

**Exposure Draft**  
**February 2023**  
*Comments due: May 18, 2023*

*International Ethics Standards Board  
for Accountants®*

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# Proposed Revisions to the Code Addressing Tax Planning and Related Services



## About the IESBA

The [International Ethics Standards Board for Accountants®](#) (IESBA®) is an independent global standard-setting board. The IESBA's mission is to serve the public interest by setting ethics standards, including auditor independence requirements, which seek to raise the bar for ethical conduct and practice for all professional accountants through a robust, globally operable [International Code of Ethics for Professional Accountants \(including International Independence Standards\)](#) (the Code).

The IESBA believes a single set of high-quality ethics standards enhances the quality and consistency of services provided by professional accountants, thus contributing to public trust and confidence in the accountancy profession. The IESBA sets its standards in the public interest with advice from the IESBA Consultative Advisory Group (CAG) and under the oversight of the Public Interest Oversight Board (PIOB).

The structures and processes that support the operations of the IESBA are facilitated by the International Foundation for Ethics and Audit™ (IFEATM).

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## REQUEST FOR COMMENTS

This Exposure Draft, *Proposed Revisions to the Code Addressing Tax Planning and Related Services*, was developed and approved by the IESBA.

The proposals in this Exposure Draft may be modified in light of comments received before being issued in the final pronouncement. Comments are requested by **May 18, 2023**.

Respondents are asked to submit their comments electronically through the IESBA website, using the "[submit a comment](#)" link. Please submit comments in both PDF and Word files. Also, please note that first-time users must register to use this feature. All comments will be considered a matter of public record and will ultimately be posted on the website. Although the IESBA prefers that comments are submitted via its website, comments can also be sent to Ken Siong, IESBA Program and Senior Director, at [KenSiong@ethicsboard.org](mailto:KenSiong@ethicsboard.org).

This publication may be downloaded from the IESBA website: [www.ethicsboard.org](http://www.ethicsboard.org). The approved text is published in the English language.

# PROPOSED REVISIONS TO THE CODE ADDRESSING TAX PLANNING AND RELATED SERVICES

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## EXPLANATORY MEMORANDUM

### I. Introduction

1. This memorandum provides background to and explains the proposed revisions to the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the Code) addressing tax planning and related services.
2. The IESBA unanimously approved these proposed revisions for exposure at its [November–December 2022](#) meeting.

### II. Background

3. In recent years, much public attention has focused on the topic of tax avoidance, considering revelations such as the “Paradise Papers”<sup>1</sup> and the “Pandora Papers,”<sup>2</sup> notwithstanding the legality of the tax mitigation schemes or related transactions to achieve desired tax outcomes. Questions have been raised regarding the ethical implications for professional behavior when individual professional accountants (PAs) in business (PAIBs) and professional accountants in public practice (PAPPs) are involved in developing tax minimization strategies that are perceived as “aggressive” or when firms provide advice to their clients on such strategies.
4. The issue is of such public interest significance<sup>3</sup> that it has been discussed on the G20 agenda. Several global bodies have also focused on transparency and better disclosure of tax practices, among other policy actions. For example:
  - (a) The Organisation for Economic Cooperation and Development (OECD) launched the [Base Erosion and Profit Shifting \(BEPS\)](#) project in partnership with the G20. The project aims to ensure that the international tax rules do not facilitate shifting corporate profits away from where the actual economic activity and value creation occur. The premise for value creation is linked to the substance over form argument, which maintains that transactions in question should not be evaluated based on their formal legal structure but instead on the underlying substance of the transactions.
  - (b) The World Federation of Exchanges has included [tax transparency](#)<sup>4</sup> as a “material Environmental, Social and Governance (ESG) metric” for reporting by listed companies.
  - (c) The International Federation of Accountants (IFAC) has called on jurisdictions to share information to promote [accountability and long-term global sustainability](#).<sup>5</sup>
  - (d) The International Accounting Standards Board (IASB) has worked on [changes to tax disclosure rules](#).<sup>6</sup>

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<sup>1</sup> See, for example, the UK House of Commons [Briefing Paper](#), *The Paradise Papers* (November 2017).

<sup>2</sup> See, for example, <https://www.bbc.com/news/world-58780561>.

<sup>3</sup> For example, in its article [What could a new system for taxing multinationals look like?](#) the Economist noted that in 2015, the OECD estimated that tax avoidance robs public coffers of \$100-240 bn, or 4-10% of global corporation tax revenues a year.

<sup>4</sup> *Exchange Guidance & Recommendation* (October 2015), WFE Sustainability Working Group, World Federation of Exchanges.

<sup>5</sup> *G20 Public Trust in Tax – Surveying Public Trust in G20 Tax Systems* (January 2019), Association of Chartered Certified Accountants (ACCA), Chartered Accountants Australia and New Zealand (CA ANZ) and IFAC.

<sup>6</sup> IFRIC 23, *Uncertainty over Income Tax Treatments*.

5. In the light of these developments and pursuant to a commitment in its [Strategy and Work Plan 2019-2023](#), the IESBA formed a Working Group in September 2019 to:
  - (a) Gather an understanding of the regulatory, practice, and other developments in corporate and individual tax planning by PAIBs and PAPPs; and
  - (b) Identify and analyze the ethical implications of those developments and determine whether there is a need for enhancements to the Code or further actions.
6. In September 2021, the Working Group submitted its final [report](#) and recommendations to the IESBA. Based on this report and the related recommendations, the IESBA decided to launch a [standard-setting project](#) on the topic of tax planning and related services, establishing a Task Force to take it forward.

### III. Project Objective

7. The objective of the project is to develop a principles-based framework, leveraging the fundamental principles and the conceptual framework of the Code, to guide PAPPs' and PAIBs' ethical conduct when providing tax planning (TP) and related services (TP services) to clients, or performing TP activities for employing organizations, thereby maintaining the Code's robustness and relevance as a cornerstone of public trust in the global accountancy profession.

## IV. Consultation with Key Stakeholders

### Global Roundtables

8. In April 2022, the IESBA hosted three global virtual roundtables to bring together a broad range of stakeholders to discuss the state of play on TP and explore how the IESBA could formulate a proposed ethical framework to guide PAIBs and PAPPs when providing TP services.
9. The three roundtables were organized to cover specific regions – the Americas, EMEA,<sup>7</sup> and Asia Pacific. Excluding observers, close to 100 delegates participated in the events. They represented various stakeholder groups, including regulators and public authorities, representatives of the legal profession, national standard setters, preparers, professional accountancy organizations, firms, and academia. Observers included a member of the Public Interest Oversight Board (PIOB).
10. The input received was rich and diverse. The discussions highlighted how intertwined, complex, and multi-dimensional the ethical considerations can be in addressing TP services. Not surprisingly, the interactions between tax laws of different jurisdictions in cross-border situations were noted as an area needing particular care and sensitivity.
11. The discussions generated practical observations, which the IESBA considered in developing the proposals in this Exposure Draft (ED). Key comments or observations from the roundtables are referenced in the discussion of the significant matters included in this explanatory memorandum. The IESBA acknowledges that the way forward will need to balance the public interest benefits of the proposed revisions to the Code with considerations of global operability, practicality, and scalability for the users of the Code.

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<sup>7</sup> Europe, the Middle East, and Africa

## V. Proposed Ethical Framework

### Overarching Considerations

12. As a result of the consultation with key stakeholders, the IESBA came to the view that the Code can play a more substantive and practical role in guiding PAs' mindset and behavior when providing TP advice. This recognizes that while the Code does not and cannot override laws and regulations, ethics is broader than the law and can guide behaviors. In this regard, the notion that "what is legal is not necessarily ethical" often resonates with stakeholders and applies to TP just as much as to any other professional activities PAs may pursue. Yet, beyond the fundamental principles (FPs), conceptual framework (CF), and specific provisions aimed at safeguarding PAPPs' independence in the context of audit and other assurance engagements, the Code is silent on the topic. Additionally, from the perspective of impact, the IESBA agreed that the Code is better placed than non-authoritative material to influence and guide behavior because it is authoritative and enforceable.
13. Through its desktop research, the IESBA noted a wide variety of frameworks and guidance materials developed by various organizations in the area of TP. However, these frameworks and guidance materials are not entirely consistent with each other because they address different aspects of TP, have different objectives, or target different audiences. Outreach undertaken also indicates that some large accounting firms have developed proprietary guidelines on TP. Not all firms, however, have such guidance to assist their TP work, especially small and medium practices (SMPs), as they do not have the resources of the larger firms. Further, feedback from outreach indicates that there are stakeholder perceptions that the tax adviser community is not as closely regulated as the audit profession and therefore, generally feels less constrained in its advisory services. Accordingly, the IESBA believes it would be in the public interest to develop a unifying framework in the Code that would codify the relevant principles and best practices, thereby planting the guideposts to help PAs navigate the judgments and idiosyncrasies of TP. Such a framework would also have the benefit of providing a consistent practice baseline for all PAIBs and PAPPs globally.
14. Given the wide diversity of tax laws and regulations, the IESBA is cognizant that this framework will need to be jurisdiction-neutral (i.e., equally applicable in jurisdictions where the tax burden is high and where it is low). Likewise, the IESBA has been careful to steer clear of analyzing the merits of tax positions or strategies planned or adopted by individual or corporate taxpayers, judging the merits of the tax regimes or strategies of respective jurisdictions, or engaging in debates about tax policy.
15. Above all, the IESBA aspires to rise to the challenge of reinforcing public trust in the global accountancy profession. News headlines such as those concerning the Paradise and Pandora Papers noted above have led to public outcry about the role of consultants, including professional tax advisers, in enabling wealthy individuals and multinational corporations to engage in tax avoidance or evasion. While this project does not need to address tax evasion, which is unlawful and therefore already addressed under the Code,<sup>8</sup> the accountancy profession has not escaped being painted with a broad brush as an "enabler" of tax malfeasance. Public mistrust in professional tax advisers has risen to such a level that in some major jurisdictions, legislation is being considered to regulate tax advice and tax advisers.<sup>9</sup>

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<sup>8</sup> Section 360 for PAPPs and Section 260 for PAIBs, both dealing with responding to non-compliance with laws and regulations (NOCLAR)

<sup>9</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13488-Tax-evasion-aggressive-tax-planning-in-the-EU-tackling-the-role-of-enablers/public-consultation\\_en?mc\\_cid=c0c64ee350&mc\\_eid=5898f32087](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13488-Tax-evasion-aggressive-tax-planning-in-the-EU-tackling-the-role-of-enablers/public-consultation_en?mc_cid=c0c64ee350&mc_eid=5898f32087)

16. The IESBA believes that developing an ethical framework in the Code to guide PAs' behaviors and actions concerning TP can go a long way towards protecting the public interest and the profession's reputation.

### **Outline of the Proposed Ethical Framework**

17. To assist PAs in exercising judgment in navigating the complexities and uncertainties of TP and deciding on the appropriate course of action in the circumstances, the IESBA proposes an ethical framework that will guide PAs to:
  - Comply with the FPs and highlight the types of threats to such compliance that might be created when performing TP activities.
  - Exhibit the mindset and behavior expected of them following the [Role and Mindset](#) provisions of the Code. This includes guidance elaborating on the relevance and applicability of behavioral concepts and principles, such as demonstrating the strength of character and having an inquiring mind, as well as expectations of PAs to promote an ethics-based culture within their employing organizations and to uphold the profession's reputation.
  - Understand the applicable tax laws and regulations, which might include the legislative intent behind the relevant laws and regulations, and, if relevant, the economic purpose and substance of the transaction.
  - Exercise professional judgment to establish a credible basis for the TP advice in circumstances of uncertainty.
  - Consult internally or externally with experts as needed, which might be part of specific actions to address identified threats. The internal or external consultations should be conducted within the professional boundaries of referring work to experts, bearing in mind the PA's responsibility to remain objective.
  - Communicate relevant matters or concerns with the individual client, management, or those charged with governance, including as part of an escalation process where necessary.
  - Evaluate the need for transparency, having regard to PAs' duty of confidentiality under the Code. This includes the circumstances in which disclosure would be appropriate or justified, when informed consent for disclosure should be obtained in the case of clients, to whom disclosure might be made and when, and the matters that might be disclosed.
  - Develop an appropriate level of documentation throughout the process to substantiate their judgments, decisions, and actions.
  - Respond to suspected non-compliance with laws and regulations when they encounter information that suggests TP might have "stepped over the line" into an actual or suspected breach of tax laws and regulations.



18. These provisions do not address the issues of tax morality,<sup>10</sup> tax fairness<sup>11</sup> and tax justice which the Board determined was outside the scope of this project.<sup>12</sup>

## VI. Scope of Proposals

### *Proposed New Sections 380 and 280*

19. The scope of the project encompasses Parts 2<sup>13</sup> and 3<sup>14</sup> of the Code, with consideration given to the need for any conforming amendments to other sections of the Code. The IESBA is of the view that the proposed ethical framework warrants new sections in Parts 2 and 3 focused on TP services or activities.
20. As part of its deliberations, the IESBA noted that the issues concerning TP services are unique compared with other professional services provided by PAs, given the sensitive nature of TP in terms of its financial impact on clients and employing organizations, the broader role of taxes in meeting jurisdictions' policy goals, and the complexity of the subject. In particular, the IESBA believes it is especially important to address the uncertainties PAs may face when providing TP services or performing TP activities, as threats to compliance with the FPs might be created in circumstances of uncertainty.
21. Therefore, the IESBA proposes that two new sections be added to the Code, namely Sections 380 and 280. In drafting these sections, the IESBA has endeavored to keep:
- Section 380 applicable to all clients, i.e., individuals and corporate clients.
  - Both sections applicable to all entities, from small- and medium-sized entities (SMEs) to large multi-national entities, regardless of whether they are public interest entities (PIEs).
- (See paragraphs 380.5 A4 and 280.5 A4.)
22. Consistent with any other provisions of the Code, the proposed provisions in Sections 380 and 280 do not override laws and regulations, including any anti-avoidance rules prevailing in a given jurisdiction.
23. Further, the IESBA notes that paragraph 100.7 A1 of the Code remains applicable, i.e., where a jurisdiction has provisions that differ from or go beyond those in the Code, PAs in that jurisdiction need to be aware of those differences and comply with the more stringent provisions unless prohibited by law or regulation.

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<sup>10</sup> [Tax Morale](#), as defined by the OECD, is "the intrinsic motivation to pay taxes." This concept is vital to the tax system as most tax systems rely on taxpayers' voluntary compliance for the bulk of their revenues.

<sup>11</sup> In the Wealth of Nations (1776) (Smith, A., & Cannan, E. (2003). The Wealth of Nations. New York, NY. Bantam Classic), Adam Smith argued that taxation should follow the four principles of fairness, certainty, convenience, and efficiency. Tax fairness is a concept which states that the system of taxation must be equitable to the public. A fair tax system encourages a fair contribution to the cost of maintaining public utilities and infrastructure.

<sup>12</sup> According to ActionAid, tax justice is a central concern for anyone working for social justice. Tax Justice UK sees a parallel in the movement for tax justice to the movement for women's rights and labor rights as important elements of a country's social fabric. It is a belief in genuinely progressive taxation, i.e., tax systems that generate sufficient public revenue while ensuring that this revenue is fairly redistributed and focused on rebalancing economic and gender inequalities.

<sup>13</sup> Part 2 – Professional Accountants in Business

<sup>14</sup> Part 3 – Professional Accountants in Public Practice

## VII. Significant Matters

### A. Scope of Services Addressed

#### *Tax Planning*

24. The IESBA is of the view that it is important to establish a description of “tax planning” in the proposed sections to circumscribe the scope of professional services and activities that the sections would address.
25. In considering how to describe TP, the IESBA has reviewed established descriptions of TP developed by the following organizations:

| Organization   | Description of Tax Planning   |
|--|---|
| OECD   | Arrangement of a person's business and/or private affairs in order to minimize tax liability <sup>15</sup>  |
| UK HMRC  | Involves using tax reliefs for the purpose for which they were intended <sup>16</sup>   |
| Confédération Fiscale Européenne (CFE) (Tax Advisers Europe) | Focus on delivering savings to clients using legal vehicles and financial transactions specifically established to exploit these technicalities <sup>17</sup> |

26. The IESBA noted that the latter two descriptions appear limiting in scope for the purposes of this project in one way or another, or overly technical. The IESBA believes that the OECD description is closer to what should be the focus of the new sections, i.e., dealing with arrangements to minimize tax liability. The IESBA, however, considered that the term “tax efficiency” would be more neutral than “tax minimization.”
27. Accordingly, the IESBA proposes the following description:

*Tax planning comprises a broad range of [services/activities] designed to assist [a client, whether an individual or an entity/an employing organization] in structuring [the client's/the employing organization's] affairs in a tax-efficient manner.*

(See paragraphs 380.5 A1 and 280.5 A1.)

28. To facilitate consistent application, the IESBA is proposing in paragraphs 380.5 A2 and 280.5 A2 illustrative examples of TP services or activities covered under these sections.

#### *Related Services or Activities*

29. During the roundtable discussions and as part of the fact-finding work underpinning the project, the IESBA noted that there are other types of services or activities performed by PAs that are ancillary to the provision of TP services or the performance of TP activities. Such services or activities include, for example, assisting in resolving a dispute with the tax authority on a TP position that the PA or another party recommended, or preparing a tax return that reflects the position in the TP

<sup>15</sup> <https://www.oecd.org/ctp/glossaryoftaxterms.htm>

<sup>16</sup> [Tackling Tax Avoidance, Evasion, and Other Forms of Non-Compliance \(March 2019\)](#), HM Revenue & Customs, HM Treasury United Kingdom.

<sup>17</sup> [Professional Judgment in Tax Planning - An Ethics Quality Bar for All Tax Advisers](#) (June 2021), CFE Tax Advisers Europe.

arrangement. These related services or activities are based on or linked to a TP service or activity. Consistent with the indicative scope in the [project proposal](#), the IESBA proposes that such related services or activities be within the scope of the ethical framework.

30. The IESBA is therefore proposing a description of related services in paragraph 380.5 A3 and related activities in paragraph 280.5 A3. As related services or activities are scoped in, the remainder of Sections 380 and 280 do not make further reference to them.

#### *Non-Compliance with Laws and Regulations (NOCLAR)*

31. As noted above, the proposals do not address tax evasion, which is unlawful. Nevertheless, to build in the proper linkage to the NOCLAR provisions of the Code,<sup>18</sup> the IESBA proposes guidance that refers PAs to the NOCLAR sections of the Code when they become aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by a client, management, those charged with governance (TCWG) or other individuals working for or under the direction of the client or employing organization.

(See paragraphs 380.7 A1 and 280.7 A1.)

#### **B. Role of the Professional Accountant in Acting in the Public Interest**

32. During the fact-finding phase of the project, the IESBA noted the benefits of having PAs provide TP services as they play a significant role in supporting and enhancing the effectiveness of the tax system. Indeed, TP is so important for employing organizations and clients that tax advisory services constitute a significant part of the profession's activities worldwide.<sup>19</sup>
33. As noted above, however, in recent times public concerns have risen significantly about the role tax advisers play in assisting tax avoidance by wealthy individuals and corporations, including concerns about multinational companies utilizing sophisticated TP strategies to minimize their taxes. Public mistrust of professional tax advisers has risen to such a level that legislation is being considered to regulate tax advice and tax advisers in some major jurisdictions, such as the EU.<sup>20</sup>
34. The IESBA recognized that there was a perceived challenge concerning understanding who is considered the public and the interests of those groups of stakeholders PAs are expected to serve in acting in the public interest. Questions have been posed regarding which parties are

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<sup>18</sup> Section 360 for PAPPs and Section 260 for PAIBs

<sup>19</sup> The global tax management market is expected to grow from USD 18.9 billion in 2021 to USD 32.5 billion by 2026, at a Compound Annual Growth Rate (CAGR) of 11.5% during the forecast period (<https://www.marketsandmarkets.com/PressReleases/tax-management.asp>)

<sup>20</sup> See, for example, [https://www.accountancyeurope.eu/tax/tax-policy-220107/?mc\\_cid=73311ac0b2&mc\\_eid=5898f32087](https://www.accountancyeurope.eu/tax/tax-policy-220107/?mc_cid=73311ac0b2&mc_eid=5898f32087).

captured under the notion of “public interest” – society at large, legislators, or shareholders and regulators of the capital markets?

35. Many participants across the three roundtables acknowledged that PAs providing TP services play an essential public interest role in serving employing organizations’ or clients’ interests in accordance with tax laws and regulations, i.e., by facilitating compliance with tax laws and regulations.
36. In considering what it means for a PA to act in the public interest in relation to TP, whether done for a client or an employing organization, the following factors, as shared by roundtable participants, are relevant:
- *Interpretation of the tax legislation:* roundtable participants expressed the view that the notion of a PA acting in the public interest when performing TP activities is closely linked to the approval of the tax treatment or structure by the tax authority in the particular jurisdiction. Thus, they believed that if the tax authority agrees with a particular tax treatment or structure at the time of consultation, the PA has acted in the public interest. There was also a strong view that legislators and regulators consider the public interest when they develop tax laws and regulations; therefore, it was argued that complying with those laws and regulations represents acting in the public interest.
  - *PAs’ expertise and reputational risks:* roundtable participants generally accepted that PAs play a public interest role by providing their clients and employing organizations with high-quality TP advice, leveraging their training and expertise. Participants suggested that in providing high-quality TP advice, PAs need to consider the potential risks of the TP to their clients or employing organizations and the reputational risks to the PAs – considerations that are relevant to the public interest. By providing high-quality advice, and when the client or employing organization implements this advice, the PA is perceived as improving compliance within the tax system and collection in the particular jurisdiction – an outcome that is in the public interest.
  - *Perception issues:* Participants generally believed that the very nature of PAs helping their clients or employing organizations to obey the law is an embodiment of PAs acting in the public interest. Participants generally agreed that it is a balancing act – clients or employing organizations may view that PAs should be preserving their interests rather than those of the public at large.
  - *The complexity of TP transactions given complexity in the underlying tax codes or interactions between tax codes:* Some participants believed that it may be challenging to determine what is in the public interest, especially in situations where multiple jurisdictions are involved in cross-border transactions. It was observed that each jurisdiction would perceive the public interest differently. So, it was argued that it is an impossible task to determine what would be in the public interest in these circumstances. Each jurisdiction would try to protect its sovereignty by determining its tax regime for competitive or other reasons. The reality, therefore, is that tax laws can differ quite considerably among jurisdictions.
37. Considering all the observations during the roundtable discussions, the IESBA determined not to attempt to define or describe the public interest in the abstract given the variety of considerations that may influence its meaning. The IESBA instead proposes contextual guidance in Sections 380 and 280 that explains that:
- An important part of what acting in the public interest means for PAs is for them to contribute their knowledge, skills and experience to assist clients or employing organizations meet their

TP goals while complying with tax laws and regulations. In doing so, PAs help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest. (See paragraphs 380.4 A1 and 280.4 A1.)

- PAs play an important role in assisting clients or employing organizations in meeting their tax obligations and not seeking to circumvent them through tax evasion. However, when PAs provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the FPs. (See paragraphs 380.4 A2 and 280.4 A2.)

38. The IESBA is also of the view that while the PA plays an important role in the efficient and effective operation of the tax system, it is ultimately for a court or other appropriate adjudicative body to determine whether a TP arrangement complies with the relevant tax laws and regulations. (See paragraphs 380.4 A3 and 280.4 A3.)

### **C. Responsibilities of Clients, Management, and Those Charged with Governance**

39. During the roundtable discussions, the IESBA heard from stakeholders about the importance of recognizing that management and TCWG share a fiduciary duty, as strategic and governance leaders within their organizations, to ensure that they play the equally important role of facilitating the provision of accurate information to the PA. The responsibilities of management and TCWG also extend to ensuring the organization's tax affairs are aligned with its tax strategy or policies.

40. The IESBA believes that it is important to recognize the specific responsibilities of management and TCWG of clients and employing organizations in relation to TP within the proposed ethical framework. While proposed Sections 380 and 280 specify PAs' responsibilities when providing TP services or performing TP activities, nothing in those sections detracts from the obligations of management and TCWG.

41. As such, the IESBA proposes guidance that highlights several key responsibilities of management (including individual clients, as the case may be) and TCWG. These include:

- Ensuring that the client's or employing organization's tax affairs are conducted in accordance with the relevant tax laws and regulations.
- Maintaining all the books and records and implementing the systems of internal control necessary to enable the client or employing organization to fulfill its tax compliance obligations.
- In relation to a TP service provided to a client, making available all the facts and other relevant information needed to enable the PA to perform the TP service.
- Deciding whether to accept and implement the PA's recommendation or advice on a TP arrangement.
- Submitting the client's or employing organization's tax returns and dealing with the relevant tax authorities in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any TP arrangements.
- Ensuring that the client's or employing organization's TP arrangements are consistent with any publicly disclosed tax strategy or policies.

(See paragraphs 380.8 A1 and 280.8 A1.)

**D. Responsibilities of All Professional Accountants**

42. Equally, the IESBA proposes that the ethical framework specify some basic responsibilities for all PAs. Notably, the IESBA observed specific circumstances that pertain to the provision of TP services.
43. First, it is important to recognize that in some jurisdictions, there are anti-avoidance laws and regulations. Accordingly, the IESBA proposes that PAs obtain an understanding of those laws and regulations and advise the client or employing organization to comply with them when providing TP services or performing TP activities. (See paragraphs R380.6 and R280.6.)
44. Secondly, the IESBA agrees with roundtable participants who commented that PAs have a responsibility to be informed and to develop the professional competence to provide TP services or to perform TP activities. This is consistent with the FP of professional competence and due care.<sup>21</sup> For the PA, it is a matter of not just adhering to the letter of the law but also being able to attest to being ethical in carrying out professional duties. In particular, a PA is expected to apply an inquiring mind and not advise on, or engage in, transactions that don't have a credible basis.<sup>22</sup>
45. To that effect, if a PAPP is requested by a client to provide a TP service, the IESBA proposes that the PA obtain an understanding of the nature of the request prior to the PA undertaking any detailed work,. The IESBA proposes that this understanding include:
- (a) Knowledge and understanding of the client, its owners, management and TCWG, and its business activities;
  - (b) The purpose and circumstances of the TP arrangement; and
  - (c) The relevant tax laws and regulations.
- (See paragraph R380.9)
46. The IESBA also considered the intersection of the proposed Sections 380 and 280 with other sections of the Code in the course of PAs providing TP services or performing TP activities. The IESBA proposes guidance that refers the PAPP to relevant provisions of the Code addressing client and engagement acceptance (Section 320), second opinions as the PAPP might be engaged to provide a second opinion on a TP arrangement (Section 321), professional competence and due care (Subsection 113), and the need to exercise professional judgment and have an inquiring mind (Section 120). (See paragraphs 380.9 A1 – 380.10 A1.)
47. For a PAIB involved in performing a TP activity, the IESBA proposes a similar requirement (paragraph R280.9) as well as guidance regarding professional competence and due care, and the need to exercise professional judgment and have an inquiring mind. (See paragraph 280.10 A1.)

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<sup>21</sup> Paragraph 110.1 A1(c) of the Code states that PAs are to attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organization receives competent professional service, based on current technical and professional standards and relevant legislation, and act diligently and in accordance with applicable technical and professional standards.

<sup>22</sup> Paragraph 110.1 A1(e) of the Code states that PAs are to comply with the fundamental principle of professional behavior, which means complying with relevant laws and regulations, behaving in a manner consistent with the profession's responsibility to act in the public interest in all professional activities and business relationships, and avoiding any conduct that they know or should know might discredit the profession.

48. The IESBA also believes it is important that PAs explain the basis on which they recommended or otherwise advised on a TP arrangement to a client or an employing organization. Accordingly, the IESBA proposes requirements to that effect in paragraphs R380.18 and R280.18.

#### **E. Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement**

49. During the fact-finding phase preceding the project's launch, stakeholders commented that in providing TP services, PAs might sometimes face situations where the legislative intent behind tax laws is unclear or uncertain, and the related regulations or tax forms lack clarity. To further explore this matter, the IESBA posed several questions during the roundtable discussions to understand how a PA would approach their advice to a client or employing organization if they were uncertain that the tax treatment would prevail based on the relevant tax laws and regulations. Participants were asked what specific factors the PA should consider in exercising their judgment in such circumstances.
50. In gaining an understanding of the challenges PAs face when the legislative intent behind tax laws is unclear or uncertain, the IESBA also thought it would be beneficial to identify specific scenarios to understand the extent to which PAs consider the legislature's intent, the approach PAs would take, and whether their assessment would change:
- If the situation concerns a cross-border transaction involving multiple jurisdictions.
  - If the tax strategy could be considered artificial or contrived.
51. In summary, the IESBA agrees with the observations shared by roundtable participants that PAs must take the necessary steps to establish a credible basis for their advice, taking into account, where the circumstances are unclear or uncertain, the intent of the tax legislation. In addition, participants also suggested several actions PAs can undertake to navigate situations where the legislative intent behind tax laws is unclear or uncertain:
- PAs may review rulings regarding specific cases to gather insight into what the legislature intended. It was noted that the PA's responsibility is to inform and educate the client or employing organization about the law's intent to better understand the underlying risks, if any, of the transaction.
  - As a general matter, participants commented that full transparency regarding the risks to the client or employing organization is essential. Participants shared that the threshold for success in terms of the TP arrangement being accepted by the relevant tax authorities is subject to debate in different jurisdictions. In such circumstances, participants expected that the PA would also explain the risks involved and advise the client or employing organization against taking unnecessary risks.
  - It would be important for PAs to document these risks as it was noted that jurisdictions have different definitions of what is considered a credible basis for the TP arrangement. Participants shared the view that what is a credible basis could vary from jurisdiction to jurisdiction as it depends on judgment in the circumstances. Participants agreed that it would be important for PAs to document the rationale for their judgments and decisions.
  - PAs are expected to address disclosure (subject to confidentiality) to the relevant tax authorities as an important matter.
  - Participants noted that understanding the legislature's intent is important to applying the tax legislation. In some jurisdictions, a PA is perceived to be acting negligently if the PA did not consider the legislature's intent.

## EXPLANATORY MEMORANDUM

- If the PA has reason to believe that the tax strategy does not have a credible basis and the client or the PA's immediate superior disagrees with the PA's assessment, participants commented that the PA should communicate their reservations to the client or the appropriate level of management within the employing organization. The PA might also consider seeking expert advice. If the expert advice aligns with the PA's assessment, participants agreed that the PA might need to decide whether to retain the client or resign from the engagement and client relationship if the client has not changed its position, or resign from the employing organization in the case of a PAIB.
52. In drafting the provisions, the IESBA deliberated various formulations that would convey the Board's intent for a PA to proceed with providing TP services or performing TP activities. The IESBA considered in particular using the phrase "to affirmatively advise" only when there is a credible basis. In considering this phrase, the IESBA was attempting to respond to concerns not to unduly preclude instances where the PA would be able to provide advice if the TP arrangement did not have a credible basis in the laws and regulations. For example, a client may be considering a TP arrangement that does not have a credible basis in laws and regulations and needs the accountant's advice to explore options that would have a credible basis in laws and regulations; or the client may advise the PA of a transaction that has already occurred that does not have a credible basis in laws and regulations and therefore needs advice on how to address it (e.g., complying with relevant disclosure requirements under the law).
53. However, the IESBA noted that the phrase "to affirmatively advise" would be difficult to translate. The IESBA therefore determined not to use that phrase.
54. Having regard to the above explanation, the IESBA proposes that the framework establish a principle that a PA recommend or otherwise advise on a TP arrangement to a client, or recommend or otherwise advise on a TP arrangement for an employing organization, only if the PA has determined that there is a credible basis in laws and regulations for the arrangement. (See paragraphs R380.11 and R280.11.)
55. The IESBA is of the view that it is important to emphasize that PAs are able to communicate to their client or the responsible parties within their employing organization if they have determined that a particular TP arrangement does not have a credible basis. However, there is no obligation for the PA to recommend an alternative TP arrangement. (See paragraphs 380.11 A1 and 280.11 A1.)

### *Credible Basis*

56. Recognizing that what is a credible basis in laws and regulations will vary from jurisdiction to jurisdiction, the IESBA proposes guidance setting out various actions a PA might take to establish a credible basis for the TP arrangement. (See paragraphs 380.11 A3 and 280.11 A3.) The IESBA is of the view that it would not be appropriate to ascribe a probabilistic numerical measure to a credible-basis threshold as doing so would convey a false sense of accuracy, more so given roundtable participants' feedback that there is a range of probabilities commonly understood and accepted in different jurisdictions.
57. The IESBA noted that the International Independence Standards use a "likely to prevail" threshold with respect to:
- (a) A tax service or transaction relating to marketing, planning or opining in favor of a tax treatment for an audit client and a significant purpose of which is tax avoidance (paragraph R604.4), and



- (b) Circumstances in which providing tax advisory and TP services will not create a self-review threat (paragraph 604.12 A2(c)).
58. The IESBA believes that the likely-to-prevail threshold—reinforced through Section 604 referring to the need for the audit firm to have confidence about clearing the threshold—is higher than a credible-basis threshold, given stakeholders’ heightened expectations regarding auditor independence. In the context of TP services provided to clients that are not audit clients or TP activities performed for employing organizations, the IESBA believes a credible-basis threshold sets a more appropriate bar for PAs as it calls on them to establish reasonable grounds for their TP recommendation or advice. Establishing such grounds will require professional judgment, taking into account the various actions PAs may take in the particular jurisdictional context at the time of the determination, as explained in paragraphs 380.11 A2 – A3 and 280.11 A2 – A3.

### *Cross-Border Transactions*

59. Concerning dealing with the complexities of cross-border transactions, which evolving tax laws may compound, the IESBA noted that there is a potential for polarization given that there may be conflicting considerations between different jurisdictions that PAs need to balance. Roundtable participants generally agreed that PAs who are not equipped with the necessary expertise or experience to recommend or otherwise advise a client or an employing organization in these circumstances need to rely upon the judgments of other firms or individual experts that have the appropriate expertise. PAs would then need to assume that these firms or experts will operate within a similar ethical framework as the PAs.
60. Roundtable participants also cautioned that in some jurisdictions, it is possible for a TP arrangement to have a very low likelihood of success in a court of law, yet not be deemed unacceptable such that fines and penalties would be levied in the event of an adverse ruling. Many participants were of the view that if the threshold was less than 50%, the PA should not recommend or otherwise advise the employing organization or client to proceed. This, however, was not a universal view as some participants indicated that the generally accepted threshold in their jurisdictions is lower than 50% particularly when safeguarded by transparency disclosure. For example, it was noted that in some jurisdictions, such as the U.S., it would be acceptable to recommend or otherwise advise on a TP arrangement, when a lower threshold exists since the position must be disclosed to the taxing authority.<sup>23</sup> Accordingly, there was a view that the Code should not contradict such practices.

## **F. Consideration of the Overall Tax Planning Recommendation or Advice**

61. In the last few years, there has been a significant shift in investor concerns and societal expectations for companies to pursue more sustainable business models. There is also an increasing recognition among stakeholders that there is greater value in the notion of companies pursuing “profitable solutions for the people and the planet” than in serving the interests of shareholders exclusively.
62. TP has become an essential part of the increasing focus among investors and other stakeholders on how companies measure up against Environmental, Social and Governance (ESG) performance indicators. Additionally, stakeholders have a greater awareness of what it means for a PA to act in

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<sup>23</sup> Reasonable Basis (20%): If a position is based on one or more authorities, it will generally satisfy reasonable basis even though it does not satisfy the substantial authority standard (not merely arguable or not merely a colorable claim). [Regs. Sec.1.6662-3(b)(3); Joint Committee on Taxation Interest and Penalty Study (JCS-3-99)] – AICPA Levels of Confidence for Tax Return Positions (May 2017)

the public interest, given a shift in perceptions regarding what is in the public interest. In particular, what may have been regarded as creative and skillful TP in the past may now be perceived to be “tax avoidance.”

63. The IESBA believes it is important that the proposed ethical framework include a consideration of how the overall TP recommendation or advice might be perceived by stakeholders given heightened public attention on the issue of “tax avoidance,” the fact that TP has become an important part of the calculus among investors and other stakeholders regarding how clients and employing organizations meet sustainability goals, and the need to protect the profession’s role and reputation in TP.
64. Therefore, the IESBA proposes that in addition to determining that there is a credible basis for the TP arrangement, the PA *consider* the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement – a “stand-back” test. (See paragraphs R380.12 and R280.12.) The IESBA is of the view that it is important for the PA to consider the wider consequences, as the case of [Starbucks](#) demonstrates.<sup>24</sup> The IESBA is proposing guidance explaining the meaning of reputational, commercial and wider economic consequences (see paragraphs 380.12 A1-A2 and 280.12 A1-A2).
65. The IESBA believes that this test is an important public interest element of the framework as it stimulates the PA to consider adverse consequences for the client or employing organization, as well as the relevant jurisdiction in terms of its tax base, in the light of how stakeholders might view the TP arrangement. The IESBA emphasized in its deliberations that the stand-back test is *not* about tax morality, tax justice or tax fairness. Equally, the IESBA does not intend for the PA to carry out research on the economic consequences other than giving the matter due consideration based on the PA’s general awareness and understanding of the current economic environment in the context of TP.
66. The IESBA notes that this consideration will assist the PA in complying with the FP of professional behavior. It is also consistent with paragraph 100.6 A4 of the Role and Mindset provisions that in acting in the public interest, a PA considers not only the preferences or requirements of an individual client or employing organization, but also the interests of other stakeholders when performing professional activities. Further, the test serves to support the OECD’s BEPS initiative.
67. If, having carried out the considerations set out in the stand-back test, the PA decides not to recommend or otherwise advise on a TP arrangement that the client or employing organization would like to pursue, the IESBA proposes that the PA inform the client or management and, if appropriate, those charged with governance, of this and explain the basis for the PA’s conclusion. (See paragraphs R380.13 and R280.13.)
68. The IESBA notes that the stand-back test need not be performed sequentially after determining that there is a credible basis but may be performed at the same time as carrying out such determination.

#### **G. Describing the “Gray Zone” of Uncertainty**

69. A PA might encounter circumstances giving rise to uncertainty as to whether a proposed TP arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the PA to determine that there is a credible basis in laws and regulations for

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<sup>24</sup> The Starbucks brand suffered in light of accusations of tax avoidance as key brand metrics plummeted and negative sentiment on social media spiked. A Reuters investigation claimed that Starbucks has paid only £8.6m in UK corporation tax since launching in 1998 and none since 2009. The newswire claims that despite generating £1.2bn in revenue in the UK over the last three years, Starbucks declared no profit here, which means it is not eligible to pay corporation tax.

the TP arrangement and might, therefore, create threats to compliance with the FPs. (See paragraphs 380.15 A1 and 280.15 A1.)

70. The IESBA has noted the challenge of identifying the appropriate terminology to use to refer to this “gray zone” of uncertainty. Various international organizations have attempted to address the issue and faced challenges in developing an appropriate term that would work globally.
71. During the global roundtables, the IESBA outlined the proposition to use terms such as “uncertain” and “egregious” to describe the gray zone and a sub-zone within the gray zone. Roundtable participants shared that this proposition suggests that TP activities can be easily categorized into subgroups within the gray zone when the situation can be significantly more complex in practice. Some also viewed the term “unacceptable tax planning” as embodying an element of moral judgment that they encouraged the IESBA to avoid.
72. A few roundtable participants offered suggestions for alternative terms or approaches. A suggestion was to use the term “reasonable” instead of “appropriate” or “proper” when referring to TP. Another suggestion was to focus on describing the characteristics of the gray zone without defining it. This would recognize that the gray zone is more context-sensitive, both from the societal or broader sustainability perspective and from the client’s or employing organization’s perspective.
73. Other participants noted that uncertainty is the key issue rather than the treatment of the tax scheme itself. It was noted that the main concern for PAs is the ambiguity around tax treatments and whether these will withstand evolving public perceptions or the scrutiny of a court of law. For example, it was observed that a tax strategy that is considered proper each year might be deemed improper a few years later.
74. The IESBA concurred with the views of the roundtable participants that, given the absence of a global consensus regarding the acceptability of TP practices, it is inappropriate to seek to categorize TP arrangements within the gray zone.
75. The IESBA also agreed with stakeholders who suggested care in not merging the boundaries of ethical behavior and moral judgment with respect to PAs performing TP activities.<sup>25</sup> Instead, the IESBA believes that PAs’ involvement in TP can contribute to their broader societal role, the sustainability of businesses, and the profession’s reputation.
76. The IESBA proposes guidance setting out various circumstances that might give rise to uncertainty. (See paragraphs 380.15 A2 and 280.15 A2.) The IESBA has endeavored as far as possible to take a generic approach to describing such circumstances, recognizing that its Technology Working Group<sup>26</sup> has identified the issue of uncertainty as potentially giving rise to threats in circumstances other than when providing TP services or performing TP activities.
77. Given that circumstances of uncertainty create risks, the IESBA is proposing that the PA discuss the nature of the uncertainty with the client or with management and, if appropriate, TCWG of the employing organization. The IESBA also proposes guidance as to the purposes such a discussion would serve. (See paragraphs R380.16 – 380.16 A1, and R280.16 – 280.16 A1.)

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<sup>25</sup> The final [report](#) (September 2021) leading to the launch of the project highlighted the concept of tax morality and the OECD’s work on this topic. Tax morale, as defined by the OECD, is the intrinsic motivation to pay taxes. This is a vital aspect of the tax system as most tax systems rely on taxpayers’ voluntary compliance for the bulk of their revenues. As recommended in the report, the IESBA does not believe the Code should deal with tax morality.

<sup>26</sup> [Agenda item 7-A](#), IESBA Meeting (September 2020).

## H. Applying the Conceptual Framework to Navigate the Gray Zone and Other Tax Planning Circumstances

78. A significant part of the proposed ethical framework is the application of the CF to assist PAs in navigating the gray zone and other TP circumstances. Considering the rich feedback from the roundtable discussions, the IESBA therefore proposed practical guidance in terms of:
- Illustrative examples of the types of threats that might be created by PAs providing a TP service or performing a TP activity. (See paragraphs 380.17 A1 and 280.17 A1.)
  - Factors that are relevant in evaluating the level of such threats. (See paragraphs 380.17 A2 and 280.17 A2.)
  - Examples of actions that might eliminate such threats. (See paragraphs 380.17 A3 and 280.17 A3.)
  - Examples of actions that might be safeguards to address such threats. (See paragraphs 380.17 A4-A5 and 280.17 A4-A5.)

## I. Disagreement with Management

79. If the PA has reason to believe that the TP arrangement does not have a credible basis in laws and regulations and the client disagrees with the PA's assessment, roundtable participants commented that the PA should communicate their reservations to the client or employing organization. The PA might also consider seeking expert advice. In the case of a PAPP, if the expert advice aligns with the PA's assessment, participants agreed that the PA might need to decide whether to retain the client or resign from the engagement and client relationship if the client has not changed its position.
80. Where a client or an employing organization is perceived to be engaging in illegal activities, participants expected the PA to escalate the matter within the client or employing organization (such as to TCWG or whistleblower ombudspersons), consider reporting these activities to an appropriate authority, and consider the need to extricate themselves from the client or employment relationship.
81. Given this context, the IESBA believes that the proposed ethical framework should contain provisions to address circumstances where a disagreement arises with the management of a client regarding a TP arrangement. The IESBA therefore proposes certain required actions for a PAPP if the PA disagrees with management regarding whether a proposed TP arrangement has a credible basis in laws and regulations. If management determines to pursue the arrangement despite the PA's advice to the contrary, the IESBA proposes that the PA take steps to be disassociated from the engagement. This includes considering the need to withdraw from the engagement and the professional relationship. (See paragraphs R380.19 to R380.21.)
82. The IESBA proposes similar provisions for a PAIB in the case of disagreement with the PA's immediate superior or other responsible individual within the employing organization. The IESBA, however, recognizes that it is more likely that an escalation process would apply in the case of an employing organization. A PAIB might also have recourse to established protocols and procedures regarding how to raise ethical or other concerns internally within the employing organization. (See paragraphs R280.19 – 280.20 A2). The IESBA, however, has taken a more measured approach with respect to the PAIB in terms of disassociation from the TP arrangement, recognizing that, unlike PAPPs who generally have more than one client, the PAIB's employing organization will ordinarily be their sole employer. Accordingly, the IESBA is proposing that a PAIB might consider the need to resign from the employing organization in these circumstances.

**J. Documentation**

83. The IESBA proposes guidance highlighting the importance of documentation. The proposals guide PAs on the matters that would be beneficial to document and explain how such documentation will assist them. (See paragraphs 380.23 A1 – A2, and 280.21 A1 – A2).
84. As part of its deliberations, the IESBA considered whether to require documentation of the TP arrangement, discussions with the client or with responsible parties within the employing organization, and the PA's analysis, judgments and decisions. The IESBA considered that requiring documentation would ensure that the PA captures all the relevant facts and circumstances, and have a basis to address inquiries from, for example, tax authorities. The IESBA, however, also considered the view that documentation is a quality and risk management matter and not an ethics matter.
85. Recognizing the approach to documentation in Parts 2 and 3 of the Code, the IESBA proposes to encourage, but not require, that PAs prepare documentation. However, the IESBA believes that the reasons for documentation set out in paragraphs 380.23 A2 and 280.21 A2 are sufficiently persuasive that in the vast majority of cases, PAs will document the various matters set out in paragraphs 380.23 A1 and 280.21 A1.

**K. Tax Planning Products or Arrangements Developed by a Third Party**

86. One of the questions the IESBA posed to the roundtable participants was about the ethical considerations for a PA if the PA is contemplating introducing a client to a firm that specializes in developing TP products or arrangements for sale to the public. Participants were also asked whether the PA should disclose to the client any commission or referral fee the PA has received or will receive from the external provider.
87. As a general matter, participants agreed that if a PA is referring a client to another firm so that the client can benefit from expert advice, this is a positive outcome for the client. That said, where the PA is referring the client to a provider of packaged TP products to meet the client's needs, participants commented that the PA would need to inform the client of the PA's relationship with the external provider. Participants felt that the PA should ascertain that the provider has appropriate expertise in developing the TP product. Some participants were of the view that the PA should still be responsible for ascertaining the reliability and consequences of the particular product, including its impact on the client or the client's financial statements
88. The IESBA concurred with the roundtable participants' general observations that where a PA is referring a client to a provider of TP products or arrangements to meet the client's needs, the PA would need to inform the client of the PA's relationship with the external provider. In addition, the PA should ascertain the provider's competence in developing the TP product or arrangement. The IESBA also believes that the PA should still be responsible for ascertaining the credibility of the particular TP product or arrangement.
89. The IESBA is therefore proposing guidance in paragraph 380.22 A1 to the effect that where a PA refers a client to a third-party provider of TP products or arrangements, or where a client approaches a PA for advice on a TP product or arrangement developed by a third party, the provisions in Section 380 apply. The IESBA believes that in both situations, the responsibilities of the PA are no different than if the PA were the creator of the TP product or arrangement.
90. If the PA receives a commission or referral fee for the introduction, roundtable participants were almost unanimously of the view that the commission or referral fee should be disclosed to the client.

Participants felt that this would need to be disclosed to the client before the actual referral is made so that the client understands the full context and expectations. It was felt that such disclosure would also enable the PA to maintain objectivity.

91. Taking into account this input, the IESBA believes that the provisions in Section 330 addressing such type of remuneration are sufficient and applicable. Accordingly, the IESBA proposes the inclusion of a reference to the appropriate provisions in Section 330. (See paragraph 380.22 A2 – A3.)

**L. Multi-jurisdictional Tax Benefit**

92. During the global roundtables, an observation was raised that a client or employing organization might obtain a tax benefit from accounting for the same transaction in more than one jurisdiction. In such a case, it was suggested that while it would not be unlawful for the client or employing organization to obtain the same tax benefit twice in two different jurisdictions, there is a public interest argument for the PA to advise the client or employing organization to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.
93. The IESBA accepted this point and proposes guidance to that effect in paragraphs 380.14 A1 – A2 and 280.14 A1 – A2.

**M. Conforming Amendments**

94. In developing an appropriate linkage to Section 321 addressing second opinions in the context of PAPPs, the IESBA noted the need for a few conforming amendments to that section to recognize that a PAPP might need to recommend or otherwise advise on the application of tax laws and regulations in the context of being approached by a client for a second opinion on a proposed TP arrangement. Section 321 currently does not contemplate a PAPP providing a second opinion on the application of laws and regulations.
95. The IESBA is therefore proposing a few conforming amendments to Section 321.

**VIII. Analysis of Overall Impact of the Proposed Changes**

96. The IESBA believes that the proposals will serve to enhance public trust in PAs providing TP services or performing TP activities by:
- (a) Promoting ethical TP conduct and practice by all PAs through a principles-based framework and guidance;
  - (b) Raising awareness about risks associated with “improper” TP to employing organizations, clients (individuals or corporate), and the profession;
  - (c) Protecting and strengthening the profession’s role and reputation in relation to TP; and
  - (d) Promoting the principles of accountability and transparency through guiding PAs’ conduct when involved in TP activities, consistent with their responsibility to act in the public interest.
97. Given the nature and extent of the proposed revisions to the Code, the IESBA believes that some of the proposals may entail significant changes to the policies and methodologies of firms and networks that carry out TP services. Such changes may result in increased costs, including with respect to the deployment of updated policies and procedures, and awareness raising and training initiatives.

98. The IESBA also expects costs related to adoption and implementation for national standard setters, professional accountancy organizations and other stakeholders, including translation where needed and education and training efforts.

## IX. Project Timetable and Effective Date

99. The indicative remaining timeline for the project is set out below. This timeline takes into account a 90-day comment period which is intended to provide stakeholders with ample time to understand the proposals in the context of their relevant jurisdictional circumstances and undertake any necessary consultations at their levels or within their networks.
100. The indicative timeline for the completion of this project is set out below.

| Indicative Timing | Milestone   |
|-------------------|---|
| June 2023         | <ul style="list-style-type: none"> <li>High level overview of respondents' comments to IESBA</li> </ul>   |
| September 2023    | <ul style="list-style-type: none"> <li>Discussion of significant matters raised on the ED and Task Force responses with IESBA CAG</li> <li>Full review of ED responses and first read post-exposure with IESBA</li> </ul> |
| December 2023     | <ul style="list-style-type: none"> <li>IESBA approval of final pronouncement</li> </ul>   |

101. The IESBA will determine an effective date for the final provisions in due course, taking into consideration the need to allow sufficient time for adoption and implementation activities.

## X. Guide for Respondents

102. The IESBA welcomes comments on all matters addressed in this ED, but especially the matters identified in the Request for Specific Comments below. Comments are most helpful when they refer to specific paragraphs, include the reasons for the comments, and, where appropriate, make specific suggestions for any proposed changes to wording. When a respondent agrees with proposals in this ED, it will be helpful for the IESBA to be made aware of this view.

### Request for Specific Comments

103. The IESBA welcomes comments on the following specific matters. Where a respondent disagrees with a proposal, it will be helpful for the respondent to explain why and to provide suggestions for other ways to address the particular matter.

*Proposed New Sections 380 and 280*

- Do you agree with the IESBA's approach to addressing TP by creating two new Sections 380 and 280 in the Code as described in Section VI of this memorandum?

*Description of Tax Planning and Related Services*

- Do you agree with IESBA's description of TP as detailed in Section VII.A above?

*Role of the PA in Acting in the Public Interest*

3. Do you agree with IESBA's proposals as explained in Section VII.B above regarding the role of the PA in acting in the public interest in the context of TP?

*Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement*

4. Do you agree with the IESBA's proposals regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or an employing organization, as described in Section VII.E above?
5. Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?

*Consideration of the Overall Tax Planning Recommendation or Advice*

6. Do you agree with the proposals regarding the stand-back test, as described in Section VII.F above?

*Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone*

7. Do you agree with the IESBA's proposals as outlined in Section VII.G above describing the gray zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement?
8. In relation to the application of the CF as outlined in Section VII.H above, is the proposed guidance on:
  - (a) The types of threats that might be created in the gray zone;
  - (b) The factors that are relevant in evaluating the level of such threats;
  - (c) The examples of actions that might eliminate threats created by circumstances of uncertainty; and
  - (d) The examples of actions that might be safeguards to address such threats sufficiently clear and appropriate?

*Disagreement with Management*

9. Do you agree with the proposals outlined in Section VII.I above which set out the various actions PAs should take in the case of disagreement with the client or with the PA's immediate superior or other responsible individual within the employing organization regarding a TP arrangement?

*Documentation*

10. Do you agree with the IESBA's proposals regarding documentation as outlined in Section VII.J above?

*Tax Planning Products or Arrangements Developed by a Third Party*

11. Do you agree with the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third party provider?



*Multi-jurisdictional Tax Benefit*

12. Do you agree with the IESBA's proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L above?

*Proposed Consequential and Conforming Amendments*

13. Do you agree with the proposed consequential and conforming amendments to Section 321 as described in Section VII.M above?

**Request for General Comments**

104. In addition to the request for specific comments above, the IESBA is also seeking comments on the matters set out below:
- (a) *SMEs and SMPs* – The IESBA invites comments regarding any aspect of the proposals from SMEs and SMPs.
  - (b) *Tax Authorities* – The IESBA invites comments on the proposals from a regulatory perspective from members of the tax regulatory community.
  - (c) *Developing Nations* – Recognizing that many developing nations have adopted or are in the process of adopting the Code, the IESBA invites respondents from these nations to comment on the proposals, and in particular on any foreseeable difficulties in applying them in their environment.
  - (d) *Translations* – Recognizing that many respondents may intend to translate the final changes for adoption in their own environments, the IESBA welcomes comment on potential translation issues respondents may note in reviewing the proposals.

## EXPOSURE DRAFT

### PART 3 – PROFESSIONAL ACCOUNTANTS IN PUBLIC PRACTICE

#### PROPOSED SECTION 380

#### TAX PLANNING AND RELATED SERVICES

##### Introduction

- 380.1 Professional accountants are required to comply with the fundamental principles and apply the conceptual framework set out in Section 120 to identify, evaluate and address threats.
- 380.2 Providing tax planning and related services might create self-interest, advocacy or intimidation threats to compliance with the fundamental principles, particularly the principles of integrity, objectivity, professional competence and due care, and professional behavior.
- 380.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the provision of tax planning and related services. This section also requires a professional accountant to comply with relevant tax laws and regulations when providing such services.

##### Requirements and Application Material

###### General

###### *Professional Accountants' Public Interest Role in Relation to Tax Planning Services*

- 380.4 A1 Professional accountants play an important role in tax planning by contributing their knowledge, skills and experience to assist clients in meeting their tax planning goals while complying with tax laws and regulations. In doing so, accountants help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.
- 380.4 A2 Clients are entitled to organize their affairs for tax planning purposes. While there are a variety of ways to achieve such purposes, clients have a responsibility to pay taxes as determined by the relevant tax laws and regulations. In this regard, professional accountants' role is to advise their clients on how best to meet their tax planning goals. In addition, accountants play an important role in assisting clients to meet their tax obligations and not seek to circumvent them through tax evasion. However, when accountants provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 380.4 A3 It is ultimately for a court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

###### *Description of Tax Planning and Related Services*

- 380.5 A1 Tax planning services comprise a broad range of services designed to assist a client, whether an individual or an entity, in structuring the client's affairs in a tax-efficient manner.
- 380.5 A2 Examples of tax planning services include:
- Advising an individual to structure their tax affairs to achieve investment, retirement or estate planning goals.

- Advising an individual business owner on structuring their ownership and income from the business to minimize their overall taxes.
- Advising an entity on structuring its international operations to minimize its overall taxes including through transfer pricing arrangements.
- Advising on efficient ways to utilize available tax losses.
- Advising an entity on how to structure its capital distribution strategy in a tax-efficient manner.
- Advising an entity on structuring its compensation strategy for senior executives to optimize the tax benefits.

380.5 A3 Related services are those that are based on or linked to a tax planning service, whether provided by the professional accountant or another party. Such services include, for example, assisting a client in resolving a dispute with the tax authority on a tax planning position that the accountant or another party recommended to the client, or preparing the client's tax return that reflects the position in the tax planning arrangement.

380.5 A4 This section applies regardless of the nature of the client, including whether it is a public interest entity.

## **Compliance with Laws and Regulations**

### *Anti-avoidance Laws and Regulations*

**R380.6** In some jurisdictions, laws and regulations, including those that are often referred to as anti-avoidance rules, limit or prohibit certain tax planning arrangements. A professional accountant shall obtain an understanding of those laws and regulations and advise the client to comply with them when providing tax planning services.

### *Non-compliance with Tax Laws and Regulations*

380.7 A1 If, in the course of providing tax planning services, a professional accountant becomes aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by a client, management, those charged with governance or other individuals working for or under the direction of the client, the requirements and application material set out in Section 360 apply.

## **Responsibilities of Management and Those Charged with Governance**

380.8 A1 In relation to tax planning, management, with the oversight of those charged with governance, has a number of responsibilities, including:

- Ensuring that the client's tax affairs are conducted in accordance with the relevant tax laws and regulations.
- Maintaining all the books and records and implementing the systems of internal control necessary to enable the client to fulfill its tax compliance obligations.
- Making available all the facts and other relevant information needed to enable the professional accountant to perform the tax planning service.

- Deciding whether to accept and implement the professional accountant's recommendation or advice on a tax planning arrangement.
- Submitting the client's tax returns and dealing with the relevant tax authorities in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any tax planning arrangements.
- Ensuring that the client's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

### **Responsibilities of All Professional Accountants**

**R380.9** As part of providing a tax planning service, a professional accountant shall obtain an understanding of the nature of the engagement including:

- (a) Knowledge and understanding of the client, its owners, management and those charged with governance, and its business activities;
- (b) The purpose and circumstances of the tax planning arrangement; and
- (c) The relevant tax laws and regulations.

380.9 A1 The requirements and application material in Section 320 apply with respect to client and engagement acceptance.

380.9 A2 A professional accountant might be engaged to provide a second opinion on a tax planning arrangement. In addition to the provisions in this section, the requirements and application material in Section 321 also apply in such circumstances.

380.10 A1 A professional accountant is expected to apply knowledge, expertise and due care in accordance with Subsection 113 when providing a tax planning service. The accountant is also expected to have an inquiring mind and exercise professional judgment in accordance with Section 120 when considering the specific facts and circumstances relating to the tax planning service.

### **Basis for Recommending or otherwise Advising on a Tax Planning Arrangement**

**R380.11** A professional accountant shall recommend or otherwise advise on a tax planning arrangement to a client only if the accountant has determined that there is a credible basis in laws and regulations for the arrangement.

380.11 A1 If the professional accountant determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R380.11 does not preclude the accountant from explaining to the client the accountant's rationale for the determination.

380.11 A2 The determination of whether there is a credible basis involves the exercise of professional judgment by the professional accountant. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.

380.11 A3 Actions that a professional accountant might take to determine that there is a credible basis in relation to a particular tax planning arrangement include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Assessing the reasonableness of any assumptions.
- Reviewing the relevant tax legislation.
- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, law or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.
- Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.
- Consulting with experts within or outside the professional accountant's firm regarding what a reasonable interpretation of the relevant tax laws and regulations might be.
- Consulting with the relevant tax authorities, where applicable.

*Consideration of the Overall Tax Planning Recommendation or Advice*

**R380.12** In addition to determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.

380.12 A1 The reputational and commercial consequences might relate to personal or business implications to the client or implications to the reputation of the client and the profession of a prolonged dispute with the relevant tax or other authorities. The implications to the client might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential adverse consequences for the client's business.

380.12 A2 An awareness of the wider economic consequences might take into account the professional accountant's understanding of the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions, where the client operates.

**R380.13** If, having considered the matters set out in paragraph R380.12, the professional accountant decides not to recommend or otherwise advise on a tax planning arrangement that the client would like to pursue, the accountant shall inform the client of this and explain the basis for the accountant's conclusion.

*Tax Planning Arrangements Involving Multiple Jurisdictions*

380.14 A1 A client might obtain a tax benefit from accounting for the same transaction in more than one jurisdiction, especially if there is no tax treaty between the jurisdictions. In such circumstances, while the client might be in compliance with the tax laws and regulations of each jurisdiction, the professional accountant might advise the client to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.

380.14 A2 Relevant factors the professional accountant might consider in determining whether to advise the client to make such disclosure include:

- The significance of the tax benefits in the relevant jurisdictions.
- The likelihood that other entities in a similar circumstance to the client are taking advantage of the tax benefits.
- Stakeholders' perceptions of the client if the facts and circumstances were known to the stakeholders.

### **Circumstances of Uncertainty**

380.15 A1 A professional accountant might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the accountant to determine that there is a credible basis in laws and regulations for the tax planning arrangement and might, therefore, create threats to compliance with the fundamental principles.

380.15 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- Lack of clarity in the tax laws and regulations and their interpretation, including:
  - Gaps in the tax laws and regulations.
  - Challenges to previous court rulings.
  - Conflicting tax laws and regulations in different jurisdictions in circumstances involving cross-border transactions.
  - Innovative business models not addressed by the current tax laws and regulations.
  - Recent court or tax authority rulings or positions that cast doubt on similar tax planning arrangements.
  - Complexity in interpreting or applying the tax laws and regulations from a technical or legal point of view.
  - Lack of a legal precedent, ruling or position.
- Lack of clarity regarding the economic purpose and substance of the tax planning arrangement.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

**R380.16** Where there is uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations, a professional accountant shall discuss the uncertainty with the client.

380.16 A1 The discussion serves a number of purposes, including:

- Explaining the professional accountant's assessment about how likely the relevant tax authorities are to have a view that supports the proposed tax planning arrangement where there is a lack of clarity in the interpretation of the relevant tax laws and regulations.
- Considering any assumptions that might need to be made or changed.
- Obtaining any additional information from the client that might reduce the uncertainty.
- Discussing any reputational, commercial or wider economic consequences in pursuing the proposed tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the client, including consideration of disclosure to the relevant tax authorities.

### **Potential Threats Arising from Providing a Tax Planning Service**

380.17 A1 Providing a tax planning service to a client might create a self-interest, advocacy or intimidation threat. For example:

- A self-interest threat might be created when a professional accountant has a direct financial interest in a client and the accountant is involved in designing a tax planning arrangement that has an impact on the client's financial situation.
- A self-interest or advocacy threat might be created when a professional accountant actively promotes a particular tax position a client should adopt.
- A self-interest threat might be created when a professional accountant accepts a significant fee for an engagement to develop a tax planning arrangement for which the interpretation of the relevant tax laws and regulations is uncertain or unclear.
- Self-interest and advocacy threats might be created when a professional accountant advocates a client's position in a tax planning arrangement before a tax authority when there are indications that the arrangement might not have a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant provides services to a client who exerts significant influence over the design of a particular tax arrangement, in a way that might influence the accountant's determination that there is a credible basis for the arrangement in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant is threatened with dismissal from the engagement or the accountant's firm concerning the position a client is insisting on pursuing regarding a tax planning arrangement.

380.17 A2 Factors that are relevant in evaluating the level of such threats include:

- The degree of transparency of the client, including, where applicable, the identity of the ultimate beneficiaries.
- Whether the proposed tax planning arrangement has a clear economic purpose and substance based on the underlying business transaction or circumstances.

- The nature and complexity of the underlying business transaction or circumstances.
- The complexity or clarity of the relevant tax laws and regulations.
- Whether the professional accountant knows, or has reason to believe, that the proposed tax planning arrangement would be contrary to the intent of the relevant tax legislation.
- The number of jurisdictions involved and the nature of their tax regimes.
- The extent of the professional accountant's knowledge, skills and experience in the relevant tax areas.
- The significance of the potential tax savings.
- The nature and amount of the fee for the tax planning service.
- The extent to which the proposed tax planning arrangement reflects an established practice that has not been challenged by the relevant tax authorities.
- Whether there is pressure being exerted by the client or another party on the professional accountant.
- The degree of urgency in implementing the tax planning arrangement.
- The known previous behavior or reputation of the client, including its organizational culture.

380.17 A3 Examples of actions that might eliminate such threats include:

- Referring the client to an expert outside the professional accountant's firm who has the necessary knowledge, skills and experience to advise the client on the proposed tax planning arrangement.
- Advising the client to structure the tax planning arrangement so that it is consistent with an existing interpretation or ruling issued by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax or other authorities, where possible.
- Not pursuing, or advising the client not to pursue, the proposed tax planning arrangement.

380.17 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the client to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the client to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Consulting with an expert within or outside the professional accountant's firm in the relevant tax areas.
- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another professional accountant) regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.



- Having an appropriate reviewer, who is not otherwise involved in providing the tax planning service, review any work performed or conclusions reached by the professional accountant with respect to the tax planning arrangement.
- Having the client provide full transparency about the tax planning arrangement to the relevant tax authorities, including the goals, business and legal aspects, and ultimate beneficiaries of the tax planning arrangement.

380.17 A5 Steps a professional accountant might take to establish the identity of the ultimate beneficiaries include, for example:

- Making inquiries of management and others within the client.
- Making inquiries of others within or outside the firm who have dealt with the client, having regard to the principle of confidentiality.
- Reviewing the client's tax records, financial statements and other relevant corporate records.
- Making inquiries of registrars where the client or entities within its legal structure are incorporated concerning the relevant shareholders.
- Researching relevant public records.

#### **Communication of Basis of Tax Planning Arrangement**

**R380.18** A professional accountant shall explain the basis on which the accountant recommended or otherwise advised on a tax planning arrangement to the client.

#### **Disagreement with Client**

**R380.19** If the professional accountant disagrees that a tax planning arrangement that a client would like to pursue has a credible basis, the accountant shall:

- (a) Inform the client of the basis of the accountant's assessment;
- (b) Communicate to the client the potential consequences of pursuing the arrangement in the event of an adverse ruling; and
- (c) Advise the client not to pursue the arrangement.

**R380.20** If the client decides to pursue the tax planning arrangement, despite the professional accountant's advice to the contrary, the accountant shall take steps to disassociate from the engagement. In doing so, the accountant shall consider advising the client to:

- (a) Communicate internally to the appropriate level of management the details of the arrangement and the difference of views;
- (b) Make full disclosure of the arrangement to the relevant tax authorities; and
- (c) Communicate the details of the arrangement and the difference of views to the external auditor, where applicable.

380.20 A1 As part of communicating the matters set out in paragraphs R380.19 and R380.20, a professional accountant may consider it appropriate to raise the relevant matters with those charged with governance of the client.

**R380.21** In light of the client's response to the professional accountant's advice, the accountant shall consider the need to withdraw from the engagement and the professional relationship.

**Tax Planning Products or Arrangements Developed by a Third Party**

380.22 A1 There might be circumstances where a professional accountant refers a client to a third-party provider of tax planning products or arrangements, or where a client approaches the accountant for advice on a tax planning product or arrangement developed by a third party. In both circumstances, the provisions in this section apply.

*Referral Fee or Commission*

380.22 A2 A self-interest threat to compliance with the principles of objectivity and professional competence and due care might be created if a professional accountant receives a referral fee or commission by referring a client to a third-party provider of tax planning products or arrangements. The provisions in paragraphs 330.5 A1 and A2 are relevant in such circumstances.

380.22 A3 In some jurisdictions, professional accountants are prohibited by law or regulation from receiving referral fees or commissions.

**Documentation**

380.23 A1 When providing a tax planning service, a professional accountant is encouraged to document on a timely basis:

- The purpose, circumstances and substance of the tax planning arrangement.
- The identity of the ultimate beneficiaries.
- The nature of any uncertainties.
- The accountant's analysis, the courses of action considered, the judgments made, and the conclusions reached in advising the client on the proposed tax planning arrangement.
- The results of discussions with the client and other parties.
- The client's response to the accountant's advice.
- Any disagreement with the client.

380.23 A2 Preparing such documentation assists the accountant to:

- Develop the accountant's analysis of the facts, circumstances, relevant tax laws and regulations, and any assumptions made or changed.
- Record the basis of the professional judgments at the time they were made or changed.
- Support the position if the tax planning arrangement is challenged by the relevant tax authorities.
- Demonstrate that the accountant has complied with the provisions in this section.

## **PART 2 – PROFESSIONAL ACCOUNTANTS IN BUSINESS**

### **PROPOSED SECTION 280**

#### **TAX PLANNING AND RELATED ACTIVITIES**

##### **Introduction**

- 280.1 Professional accountants are required to comply with the fundamental principles and apply the conceptual framework set out in Section 120 to identify, evaluate and address threats.
- 280.2 Performing tax planning and related activities might create self-interest, advocacy or intimidation threats to compliance with the fundamental principles, particularly the principles of integrity, objectivity, professional competence and due care, and professional behavior.
- 280.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the performance of tax planning and related activities. This section also requires a professional accountant to comply with relevant tax laws and regulations when performing such activities.

##### **Requirements and Application Material**

###### **General**

###### *Professional Accountants' Public Interest Role in Relation to Tax Planning Services*

- 280.4 A1 Professional accountants play an important role in tax planning by contributing their knowledge, skills and experience to assist employing organizations in meeting their tax planning goals while complying with tax laws and regulations. In doing so, accountants help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.
- 280.4 A2 Employing organizations are entitled to organize their affairs for tax planning purposes. While there are a variety of ways to achieve such purposes, employing organizations have a responsibility to pay taxes as determined by the relevant tax laws and regulations. In this regard, professional accountants' role is to advise their employing organizations on how best to meet their tax planning goals. In addition, accountants play an important role in assisting employing organizations meet their tax obligations and not seek to circumvent them through tax evasion. However, when accountants provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 280.4 A3 It is ultimately for a court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

###### *Description of Tax Planning and Related Activities*

- 280.5 A1 Tax planning activities comprise a broad range of activities designed to assist an employing organization in structuring its affairs in a tax-efficient manner.
- 280.5 A2 Examples of tax planning activities include:
- Advising management on structuring the employing organization's international operations to minimize its overall taxes, including through transfer pricing practices.

- Advising management on efficient ways to utilize available tax losses for the employing organization.
- Advising the employing organization on how to structure its capital distribution strategy in a tax-efficient manner.
- Advising management on structuring the employing organization's compensation strategy for senior executives to optimize the tax benefits for the employing organization.
- Advising a non-profit employing organization on how to structure its business to avoid breaching its non-profit status.
- Advising management on structuring the employing organization's investments to take advantage of tax incentives offered by jurisdictions or localities.

280.5 A3 Related activities are those that are based on or linked to a tax planning activity, whether provided by the professional accountant or another party. Such activities include, for example, assisting an employing organization in resolving a dispute with the tax authority on a tax planning position that the accountant or another party recommended to the employing organization, or preparing the employing organization's tax return that reflects the position in the tax planning arrangement.

280.5 A4 This section applies regardless of the nature of the employing organization, including whether it is a public interest entity.

## **Compliance with Laws and Regulations**

### *Anti-avoidance Laws and Regulations*

**R280.6** In some jurisdictions, laws and regulations, including those that are often referred to as anti-avoidance rules, limit or prohibit certain tax planning arrangements. A professional accountant shall obtain an understanding of those laws and regulations and advise the employing organization to comply with them when providing tax planning activities.

### *Non-compliance with Tax Laws and Regulations*

280.7 A1 If, in the course of performing a tax planning activity, a professional accountant becomes aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by an employing organization, management, those charged with governance or other individuals working for or under the direction of the employing organization, the requirements and application material set out in Section 260 apply.

## **Responsibilities of Management and Those Charged with Governance of the Employing Organization**

280.8 A1 In relation to tax planning, management, with the oversight of those charged with governance, has a number of responsibilities, including:

- Ensuring that the employing organization's tax affairs are conducted in accordance with the relevant tax laws and regulations.

- Maintaining all the books and records and implementing the systems of internal control necessary to enable the employing organization to fulfill its tax compliance obligations.
- Deciding whether to accept and implement the professional accountant's recommendation or advice on a tax planning arrangement.
- Submitting the employing organization's tax returns and dealing with the relevant tax authorities in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any tax planning arrangements.
- Ensuring that the employing organization's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

### **Responsibilities of All Professional Accountants**

**R280.9** As part of performing a tax planning activity for an employing organization, the professional accountant shall obtain an understanding of the nature of the tax planning activity, including:

- (a) The purpose and circumstances of the tax planning arrangement; and
- (b) The relevant tax laws and regulations.

280.10 A1 A professional accountant is expected to apply knowledge, expertise and due care in accordance with Subsection 113 when performing a tax planning activity. The accountant is also expected to have an inquiring mind and exercise professional judgment in accordance with Section 120 when considering the specific facts and circumstances relating to the tax planning activity.

### **Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement**

**R280.11** A professional accountant shall recommend or otherwise advise on a tax planning arrangement for an employing organization only if the accountant has determined that there is a credible basis in laws and regulations for the arrangement.

280.11 A1 If the professional accountant determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R280.11 does not preclude the accountant from explaining to the accountant's immediate superior or other responsible individual within the employing organization the accountant's rationale for the determination.

280.11 A2 The determination of whether there is a credible basis involves the exercise of professional judgment. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.

280.11 A3 Actions that a professional accountant might take to determine that there is a credible basis in relation to a particular tax planning arrangement include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Assessing the reasonableness of any assumptions.
- Reviewing the relevant tax legislation.

- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, law or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.
- Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.
- Consulting with experts within or outside the employing organization regarding what a reasonable interpretation of the relevant tax laws and regulations might be.
- Consulting with the relevant tax authorities, where applicable.

*Consideration of the Overall Tax Planning Recommendation or Advice*

**R280.12** In addition to determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.

280.12 A1 The reputational and commercial consequences might relate to personal or business implications to the employing organization or implications to the reputation of the employing organization and the profession of a prolonged dispute with the relevant tax or other authorities. The implications to the employing organization might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential adverse consequences for the employing organization.

280.12 A2 An awareness of the wider economic consequences might take into account the professional accountant's understanding of the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions, where the employing organization operates.

**R280.13** If, having considered the matters set out in paragraph R280.12, the professional accountant decides not to recommend or otherwise advise on a tax planning arrangement that the employing organization would like to pursue, the accountant shall inform management and, if appropriate, those charged with governance, of this and explain the basis for the accountant's conclusion.

*Tax Planning Arrangements Involving Multiple Jurisdictions*

280.14 A1 An employing organization might obtain a tax benefit from accounting for the same transaction in more than one jurisdiction, especially if there is no tax treaty between the jurisdictions. In such circumstances, while the employing organization might be in compliance with the tax laws and regulations of each jurisdiction, the professional accountant might advise management to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.

280.14 A2 Relevant factors the professional accountant might consider in determining whether to make such disclosure include:

- The significance of the tax benefit in the relevant jurisdictions.

- Stakeholders' perceptions of the employing organization if the facts and circumstances were known to the stakeholders.

### **Circumstances of Uncertainty**

280.15 A1 A professional accountant might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the accountant to determine that there is a credible basis in laws and regulations for the tax planning arrangement and might therefore create threats to compliance with the fundamental principles.

280.15 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- Lack of clarity in the tax laws and regulations and their interpretation, including:
  - Gaps in the tax laws and regulations.
  - Challenges to previous court rulings.
  - Conflicting tax laws and regulations in different jurisdictions in circumstances involving cross-border transactions.
  - Innovative business models not addressed by the current tax laws and regulations.
  - Recent court or tax authority rulings or positions that cast doubt on similar tax planning arrangements.
  - Complexity in interpreting or applying the tax laws and regulations from a technical or legal point of view.
  - Lack of a legal precedent, ruling or position.
- Lack of clarity regarding the economic purpose and substance of the tax planning.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

**R280.16** Where there is uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations, a professional accountant shall discuss the uncertainty with management and, if appropriate, those charged with governance.

280.16 A1 The discussion serves a number of purposes, including:

- Explaining the professional accountant's assessment about how likely the relevant tax authorities are to have a view that supports the proposed tax planning arrangement where there is a lack of clarity in the interpretation of the relevant tax laws and regulations.
- Considering any assumptions that might need to be made or changed.
- Obtaining any additional information from management and, if appropriate, those charged with governance that might reduce the uncertainty.

- Discussing any reputational, commercial or wider economic consequences in pursuing the proposed tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the employing organization, including consideration of disclosure to the relevant tax authorities.

### **Potential Threats Arising from Performing a Tax Planning Activity**

280.17 A1 Performing a tax planning activity for an employing organization might create a self-interest, advocacy or intimidation threat. For example:

- A self-interest threat might be created when a professional accountant's career advancement prospects depend on developing a creative tax planning arrangement for which the interpretation of the relevant tax laws and regulations is unclear.
- A self-interest threat might be created when a professional accountant participates in an incentive compensation scheme impacted by the accountant's design of a tax planning arrangement.
- Self-interest and advocacy threats might be created when a professional accountant advocates an employing organization's position in a tax planning arrangement before a tax authority, when there are indications that the arrangement might not have a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a dominant owner or leader of the employing organization exerts significant influence over the design of a particular tax arrangement, in a way that might influence the accountant's determination that there is a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant faces potential dismissal over the position the employing organization is insisting on pursuing regarding a tax planning arrangement.

280.17 A2 Factors that are relevant in evaluating the level of such threats include:

- The degree of transparency regarding the underlying business transaction or circumstances, including, where applicable, the identity of the ultimate beneficiaries.
- Whether the proposed tax planning arrangement has a clear economic purpose and substance based on the underlying business transaction or circumstances.
- The nature and complexity of the underlying business transaction or circumstances.
- The complexity or clarity of the relevant tax laws and regulations.
- Whether the professional accountant knows, or has reason to believe, that the proposed tax planning arrangement would be contrary to the intent of the relevant tax legislation.
- The number of jurisdictions involved and the nature of their tax regimes.
- The extent of the professional accountant's knowledge, skills and experience in the relevant tax areas.
- The significance of the potential tax savings.



- The nature and significance of any incentives offered to the professional accountant to develop the proposed arrangement.
- The extent to which the proposed tax planning arrangement reflects an established practice that has not been challenged by the relevant tax authorities.
- Whether there is pressure being exerted on the professional accountant.
- The degree of urgency in implementing the tax planning arrangement.
- The organizational culture of the employing organization.

280.17 A3 Examples of actions that might eliminate such threats include:

- Advising the employing organization to structure the tax planning arrangement so that it is consistent with an existing tax interpretation or ruling issued by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax or other authorities, where possible.
- Advising management not to pursue the proposed tax planning arrangement.

280.17 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the employing organization to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the employing organization to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Engaging an internal or external expert who has the necessary knowledge, skills and experience to advise the employing organization on the proposed tax planning arrangement.
- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another professional accountant) regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- Having a tax expert, who is not otherwise involved in the tax planning activity, review any work performed or conclusions reached by the professional accountant with respect to the tax planning arrangement.
- Having the employing organization provide full transparency about the tax planning arrangement to the relevant tax authorities, including the goals, business and legal aspects, and ultimate beneficiaries of the tax planning arrangement.

280.17 A5 Steps a professional accountant might take to establish the identity of the ultimate beneficiaries include, for example:

- Making inquiries of management and others within or outside the employing organization having regard to the principle of confidentiality.
- Reviewing the employing organization's tax records, financial statements and other relevant corporate records.

- Researching relevant public records.

### **Communication of Basis of Tax Planning Arrangement**

**R280.18** A professional accountant shall explain to management and, if appropriate, those charged with governance the basis on which the accountant recommended or otherwise advised on a tax planning arrangement to the employing organization.

### **Disagreement on the Tax Planning Arrangement**

**R280.19** If the professional accountant disagrees with the accountant's immediate superior or other responsible individual within the employing organization that a tax planning arrangement that the employing organization would like to pursue has a credible basis, the accountant shall:

- (a) Inform the immediate superior or other responsible individual within the employing organization, and if appropriate, those charged with governance, of the accountant's assessment;
- (b) Communicate to them the potential consequences of pursuing the arrangement in the event of an adverse ruling; and
- (c) Advise them not to pursue the arrangement.

**R280.20** If the immediate superior or other responsible individual within the employing organization decides to pursue the tax planning arrangement despite the professional accountant's advice to the contrary, the accountant shall take steps to disassociate from the arrangement. In doing so, the accountant shall consider:

- (a) Taking steps to have the details of the arrangement and the difference of views communicated with the next higher level of authority within the employing organization and, if appropriate, those charged with governance;
- (b) Advising the employing organization to make full disclosure of the arrangement to the relevant tax authorities; and
- (c) Communicating the details of the arrangement and the difference of views to the employing organization's external auditor.

280.20 A1 In light of the response of the immediate superior or other responsible individual within the employing organization to the professional accountant's advice, the accountant might also consider the need to resign from the employing organization.

280.20 A2 Many employing organizations have established protocols and procedures regarding how to raise ethical or other concerns internally. These protocols and procedures include, for example, an ethics policy or internal whistle-blowing mechanism. Such protocols and procedures might allow matters to be reported anonymously through designated channels.

### **Documentation**

280.21 A1 When performing a tax planning activity, a professional accountant is encouraged to document on a timely basis:

- The purpose, circumstances and substance of the tax planning arrangement.
- The identity of the ultimate beneficiaries.

- The nature of any uncertainties.
- The accountant's analysis, the courses of action considered, the judgments made, and the conclusions reached in advising the employing organization on developing the proposed tax planning arrangement.
- The results of discussions with the accountant's immediate superior and appropriate levels of management, those charged with governance and other parties.
- The response of the accountant's immediate superior, management and, where applicable, those charged with governance to the accountant's advice.
- Any disagreement with the accountant's immediate superior, management and, where applicable, those charged with governance.

280.21 A2 Preparing such documentation assists the accountant to:

- Develop the accountant's analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made or changed.
- Record the basis of the professional judgments at the time they were made or changed.
- Support the position if the tax planning arrangement is challenged by the relevant tax authorities.
- Demonstrate that the accountant has complied with the provisions in this section.

**PROPOSED CONFORMING AMENDMENTS TO THE CODE**  
**(Marked-up against extant Code)**

**PART 3 – PROFESSIONAL ACCOUNTANTS IN PUBLIC PRACTICE**

**SECTION 321**

**SECOND OPINIONS**

...

**Requirements and Application Material**

**General**

...

321.3 A1 A professional accountant might be asked to provide a second opinion on the application of laws and regulations, such as tax laws and regulations, and accounting, auditing, reporting or other standards or principles to (a) specific circumstances, or (b) transactions by or on behalf of a company or an entity that is not an existing client. A threat, for example, a self-interest threat to compliance with the principle of professional competence and due care, might be created if the second opinion is not based on the same facts that the existing or predecessor accountant or other service provider had, or is based on inadequate evidence.

....

321.3 A3 Examples of actions that might be safeguards to address such a self-interest threat include:

- With the client's permission, obtaining information from the existing or predecessor accountant or other service provider.
- Describing the limitations surrounding any opinion in communications with the client.
- Providing the existing or predecessor accountant or other service provider with a copy of the opinion.

*When Permission to Communicate is Not Provided*

**R321.4** If an entity seeking a second opinion from a professional accountant will not permit the accountant to communicate with the existing or predecessor accountant or other service provider, the accountant shall determine whether the accountant may provide the second opinion sought.

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