

Responding to Non-Compliance with Laws and Regulations (NOCLAR)

Chartered Accountants Australia & New Zealand

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Accounting Professional & Ethical Standards Board

Agenda

- Background to NOCLAR
- Scope of NOCLAR
- NOCLAR framework/s
- Key considerations for disclosure
- Existing reporting mechanisms
- Impact on Auditing Standards
- Practical considerations
- Q&A session



Background to NOCLAR

- **Public interest considerations**
 - Regulatory and enforcement authorities concerns since 2007
 - Auditors resigning due to identified or suspected NOCLAR without addressing issues
 - A lack of guidance in the Code about the **thought process** and **relevant factors** to consider
 - Based on IESBA's global standard which was developed over 6 years

Definition of NOCLAR

*Any act of omission or commission, intentional or unintentional, committed by **a client or employer**, or by **TCWG, management or other individuals** working for or under the **direction of a client**, or the **employing organisation** which are **contrary to the prevailing laws or regulations**.*

Scope of NOCLAR

An act that causes substantial harm

- Involves serious **adverse consequences** to investors, creditors, employees, general public in **financial** or **non-financial terms**
- Has wide **public interest** implications
- Examples:
 - Financial fraud resulting in significant financial losses to investors
 - Breaches of environmental laws/regulations that endanger health and safety of employees or public

Scope of NOCLAR

- NOCLAR or suspected NOCLAR that can cause **substantial harm** relate to matters:
 - that have a **direct and material** effect on a client's or employer's financial statements
 - that are **fundamental** to an entity's business/operations or to avoid material penalties
- Excludes:
 - inconsequential matters
 - personal misconduct unrelated to business
 - Non-compliance not committed by a client or employer

Examples of laws and regulations

NOCLAR covers:

- Fraud/corruption/bribery
- Securities markets trading
- AML/CTF/proceeds of crime
- Banking/financial products & services
- Public health and safety
- Data protection
- Tax/pension liabilities
- Environmental protection
- Public health and safety



Scope of NOCLAR

■ NOCLAR Framework

- Sets a **framework** to guide accountants' actions to consider when they become aware of NOCLAR or suspected NOCLAR that poses **substantial harm**
- Member's professional judgement
- In exceptional circumstances, in the absence of appropriate action **permits disclosure** to an appropriate authority who can address the matter
- Effective **1 January 2018** in Australia, early adoption permitted

All Members impacted

- Applies to **all** Members of CA ANZ, CPA Australia and IPA
- Amending Standard to APES 110 *Code of Ethics for Professional Accountants* (Code) issued May 2017
 - Section 225 Members in Public Practice
 - Section 360 Members in Business
 - Consequential amendments to other sections
- Compiled Code issued September 2017

NOCLAR Framework - 4 variations

- Auditors
- Other Members in Public Practice
- Senior Members in Business (directors, CFOs, senior finance staff)
- Other Members in Business

Framework specifies different but proportionate approach for each category of accountants



Requirements of NOCLAR Framework

- **Adopts a differential proportionate approach which:**
 - recognises the remits of **four** categories of Accountants
 - Members spheres of influence
 - Members levels of authority, responsibility and decision making power
 - levels of public expectations on Members

General NOCLAR Framework

1. Obtain an understanding of the matter
2. Address the matter
3. Determine whether further action is needed
4. Determining whether to disclose the matter to an appropriate authority
5. Documentation

The Madoff Ponzi Scheme



The Fraud of Bernard Madoff



Bernard "Bernie" Madoff

Born in the New York City borough of Queens, on April 29, 1938.

Sentenced on June 29 to 150 years in prison, pled guilty to an 11-count criminal complaint, admitting to defrauding thousands of investors of billions of dollars. He was convicted of operating a Ponzi scheme that has been called the largest investor fraud ever committed by a single person.



The countries affected by the fraud

Total cost of the fraud



\$46 m
Legal fees

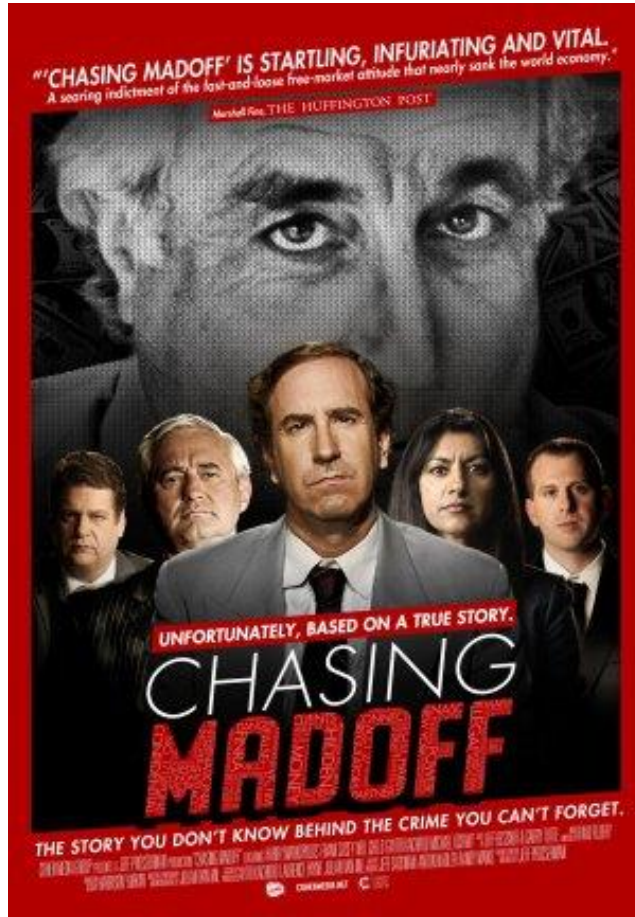


Number of years sentence for those involved

- 25 years**
Bernie Ebers World comm Chief
Jeff Skilling Enron Chief
- 20 years** Tim Rigas
Chief of Adelphia communications

source: http://www.nytimes.com/2009/07/10/business/10madoff.html?_r=1&sq=madoff&st=ec | <http://business.timesonline.co.uk/eol/business/ins/article5733960.ece> | <http://www.bbc.com/centralated-news/566800-madoff-screwed-the-entire-world-made-of-and-made-out>

Chasing Madoff for 9 years in the public interest



<https://www.youtube.com/watch?v=ZWjt5pzj3uE>

A courageous forensic investigator...

Harry Markopolos – Independent Financial Fraud Investigator & Analyst

- Warned the US SEC's Boston office in **May 1999**
- Submitted an **eight page** document listing red flags to the Boston Office in May 2000
- At the time Madoff fund was estimated at **US\$7-10 billion**
- Resubmitted evidence to U.S. SEC Offices in **2001, 2005, 2007 and 2008**
- The 2005 report documented **29 red flags**, at which time the Madoff fund was estimated at **US\$20-50 billion**
- The final loss in excess of **\$170 billion**

General NOCLAR Framework

1. *Obtain an understanding of the matter*

- Obtain an understanding of the matter
- Apply knowledge, professional judgement and expertise
- Subject to **nature/significance** of matter consult within the applicable organisation, Professional Body or legal counsel on a confidential basis
- Raise matter to management/TCWG

General NOCLAR Framework

2. *Addressing the matter*

- Advise management or TCWG to take appropriate and timely action to address the issue
 - rectify/remediate/mitigate the consequences
 - deter the non-compliance if it has not occurred
 - disclose to appropriate authority (required by law or public interest)
- Comply with applicable laws/regulations and if applicable Auditing standards

General NOCLAR Framework

3. *Determining whether further action is needed*

- Assess response of management or TCWG
- Consider other factors that impact the issue
- Further action by the Member may include
 - (a) Disclosure to an appropriate authority
 - (b) Withdrawal from the engagement or assignment

General NOCLAR Framework

4. *Determining whether to disclose the matter to an appropriate authority*

- Is disclosure precluded by law or regulation?
- Nature and extent of **substantial harm**
- Consider **External factors** such as existence of an authority, Whistleblower protection, or physical safety
- If disclosure is appropriate then not considered to be a **breach** of confidentiality under **Sec. 140 of the Code**.
- Disclose, if imminent breach leading to substantial harm

General NOCLAR Framework

5. Documentation

- Document the following matters:
 - identified or suspected NOCLAR
 - discussions of identified or suspected NOCLAR with management, TCWG and other parties
 - response of management and TCWG
 - courses of action considered, judgements made and decisions taken (apply reasonable 3rd party test)

NOCLAR Framework for Auditors

Specific Auditor Obligations

- Comply with requirements under Auditing and Assurance Standards
- Communicate in the context of group audit
 - Component Auditor to communicate with the Group Engagement Partner (EP)
 - Group EP to Communicate with component auditors
- Documentation required

NOCLAR framework for Other PAs in Public Practice

Specific Obligations for other PAs in Public Practice

- Where the client is an audit client of the Firm or Network Firm communicate the matter within the Firm/Network Firm and the Audit Engagement Partner
- Where the client is not an audit client of the Firm or Network Firm consider communicating with the external auditor
- Documentation is encouraged as per NOCLAR **but** note APES 320 *Quality Control for Firms*

NOCLAR framework for senior PAIBs

Specific obligations on a Senior PAIB

- Set the right tone at the top within the organisation.
- Establish appropriate policies and procedures to prevent NOCLAR
- Establish internal whistle-blowing procedures as a necessary part of good governance
- Disclose to External Auditor in accordance with obligation to provide information to conduct audit

NOCLAR framework for senior PAIBs

Courses of further action for a Senior PAIB may include:

- Informing the parent entity in the case of a group
- Resigning from the employing organisation
- Documentation is encouraged

NOCLAR framework for Other PAIBs

Expectations for Other PAIBs

- Escalate the identified, or suspected NOCLAR to immediate superior or next higher level of authority
- Resigning from the employing organisation
- Documentation is encouraged

Key considerations for disclosure

- Disclosure to an appropriate authority depends on various factors
 - Precluded by law or regulation?
 - Credible **evidence** of **substantial harm** to entity, stakeholders and general public
 - Existence of an **appropriate authority**
 - Any legislative or regulatory **protection** for whistleblowing
 - Likelihood of **physical harm** to Member or other individuals
- In case of **imminent breach**, immediate disclosure to authorities is permitted

Existing legal and regulatory mechanisms

- **RG 34 Auditor's obligations: Reporting to ASIC**
 - Suspected contraventions of the Corps Act (Sec. 311 and Sec. 601HG)
 - Contraventions/suspected contraventions by AFSL licensees (Sec. 990K) or Credit licensees (Sec. 104 of National Credit Act)
- **ASIC Information Sheet 52 *Guidance for Whistleblowers***
 - Protection of whistleblowers for breaches in companies under the Corps Act (protected disclosures)
- **AUSTRAC** – reporting of money laundering activities (under *AML-CTF Act 2006*)
- **APRA** reporting for misconduct in APRA-regulated entities
- **Federal and state public sector** whistleblower protections

Whistleblower protection legislation

- Treasury issued Consultation Paper ***Review of tax and corporate whistleblower protections in Australia***
- APESB made a submission with following key points:
 - Supports strengthening of statutory tax and corporate whistleblower protections
 - Supports expansion/clarification of qualifying whistleblowers in Corps Act to cover accountants
 - Strong whistleblower protections will provide proper legislative environment and statutory protection for accountants to report NOCLAR
 - Implement a stand-alone legislation

Key intended outcomes of NOCLAR

- Focus on public interest
- Accountants not to turn a blind eye
- Deter commission or address consequences of illegal acts
- Increased reporting of illegal acts under law or regulation, or under the Code in the public interest

Resources

- For more information:

Visit: IESBA website <https://www.ethicsboard.org/>

APESB website www.apesb.org.au

- For timely updates, follow the APESB page:

[LinkedIn](#) 

- To download APESB's mobile app:





What key changes have been made to ASA 250 Consideration of Laws and Regulations in the Audit of a Financial Report?

The AUASB made limited amendments to ASA 250 in order to address potential inconsistencies in relation to the approach when identifying and dealing with instances of identified or suspected NOCLAR. Changes have been made to:

- **Align** aspects of ASA 250 to the amended APES 110 Code of Ethics for Professional Accountants
- **Clarify** the requirement regarding the auditor's determination of whether to report identified or suspected NOCLAR to an appropriate authority outside the entity and the auditor's duty of confidentiality
- **Highlight** that the auditor may have additional responsibilities under law, regulation or relevant ethical requirements
- **Enhance** the consideration of the implications of NOCLAR on the audit
- **Emphasize** the fact that, in certain cases, communication with management or those charged with governance may be restricted or prohibited by law or regulation



What key changes have been made to ASA 250 Consideration of Laws and Regulations in the Audit of a Financial Report?

ASA 250 sets out specific expectations for auditors in relation to NOCLAR and differentiates between two types of laws and regulations as follows:

- (a) Laws and regulations generally recognized to have a direct effect on the determination of material amounts and disclosures in the financial statements; and
- (b) Other laws and regulations that do not have a direct effect on the determination of the amounts and disclosures in the financial statements, but compliance with which may be fundamental to the operating aspects of the business, to an entity's ability to continue its business, or to avoid material penalties; non-compliance with such laws and regulations may therefore have a material effect on the financial statements.

For category (a), the auditor is required to obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations.

For category (b), the auditor's responsibility is limited to undertaking specified audit procedures to help identify non-compliance with those laws and regulations.



Which other AUASB Standards are affected by the changes?

<p>ASA 210 <i>Agreeing the Terms of Audit Engagements</i></p>	<p>Additional application material to emphasise that the auditor should consider including in the audit engagement letter the auditor's responsibilities under law, regulation or relevant ethical requirements regarding reporting of NOCLAR to an appropriate authority</p>	<p>ASAE 3000 <i>Assurance Engagements Other than Audits or Reviews of Historical Financial Information</i></p>	<p>Amendments to be consistent with those made to ASA 250, in particular to address the additional responsibilities under law, regulation or relevant ethical requirements, the communication with management and those charged with governance and reporting NOCLAR to an appropriate authority outside the entity.</p> <p>Amendments also made to address the practitioner's expected</p>
<p>ASA 240 <i>The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements</i></p>	<p>Amendments to be consistent with those made to ASA 250, in particular to address the additional responsibilities under law, regulation or relevant ethical requirements, the communication with management and those charged with governance, and reporting fraud to an appropriate authority outside the entity</p>	<p>ASRE 2400 <i>Engagements to Review Historical Financial Statements</i></p>	<p>Amendments to be consistent with those made to ASA 250, in particular to address the additional responsibilities under law, regulation or relevant ethical requirements, the communication with management and those charged with governance and reporting NOCLAR</p>
<p>ASA 220 <i>Quality Control for an Audit of Financial Statements</i></p>	<p>New application material to explain the communication between a predecessor and successor auditor, including with respect to NOCLAR, linking it to the provisions in APES 110</p>	<p>ASAE 3402 <i>Assurance Reports on Controls at a Service Organization</i></p>	<p>New application material to highlight that the auditor may communicate with third parties when NOCLAR is identified</p>



NOCLAR

STEPHEN NEWMAN, GENERAL COUNSEL, BDO AUSTRALIA





NOCLAR

Confidentiality Agreement - Exception to Disclosure?

- ▶ Paragraph 225.33 (NOCLAR) permits non-disclosure of a non compliance event where to do so would be contrary to law or regulation
- ▶ If you have signed a confidentiality/non-disclosure agreement, is that a law that would prevent non disclosure of a non compliance event?
- ▶ IESBA Guidance - Staff Questions & Answers - Question 6 -recognition of tension between confidentiality clauses and compliance with professional standards and applicable laws and regulations in the same document.
- ▶ What's the solution?

NOCLAR

Registered Tax Agents, BAS Agents and Tax Advisers - Exception to Disclosure

- ▶ *Tax Agents Services Act 2009 - The Code of Professional Conduct*
- ▶ Sub-section 30-10 (6) - *“Unless you have a legal duty to do so, you must not disclose any information relating to a client’s affairs to a third party without your client’s permission”*
- ▶ TPB’s guidance on meaning of *“client’s affairs”*
- ▶ Still obligated to follow the NOCLAR process despite being unable to report to an appropriate authority
- ▶ How will this play against the proposed new Whistleblower legislation?

REAL LIFE EXAMPLES

NOCLAR

- ▶ Food franchises/Convenience stores/Petroleum outlets - underpayment of wages and other breaches of the FWA
- ▶ *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 (28 April 2017) - Accountant held to be an accessory to employer breaches of the FWA
- ▶ *Fair Work Ombudsman v Kjoo Pty Ltd & Ors* [2017] FCCA 3160 (20 December 2017) - Accountant prepared false records for client and gave them to FWO during an investigation
- ▶ CBA anti money laundering allegations
- ▶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry



REAL LIFE EXAMPLES

NOCLAR

- ▶ Volkswagen emissions scandal
- ▶ Ford and Holden - consumer guarantees under the Australian Consumer Law
- ▶ Wells Fargo fake accounts scandal
- ▶ Rio Tinto - various allegations of bribery and corruption against the company and individuals
- ▶ Amber Harrison and Seven West Media - *personal misconduct unrelated to the business activities of the client* is an exception to the NOCLAR requirements (paragraph 225.9). Is that what happened here?



PRACTICAL TIPS AND QUESTIONS

NOCLAR

- ▶ Read and understand the Standard
- ▶ View the Standard through a risk prism not just more red tape
- ▶ Understand the regulatory framework in which clients operate
- ▶ Provide training for staff and clients
- ▶ Update policies and procedures



PRACTICAL TIPS AND QUESTIONS

NOCLAR

- ▶ Consider implementing a whistleblowing procedure
- ▶ Have you signed a document with a confidentiality clause in it?
- ▶ When should you seek legal advice?
- ▶ When should you withdraw from an assignment?
- ▶ Do you know who the ‘appropriate authority’ is for reporting purposes?
- ▶ Do you need to amend your engagement letter and terms of trade?

Q & A session...