:

- The Finance Officer could escalate the matter ~~to~~with the Managing Director and/or those charged with governance.
- Document the processes they have followed to address the threats.

Even if the Finance Officer does not yield to pressure from the Finance Manager to act unethically, the threats might still not be at an acceptable level, especially ~~given as there are~~ multiple threats to the fundamental principles in this scenario. An action that might be a safeguard would be to discuss the matter with the Managing Director or the Board of Directors of the entity; however, the Finance Officer needs to apply professional judgment to determine if this will reduce the identified threats to an acceptable level.

Decline or End Professional Activity

If the Finance Officer cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Finance Officer may need to decline future requests to record ~~the~~ revenue transactions or resign from their position (para R120.10(c)).

CASE STUDY 3

Misleading or false information used in taxation returns

Issues: Misleading or false information/Whistleblowing

Case Outline: A tax agent who is a partner at a small accounting firm has prepared the tax returns for the same client for the last three years. While preparing the current year's tax return, the tax partner has become aware that the client is making false statements ~~regarding with respect to~~ the nature of various items of expenditure.

The tax partner explains to the client that this treatment is not allowable under the tax legislation and that the prior years' tax returns would need to be amended, as there may be tax consequences (e.g., penalties) if the treatment is discovered by the Australian Taxation Office. The tax partner explains that the current year's tax return cannot be prepared using the previous treatment. The client requests ~~that~~ the tax partner ~~to~~ stop working on the client's tax return as the client will engage another accountant to complete this year's tax return and any future tax work.

The tax partner is not sure whether there is a need to contact the new accountant about the issue and whether there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

There is a self-interest threat created through the discovery of past errors in the tax returns and the impact on the tax partner's reputation, which could inappropriately influence the tax partner's judgement and behaviour. This threat could impact compliance with the fundamental principles of integrity, objectivity, confidentiality, professional competence and due care, and professional behaviour (para 120.6 A3(a)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The tax partner must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment (paras 300.7 A3 to 300.7 A4a list several factors that may be relevant).
- Conditions, policies and procedures relating to the firm and its operating environment (paras 300.7 A2, ~~and~~ 300.7 A5 and 300.7 A6).
- The length and closeness of the relationship between the tax partner and the client (qualitative factor).

- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there has been a breach of professional standards.

As it appears that the tax legislation has been breached, but it is not clear if the matter is inconsequential (para 360.7 A2), the tax partner should follow the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 360).

Therefore, as part of evaluating the threats to compliance with the fundamental principles, the tax partner needs to obtain an understanding of the matter (para R360.29), ~~which includes the nature of the~~ including the nature of the NOCLAR and the circumstances in which it occurred.

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The tax partner must not knowingly be associated with reports, returns, communications or other information where the tax partner believes that the information contains a materially false or misleading statement (para R111.2). [APES 220 Taxation Services \(APES 220\)](#) sets out requirements and guidance for Members on how this provision applies when providing taxation services to a client or employer.

In this scenario, the tax partner has now become aware that previous tax returns lodged for the client by the firm were incorrect. The tax partner has taken action and raised these concerns with the client ~~regarding about the~~ false information in the prior years' tax returns (APES 220 para 7.3) and that this false information cannot be used in the current year's tax return (APES 220 para 7.1). The client has then discontinued the professional relationship.

While the client has ended the firm's professional relationship, there are still threats that the tax partner needs to address, such as the self-interest threat relating to reputation. The tax partner may not be able to eliminate the circumstances that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

If the tax partner has determined that the NOCLAR provisions apply (as the matter is more than inconsequential), the tax partner is required to raise this matter with management or those charged with governance, if any (as per paragraph R360.30). The tax partner has raised this matter with the client, who appears ~~to not to~~ be going to take further action. The tax partner should apply professional judgement to determine if further action would be considered necessary in the public interest (para R360.36). In making this determination, the Member should consider the following factors:

- The legal and regulatory framework.
- The appropriateness and timeliness of the response by the client.
- The urgency of the situation.
- The involvement of management or those charged with governance, if any.
- The likelihood of substantial harm to the interests of the client, the general public or, if any, investors, creditors, or employees (para 360.36 A1).

The tax partner should consider whether to make a disclosure to an appropriate authority, even if there is no legal or regulatory requirement to do so. If the tax partner believes this is a NOCLAR matter, it would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(ae\)](#)).

In determining whether to make a disclosure to an appropriate authority under the NOCLAR framework, the Member should consider (para 360.36 A3):

- Whether doing so would be contrary to law or regulation.
- Whether there are restrictions about disclosures imposed by a regulatory agency or prosecutor in an ongoing investigation into the NOCLAR.

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 360.39 A1).

In making a disclosure under NOCLAR, the Member shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter (para R360.37).

If this was not considered to be a NOCLAR matter and there is no specific legal requirement for the tax partner to disclose this information to the Australian Taxation Office, the tax partner can make a choice whether or not to provide information to the Australian Taxation Office, if the circumstances meet the criteria established in the whistleblower protection legislation. The tax partner has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para [AUST R114.43\(ad\)](#)).

However, the tax partner should consider if they need to notify the ex-client that they have made a disclosure to the Australian Taxation Office (APES 220 para 3.12). If the tax partner is considering making this disclosure, they should consider consulting with their professional body and/or obtaining legal advice.

In addition, the tax partner should consider their professional obligations ~~in relation to being~~ a registered tax agent or BAS agent. ~~The tax partner will need to consider if the provision of their service on the prior year tax returns would be considered a breach of the TPB Code of Professional Conduct (the TPB Code). If it is considered to be a breach of the Code that occurred on or after 1 July 2024, and the breach would be considered significant, the tax partner may need to self-report the breach to the TPB.~~²

The tax partner ~~may also consider should seeking out~~ legal advice if they are considering disclosing ~~at the~~ matter to the Tax Practitioners Board (TPB), ~~especially as a disclosure made to the TPB is not covered by whistleblower protections set out in the Corporations Act 2001 or the Taxation Administration Act 1953.~~³ However, a disclosure to the Australian Taxation Office ~~as the tax partner~~ may be covered by ~~legislated the~~ whistleblower protections if the tax partner meets the relevant criteria in the whistleblower protection legislation ~~and the disclosure is made on or after 1 July 2024.~~⁴

The tax partner cannot disclose the inclusion of false information to the proposed new accountant without the ex-client's permission to do so (APES 220 para 3.9). If the proposed new accountant requests information about whether or not they should accept the new engagement, the tax partner needs to comply with relevant laws and regulations governing the request and provide any information honestly and unambiguously (para R320.7). However, the tax partner must comply with the fundamental principle of confidentiality (para 320.7 A1) and will therefore need permission from the ex-client to do so.

The tax partner needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

² Refer to the TPB website (www.tpb.gov.au) for further guidance on breach reporting.

³ ~~The TPB can receive information from the ATO if the eligible whistleblower consents but the TPB cannot receive the disclosure directly from the whistleblower without impacting the protections available to the whistleblower. Refer to the TPB website (www.tpb.gov.au) for further guidance on whistleblowing, including a guidance sheet, TPB Questions and Answers and TPB Information Sheet 21/2104 Code of Professional Conduct – Confidentiality of client information and TPB Information Sheet 32/2017 Code of Professional Conduct – Confidentiality of client information for tax (financial) advisers.~~

⁴ Refer to the TPB website (www.tpb.gov.au) for further guidance on whistleblowing including a guidance sheet and TPB Information Sheet 21/2104 Code of Professional Conduct – Confidentiality of client information.

Decline or End Engagement

The engagement with the client has already ended (para R120.10(c)). The tax partner needs to apply professional judgement to assess if further action is required if approached by the proposed new accountant or through disclosure to the Australian Taxation Office [or the Tax Practitioners Board](#).

CASE STUDY 4

Potential misappropriation of funds at a charity

Issues: Misappropriation of funds/Whistleblowing

Case Outline: A Member in Public Practice, who is a registered Tax Agent, has an ongoing engagement to prepare the quarterly Business Activity Statement (BAS) for a large charity with annual revenues in excess of \$2 million, which is regulated by the Australian Charities and Not-for-Profits Commission (ACNC).

In the most recent BAS return, the Member noticed several expenses being claimed for large quantities of building materials and a luxury retreat/holiday, which differed from the charity's regular transactions. The Member is not aware of any current building projects being undertaken by the charity and the payment for the luxury retreat/holiday does not seem appropriate as a business expense. The Member raised this with the charity's Finance Manager ~~at the charity~~ and requested further information on the transactions. The Finance Manager provided the Member with supporting documentation and reinforced that the expenses should be recorded in the BAS.

The Member reviewed the additional information provided and determined that all ~~the~~ payments relating to the new expenses were made directly to the Chairman of the Board. The Member is now of the view that the Chairman may have been misappropriating funds.

The Member is not sure if there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

There is a threat that due to the Member's fear of losing this client, such a threat will inappropriately influence the Member's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

Familiarity

There might be a threat that due to the long or close relationship with the client, the Member will be too accepting of the information provided by the client. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(d)).

Intimidation

There is a threat that the Member will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Finance Manager to include the items in the BAS as business expenses and the potential loss of a client. The Finance Manager may be subject to pressure by the Chairman to ensure the expenses are treated as legitimate business expenses (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Member must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment (paras 300.7 A3 to 300.7 A4a list several factors that may be relevant). ~~From 1 January 2020, there is a requirement under legislation for Aa~~ range of entities, including large charities that are public companies limited by guarantee with an annual (consolidated) revenue of \$1 million or greater, are required by legislation to have a whistleblower policy ~~which. The policies are required by legislation to provide that provides~~ protection to whistleblowers who meet the necessary criteria.
- Conditions, policies and procedures relating to the firm and its operating environment (paras 300.7 A2, ~~and~~ 300.7 A5 and 300.7 A6). The Member's firm may have policies in relation to dealing with ethical issues with clients.
- The length and closeness of the relationships between the Member and the client, including the Finance Manager and the Chairman (qualitative factor).
- The intent of the Finance Manager in allowing the items to be treated as legitimate business expenses.
- The nature of the organisation.
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there is a breach of professional standards.

Based on the facts in this scenario, it is likely that the inappropriate expenses would be a breach of laws and regulations and that the matter may not be inconsequential. Therefore, the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 360) should be considered by the Member. This would mean the Member needs to obtain an understanding of the matter, including the nature of the NOCLAR and the circumstances in which it occurred (para R360.29).

The level of threats would be heightened in this situation as the client is a charity that invokes higher levels of public interest. As a supplier to the large charity, the Member should consider the disclosure mechanism in the client's whistleblower policy. Discussing the circumstances that relate to NOCLAR with those charged with governance or the Member's professional body on a confidential basis may also be of assistance in evaluating the level of threats (paras 360.29 A1 to R360.30).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The Member must not knowingly be associated with reports, returns, communications or other information where the Member believes that the information contains a materially false or misleading statement (para R111.2). [APES 220 Taxation Services \(APES 220\)](#) sets out requirements and guidance for Members on how this provision applies when providing taxation services to a client or employer.

In this scenario, the Member believes the expenses are not legitimate business expenses. The Member shall not provide the taxation service if the service is based on false or misleading information (APES 220 para 7.1). The Member is required to discuss the matter with the client (which could be the Finance Manager, Chairman or other members of the Board) and advise them of the consequences if no action is taken (APES 220 para 7.3). If the client does not take action to address the matter, the Member should consider the firm's policies around client acceptance and continuance (APES 220 para 7.6). However, the Member may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

The Member could consider the large charity's whistleblower policy to determine if the Member could follow an appropriate reporting mechanism to report on the inappropriate business expenses and the potential misappropriation of funds. The policy may allow disclosures to be made to individuals within the charity or to other individuals or organisations, such as the external auditor or a regulator.

If the Member has determined that the NOCLAR provisions apply, the Member is required to raise this matter with the appropriate level of management and those charged with governance (as per paragraph R360.30). If the Member notifies the organisation and no further action is being taken, the Member should apply professional judgement to determine whether further action by the Member would be considered necessary in the public interest (para R360.36). In making this determination, the Member should take into consideration the following factors (para 360.36 A1):

- The legal and regulatory framework.
- The appropriateness and timeliness of the response of management and those charged with governance.
- The urgency of the situation.
- The pervasiveness of the matter throughout the client.
- The involvement of management or those charged with governance in the matter.
- Whether the Member has confidence in the integrity of the Finance Manager, the Chairman and those charged with governance.
- Whether the NOCLAR or suspected NOCLAR is likely to recur.
- Whether it is likely that there will be substantial harm to the interests of the charity, donors, donor recipients/beneficiaries, creditors, employees or the general public.

If no action is taken by the charity to address the concerns of the Member, the Member should consider whether to make a disclosure to an appropriate authority, even if there is no legal or regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(ad\)](#)).

In determining whether to make a disclosure to an appropriate authority under the NOCLAR framework, the Member should consider (para 360.36 A3):

- Whether doing so would be contrary to law or regulation.
- Whether there are restrictions about disclosures imposed by a regulatory agency or prosecutor in an ongoing investigation into the NOCLAR.

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 360.39 A1).

In making a disclosure under NOCLAR, the Member shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter (para R360.37).

If this was not a NOCLAR matter, the Member has a choice whether or not to provide the information to the Australian Taxation Office [or the Tax Practitioners Board](#) if the circumstances meet the criteria for disclosure established in the whistleblower protection legislation. The Member has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para [AUST R114.31\(ad\)](#)).

However, when a Member is making a disclosure to a third party (whether due to NOCLAR or as a choice under the whistleblower protection legislation), the Member needs to consider whether they need to advise the client of this disclosure. Therefore, before making such a disclosure, the Member should consider consulting with their professional body. In addition, the Member should seek out legal advice, especially as a disclosure made to either the Tax Practitioners Board (TPB) or the Australian Charities and Not-for-Profits Commission (ACNC)⁵ is not covered by whistleblower protections set out in the [Corporations Act 2001](#) or the [Taxation Administration Act 1953](#). However, a disclosure to [either](#) the Australian Taxation Office [or the Tax Practitioners Board](#)⁶ may be covered by the whistleblower protections if the circumstances meet the relevant criteria in the whistleblower protection legislation.

The Member may also consider the disclosure of matters to the relevant state's police office or department.

The Member needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

Decline or End Engagement

If the Member cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Member may need to decline to prepare the BAS or withdraw from the engagement (para R120.10(c)). The Member will also need to consider applicable legislative reporting obligations or the NOCLAR framework (which may not be satisfied by the Member withdrawing from the engagement) (para 360.36 A2).

⁵ The ACNC have released a [factsheet](#) on whistleblower guidance for charities on their website: www.acnc.gov.au. The ACNC is not an eligible recipient as defined in the whistleblowing protection legislation and therefore any disclosures to the ACNC are not covered by the protections in the [Corporations Act 2001](#) or the [Taxation Administration Act 1953](#).

⁶ [The TPB can receive information from the ATO if the eligible whistleblower consents but the TPB cannot receive the disclosure directly from the whistleblower without impacting the protections available to the whistleblower. Refer to the TPB website \(www.tpb.gov.au\) for further guidance on whistleblowing, including a guidance sheet, TPB Questions and Answers and TPB Information Sheet 21/2104 Code of Professional Conduct - Confidentiality of client information and TPB Information Sheet 32/2017 Code of Professional Conduct - Confidentiality of client information for tax \(financial\) advisers](#)

CASE STUDY 5

Auditor receives a whistleblowing disclosure

Issues: Handling the receipt of Whistleblowing disclosures

Case Outline: A Member in Public Practice has been the Manager of an external audit engagement for a large manufacturing company for the last four years. The Member has just finished a meeting with the Chief Financial Officer (CFO) and the client's Financial Accountant about the upcoming stocktake for this year's audit engagement.

The CFO has rushed off to attend another meeting. After checking to make sure no one else can hear their conversation, the Financial Accountant mentions something odd about stock levels. The Financial Accountant thinks some stock purchases are being expensed and not being recorded as stock, but they are unsure if this means the stock is being stolen or whether it is for a special project.

The Member asks if the CFO is aware of the issue, and the Financial Accountant admits that they have not said anything to the CFO, as they are worried the CFO will react badly to their questions. The Financial Accountant has noted that the CFO has approved the unusual stock purchases when the Stock Controller usually approves all stock purchases under the company's delegation of authority policy. The Financial Accountant hopes the auditor can address the situation, as the Financial Accountant does not want to report the matter further within the organisation. The Financial Accountant does not want the Member to raise this issue with the CFO or other executives as they may suspect that it was the Financial Accountant who identified the issue.

After the Financial Accountant has left the room, the Member starts to draft a briefing document on the stock issue for the Audit Partner. Upon reflecting on the Financial Accountant's comments, the Member realises that the Financial Accountant could be considered a protected whistleblower under whistleblowing legislation if the information about the stock is regarded as an eligible disclosure and, if that is the case, the Member is required under the whistleblowing laws to ensure the anonymity of the Financial Accountant's identity in any further discussions the Member may have about this matter.

The Member is not sure what their responsibility is in relation to the disclosure or if there is a legal or professional duty to disclose this matter further.



Identifying Threats

Familiarity

There might be a threat that due to the long or close relationship with the client, the Member will be too accepting of the CFO's approval of the unusual stock transactions. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(d)).

Intimidation

There might be a threat that, due to actual or perceived pressures on the Member relating to dealing with a potentially difficult situation involving suspected NOCLAR and whistleblowing, the Member may either pass the information (and the resulting issues) to the Audit Partner or ignore the Financial Accountant's information. This intimidation threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Member must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment (paras 300.7 A3 to 300.7 A4a list several factors that may be relevant). ~~From 1 January 2020, A range of entities are there is a requirement~~ under legislation⁷ ~~for a range of entities~~ to have a whistleblower policy. ~~The policies are required by legislation~~ to provide protection to whistleblowers who meet the necessary criteria.
- Conditions, policies and procedures relating to the firm and its operating environment (paras 300.7 A2, ~~and~~ 300.7 A5 ~~and 300.7 A6~~). The Member's firm may have policies in relation to dealing with ethical issues with clients, including a whistleblowing policy.
- The length and closeness of the relationship between the Member and the client (qualitative factor).
- The significance of the unusual stock transactions and the frequency of the transactions.
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there is a breach of professional standards.

Based on the facts in this scenario, it is not clear if the unusual stock transactions are a breach of laws and regulations and if they would be considered to be inconsequential (para 360.7 A2). However, the discussion with the Financial Accountant indicates that there may be a suspected breach of laws and regulations. As such, the Member should consider the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 360). This would mean the Member needs to obtain an understanding of the matter, including the nature of the NOCLAR and the circumstances in which it occurred (para R360.10).

As the client is a large manufacturing entity that is likely to have a whistleblowing policy, the Member should consider the disclosure mechanism in the client's whistleblower policy. Discussing the circumstances that relate to NOCLAR with the appropriate level of management, those charged with governance, others within the firm or a network firm, the Member's professional body or with legal counsel may also be of assistance in evaluating the level of threats (paras 360.10 A3 to R360.12). However, the Member must be careful in having these discussions to ensure that the confidentiality of the whistleblower's identity is maintained as required under the whistleblower protection legislation (para R360.6 and the [Corporations Act 2001, section 1317AAE](#)). While the Financial Accountant has clearly stated that they do not want the CFO or executives to know that the Financial Accountant raised the issue, the Member could seek specific consent from the Financial Accountant to be able to raise this matter with the Audit Partner or others within the firm. The Member must document the consent if received. If consent is not provided, the Member must not disclose the Financial Accountant's identity or any identifying information, even to other parties in their firm.

⁷ Refer to the requirements in [s1317AI of the Corporations Act 2001](#) and [ASIC Corporations \(Whistleblower Policies\) Instrument 2019/1146](#).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The Member may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

In this scenario, the Member has become aware that there are unusual stock transactions that may be actual or suspected NOCLAR. In determining how to address this situation, the Member needs to consider what safeguards or actions could be taken to address the threats.

The Member could consider the large manufacturing entity's whistleblower policy⁸ to determine if there is an appropriate reporting mechanism that the Member could follow. The policy may allow disclosures to be made to individuals within the manufacturing entity or to a regulator. However, in making any subsequent disclosures, the Member must maintain the confidentiality of the whistleblower's identity and related information that may identify the whistleblower. This means that the Financial Accountant's identifying details must not be disclosed "...to the audit partner, other members of the audit team or other eligible recipients..."⁹ unless the Financial Accountant consents to the disclosure or it is necessary to investigate the concerns. The Member should refer to [Part 9.4AAA Protection for Whistleblowers of the Corporations Act 2001](#) and seek legal advice if they are unsure if consent has been provided or what level of information can be disclosed.

If the Member has determined that the NOCLAR provisions apply (as there is a suspected breach of the law and the matter is more than inconsequential), the Member is required to raise this matter with the appropriate level of management and/or those charged with governance (as per paragraphs R360.11 and R360.12), subject to any prohibition in relevant laws and regulations on alerting the client to the matter (para R360.6). If the Member notifies the entity and no further action is being taken, the Member should apply professional judgement to determine if further action would be considered necessary in the public interest (para R360.20). In making this determination, the Member should consider whether a reasonable and informed person would think the Member acted in the public interest, as well as taking into consideration the following factors (para 360.20 A1):

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the client.
- Whether the Member has confidence in the integrity of the CFO, the management and those charged with governance.
- Whether the NOCLAR or suspected NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the company, investors, creditors, employees or the general public.

If no action is taken by the manufacturing entity to address the concerns of the Member, the Member should consider whether to make a disclosure to an appropriate authority even if there is no legal or

⁸ Refer to ASIC Regulatory Guide 270 Whistleblowing Policies for details on what should be in a whistleblowing policy.

⁹ ASIC Information Sheet 246: Company auditor obligations under the whistleblower protection provisions

regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(ad\)](#)). However, maintaining the confidentiality of the Financial Accountant's identity is still required under the whistleblower protection legislation.¹⁰

In determining whether to make disclosure to an appropriate authority under the NOCLAR framework, the Member should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to investors, creditors, employees or the general public (para 360.25 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken (para 360.25 A3).
- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation (para 360.25 A3).
- Whether there are actual or potential threats to the physical safety of the Member or other individuals (para 360.25 A3).

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 360.24 A1).

In making a disclosure under NOCLAR, the Member shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter (para R360.26).

If this was not a NOCLAR matter (due to the matter being inconsequential (para 360.7 A2)), the Member could choose whether or not to provide information to an appropriate authority, such as ASIC, if the circumstances meet the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para [AUST R114.34\(ad\)](#)). However, maintaining the confidentiality of the Financial Accountant's identity is still required under the whistleblower protection legislation.¹¹ Before making such a disclosure, the Member should consider consulting with their professional body and/or seeking legal advice.

In addition, the Member would need to consider whether the Member or the firm have an obligation to report certain breaches or suspected breaches to ASIC¹² and also comply with the requirements of [the](#) relevant Auditing and Assurance Standards¹³ (para R360.15).

The Member needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

Decline or End Engagement

If the Member cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Member should discuss with the Audit Engagement Partner or others in the firm that there may be a need to withdraw from the engagement (para R120.10(c)). The Member will also need to consider applicable legislative reporting obligations or the NOCLAR framework (which may not be satisfied by withdrawing from the engagement) (para 360.21 A2).

¹⁰ Refer to [Part 9.4AAA Protection for Whistleblowers of the Corporations Act 2001](#).

¹¹ Refer to [Part 9.4AAA Protection for Whistleblowers of the Corporations Act 2001](#).

¹² For example, there are auditor reporting obligations in the [Corporations Act 2001](#) which a Member in Public Practice must comply with. Further information on these requirements is set out in [ASIC Regulatory Guide 34 Auditor's obligations: Reporting to ASIC](#) and also in [ASIC Information Sheet 246 Company auditor obligations under the whistleblower protection provisions](#).

¹³ For example, Members should consider the provisions in [Auditing Standard ASA 250 Considerations of Laws and Regulations in an Audit of a Financial Report](#) which is issued by the Australian Auditing and Assurance Standards Board.

CASE STUDY 6

Auditor suspects potential misuse of credit cards

Issues: Misappropriation of funds/Whistleblowing

Case Outline: A Member in Public Practice is performing the audit of a small local council. The Member has noticed that a Councillor has large expense claims and high levels of usage of their Council allocated credit card, which span the last three years. In performing audit procedures on these expenses, the Member notices that a significant number of the expenses appear to relate to personal matters, such as the purchase of a marble fireplace which was delivered to the Councillor's home address. The expenses also appear to be misclassified in the financial records as relating to travel or conferences and events. The Member did not notice this matter in the previous two years' audits.

The Member has decided to raise this matter with the Director of Business Services at the Council. As the Member approaches the Director's office, the Member overhears the Councillor and the Director talking about their plans to spend the weekend away with their families at the Councillor's beach house. It is apparent from the conversation that the Director and Councillor are long-term friends.

The Member is now concerned that the Director of Business Services may be implicated in the misappropriation of funds due to the close personal relationship with the Councillor. The Member is planning to speak to the CEO about this matter; however, the Member is not sure if there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

There is a self-interest threat created due to the potential impact ~~on~~^{on} the Member's reputation, as not identifying the misuse of the council credit card in the previous audits implies that the Member is not competent ~~at~~^{at} ~~in~~ⁱⁿ their role, and such a threat could inappropriately influence the Member's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

Intimidation

There is a threat that the Member will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Director of Business Services or the Councillor. The Member may be subject to pressure by the Director of Business Services or the Councillor to ensure the expenses are treated as legitimate business expenses (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Member must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment (paras 300.7 A3 to 300.7 A4a list several factors that may be relevant). Under [relevantthe state or territory Public Interest Disclosure Act 2013Public Interest Disclosure Acts 2013](#), the local council must have procedures in place for facilitating and dealing with public interest disclosures. This legislation also protects the disclosers of public interest information.
- Conditions, policies and procedures relating to the firm and its operating environment (paras 300.7 A2, ~~and~~ 300.7 A5 ~~and~~ 300.7 A6). The Member's firm (which may be an Auditor-General's office or department) may have policies in relation to dealing with ethical issues with clients.
- The length and closeness of the relationship between the Member and the client (qualitative factor).
- The nature of the organisation.
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there is a breach of professional standards.

Based on the facts in this scenario, it is likely that the credit card expenses would be a breach of laws and regulations and that the matter may not be inconsequential (para 360.7 A2). Therefore, the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 360) should be considered by the Member. This would mean the Member needs to obtain an understanding of the matter, including the nature of the NOCLAR and the circumstances in which it occurred (para R360.10).

The level of threats would be heightened in this situation as the client is a local council, which invokes higher levels of public interest. The Member should consider the disclosure mechanism in the Council's public interest disclosure or whistleblowing policy. Discussing the circumstances that relate to NOCLAR with the appropriate level of management, those charged with governance or the Member's professional body may also be of assistance in evaluating the level of threats (paras 360.10 A3 to R360.12).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The Member may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

In this scenario, the Member has become aware of suspect transactions of a personal nature on a business credit card that may be actual or suspected NOCLAR. In determining how to address this situation, the Member needs to consider what safeguards or actions could be taken to address the threats.

The Member could consider the local council's public interest disclosure or whistleblower policy to determine if there is an appropriate reporting mechanism that the Member could follow. The policy may allow disclosures to be made to individuals within the council or other individuals or organisations such as an Independent Anti-Corruption Body (such as the Independent Broad-based Anti-Corruption Commission (IBAC) in Victoria) or the relevant State's Ombudsman.

If the Member has determined that the NOCLAR provisions apply (as an actual or suspected breach of laws and regulations has occurred and the matter is more than inconsequential), the Member is required to raise this matter with the CEO of the local council and/or those charged with governance (as per paragraphs R360.11 and R360.12). If the Member notifies the organisation and no further action is being taken, the Member should apply professional judgement to determine if further action by the Member would be considered necessary in the public interest (para R360.20). In making this determination, the Member should consider whether a reasonable and informed person would think the Member acted in the public interest, as well as taking into consideration the following factors (para 360.20 A1):

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the client.
- Whether the Member has confidence in the integrity of the Director of Business Services, the CEO and those charged with governance.
- Whether the NOCLAR or suspected NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the local council, rate payers, creditors, employees or the general public.

If no action is taken by the CEO and the local council to address the concerns of the Member, the Member should consider whether to make a disclosure to an appropriate authority even if there is no legal or regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(ad\)](#)).

In determining whether to make disclosures to an appropriate authority under the NOCLAR framework, the Member should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to the government, ratepayers, creditors, employees or the general public (para 360.25 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken (para 360.25 A3).
- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation (para 360.25 A3).
- Whether there are actual or potential threats to the physical safety of the Member or other individuals (para 360.25 A3).

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 360.24 A1).

In making a disclosure under NOCLAR, the Member shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter (para R360.26).

If this was not a NOCLAR matter, the Member could choose to provide information to an Independent Anti-Corruption Body or the relevant State Ombudsman under the public interest disclosure protections, if the circumstances meet the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para [AUST R114.34\(ae\)](#)). Before making such a disclosure, the Member should consider consulting with their professional body and/or seeking legal advice.

In addition, the Member would need to consider whether the firm has an obligation to report certain breaches or suspected breaches to relevant regulators and should also comply with the requirements of relevant Auditing and Assurance Standards¹⁴ (para R360.15).

The Member needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

Decline or End Engagement

If the Member cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, if possible, the Member may need to withdraw from the engagement (para R120.10(c)). The Member will also need to consider applicable legislative reporting obligations or the NOCLAR framework (which may not be satisfied by the Member withdrawing from the engagement) (para 360.21 A2).

¹⁴ For example, Members should consider the provisions in [Auditing Standard ASA 250 Considerations of Laws and Regulations in an Audit of a Financial Report](#) which is issued by the Australian Auditing and Assurance Standards Board.

CASE STUDY 7

Sustainability Assurance Practitioner suspects potential greenwashing

Issues: Greenwashing/Sustainability assurance/NOCLAR

Case Outline: A Sustainability Assurance Practitioner is performing their first sustainability assurance engagement for a listed entity. The listed entity client has publicly promoted its products and operations as “carbon neutral”, “net zero aligned” and “sustainably sourced”. During the assurance engagement, the Sustainability Assurance Practitioner is concerned that these claims are overstated or unsupported due to the client's exclusion of material Scope 3 emissions from the entity's calculations without clear explanations, and the use of carbon offsets of uncertain quality to support a “carbon neutral” statement.

The Sustainability Assurance Practitioner raises these matters with the Chief Financial Officer (CFO) and requests supporting evidence for the claims. The CFO responds that the statements are primarily marketing language and mirrors mirror statements made by the company's competitors. The CFO states that, as the statements are not part of the sustainability report that the Sustainability Assurance Practitioner is providing assurance over, they are irrelevant for the sustainability assurance engagement. The product statements were approved by the Board, and the CFO does not want to change them or remove them from the company's website. The CFO is of the view that excluding Scope 3 emissions aligns with how other industry participants prepare their calculations. The CFO raises a concern that the Sustainability Assurance Practitioner is not aware of industry best practice.

The Sustainability Assurance Practitioner reviewed the Board papers and minutes relating to the approval of the claims and noted that the information provided to the Board by the CEO and CFO was high level and did not refer to the exclusion of Scope 3 emissions from the relevant calculations.

The Sustainability Assurance Practitioner is concerned that the public statements may omit or obscure material information and may be misleading to investors and other users. The Sustainability Assurance Practitioner is planning to raise this matter with the Board. However, the Sustainability Assurance Practitioner is not sure if there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

There are two self-interest threats created in this scenario. The first relates to the Sustainability Assurance Practitioner's fear of losing the client. The second is the potential impact on the Sustainability Assurance Practitioner's reputation if their views are not in line with industry approved practices supported by regulators. These threats could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 5120.6 A3(a)).

Intimidation

There is a threat that the Sustainability Assurance Practitioner will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressure from the CFO. The Sustainability Assurance Practitioner may be subject to pressure from the CFO to ensure no changes are made to sustainability disclosures and to avoid the concerns being raised with the Board (para 5120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Sustainability Assurance Practitioner must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 5120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment (paras 5300.7 A3 to 5300.7 A4a list several factors that may be relevant). A range of entities are required under legislation¹⁵ to have a whistleblower policy to provide protection to whistleblowers who meet the necessary criteria.
- Conditions, policies and procedures relating to the firm and its operating environment (paras 5300.7 A2, 5300.7 A5 and 5300.7 A6). The Sustainability Assurance Practitioner's firm may have policies in relation to dealing with ethical issues with clients.
- The length and closeness of the relationship between the Sustainability Assurance Practitioner and the client (qualitative factor).
- The nature of the organisation.
- Whether a breach of laws or regulations has occurred, and, if so, the significance of the breach.
- Whether there is a breach of professional standards, including ethical and assurance requirements applicable to sustainability assurance engagements.

Based on the facts in this scenario, it is likely that the listed entity's potentially misleading sustainability claims would constitute a breach of laws and regulations, and that the matter may not be inconsequential (para 5360.7 A2). Therefore, the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 5360) should be considered by the Sustainability Assurance Practitioner. This would mean the Sustainability Assurance Practitioner needs to obtain an understanding of the matter, including the nature of the actual or suspected NOCLAR and the circumstances in which it occurred (para R5360.10).

The level of threats would be heightened in this situation as the client is a listed entity, which invokes higher levels of public interest. The Sustainability Assurance Practitioner should consider the disclosure mechanism in the Client's whistleblowing policy. Discussing the circumstances that relate to NOCLAR with those charged with governance or the Sustainability Assurance Practitioner's professional body may also be of assistance in evaluating the threats (paras 5360.10 A3 to R5360.12).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats need to be addressed.

¹⁵ Refer to the requirements in s1317AI of the *Corporations Act 2001* and ASIC Corporations (Whistleblower Policies) Instrument 2019/1146.



Addressing Threats

Eliminate Circumstances

The Sustainability Assurance Practitioner may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R5120.10(a)).

Apply Safeguards and Other Actions

In this scenario, the Sustainability Assurance Practitioner has become aware of misleading disclosures that may be actual, or suspected, NOCLAR. In determining how to address the situation, the Sustainability Assurance Practitioner needs to consider what safeguards or actions could be taken to address the threats.

The Sustainability Assurance Practitioner could consider the listed entity's whistleblower policy to determine whether there is an appropriate reporting mechanism to follow. The policy may allow disclosures to be made to individuals within the organisation or to a regulator.

If the Sustainability Assurance Practitioner has determined that the NOCLAR provisions apply (as there is a suspected breach of the law and the matter is more than inconsequential), the Sustainability Assurance Practitioner is required to raise this matter with the CEO and/or those charged with governance (as per paragraphs R5360.11 and R5360.12). If the Sustainability Assurance Practitioner notifies the organisation and no further action is being taken, the Sustainability Assurance Practitioner should apply professional judgement to determine if further action by the Sustainability Assurance Practitioner would be considered necessary in the public interest (para R5360.20). In making this determination, the Sustainability Assurance Practitioner should consider whether a reasonable and informed person would think the Sustainability Assurance Practitioner acted in the public interest, as well as taking into consideration the following factors (para 5360.20 A1):

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the client.
- Whether the Sustainability Assurance Practitioner has confidence in the integrity of the CFO, the CEO and those charged with governance.
- Whether the NOCLAR or suspected NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the company, investors, creditors, employees or the general public.

If the CEO and the listed entity do not take action to address the Sustainability Assurance Practitioner's concerns, the Sustainability Assurance Practitioner should consider whether to disclose to an appropriate authority, even if there is no legal or regulatory requirement to do so. If the Sustainability Assurance Practitioner believes this is a NOCLAR matter, it would be considered a professional duty to disclose and is therefore not a breach of the fundamental principle of confidentiality (para AUST R5114.3(a)).

In determining whether to make disclosures to an appropriate authority under the NOCLAR framework, the Sustainability Assurance Practitioner should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to investors, creditors, employees or the general public (para 5360.25 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken (para 5360.25 A3).

- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation (para 5360.25 A3).
- Whether there are actual or potential threats to the physical safety of the Sustainability Assurance Practitioner or other individuals (para 5360.25 A3).

As the assessment of the NOCLAR matter is complex, the Sustainability Assurance Practitioner might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 5360.24 A1).

In making a disclosure under NOCLAR, the Sustainability Assurance Practitioner shall act in good faith and exercise caution when making statements or assertions. The Sustainability Assurance Practitioner shall also consider whether it is appropriate to inform the client of the Sustainability Assurance Practitioner's intention before disclosing the matter (para R5360.26).

If this was not a NOCLAR matter (due to the matter being inconsequential), the Sustainability Assurance Practitioner could choose whether or not to provide information to an appropriate authority, such as ASIC, if the circumstances meet the criteria for disclosure established in the legislation. The Sustainability Assurance Practitioner has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para AUST R5114.3(a)). Before making such a disclosure, the Sustainability Assurance Practitioner should consider consulting with their professional body and/or seeking legal advice.

In addition, the Sustainability Assurance Practitioner would need to consider whether the Sustainability Assurance Practitioner or firm have an obligation to report certain breaches or suspected breaches to relevant regulators and also comply with the requirements of relevant Auditing and Assurance Standards¹⁶ (para R5360.15).

The Sustainability Assurance Practitioner needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

Decline or End Engagement

If the Sustainability Assurance Practitioner cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, if possible, the Sustainability Assurance Practitioner may need to withdraw from the engagement (para R5120.10(c)). The Sustainability Assurance Practitioner will also need to consider applicable legislative reporting obligations or the NOCLAR framework (which may not be satisfied by the Sustainability Assurance Practitioner withdrawing from the engagement) (para 5360.21 A2).

¹⁶ For example, Members should consider the provisions in *Standard on Sustainability Assurance ASSA 5000 General Requirements for Sustainability Assurance Engagements* which is issued by the Australian Auditing and Assurance Standards Board.

CASE STUDY 87

Potential client with suspected criminal connections

Issues: Whistleblowing/Integrity of the Client

Case Outline: A Member in Public Practice, who is a registered Tax Agent, runs a small accounting practice in a large regional town. The Member has received an email from Mr John Doe requesting the Member complete the tax return for his associate, Mr Strawman. The Member is aware that Mr Doe has been subject to investigation by the police for various illegal activities due to his connection with a local crime syndicate.

The Member responds to Mr Doe, requesting a meeting with Mr Strawman to gain an understanding of Mr Strawman's business activities and to gain information to complete the tax return. Mr Doe replies that a face-to-face meeting is not possible at the moment, so he has attached all the necessary documents for the Member to complete the tax return online. Mr Doe has indicated he is willing to pay four times the Member's customary fee for completing this tax return service.

The Member is suspicious of the request and is not sure whether there is a legal or professional duty to disclose this matter further.



Identifying Threats

Self-interest

A self-interest threat is created if the Member accepts the engagement before obtaining knowledge and understanding of the client, its owners, management and **theirs** business activities. The high level of fees offered by Mr Doe also creates a self-interest threat. These threats could inappropriately influence the Member's judgement and behaviour and could threaten the fundamental principles of integrity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

Intimidation

There is a threat that the Member will be deterred from acting with integrity and professional behaviour due to actual or perceived pressures from Mr John Doe to undertake the engagement (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Member must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the firm and its operating environment (paras 300.7 A2, ~~and~~ 300.7 A5 and 300.7 A6).
- The existence of quality control policies and procedures designed to provide reasonable assurance that engagements are accepted only when they are performed competently.
- An appropriate understanding of the client (Mr Strawman), the engagement requirements and the purpose, nature and scope of the work to be performed.
- Indications that Mr Strawman (or Mr Doe) might be involved in money laundering or other criminal activities (APES 320 Quality Management for Firms that provide Non-Assurance Services, para 4.12~~APES 320 Quality Control for Firms, para 40~~).
- The identity and business reputation of related parties, including the previous behaviour and suspected criminal reputation of Mr Doe.
- Experience with relevant regulatory or reporting requirements.
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there has been a breach of professional standards.

Based on the facts in this scenario, it is not clear if there has been an actual or suspected breach of laws and regulations or if the matter is inconsequential (para 360.7 A2). Therefore, the Member could consider the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 360). This would mean the Member needs to obtain an understanding of the matter, including the nature of the NOCLAR and the circumstances in which it occurred (para R360.29).

The level of threats would be heightened in this situation as information ~~en~~about the client (Mr Strawman) is coming from an individual with suspected criminal connections (Mr Doe). Discussing the circumstances that relate to NOCLAR with Mr Doe/Mr Strawman or the Member's professional body may also ~~be of assistance~~assist in evaluating the level of threats (paras 360.29 A1 to R360.30).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

While the Member has not yet agreed to undertake the engagement, there are still threats that the Member needs to address, such as the self-interest threat relating to client acceptance. The Member may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

In deciding whether or not to accept a professional appointment, the Member needs to consider the provisions of Section 320 *Professional Appointments* of the Code and APES 320 Quality Management for Firms that provide Non-Assurance Services (APES 320)~~APES 320 Quality Control for Firms (APES 320)~~. The Member should only undertake client relationships where the firm has considered the integrity of the client and does not have information that would lead it to conclude that the client lacks integrity (APES 320, para ~~4.1038~~ 4.1038). The Member could obtain information from other sources, such as through inquiries of third parties regarding Mr- Strawman's reputation and activities. Based on the facts and

circumstances in this scenario, it is unlikely that safeguards could be applied that would reduce the level of threats to an acceptable level.

The Member must not accept an inducement that is made, or a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the Member (para R340.8). In this scenario, the inducement is the inflated fee for performing the tax return without meeting the client. The Member could have an appropriate reviewer review any work performed or decisions made with respect to the client, but based on the inability to meet the actual client and the suspected criminal associations of Mr Doe, it would be likely that there are no safeguards available or capable of being applied that would reduce the identified threats to an acceptable level. The Member could eliminate these threats by not accepting the offer of the inflated fees for the service (para 340.11 A5).

While the Member has not yet accepted this engagement, the Member could follow the NOCLAR framework if the Member believes there may be an actual or suspected NOCLAR associated with this potential engagement (para 360.7 A3). The Member could raise this matter with the potential client Mr Strawman or Mr Doe (as per paragraph R360.30). If the Member believes no further action is being taken, the Member should apply professional judgement to determine if further action by the Member would be considered necessary in the public interest (para R360.36). In making this determination, the Member should consider whether a reasonable and informed person would think the Member acted in the public interest, as well as taking into consideration the following factors (para 360.36 A1):

- The legal and regulatory framework.
- The appropriateness and timeliness of the response of Mr Doe or Mr Strawman.
- The urgency of the situation.
- Whether the Member has confidence in the integrity of Mr Strawman and Mr Doe.
- The likelihood of actual or potential substantial harm to the interests of the client, general public or potential investors, creditors or employees (if any).

If no action is taken by Mr Doe or Mr Strawman to address the concerns of the Member, the Member should consider whether to make a disclosure to an appropriate authority even if there is no legal or regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose and it is therefore not a breach of the fundamental principle of confidentiality (para [AUST R114.34\(ad\)](#)).

In determining whether to make disclosure to an appropriate authority under the NOCLAR framework, the Member should consider (para 360.36 A3):

- Whether doing so would be contrary to law or regulation.
- Whether there are restrictions about disclosures imposed by a regulatory agency or prosecutor in an ongoing investigation into the NOCLAR.

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or professional body (para 360.39 A1).

In making a disclosure under NOCLAR, the Member shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter (para R360.37).

If this was not a NOCLAR matter, the Member could make a choice whether or not to provide information to a regulator, such as the Australian Taxation Office or the Tax Practitioners Board,⁴⁷ if the circumstances meet the criteria for disclosure established in the whistleblower protection legislation.

⁴⁷ ~~The TPB can receive information from the ATO if the eligible whistleblower consents but the TPB cannot receive the disclosure directly from the whistleblower without impacting the protections available to the whistleblower. Refer to the TPB website (www.tpb.gov.au) for further guidance on whistleblowing, including a guidance sheet, TPB Questions and Answers and TPB Information Sheet 21/2104 Code of Professional Conduct – Confidentiality of client information and TPB Information Sheet 32/2017 Code of Professional Conduct – Confidentiality of client information for tax (financial) advisers.~~

The Member has the legal right to make this disclosure, so it will not be considered a breach of confidentiality of the Code (para [AUST R114.34\(ad\)](#)).

However, when a Member is making a disclosure to a third party (whether due to NOCLAR or as a choice under the whistleblower protection legislation), the Member should consider consulting with their professional body. In addition, the Member should seek out legal advice.

[In addition, the Member should consider their obligations under the anti-money laundering and counter-terrorism financing \(AML/CTF\) legislation.](#)

The Member needs to apply professional judgement to determine if the actions taken will reduce the identified threats to an acceptable level.

Decline the Engagement

If the Member cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Member may need to decline to undertake the engagement to complete the lodgement of the tax return for Mr Strawman (para R120.10(c)).

CASE STUDY 98

Trading while insolvent and breaches of loan covenants

Issues: Whistleblowing/Preparation and presentation of information

Case Outline: The Finance Manager for a hospitality company that runs a chain of cafes that operate in several suburbs in a capital city is concerned about the company's financial position. There has been a significant drop in revenue across a number of the company's venues. The decline in revenue has meant the Finance Manager has been stretching out payments to suppliers well past the agreed payment terms, but has managed to pay employees on time and meet the bank's monthly loan repayment. While payments to suppliers have been made late, the amounts owed to the suppliers are not substantial with the highest individual outstanding supplier balance being just over \$10,000.

The Finance Manager has prepared the latest monthly management accounts, including preparing a cash flow projection. The results show that current liabilities are higher than current assets, and the company will need significant cash injections over the next few months to continue to meet their existing financial commitments. The company also appears to have breached the loan covenants with the bank. Under the terms of the loan agreement, the directors need to notify the bank of this within 30 days of discovering the breach or as part of the quarterly reporting process to the bank (whichever is the shorter timeframe).

The Finance Manager has reported this matter to the Directors of the company. The Directors tell the Finance Manager not to worry about the financial position, as they will ensure the company has the necessary capital to continue to operate. The Directors believe there is no reason to notify the bank at the moment of the company's current financial position. The Directors will consider disclosing the matter as part of the normal quarterly reporting process to the bank due in a couple of months.

The Finance Manager is still concerned about the company's financial viability. In the past, the Directors have been unable to inject cash into the company when cash flow was tight. However, the Finance Manager has no knowledge of the Directors' current financial position and their ability to contribute capital if required. The Finance Manager is unsure whether there is a legal or professional duty to disclose this matter further.

[Note that this case study does not take into account the temporary COVID-19 relief measures put in place by the Australian Government in 2020 in relation to insolvency and debt repayment obligations.]



Identifying Threats

Self-interest

Due to the Finance Manager's fear of losing their job if the bank withdraws financial support, a self-interest threat is created that may inappropriately influence the Finance Manager's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(a)).

Familiarity

There is a threat that due to the relationship between the Finance Manager and the Directors, the Finance Manager will be too accepting of the Directors' suggestion that the bank does not need to be notified of the breach of the loan covenants. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour (para 120.6 A3(d)).

Intimidation

There is a threat that the Finance Manager will be deterred from acting with integrity, objectivity, and professional behaviour due to actual or perceived pressures from the Directors not to disclose the breach of the loan covenants to the bank (para 120.6 A3(e)).



Evaluating Threats

Are Identified Threats at an Acceptable Level?

The Finance Manager must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable (para 120.8 A1).

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the work environment of the business (paras 200.7 A1 to 200.7 A45), for example:
 - Leadership that stresses the importance of ethical behaviour and the expectation that employees will act ethically (also refer to para 270.3 A3).
 - Policies and procedures to empower and encourage employees to communicate ethics issues that concern them to senior management levels without fear of retribution (also refer to para 270.3 A3 and human resources policies that address pressure).
- The nature of the relationship between the Finance Manager and the Directors (qualitative factor).
- Whether a breach of laws and regulations has occurred, and, if so, the significance of the breach.
- Whether there has been a breach of professional standards.

Based on the facts in this scenario, the non-disclosure by the Directors to the bank is unlikely to be a breach of laws and regulations and may be inconsequential (para 260.7 A2). There is also not enough evidence for the Finance Manager to conclude that the company is operating while insolvent. Therefore, as there is no breach of laws and regulations, the *Responding to Non-Compliance with Laws and Regulations (NOCLAR)* framework of the Code (set out in Section 260) would not apply.

The facts indicate that this would be a small proprietary company and may not have a whistleblower policy. However, there may still be policies the Finance Manager should follow. Discussing the circumstances creating the pressure to breach the fundamental principles with the Directors or the Finance Manager's professional body may also be of assistance in evaluating the level of threats (para 270.3 A4).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.



Addressing Threats

Eliminate Circumstances

The Finance Manager must not knowingly be associated with reports, returns, communications or other information where the Finance Manager believes that the information omits or obscures required information where such omission or obscurity would be misleading (para R111.2). Therefore, the Finance Manager must not hide that the company is experiencing financial difficulties and should take appropriate actions ~~to seek~~ to resolve the matter (para R220.89). The Finance Manager should raise this matter with the Directors. However, as the Finance Manager is not responsible for reporting to the bank in relation to the loan agreement, the Finance Manager may ~~not~~ be unable to eliminate the circumstances that are creating the threats (para R120.10(a)).

Apply Safeguards and Other Actions

If the company has a whistleblower policy, the Finance Manager could use it to determine if there is an appropriate reporting mechanism. The policy may allow disclosures to be made to individuals within the company or other individuals or organisations, such as a regulator or auditor (if any).

The Finance Manager must not allow pressure from the Directors to result in a breach of compliance with the fundamental principles (para R270.3(a)). However, if the Directors do exert pressure on the Finance Manager, the Finance Manager should document the processes they have followed to address the threats to ensure they do not breach the Code.

Even if the Finance Manager does not yield to pressure from the Directors to act unethically, the level of the threats might still not be at an acceptable level, especially ~~as there are given~~ multiple threats to the fundamental principles in this scenario.

Decline or End Professional Activity

If the Finance Manager cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Finance Manager may need to decline future requests from the Directors to not disclose to the bank the correct financial position of the company or resign from their position (para R120.10(c)).

Further Information

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