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29 May 2024

International Ethics Standards Board for Professional Accountants (**IESBA**)

Ms. Gabriela Figueiredo Dias, Chair

RE: Response to the IESBA's Proposed International Ethics Standards for Sustainability Assurance (Including International Independence Standards) (IESSA) and Other Revisions to the Code Relating to Sustainability Assurance and Reporting

Dear Chair, Figueiredo Dias:

The International Bar Association (**IBA**) Business Human Rights Committee, Regulation of Lawyers Committee and Professional Ethics Committee, with support and input from the IBA Legal Policy and Research Unit (**LPRU**), welcomes the opportunity to provide feedback on the IESBA's Proposed International Ethics Standards for Sustainability Assurance (Including International Independence Standards) (**IESSA**) and Other Revisions to the Code Relating to Sustainability Assurance and Reporting.

About the IBA and LPRU

The IBA is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, with the aim of protecting and advancing the rule of law globally, the IBA was born out of the conviction that an organisation made up of the world's bar associations could contribute to global stability and peace through the administration of justice. In the ensuing 75 years since its creation, the organisation has evolved, from an association comprised exclusively of bar associations and law societies, to one that incorporates individual international lawyers and entire law firms. The present membership is comprised of more than 80,000 individual international lawyers from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

The IBA has considerable expertise in assisting the global legal community, and through its membership it influences the development of international law reform and shapes the future of the legal profession throughout the world.¹

The LPRU is a specialised unit of the IBA that undertakes research, and develops and implements innovative strategies, projects and initiatives that are relevant to business and the rule of law, the global legal profession and the broader global community.²

¹ For more information about the IBA, see: <https://www.ibanet.org/About-the-IBA>

² For more information about the LPRU, see: <https://www.ibanet.org/LPRU>

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Overarching comments

In response to growing reliance from investors, customers, employees, regulators and others on sustainability information reported by public and private entities to support decision-making, sustainability reporting and assurance frameworks are rapidly developing through bodies such as the Taskforce for Nature-related Financial Disclosures (**TNFD**), International Sustainability Standards Board (**ISSB**) and International Auditing and Assurance Standards Board (**IAASB**), and are being translated into national and subnational regulations. The IBA's journalists and committees have worked consistently to raise awareness among the legal community of these developments, including through publications and ESG-focused conferences.³

Against that background, we recognise the importance of sustainability assurance engagements (**SAEs**) being undertaken to a high ethical standard, irrespective of whether that engagement is performed by a professional accountant (**PA**) or other practitioner (**non-PA**). We therefore support IESBA's efforts to develop a framework-neutral and profession-agnostic ethical standard through proposed new Part 5 of the IESBA Code (**IESSA**).

With respect to the potential application of IESSA to legal practitioners who undertake SAEs, we recognise that the ethical standards that apply to SAEs differ from those that apply to legal services. However, as a profession-agnostic standard, it is critical that IESSA is drafted in a manner that has regard to the profession-specific rules that govern legal practitioners' conduct, and its implications not only for individual legal practitioners but also for the firms in which they operate.

While we expect that the pool of legal practitioners who undertake SAEs will be reasonably limited, IESSA as currently drafted – particularly its scope and complexity – poses challenges for these practitioners in understanding how to apply IESSA consistent with their professional conduct obligations as lawyers. Further, as currently drafted, IESSA may unjustifiably limit the ability of legal teams within accountancy firms or law firms who undertake SAEs to provide legal services to sustainability assurance clients. In this regard, we wish to highlight the significant role that lawyers play in the rapidly evolving landscape of sustainability reporting and disclosure through their legal advice, for example, through helping clients to understand sustainability-related risks and opportunities; to understand good practice sustainability reporting and assurance approaches; to install appropriate governance mechanisms for managing sustainability-related risks; and with sustainability strategy and target setting. IESSA must be sufficiently flexible to enable firms to provide these (and other) legal services to sustainability assurance clients provided that any conflicts of interest or confidentiality concerns can be managed (for example, through robust information barriers).

³ See, for example: <https://www.ibanet.org/the-iba-esg-conference-and-evolving-role-of-lawyers-in-sustainability-due-diligence>; <https://www.ibanet.org/mandatory-climate-related-disclosures-loom-over-in-house-teams>

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Further, the complexity of the draft may prevent or delay its adoption by non-PAs. Specific guidance for legal practitioners on how to apply IESSA consistent with their existing professional conduct rules may be warranted.

Schedule 1 to this letter sets out our responses to questions posed in the Explanatory Memorandum which we consider to be most relevant to its application to the legal profession.

We would welcome future opportunities to be involved in discussions in this regard.

Kind regards,

IBA Business Human Rights Committee

IBA Regulation of Lawyers Committee

IBA Professional Ethics Committee

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Schedule 1 – Responses to Request for Specific Comments

This schedule sets out our responses to the questions posed in the Explanatory Memorandum which we consider to be most relevant to the application of Part 5 of the Code (**IESSA**) to the legal profession. We have not sought to address questions which go to the more technical aspects of the draft.

1. **Do you agree that the proposals in Chapter 1 of the Exposure Draft (ED) are:**
 - a. **Equivalent to the ethics and independence standards for audit engagements in the extant Code?**
 - b. **Profession-agnostic and framework-neutral?**

IBA appreciates that IESSA is intended to be profession-agnostic and framework-neutral, and therefore will apply to legal practitioners (and their firms) who undertake SAEs.

We make the following comments on this approach.

Profession-agnostic approach

Legal professionals are subject to jurisdiction-specific professional conduct rules, which have some overlap with the fundamental principles in IESSA, including in relation to confidentiality and managing conflicts of interest. IESSA does not specify how it should be applied by sustainability assurance practitioners (**SAPs**) who are subject to other rules that govern their professional conduct.

We recognise that assurance services may entail different ethical and independence considerations to those that are relevant to providing legal services. For example, generally, professional conduct rules contain duties with respect to lawyers' conduct toward clients, while the five principles contained in IESSA do not set out such requirements, but emphasise that SAPs must 'behave in a manner consistent with acting in the public interest in all professional activities and business relationships relating to sustainability assurance clients'.⁴

If IESSA is to be effectively implemented by legal practitioners, it must be drafted in a manner that is consistent with – and does not undermine – the jurisdiction-specific professional conduct duties of lawyers.

We recognise that IESBA has made efforts to avoid conflicts between IESSA and laws and regulations: the introductory section of IESSA provides that if there are circumstances where laws or regulations preclude a sustainability assurance practitioner from complying with certain provisions in Part 5, then those laws and regulations prevail, and the practitioner shall comply with all other provisions of that Part.⁵ Further, the principle of professional behaviour requires SAPs to comply with relevant laws and regulations.⁶ The general application guidance for IESSA notes that 'some jurisdictions might have provisions that differ from or go beyond those set out in this Part. Practitioners in those jurisdictions need to be aware of those differences and comply with the more stringent provisions unless

⁴ R5115.1(b).

⁵ R5100.7

⁶ Section 5115; R5115.1.

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prohibited by law or regulation.⁷ Further, the confidentiality provisions recognise that a ‘legal or professional duty or right’ to disclose or use confidential information constitutes an exception to the general confidentiality rules in IESSA (although other parts of IESSA do not recognise the potential existence of legal or professional duties).

Despite these qualifications, in our view, if IESSA is to be effectively implemented by legal practitioners (either voluntarily, or under regulatory obligation), then it must clearly address how it is to be applied by SAPs who are subject to existing professional conduct rules. As described in our response to Question 4 (below), in our view, the most appropriate approach is for IESSA to apply to the conduct of SAEs, while existing professional conduct rules govern all other aspects of dealing with a sustainability assurance client. IESSA should make clear that this is how it is intended to be implemented, so that jurisdictional laws or regulations that adopt IESSA reflect this approach.

Profession-specific guidance

We expect that legal practitioners will be hesitant to apply IESSA voluntarily when undertaking a SAE if they do not have a clear understanding of how it interacts with their professional conduct obligations. Therefore, specific application guidance about how to apply IESSA for practitioners who are subject to other professional conduct rules may be warranted.

Complexity

The complexity of the draft may present a barrier to jurisdictional adoption of IESSA, and to effective implementation by legal practitioners. A transition period for non-PAs to become familiar with the IESSA may be warranted.

Framework neutral

IBA supports the framework-neutral approach of IESSA, particularly given the rapidly evolving nature of sustainability reporting and assurance standards. It will be important for IESBA to continue to coordinate with IAASB to maximise consistency in approach and terminology between ISSA 5000⁸ and IESSA.

⁷ 5100.7 A1.

⁸ IAASB Proposed International Standard on Sustainability Assurance (ISSA) 5000, *General Requirements for Sustainability Assurance Engagements*.



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3. Do you support the definition of ‘sustainability information’ in Chapter 2 of the ED?

We recognise and broadly support IESBA’s intention for the definition of ‘sustainability information’ to be sufficiently broad and generic to apply to evolving sustainability reporting and assurance frameworks. However, it is equally important that the definition is clear, and does not risk covering all types of information – particularly because the definition is central to the scope of IESSA.

In our view, Part (a) of the draft definition is unclear in multiple respects:

- ‘opportunities, risks of factors on an entity’s activities, services or products’ does not make sense. Are these ‘opportunities’ opportunities for the entity? Are these ‘risks’ risks that could adversely impact the entity’s activities, services or products?
- the reference to ‘entity’s activities, services or products’ may be too narrow to cover the impacts of factors on, for example, the entity’s reputation, or financial prospects.
- the definition does not apply different concepts equally e.g. it considers the impact of social factors on a business to be ‘sustainability information’ but the impact of the business on social factors is not included in the definition.

In our view, the ISSA 5000 draft definition is clearer, while also being broad and accommodating double materiality.⁹ IESBA should consider using the ISSA 5000 definition in place of part (a) of the IESSA definition. As noted above, coordination with IAASB will be important to maximise consistency of terminology.

We support the inclusion of Part (b) of the definition to align with the framework-neutral approach of IESSA.

We support Part 2 of the definition as it provides examples of what constitutes sustainability information. However, for clarity, we suggest that rather than ‘Sustainability information includes information that may be: ...’ it would be more appropriate to frame this part as ‘Sustainability information may include information that is: ...’

4. The IESBA is proposing that the ethics standards in the new Part 5 (Chapter 1 of the ED) cover not only all SAEs provided to sustainability assurance clients but also all other services provided to the same sustainability assurance clients. Do you agree with the proposed scope for the ethics standards in Part 5?

Proposed scope of IESSA ethics standards

⁹ Draft IAASB ISSA 5000 defines ‘sustainability information’ as follows:

(uu) Sustainability information – Information about sustainability matters. Sustainability information results from measuring or evaluating sustainability matters against the applicable criteria. For purposes of the ISSAs, sustainability information is the equivalent of ‘subject matter information’ in other IAASB assurance standards. (Ref: Para. A32)

(vv) Sustainability matters – Environmental, social, economic and cultural matters, including: (i) The impacts of an entity’s activities, products and services on the environment, society, economy or culture, or the impacts on the entity, and (ii) The entity’s policies, performance, plans, goals and governance relating to such matters. For purposes of the ISSAs, sustainability matters being measured or evaluated in accordance with the applicable criteria are the equivalent of ‘underlying subject matter’ in other IAASB assurance standards.

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The IESSA ethics standards apply to SAE and *'and any other services that the practitioner provides to the same sustainability assurance client'*. We understand this to mean that IESSA applies where a lawyer undertakes an SAE for a client as well as to any other services that the lawyer provides to that client: this broad scope effectively means that IESSA applies to all services which a lawyer provides to a client, where that lawyer (or their firm) provides a SAE to that same client.

We appreciate that the reason for adopting this 'middle ground' approach is the high level of public reliance on sustainability information disclosed by companies, which means that adhering to the highest standards of ethical behavior only when performing the SAE for the client might not sufficiently safeguard stakeholder confidence and the public interest at large.¹⁰ IESBA therefore believes it is important to hold the practitioner to the same high ethics standards with respect to any other professional services they might provide to the same client.¹¹

In our view, however, it is equally important that the scope of IESSA does not go beyond regulating assurance, such that it regulates other aspects of a legal practitioner's approach to legal services. This is particularly the case given the broad definition of 'sustainability information'. In our view, the proposed scope of IESSA is too broad and may unjustifiably limit legal practitioners' ability to conduct legal services, particularly in light of the following considerations:

- As the Explanatory Memorandum notes, the objective of IESBA's Sustainability Project is to develop ethics (including independence) standards for SAEs that are equivalent to those that apply to audits of financial statements.¹² The proposed IESSA scope goes beyond this objective by applying beyond SAEs and has potential to unnecessarily limit lawyers' ability to provide legal services to clients.
- The proposed scope of IESSA has significant overlap with and may contradict existing jurisdictional professional conduct rules which apply to lawyers when they provide legal services, for example with respect to principles governing client confidentiality and conflicts of interest (see our response to Question 1).
- IESSA should not preclude legal practitioners within a single law firm from providing legal advice to a client with respect to (for example) their sustainability reporting or assurance obligations under a particular reporting or assurance framework, or how to develop a sustainability reporting or assurance process; while also providing SAEs to that same client – provided that appropriate measures to manage conflicts of interest and confidentiality concerns are in place (for example, that the client provides consent, separate personnel undertake these different work types and robust information barriers are installed). Law firms commonly manage potential conflicts of interest through information barriers, and IESSA should not restrict this practice.

In light of these considerations, the scope of IESSA should be limited to SAEs (i.e. the 'narrow ground' approach).

¹⁰ Para 32 of the Explanatory Memorandum.

¹¹ Para 32 of the Explanatory Memorandum.

¹² At paragraph 30 of the Explanatory Memorandum.

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In order to protect the public interest in relation to other services (which we understand is IESBA's concern), IESSA could also specify that where an SAP is not subject to profession-specific ethics standards, then that SAP 'should' apply IESSA to 'other services that the practitioner provides to the same sustainability assurance client' (where doing so is consistent with existing law and regulations).

Clarity of ethics v independence standards

We understand that the ethics standards in IESSA are intended to cover all SAEs irrespective of whether they are within the scope of independence standards in Part 5.¹³ However, the wording of subsection 5100.2 suggests that the ethics element of Part 5 (sections 5100-5390) is not always accompanied by the independence element of Part 5 (sections 5400-5700). The text of IESSA should make clear that the ethics standards apply to all SAEs, regardless of whether they meet the thresholds for the Part 5 International Independence Standards (IIS).

We understand that where an SAE does not fall within the scope of the Part 5 IIS, then the IIS in Part 4B of the Code is intended to apply to non-PAs as well as PAs.¹⁴ Other elements of IESSA and Explanatory Memorandum, however, indicate that parts 1 – 4B only mandatorily apply to PAs. IESSA should clearly and consistently state the circumstances where non-PAs are required to apply Part 4B of the Code.

Paragraph 5100.2b(b) of the ED 'encourages' practitioners who are not professional accountants to apply Parts 1 to 4B of the Code to guide their general conduct. This will not be appropriate for legal practitioners – who are required to apply their professional conduct rules in their provision of legal services. Therefore, subsection 5100.2b(b) should be amended to specify that this encouragement is 'subject to any profession-specific rules or regulations that apply to the practitioner' (or words to similar effect).

Definition of 'intended users'

An SAE is defined as 'an engagement in which a sustainability assurance practitioner aims to obtain sufficient appropriate evidence in order to express a conclusion designed to enhance the degree of confidence of the intended users about the sustainability information'. We recognise that the 'intended user' of sustainability information will depend on the applicable sustainability reporting and assurance framework. However, this term should be given some definition to clarify the scope of what constitutes a SAE.

Application of IESSA to firms

We understand that the scope of IESSA extends not only to individual practitioners but also to the firms which undertake SAEs. The determination of a 'firm' in the context of a SAE is equivalent to the approach in the context of an audit or other assurance engagement.¹⁵ It includes:¹⁶

- (a) A sole practitioner, partnership or corporation of sustainability assurance practitioners;

¹³ Para 35 of the Explanatory Memorandum.

¹⁴ 5100.2a.

¹⁵ Para 77 of the Explanatory Memorandum.

¹⁶ See the 'proposed revised glossary'.

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- (b) An entity that controls such parties, through ownership, management or other means; and
- (c) An entity controlled by such parties, through ownership, management or other means.

This definition of 'firm' as we understand it does not capture an entire law firm or other partnership which could comprise some legal practitioners who are SAPs (i.e. undertake SAEs) and some which who are not. However, other provisions of IESSA (for example, the fees provisions at section 5410) indicate that the term 'firm' is intended to cover such law firms. This should be clarified.

In our view, whatever the definition of 'firm', the obligations in IESSA should as far as possible be clearly limited to the team in the law firm who undertakes SAEs, as law firms themselves (as well as individual legal practitioners) may be subject to jurisdiction-specific professional conduct rules.¹⁷

5. The IESBA is proposing that the International Independence Standards in Part 5 apply to SAEs that have the same level of public interest as audits of financial statements. Do you agree with the proposed criteria for such engagements in paragraph 5400.3a?

We understand that the IIS are intended to apply to SAEs that are attestation engagements where the criteria in subsection 5400.3a are satisfied. The term 'general purpose framework', while defined, lacks clarity and may benefit from specific guidance.

Further, the reference to 'investors or other stakeholders' should be clarified: is this intended to have the same meaning as 'intended users' (which is the term used in the definition of SAE)? We emphasise the importance of consistent use of terminology throughout the document.

We otherwise do not make any specific comment about the appropriateness of IIS applying to SAEs that have the same level of public interest as audits of financial statements, but in principle recognise the value in maximising consistency between the standards that apply to SAEs and financial audits.

6. Do you support including Section 5270 in Chapter 1 of the ED?

Consistent with our response to Question 4, the scope of the obligations set out in section 5270 should be limited to the undertaking of SAEs and not to other services.

7. Do you support the provisions added in extant Section 360 and in Section 5360 for the auditor and the sustainability assurance practitioner to consider communicating (actual or suspected) NOCLAR to each other?

Subsection R5360.18a of the ED requires an SAP to consider whether to communicate a non-compliance or suspected non-compliance with law or regulation (NOCLAR) by a sustainability assurance client to that client's external auditor (if any).

¹⁷ See for example, SRA Code of Conduct for Firms, available at: <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>



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If IESSA applies to ‘not only all SAEs provided to sustainability assurance clients but also all other services provided to the same sustainability assurance clients’ (as discussed in our response to Question 4), then subsection 5360.18a suggests that lawyers should consider disclosing to an external party a client’s non-compliance or suspected non-compliance with laws or regulations that is uncovered in the course of providing legal services.

We recognise that this subsection is worded as a requirement to ‘consider’ rather than as an obligation to communicate NOCLAR to an external auditor. Additionally, the application guidance at subsection 5360.18a A1 provides that factors relevant to considering the communication in accordance with subsection R5360.18a include whether doing so would be contrary to law or regulation (among other things).¹⁸

However, despite those qualifications, in our view, subsection 5360.18a presents complexities for lawyers that may prove a barrier to adoption. Legal practitioners have duties of confidentiality under jurisdictional professional conduct rules and legal obligations to maintain legal professional privilege. Disclosing NOCLAR that was uncovered in the course of legal services to a third party would be fundamentally inconsistent with those duties.

This is a further reason why the scope of IESSA should be limited to the undertaking of SAEs only – and that lawyers’ professional conduct obligations apply in respect of any legal services provided to a sustainability assurance client (see response to Question 4).

If the application of R5360.18a was limited to circumstances in which a legal practitioner in their capacity as SAP uncovered NOCLAR in the course of undertaking a SAE, then we still see difficulty with respect to its application: it suggests that two unrelated parties communicate with each other about their common client, and this gives rise to confidentiality concerns.

9. For SAEs addressed by Part 5, do you agree with the proposal to use the determination of a Public Interest Entity (PIE) for purposes of the audit of the entity’s financial statements?

We do not wish to make any specific comments on technical aspects of the definition of a PIE. However, at a general level, we recognise that in the interests of consistency and as an initial step, IESSA does not prescribe which entities are PIEs in the context of SAEs but, instead, relies on the revised definition of PIE recently finalized by the IESBA in the context of audits of financial statements.¹⁹

While the definition of PIE may warrant revision in due course, we generally support IESBA’s approach in the interests of limiting complexity of this draft.

10. The IESBA is proposing that the International Independence Standards in Part 5 specifically address the independence considerations applicable to group SAEs.

¹⁸ Further, subsection R5360.6 appropriately recognises that in some jurisdictions, there may be legal or regulatory provisions governing how sustainability assurance practitioners should address non-compliance or suspected non-compliance, which might differ from or go beyond the provisions in section 5360. Further, R5360.15(a) requires SAPs to comply with applicable laws and regulations, including legal or regulatory provisions governing the reporting of non-compliance or suspected non-compliance to an appropriate authority.

¹⁹ Para 81 of the Explanatory Memorandum.

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- a. **Do you support the IIS in Part 5 specifically addressing group SAEs? Considering how practice might develop with respect to group SAEs, what practical issues or challenges do you anticipate regarding the application of proposed Section 5405?**
- b. **If you support addressing group SAEs in the IIS in Part 5:**
 - i. **Do you support that the independence provisions applicable to group SAEs be at the same level, and achieve the same objectives, as those applicable to a group audit engagement (see Section 5405)?**
 - ii. **Do you agree with the proposed requirements regarding communication between the group sustainability assurance firm and component sustainability assurance firms regarding the relevant ethics, including independence, provisions applicable to the group SAE?**
 - iii. **Do you agree with the proposed defined terms in the context of group SAEs (for example, 'group SAE' and 'component')?**

While we do not wish to make specific comments about the technical aspects of the proposed group SAE provisions in IESSA, we note that (as the Explanatory Memorandum recognises), draft ISSA 5000 does not address group sustainability assurance. While we recognise IESBA's rationale for including group engagements in IESSA,²⁰ in our view, inconsistency between IESSA and ISSA 5000 is likely to result in increased complexity and may delay adoption.

We also consider that the group assurance provisions in IESSA are unclear in several respects which may pose challenges for adoption by non-PAs, including legal practitioners: the definition of 'component' should be clearer, and IESSA would benefit from clarification as to how a component and a group is determined, and how components are differentiated from value chain entities. Further, we note the term 'group sustainability assurance firm' is defined, but not 'sustainability assurance firm' and this may give rise to confusion.

We agree with the Explanatory Memorandum that specific guidance on group assurance may be needed, if these provisions are included in the final draft of IESSA.²¹

13. Do you support the provisions in Section 5407 addressing the independence considerations when assurance work is performed at, or with respect to, a value chain entity?

We do not wish to make specific comments on the technical elements of the IESSA's approach to value chain entities.

However, at a general level, the provisions on value chain entities at section 5400 are unclear: for example, subsection R5407.6 does not specify that firms must be independent from a value chain entity when that firm performs the assurance work on the sustainability

²⁰ As outlined in the Explanatory Memorandum.

²¹ See paragraph 92 of the Explanatory Memorandum.



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information of the value chain entity provided by the sustainability assurance client – without carrying out assurance work at that entity. However, the Explanatory Memorandum indicates an intention for independence requirements to apply in these circumstances.

The complexities associated with requiring independence from value chain entities may be a barrier to implementation by non-PAs.

16. Subsections 5601 to 5610 address specific types of non-assurance services (NAS).

- a. Do you agree with the coverage of such services and the provisions in the Subsections?**
- b. Are there any other NAS that Part 5 should specifically address in the context of SAEs?**

We note that section 5608 deals specifically with independence considerations that arise where a firm that undertakes an SAE also provides legal services to the same client.

We agree that providing legal services to a sustainability assurance client might create a self-review threat when there is a risk that such services will affect the records underlying the sustainability information, or the sustainability information itself that the firm then expresses an opinion on. We therefore support the inclusion of legal services within the examples of NAS (consistent with section 608 of the existing Code).

With respect to the examples of legal advice set out at section 5608.4 A1, we would suggest elaborating this list to recognise the significant role that lawyers play in helping clients to understand sustainability-related risks and opportunities; understand good practice sustainability reporting and assurance approaches (which may go beyond legislative requirements); install appropriate governance mechanisms for managing sustainability-related risks; and with sustainability strategy and target setting (among other things).

24. Do you support the IESBA's proposal to align the effective date of the final provisions with the effective date of ISSA 5000 on the assumption that the IESBA will approve the final pronouncement by December 2024?

Given the complexity of the draft, we would suggest that the timeline for the effective date of IESSA is delayed beyond December 2024 by a reasonable period to enable training, upskilling and awareness raising among non-PAs (including legal practitioners) of how the draft will apply to them. As suggested above, specific guidance to professions will likely be required, and this will take time to develop.

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