APESB

Accounting Professional & Ethical Standards Board

WHISTLEBLOWING & CONFIDENTIALITY - APESB TECHNICAL STAFF Q&As

Contents

Introduction and purpose

This publication was developed by the Staff of the Australian Accounting Professional & Ethical Standards Board (APESB) to assist members in public practice 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.

This staff publication provides guidance on applying the Code, including the conceptual framework and other APESB pronouncements to eight scenarios covering a range of different situations relating to whistleblowing. Members 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 may undertake. There are scenarios for both members in public practice, including auditors and members in business.

The scenarios are hypothetical and are solely intended to illustrate the application of the conceptual framework and other APESB pronouncements to enable members to identify, evaluate and address threats to compliance with the fundamental principles in the Code created by situations related to whistleblowing and confidentiality.

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. This publication does not constitute an authoritative or official pronouncement of APESB.

CASE STUDY 1

Substantial underpayment of wages

Issues: Whistleblowing/ NOCLAR

Case Outline: A Chief Financial Officer (CFO) for a large proprietary company recently discovered that the company had 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 to the employees under the relevant industry award issued by Fair Work Australia.

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 was reported to the Board and the shareholders. The CFO is not able to correct the underpayment without the CEO's or the Board's approval as the CFO does not have the delegated authority to process transactions of that dollar size.

The CFO reported the underpayment to the Chief Executive Officer (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 or the industry award and how to remedy the underpayments. Both the CEO and the Chairman expressed concern about the matter but have not spoken to the CFO about the issue since and have not appeared to have 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 companies' whistleblower policy (which came into force on 1 January 2020) and notes that the matters can be disclosed to the Chairman of the Board, the external auditor, or ASIC or APRA. The CFO sends copies of notes and supporting documents to a personal email address, in the 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 even if the CFO would be protected under any applicable whistleblower 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 at 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))

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 perceived 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 A4), 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). The evaluation 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.
    - 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). From 1 January 2020, there is a requirement 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. While this policy is in place and the CFO might meet the disclosure criteria, the Chairman and CEO do not appear to be adhering to the policy. The CFO could also consider accessing the professional ethics counselling service of the applicable professional body.
- 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.
- The intent, timing and amount of the offer to pay-out a six-month notice period for the CFO. In this scenario, threats would be elevated as the Chairman is trying to improperly influence the CFO's behaviour with a financial incentive. (para 250.9 A3)
- 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 (quantitative factor).
- The application of laws, regulations, and professional standards to the circumstances. The company has not met its legal obligations under employment laws and regulations. It is not clear if the company is planning to rectify this situation going forward, but an actual breach of laws and regulations has already occurred. As the historical underpayment is significant and affects many employees, the CFO should consider whether the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (section 260) applies. If the breach of laws is considered to cause substantial harm to investors, creditors, employees or the general public, as

part of evaluating the threats to compliance with the fundamental principles, the CFO needs to obtain an understanding of the matter, which includes:

- The nature of the NOCLAR and the circumstances in which it occurred;
- The application of the laws and regulations to the circumstances; and
- An assessment of the potential consequences to the employing organisation, investors, creditors, employees or the wider public. (para R260.12)

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 it is likely the unethical actions will continue to occur (para 200.7 A4) 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 may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

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 are based on the underpayment and misstate employee obligations and entitlements, the CFO must take appropriate actions to seek to resolve the matter (para R220.8). The CFO has raised this matter with the CEO and Chairman, and, likely, they are not going to take appropriate action to address the matter. The CFO could raise this matter with the other directors on the Board.

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 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). 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.

As the CEO and Chairman have not taken further action, the CFO needs to exercise professional judgement to determine if further action needs to be undertaken 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 considering the following factors:

- 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. (para 260.17 A1)

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 may continue with the underpayments as it appears that they are trying to stop the CFO from taking action 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 per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. 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 the *Fair Work Act 2009* and associated regulations, which may not be covered by whistleblower protections set out in the *Corporations Act 2001*.

The CFO must 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.
- Document the processes they have followed to address the threats.

Even if the CFO does not allow pressure from the Chairman to act unethically, the threats might still not be at an acceptable level, especially as there are multiple threats to the fundamental principles in this scenario, and there is evidence of non-compliance with laws and regulations. A safeguard may be to discuss the matter with the Board of Directors of the entity; however, the CFO needs to apply professional judgment to determine if this will eliminate or 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 or the NOCLAR reporting obligations (which may not be satisfied by the CFO resigning as he is a Senior Member in Business).

In determining whether to make disclosures under the NOCLAR reporting obligations, the CFO 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 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).

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 raised 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 budget 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 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

There is a threat that due to the Finance Officer's fear of losing their job or the loss of support from the Finance Manager, such a threat 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 too 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 A4), 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). As this is a small proprietary company, it is not required to have a whistleblower policy in line with whistleblower legislation. However, there may still be policies the Finance Officer should follow. The Finance Officer could also consider accessing the professional ethics counselling service of the applicable professional body.
- 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 the accounting treatment for revenue, including the extent to which the inappropriate accounting treatment impacts the Finance Manager's compensation.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, the treatment may not be a breach of laws and regulations, does not have a material impact on the financial statements, and it is unlikely that the inappropriate accounting treatment would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 260) would not apply (para 260.7 A2).

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

Apply Safeguards

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 R220.8). 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. If the Finance Manager does not provide the Finance Officer with any valid reasons, the Finance Officer could raise this matter with the Managing Director or other directors on the Board. The Finance Officer could also consider whether it would be appropriate to consult with the external auditor about the accounting treatment (para 220.8 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 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, if 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 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 allow pressure from the Finance Manager to act unethically, the threats might still not be at an acceptable level, especially as there are multiple threats to the fundamental principles in this scenario. A safeguard may 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 eliminate or 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 and partner at a small accounting firm has prepared the tax returns for one client for the last three years. In the course of preparing the current year's tax return, the tax partner has become aware that the client is making false statements 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. The tax partner explains that the current year's tax return cannot be prepared using the previous treatment. The client requests 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))

Intimidation

There is a threat that the tax partner will be deterred from acting with integrity, objectivity, confidentiality and professional behaviour due to actual or perceived pressures by the client ending their engagement with the firm, including how the tax partner responds to those pressures. (para 120.6 A3(e))

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 and the firm and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).
- The length and closeness of the relationships between the tax partner and the client (qualitative factor).
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is unlikely that the misstatements in the individual's tax returns would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 360) is less likely to apply. (para 360.7 A2)

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 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, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

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 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.

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.

This is unlikely to be a NOCLAR situation, and there is no specific legal requirement for the tax partner to disclose this information to the Australian Taxation Office. However, the tax partner can make a choice to provide information to the Australian Taxation Office under the new whistleblower protections if the tax partner meets the criteria established in the legislation. The tax partner has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code.

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 (para 3.12). If the tax partner is considering making this disclosure, they should consider consulting with their professional body or obtaining legal advice.

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

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.

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 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 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 and the firms and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).

  From 1 January 2020, there is a requirement under legislation for a range of entities, including large charities, to have a whistleblower policy. The policies are required by legislation to provide protection to whistleblowers who meet the necessary criteria. As a supplier to the large charity, the Member should consider the disclosure mechanism in the client's whistleblower policy. The Member's firm may also have policies in relation to dealing with ethical issues with clients. The Member could also consider accessing the professional ethics counselling service of the applicable professional body.
- The length and closeness of the relationships between the Member and the client (qualitative factor).
- The intent of the Finance Manager in allowing the items to be treated as business expenses.
- The nature of the organisation. The evaluation of threats would be heightened in this situation as the client is a charity that invokes higher levels of public interest.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is not clear if the inappropriate expenses significantly affect the large charity's financial statements or if it would cause substantial harm to investors, creditors, employees, or the general public. 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).

Discussing the circumstances that relate to NOCLAR with 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

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).

The Member could consider the large charity's whistleblower policy to determine if the Member could follow an appropriate reporting mechanism. 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 Those Charged with Governance (as per paragraph R360.11). If the Member notifies the organisation 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 considering the following factors:

- 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 Finance Manager, the Chairman 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. (para 360.20 A1)

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 per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. If this was not a NOCLAR matter, the Member could make a choice to provide information to the Australian Taxation Office under the new whistleblower protections if the Member meets the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code.

However, when a Member is making a disclosure to a third party (whether due to NOCLAR or as a choice under the whistleblower 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 the Australian Charities and Not-for-Profits Commission may not be covered by whistleblower protections set out in the *Corporations Act 2001* or the *Taxation Administration Act 1953*. However, a disclosure to the Australian Taxation Office may be covered by the whistleblower protections if the Member meets the relevant criteria in the whistleblower legislation.

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 reporting obligations (which may not be satisfied by the Member withdrawing from the engagement) (para 360.21 A2).

In determining whether to make disclosures under the NOCLAR reporting obligations, 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, donors, donor recipients, 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).

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 written off and expensed and not being recorded as stock but is unsure if this means the stock is being stolen or 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 its delegation of authority policy. The Financial Accountant hopes the upcoming stocktake might clarify the correct stock position without the Financial Accountant having 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 these stock transactions.

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.

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 on 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 is a threat that due to the Member's fear of 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 and the firms and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).

  From 1 January 2020, there is a requirement under legislation 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. 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.

  The Member's firm may also have policies in relation to dealing with ethical issues with clients, including a whistleblowing policy. As this situation involves a potential whistleblowing disclosure protected under the legislation, the Member may consider seeking legal advice. The Member could also consider accessing the professional ethics counselling service of the applicable professional body; however, the confidentiality of the whistleblower's identity must be maintained to ensure compliance with relevant laws and regulations. (*Corporations Act 2001*, Section 1317AAE)
- The length and closeness of the relationships between the Member and the client (qualitative factor).
- The significance of the unusual stock transactions and the frequency of the transactions.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is not clear if the unusual stock transactions significantly affect the financial statements of the large manufacturing entity or if it would cause substantial harm to investors, creditors, employees or the general public. 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).

Discussing the circumstances that relate to NOCLAR with 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). 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).

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.

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

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 Members need to consider what safeguards or actions could be taken to address the threats.

The Member could consider the large manufacturing entity's 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 manufacturing entity or to a regulator. However, in making any subsequent disclosures, the Member must maintain the confidentiality of the whistleblower's identity. 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…"[1] unless the Financial Accountant consents to the disclosure or it is necessary to investigate the concerns.

If the Member has determined that the NOCLAR provisions apply, the Member is required to raise this matter with the appropriate level of management or Those Charged with Governance (as per paragraph R360.11). 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 considering the following factors:

- 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 Chief Financial Officer, 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. (para 360.20 A1)

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 regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. However, maintaining the confidentiality of the Financial Accountant's identity is still required under the whistleblower protection legislation.

If this was not a NOCLAR matter, the Member could choose to provide information to an appropriate authority such as ASIC under the new whistleblower protections if the Member meets the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure (para

[1] ASIC Information Sheet 246: *Company auditor obligations under the whistleblower protection provisions*

R114.1(d)), so it will not be considered a breach of confidentiality of the Code. Before making such a disclosure, the Member should consider consulting with their professional body 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 ASIC and also consider the requirements of relevant Auditing and Assurance Standards (para R360.15).

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 withdraw from the engagement (para R120.10(c)). The Member will also need to consider applicable legislative reporting obligations or the NOCLAR reporting obligations (which may not be satisfied by the Member withdrawing from the engagement) (para 360.21 A2).

In determining whether to make disclosures under the NOCLAR reporting obligations, 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).

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. 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 chandelier, 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 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 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))

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 Local Council, which could lead to the potential loss of this client. The Member may be subject to pressure by the Director of Business Services or the local council 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 and the firms and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).

  Under the *Public Interest Disclosure Act 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. The Member should consider the disclosure mechanism in the Council's public interest disclosure or whistleblowing policy. The Member's firm (which could be an Auditor-General's office or department) may also have policies in relation to dealing with ethical issues with clients. The Member could also consider accessing the professional ethics counselling service of the applicable professional body.
- The length and closeness of the relationships between the Member and the client (qualitative factor).
- The nature of the organisation. The evaluation of threats would be heightened in this situation as the client is a local council, which invokes higher levels of public interest.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is not clear if the credit card expenses significantly affect the council's financial statements or if it would cause substantial harm to the government, ratepayers, creditors, employees, or the general public. 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).

Discussing the circumstances that relate to NOCLAR with 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

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 Members need 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 the Independent Broad-based Anti-Corruption Commission (IBAC) or the relevant State's Ombudsman.

If the Member has determined that the NOCLAR provisions apply, the Member is required to raise this matter with Those Charged with Governance (as per paragraph R360.11). If the Member notifies the organisation 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 considering the following factors:

- 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, investors, creditors, employees or the general public. (para 360.20 A1)

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 per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. If this was not a NOCLAR matter, the Member could choose to provide information to IBAC or the relevant State Ombudsman under the public interest disclosure protections if the Member meets the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code. Before making such a disclosure, the Member should consider consulting with their professional body 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 consider the requirements of relevant Auditing and Assurance Standards (para R360.15).

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 withdraw from the engagement (para R120.10(c)). The Member will also need to consider applicable legislative reporting obligations or the NOCLAR reporting obligations (which may not be satisfied by the Member withdrawing from the engagement) (para 360.21 A2).

In determining whether to make disclosures under the NOCLAR reporting obligations, 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).

CASE STUDY 7

A potential client with known criminal connections

Issues: Whistleblowing/ Integrity of the Client

Case Outline: A Member in Public Practice, 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 the client, its owners, management and the 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 client and its operating environment and the firms and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).
- 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. The evaluation of threats would be heightened in this situation as information on the client (Mr Strawman) is coming from an individual with known criminal connections (Mr Doe).
- Indications that Mr Strawman (or Mr Doe) might be involved in money laundering or other criminal activities.
- The identity and business reputation of related parties, including the known previous behaviour and criminal reputation of Mr Doe.
- Experience with relevant regulatory or reporting requirements.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is not clear if the provision of the tax service would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 360) could 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).

Discussing the circumstances that relate to NOCLAR with 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

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

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 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 38). 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 known criminal associations of Mr Doe, it would be likely that there are no safeguards available or capable of being applied that would reduce the threat to an acceptable level. The Member could eliminate this threat 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 provisions if the Member believes there may be an actual or suspected NOCLAR associated with this potential engagement. 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 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 considering the following factors:

- The legal and regulatory framework.
- The urgency of the situation.
- Whether the Member has confidence in the integrity of Mr Strawman and Mr Doe.
- 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. (para 360.36 A1)

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 per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. If this was not a NOCLAR matter, the Member could make a choice to provide information to a regulator, such as the Australian Taxation Office, under the new whistleblower protections, if the Member meets the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code.

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

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 undertake the engagement to complete the lodgement of the tax return for Mr Strawman (para R120.10(c)).

CASE STUDY 8

Trading while insolvent and breaches of loan covenants

Issues: Whistleblowing/Preparation and presentation of information

Case Outline: The Finance Manager for a hospitality business that runs a chain of cafes that operate in several suburbs in a capital city is concerned about the business's financial position. There has been a significant drop in revenue across a number of the business' 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.

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 business will need significant cash injections over the next few months to continue to meet their existing financial commitments. The business also appears to have breached the loan covenants with the bank. Under the terms of the loan agreement, it needs 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 business. The Directors tell the Finance Manager not to worry about the financial position that they will ensure the business has the necessary capital to continue to operate. The Directors believe there is no reason to notify the bank of the business' current financial position at the moment. The Finance Manager is still concerned about the business's financial viability. In the past, the Directors have been unable to inject cash into the business when cash flow was tight.

The Finance Manager is unsure whether they need to notify the bank of the business' financial position or 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 Finance Manager's fear of losing their job if the bank withdraws financial support, it will 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 loan covenants' breach 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 A4), 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 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. The Finance Manager could also consider accessing the professional ethics counselling service of the applicable professional body.
- The nature of the relationship between the Finance Manager and the Directors (qualitative factor).
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, the treatment may not be a breach of laws and regulations. It does not have a material impact on the financial statements. It is unlikely that it would cause substantial harm to investors, creditors, employees, or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 260) would not apply. (para 260.7 A2)

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

Apply Safeguards

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 business is experiencing financial difficulties and should take appropriate actions to seek to resolve the matter (para R220.8). The Finance Manager should raise this matter with the Directors.

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.

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 Manage 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 allow pressure from the Directors to act unethically, the level of the threats might still not be at an acceptable level, especially as there are multiple threats to the fundamental principles in this scenario. A safeguard may be to discuss the matter with the Directors of the entity; however, the Finance Manager needs to apply professional judgment to determine if this will eliminate or reduce the identified threats to an acceptable level.

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 business or resign from their position (para R120.10(c)).

Further Information

For member queries or general information on the 'Whistleblowing & Confidentiality– APESB Technical Staff Q&As, XXX 2020' and professional accountants please contact the relevant professional accounting body using their details below:

Chartered Accountants Australia and New Zealand (CA ANZ)

Website:www.charteredaccountantsanz.com

Email: service@charteredaccountantsanz.com

Phone: 1300 137 322

Phone: +61 2 9290 5660 (outside of Australia)

CPA Australia

Website: www.cpaaustralia.com.au

Email: qualityreview@cpaaustralia.com.au

Phone: 1300 73 73 73 (within Australia)

Phone: +61 3 9606 9677 (outside of Australia)

The Institute of Public Accountants (IPA)

Website: www.publicaccountants.org.au

Email: headoffice@publicaccountants.org.au

Phone: +61 3 8665 3100

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Website: www.apesb.org.au

Email: enquiries@apesb.org.au

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