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June 24, 2021

Ms. Toni Lee-Andrews
Director
AICPA Professional Ethics Division
American Institute of Certified Public Accountants
1211 Avenue of the Americas, 19th Floor
New York, NY 10036-8775

Re: Exposure Draft, Proposed Interpretations and definition, Responding to Non-Compliance with Laws and Regulations

Dear Ms. Lee-Andrews:

Deloitte LLP ("Deloitte," "our," or "we") appreciates the opportunity to provide comments on the exposure draft "Responding to Non-Compliance with Laws and Regulations" (the "Exposure Draft") issued February 25, 2021, by the AICPA Professional Ethics Executive Committee ("PEEC").

General Comments

We thank the PEEC for their consideration of the comments from the original March 2017 exposure draft. We believe the current Exposure Draft which clearly distinguishes the responsibilities for those providing financial statement attest services from those providing other services is a significant improvement on the original exposure draft.

We still believe that significant improvements are needed to the applicability and scope of this Exposure Draft to recognize that members who are performing financial statement attest services and those that are providing other services have different educational requirements, skillsets, and experiences. As we stated in our May 12, 2017 comment letter, those providing services other than financial statement attest services may not have an appreciation, based upon their professional experience, of what might have a direct effect on the determination of material amounts and disclosures in the financial statements. It is also possible that a professional performing non-audit services may not have access to the information necessary to make a determination on whether noncompliance with laws and regulations (NOCLAR) would have a direct effect on a determination of material amounts and disclosures in the financial statements.

Also, members cannot be expected to predict what may or may not happen in the future. Accordingly, we believe it is inappropriate to ask members to communicate noncompliance matters that are likely to occur.

Our specific comments to address the concerns raised above, comments to the questions raised in the Exposure Draft, and some additional comments, are provided below.

Comments in response to question 42a.

Do you agree with the differentiation in requirements applicable to members in public practice providing services other than financial statement attest services?

Subject to the other comments included in this letter, we agree with the differentiation in the requirements applicable to members in public practice providing services other than financial statement attest services.

Comments in response to question 42b.

Do you agree that a litigation or investigation engagement as defined in, and subject to, SSFS No. 1, and an engagement to which the protections set forth in IRC Section 7525 apply, should be excluded from the proposed interpretation for members in public practice? If not, why? Are there other nonattest services that should be excluded from the proposed interpretation? If yes, please identify which services and explain why.

General Comment

We believe that it is difficult to define all of the types of engagements where this interpretation might not be applicable. We believe the applicability section as described in paragraph .06 should be more of a principles-based guidance, rather than listing specific engagements where this interpretation does not apply. Accordingly, we recommend that paragraphs .06c and .06d be revised and a new .06e be added.

We also believe that paragraph .06b is overly confusing and, as written, one could infer that noncompliance by management and others within the entity are not subject to this interpretation. Paragraph 1.170.010.011 clearly and correctly indicates that these individuals are responsible for compliance.

We also note that with respect to the applicability of the interpretation to litigation or investigation engagements, the exposure draft states the interpretation does not apply to "a litigation or investigation engagement, including those defined in the AICPA's Statement on Standards for Forensic Services No. 1." The explanatory memorandum and this question erroneously include the phrase "and subject to" SSFS No. 1.

Implementing our recommendations would result in paragraph .06 that would read as follows:

.06 This interpretation does not apply to the following:

a. Personal misconduct unrelated to the business activities of the client.

b. Noncompliance by parties other than the client. This includes for example, circumstances in which a member has been engaged by a client to perform a due diligence assignment on a third-party entity (that is, subject entity) and the identified or suspected noncompliance has been committed by that third party.

c. A litigation or investigation engagement, including those defined in the AICPA's Statement on Standards for Forensic Services No. 1.

d. An engagement subject to broadly applicable legal and/or accountant privilege, such as those set forth in Internal Revenue Code Section 7525.

e. An engagement where existing AICPA professional standards already address the reporting of

noncompliance with laws and regulations.

Tax Services

Regarding whether an engagement to which the protections set forth in IRC section 7525 apply should be excluded from the proposed interpretation for members in public practice, we believe an explicit reference to IRC section 7525 would be an imperfect condition for exclusion as IRC section 7525 is only applicable to certain US federal tax matters and is subject to a number of exceptions. Rather, we suggest a more broadly worded exclusion such as "engagements subject to broadly applicable legal and/or accountant privilege". This would encompass not only IRC section 7525 but also US state law analogs. The revised wording would also cover work conducted by members under arrangements with clients and their legal counsel where the member's work is protected under attorney-client or attorney work product privileges.

It is also our belief that tax services already covered by existing professional standards of the AICPA should generally be excluded from the proposed interpretation. The explanation for the new interpretations indicates "[t]he AICPA code does not currently provide specific guidance for members who encounter noncompliance with laws or regulations (NOCLAR) or suspected NOCLAR." While, arguably, this is an accurate statement with regard to the code, we question whether it is accurate with respect to members in tax practice where they encounter noncompliance or suspected noncompliance with tax laws and regulations. The AICPA does have enforceable tax ethical standards by which members abide—specifically, the AICPA Statements on Standards for Tax Services ("SSTSs"). As noted in the introduction to the SSTSs, "[t]he following SSTSs and any interpretations issued thereunder reflect the AICPA's standards of tax practice and delineate members' responsibility to taxpayers, the public, the government, and the profession." Among other matters, the SSTSs provide standards related to tax return positions, including obligations imposed on members to advise a client where positions carry risk due to noncompliance and uncertainty. Further the standard imposes not only a notification requirement upon members but also members must inform clients of relevant tax return disclosure responsibilities and potential penalties (SSTS No. 1) that may result from such noncompliance. Further, the standards govern a member's required responsibilities when the member has knowledge of an error in return preparation, including a taxpayer's noncompliance inclusive of failure to file a required tax return, and imposes duties to inform clients of such errors (SSTS No. 6). In addition, SSTS No. 6 proscribes the member's obligation during representation of the client during tax administrative proceedings before revenue authorities.

As members are expected to comply with the SSTSs, and the SSTSs provide members with enforceable guidance related to noncompliance with tax laws and regulations (e.g., as in the situation of learning that a client has not filed a required tax return), it seems unnecessary and potentially confusing to subject tax services to an additional set of guidance addressing NOCLAR. Management of tax practices delivered by members have heretofore incorporated the SSTSs into their firm risk management portfolio inclusive of how risk and exposure is managed in their practices and respective duties owed by members to clients. Given the long-standing understanding by members of their obligations regarding tax services under the SSTS, and the incorporation of SSTS guidelines into management of tax practices, we believe subjecting members providing tax services to a different set of guidance in NOCLAR is a solution in search of a problem in the tax context.

If our comment is not adopted and tax services are included within the scope of the interpretation, at a minimum the interpretation should cross-reference to the SSTSs including making it clear that tax positions that meet the standards set out in SSTS No. 1 (i.e., positions that have a realistic possibility of being sustained or that have a reasonable basis and are appropriately disclosed) are not considered to be noncompliance within the scope of the interpretation.

We also strongly recommend that the PEEC hold a specific session to meet with the members of the AICPA Tax Executive Committee and in particular the AICPA Tax Division Tax Practice Responsibilities Committee to discuss the issue of which set of AICPA standards should serve as controlling standards to members providing tax services in an effort to avoid confusion introduced by layering a new unfamiliar standard in NOCLAR on top of the well-understood standards in the SSTS

and in order to harmonize any overlapping and conflicting guidance to members.

Comments in response to question 42c.

Is a one-year transition period for the effective date appropriate? If not, why not.

We believe a one-year transition period is appropriate. However, the wording of the transition period should be based on the member and the service being provided. Our recommendation is as follows:

For members in public practice providing financial statement attest services:
This interpretation is effective for financial statement attest services performed on a client's financial statements with a fiscal year beginning on or after one year after notice is published in the Journal of Accountancy.

For members in public practice providing services other than financial statement attest services:
This interpretation is effective for engagements beginning on or after one year after notice is published in the Journal of Accountancy. If the notice is published during a multiyear engagement that expires later than one year after the notice is published, this interpretation would become effective when the multiyear engagement was renewed.

For members in business:
This interpretation is effective one year after notice is published in the Journal of Accountancy.

Comments on Access to Management

Consistent with paragraph 31 of the *Explanation for the new interpretations "Responding to Noncompliance with Laws and Regulations,"* the interpretations should recognize that members do not always have access to the appropriate level of management. That is, members may not be engaged by or otherwise have access to management that is at least one level above the person or persons involved or potentially involved in the matter. Accordingly, we recommend that "if they have access to" be added to the guidance. Also, consistent with our comment above about members not being able to predict the future and our recommendation that "likely to occur" be removed from the interpretation, we also recommend the deletion of sentence 1.170.010.05b.ii. Revised paragraph 1.170.010.05 would read as follows:

1.170.010.05 A distinguishing mark of the accounting profession is its acceptance of the responsibility to act in the public interest. When responding to noncompliance or suspected noncompliance, the objectives of a member are as follows:

a. To comply with the "Integrity and Objectivity Rule" [1.100.001]

b. If they have access, to alert management, or when appropriate, those charged with governance of the client, to enable them to rectify, remediate, or mitigate the consequences of the identified or suspected noncompliance

c. To determine whether withdrawal from the engagement and the professional relationship is necessary, when permitted by law and regulation

d. To comply with applicable, laws, regulations, and professional standards.

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Consistent with the recommended changes above, paragraph 1.170.010.33 should also be revised as follows:

.33 If the member identifies or suspects that noncompliance has occurred, and has access to the appropriate level of management, the member should discuss the matter with such management and, when appropriate, those charged with governance.

Comments on Applicability

As indicated in our response to question 42b. above, we believe that the manner in which paragraph 1.170.010.06.b is written one could infer that noncompliance by management and others within the entity are not subject to this interpretation. We also have similar concerns on paragraph 2.170.010.10.b. It should be replaced with the following:

2.170.010.10 This interpretation does not address the following:

a. Personal misconduct unrelated to the business activities of the employing organization

b. With the exception of those charged with governance, noncompliance by others not employed by the employing organization.

Comments on Scope

As set forth above at page 1, members providing services other than financial statement attest services may not have an appreciation of what is meant by or how to determine what is "a direct effect on the determination of material amounts and disclosures in the client's financial statements." Also, the existing professional standards that are applicable for financial statement attest services currently address matters that have a direct and material effect on financial statements. Accordingly, we recommend that paragraph 1.170.010.07 be rewritten as follows:

.07 This interpretation sets out the approach to be taken by a member who encounters or is made aware of noncompliance or suspected noncompliance with laws and regulations where compliance may be fundamental to the operating aspects of the client's business, to its ability to continue its business, or to avoid material penalties. Noncompliance or suspected noncompliance with laws and regulations that have a direct effect on the determination of material amounts and disclosures in the financial statements may be example of such noncompliance or suspected noncompliance.

Similar revisions will also be required to paragraph 2.170.010.06.

This also brings up our second concern with the scope of this Exposure Draft. Paragraph .07 correctly implies that this interpretation is applicable for material items when it states **..."to avoid material penalties."** Paragraph 1.170.010.10 indicates that a member is not required to comply with this interpretation with respect to matters that are clearly inconsequential. It could be inferred from including this statement that this interpretation applies to matters that are greater than clearly inconsequential but less than material. We do not believe that this is appropriate for these interpretations. Consideration of matters that are greater than inconsequential are correctly addressed in professional standards regarding financial statement attest services because of aggregation risk. That is, the risk that errors that are not individually material could aggregate to a material error. That risk is not applicable for reporting on non-compliance with laws and regulations. A combination of unrelated small noncompliance matters does not necessarily result in a material non-compliance matter. Accordingly, we recommend that paragraphs 1.170.010.10 and 2.170.010.09 be deleted. Those noncompliance or suspected noncompliance matters that meet our recommended definition in paragraph .07 (see above) would be subject to this interpretation.

Comments on "Likely to Occur"

Paragraph 1.170.010.02 correctly states that "noncompliance with laws and regulations (noncompliance) comprises acts of omission or commission…." Acts of omission or commission that are likely to occur may never occur and therefore are not noncompliance matters until the act is omitted or committed. Also, members cannot be expected to predict what may, is likely, or probable to occur. Lastly, an interpretation that requires communication of matters that may, is likely or probable to occur raises additional legal and regulatory risks to the members every time non-compliance does occur that was not communicated. The member may be challenged on how they could have not foreseen that the noncompliance was about to happen. Accordingly, we recommend that "is likely to occur" be deleted from paragraph 1.170.010.15. This will also require revisions to the following paragraphs:

1.170.010.05.b.ii

1.170.010.19b.

1.170.010.25d.

1.170.010.33

2.170.010.05b.ii.

2.170.010.22.b.

2.170.010.30.

We would be pleased to discuss our comments with you at your convenience. If you wish to do so, please contact Glenn Stastny, Chief Ethics and Compliance Officer, via email (gstastny@deloitte.com) or at +1 203 423 4689.

Sincerely,

Glenn Stastny
Chief Ethics and Compliance Officer
Deloitte LLP