
Illustrative examples of clauses in engagement letters or in employment contracts relating to the professional accountant's NOCLAR obligations *(Information was used originally in the SAICA 2017 NOCLAR Seminar)*

Please note:

- *Every effort has been made to ensure that the information in this document is complete and accurate. Nevertheless, information is given purely as guidance with respect to the subject matter and SAICA will have no responsibility to any person for any claim of any nature whatsoever which may arise out of or related to the contents of this document.*
- *The information provided in this document does not constitute legal advice and should be read in that context.*
- *Where the document suggests a particular view, such a view is based on SAICA's interpretation at that point in time, of the relevant laws, regulations, standards, codes and related pronouncements (as may be applicable). Although SAICA has consulted with respect to the illustrative examples provided, other options or interpretations are also possible and a different view or approach may ultimately be followed in practice; for example, in instances where specific guidance or clarification may be issued. The document's purpose is to provide some illustrative examples in the context of the SAICA 2017 NOCLAR Seminar.*
- *It would be prudent for any SAICA member of associate or firm to obtain independent advice in the context of the specific terms of their general engagement letter and/or standard terms and conditions for professional services. Furthermore, given that compliance with the NOCLAR provisions in the SAICA Code of Professional Conduct is highly fact specific and dependent on the circumstances of each case, we advise that a SAICA member or associate contemplating a disclosure of information that would, apart from the provisions of a clause included in an engagement letter or an employment contract (as applicable), likely be considered confidential, seek appropriate legal advice.*
- *This document is not a substitute for any laws and regulations that are relevant to the business of any particular entity, or to the CA(SA) or AGA(SA) for purposes of performing a given engagement, or in relation to his or her role within an employing organisation. Furthermore, it is not a substitute for the Pronouncements of the Independent Regulatory Board for Auditors (IRBA), as well as those issued by the International Ethics Standards Board for Accountants (IESBA) and the International Auditing and Assurance Standards Board (IAASB).*

Illustrative example 1

Clauses that could be considered for inclusion in an engagement letter of a SAICA member or associate (generically referred to in this document as a "professional accountant") in public practice who is engaged to perform an independent review of a company's financial statements in terms of section 29(4) of the Companies Regulations, 2011; or alternatively when a company decides to be independently reviewed voluntarily.

The following does not represent the professional accountant's entire engagement letter for an independent review engagement, but is merely illustrative wording for the clauses in such an engagement letter that deal with the professional accountant's obligations in terms of the

NOCLAR provisions of the SAICA Code of Professional Conduct, as well as regulatory disclosures in accordance with section 29 of the Companies Regulations, 2011.

[#] Regulatory and professional obligations

The partners or employees of **the firm** have a professional obligation to act in the public interest, and to act in order to (i) enable **the Client** to rectify, remediate or mitigate the consequences of the identified or suspected non-compliance with law or regulation; or (ii) deter the commission of the non-compliance or suspected non-compliance with law or regulation where it has not yet occurred.

“Non-compliance with law or regulation” (non-compliance) refers to an act of omission or commission, intentional or unintentional, committed by **the Client**, or by those charged with governance, by management or by other individuals working for or under the direction of **the Client** which are contrary to a prevailing law or regulation.

Where we encounter non-compliance or suspected non-compliance we will seek to obtain an understanding of the matter and where appropriate will discuss the matter with the appropriate people at **the Client**, or those charged with governance of **the Client** in order that such people can take appropriate action to rectify, remediate or mitigate the consequences of the non-compliance, deter the commission of non-compliance where it has not yet occurred or disclose the matter to appropriate authority where required by law or regulation or where considered necessary in the public interest.

We, in encountering non-compliance or suspected non-compliance, are also obliged to comply with applicable legislation or professional standards, which may require us to disclose the matter to an appropriate authority, including as referred to in clause [insert number].

We also have a professional responsibility to consider whether the response of **the Client** to the instance of non-compliance or suspected non-compliance is adequate, and may determine that further action is necessary. Such further action may include, amongst other actions, the disclosure of the matter to an appropriate authority. We will disclose the matter to an appropriate authority only where, in the professional judgment of the engagement partner, the extent of the actual or potential harm that is or may be caused to investors, creditors or employees or the general public is sufficient to justify the disclosure.

In exceptional circumstances, we may be required to immediately disclose the matter to an appropriate authority where we have become aware of actual or intended conduct that we have reason to believe would constitute an imminent breach of law or regulation that would cause substantial harm to investors, creditors, employees or the general public. In such circumstances we discuss the matter with the management or those charged with governance of **the Client** where it is appropriate to do so.

[#] Reportable irregularities in terms of the Companies Regulations, 2011

It is our responsibility to inform **the Client** regarding our obligation, in terms of Regulation 29 of the Companies Regulations, 2011, to report reportable irregularities to the Companies and Intellectual Property Commission (the Commission).

A “reportable irregularity” refers to any act or omission committed by any person responsible for the management of a company, which:

- Unlawfully has caused or is likely to cause material financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of his, her or its dealings with that entity; or
- Is fraudulent or amounts to theft; or
- Causes or has caused the company to trade under insolvent circumstances.

We are not required to design procedures for the specific purpose of identifying reportable irregularities. However, we will consider all information that comes to our attention from any source in order to determine whether a reporting obligation arises. In instances where we are satisfied or have reason to believe that a reportable irregularity has taken place or is taking place, the engagement partner is required, without delay, to send a written report to the Commission. Such a report initiates a series of activities in accordance with section 29 of the Companies Regulations, 2011, pertaining to discussing the report with the members of the Board of the company, obtaining representations from the Board and sending a final report to the Commission concluding on the existence and status of a reportable irregularity, including information relating to steps that have been taken for the prevention or recovery of any loss as a result thereof (if relevant).

Illustrative example 2

A clause that could be considered for inclusion in the standard terms and conditions of a professional accountant or firm in public practice; which standard terms and conditions attach to an engagement letter for non-assurance services.

The following does not represent the professional accountant's engagement letter or complete standard terms and conditions, but is merely illustrative wording for the clause in such standard terms and conditions that deals with the professional accountant's obligations in terms of the NOCLAR provisions of the SAICA Code of Professional Conduct. Readers can also refer to the *SAICA Guide, Engagement Letter for Non-Assurance Services (excluding Tax Services) (February 2017)* for an illustrative engagement letter and standard terms and conditions, which can be accessed on the [SAICA website](#).

[#] *Confidentiality*

The Firm will keep confidential all information obtained from **the Client** and will not disclose such information, except:

- Information in respect of which **the Client** has provided consent to the disclosure in writing;
- Information that has been or which is made public otherwise than through a breach of this Agreement;
- Information that has been independently obtained by **the Firm** other than from **the Client**, including information already in the possession of **the Firm** prior to its disclosure by **the Client**;
- To the extent required by our obligation to report certain matters in accordance with our regulatory and professional obligations, including those referred to in clause [insert number]; and
- To the extent any disclosure is required to satisfy the order of a court of competent jurisdiction or to comply with the provisions of any law or regulation in force from time to time.

The **Client** agrees to keep confidential any methodologies, technology, know how, trade secrets, software and tools used/ provided and/or developed by **the Firm** in providing and delivering the **Services**. Similarly, any information provided and/or developed by **the Firm** in relation to the **Services** will be kept confidential, unless **the Firm** expressly provides its prior consent in writing to the **Client** to disclose such confidential information to any other party. This confidentiality requirement will not apply to any information that the **Client** is required by law to disclose to another party.

Where **the Client** does not accept a proposal accompanied by a **Written Agreement** any documentation or property specifically identified by **the Firm** will be returned to **the Firm** on request.

The **Client** acknowledges that **the Firm** is required in terms of professional standards to retain documentation to support the work done and any deliverables provided. Where this documentation contains confidential information of **the Client**, **the Client** gives consent to **the Firm** to retain such documentation for the purposes as stipulated herein.

[#] *Regulatory and professional obligations*

The partners or employees of **the firm** have a professional obligation to act in the public interest, and to act in order to (i) enable **the Client** to rectify, remediate or mitigate the consequences of the identified or suspected non-compliance with law or regulation; or (ii) deter the commission of the non-compliance or suspected non-compliance with law or regulation where it has not yet occurred.

“Non-compliance with law or regulation” (non-compliance) refers to an act of omission or commission, intentional or unintentional, committed by **the Client**, or by those charged with governance, by management or by other individuals working for or under the direction of **the Client** which are contrary to a prevailing law or regulation.

Where we encounter non-compliance or suspected non-compliance we will seek to obtain an understanding of the matter and where appropriate will discuss the matter with the appropriate people at **the Client**, or those charged with governance of **the Client** in order that such people can take appropriate action to rectify, remediate or mitigate the consequences of the non-compliance, deter the commission of non-compliance where it has not yet occurred or disclose the matter to appropriate authority where required by law or regulation or where considered necessary in the public interest.

We, in encountering non-compliance or suspected non-compliance, are also obliged to comply with applicable legislation or professional standards, which may require us to disclose the matter to an appropriate authority.

We also have a professional responsibility to consider whether the response of **the Client** to the instance of non-compliance or suspected non-compliance is adequate, and may determine that further action is necessary. Such further action may include, amongst other actions, the disclosure of the matter to an appropriate authority. We will disclose the matter to an appropriate authority only where, in the professional judgment of the engagement partner, the extent of the actual or potential harm that is or may be caused to investors, creditors or employees or the general public is sufficient to justify the disclosure.

In exceptional circumstances, we may be required to immediately disclose the matter to an appropriate authority where we have become aware of actual or intended conduct that we have reason to believe would constitute an imminent breach of law or regulation that would cause substantial harm to investors, creditors, employees or the general

public. In such circumstances we discuss the matter with the management or those charged with governance of **the Client** where it is appropriate to do so.

Illustrative example 3

Illustrative wording relating to a clause that could be considered for inclusion in the employment contract of a *senior* professional accountant in business.

“Senior professional accountants in business” are directors, officers or senior employees able to exert significant influence over, and make decisions regarding, the acquisition, deployment and control of the employing organisation’s human, financial, technological, physical and intangible resources (SAICA Code of Professional Conduct, section 360, paragraph 13).

[#] Confidentiality

It is a condition of employment that you:

- Shall not disclose confidential information of [Entity], and that this duty shall remain in existence even after your employment with [Entity] ceases;
- Shall not, either before, during or after termination of your employment with [Entity], use for your own benefit or that of any person, firm or company, any confidential information relating to the affairs of [Entity], which have come into your possession, or which you were or became aware of whilst in the employ of [Entity];
- Shall hold in confidence all confidential information received from [Entity] and not divulge the confidential information to any person, including any fellow employees; and
- Shall keep confidential, both during and after the term of employment, all such information which may come to your knowledge, either directly or indirectly, during the course of or by virtue of your appointment in terms of this agreement.

Furthermore, you and [Entity] agree that the disclosure of confidential information by you shall constitute a serious breach of the trust relationship between employer and employee which could justify termination of this agreement, subject to the Disciplinary Process of [Entity].

It shall not constitute of breach of your obligations under this clause if information is disclosed:

- To the extent required by your obligation to report certain matters in accordance with your regulatory and professional obligations as a [e.g. Chartered Accountant (SA)] and subject to [Entity’s Internal Protocols and Procedures]; and
- To the extent any disclosure is required to satisfy the order of a court of competent jurisdiction or to comply with the provisions of any law or regulation in force from time to time.

[Entity] acknowledges that as a [e.g. Chartered Accountant (SA)] you have a professional duty to act in the public interest, and to act in order to (i) enable [Entity] to rectify, remediate or mitigate the consequences of the identified or suspected non-compliance with law or regulation; or (ii) deter the commission of the non-compliance or suspected non-compliance where it has not yet occurred.

“Non-compliance with law or regulation” (non-compliance) refers to an act of omission or commission, intentional or unintentional, committed by [Entity], or by those charged with governance, by management or by other individuals working for or under the direction of [Entity] which are contrary to a prevailing law or regulation.

[Entity] acknowledges that your professional obligations include:

- Compliance with your legal obligations which may include an obligation to disclose information to an appropriate authority;
- Where appropriate to address an instance of non-compliance or suspected non-compliance with [superiors; those charged with governance (amend depending on position)];
- To take steps to have the consequences of the non-compliance or suspected non-compliance rectified, remediated or mitigated; reduce the risk of re-occurrence and deter the commission of the non-compliance if it has not yet occurred;
- To consider whether the response to the instance of non-compliance or suspected non-compliance is adequate, and you may determine that further action is necessary. Such further action may include, amongst other actions, the disclosure of the matter to an appropriate authority. You will disclose the matter to an appropriate authority in such circumstances only where, in your professional judgment, the extent of the actual or potential harm that is or may be caused to investors, creditors or employees or the general public is sufficient to justify the disclosure; and
- In exceptional circumstances, you may be required to immediately disclose the matter to an appropriate authority where you have become aware of actual or intended conduct that you have reason to believe would constitute an imminent breach of law or regulation that would cause substantial harm to investors, creditors, employees or the general public. In such circumstances you will discuss the matter with the management or those charged with governance of [Entity] where it is appropriate to do so.

[[