

IFA REPRESENTATION 03/23



Proposed Revisions to the Code Addressing Tax Planning and Related Services

The Institute of Financial Accountants welcomes the opportunity to comment on the [Consultation](#) published on 17 February 2023

We would be happy to discuss any aspect of our response and to take part in any further consultations in this area.

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General comments

1. We support the objective of this project 'to develop a principles-based framework, leveraging the fundamental principles and the conceptual framework of the Code' to guide conduct in respect of tax planning and related services.¹ However, we also recognise that there are significant challenges to implementing meaningful requirements and guidance given the potential lack of agreement concerning where the public interest lies and the sensitivity around the interactions between the tax laws of different jurisdictions in cross-border situations.
2. Recognising that 'what is legal is not necessarily ethical', the explanatory memorandum notes that the IESBA believes it can play a greater role in guiding the mindset of professional accountants. This follows recent changes deemed to concern the mindset of professional accountants but which, in fact, only focused on promoting an enquiring mind. The challenge remains that any two individuals will very often fail to agree on the ethical course of action. Therefore, we remain doubtful that the proposed changes will have a meaningful impact on the mindset of professional accountants.
3. Unconscious bias will, inevitably, result in professional accountants being more inclined to believe that a particular course of action is ethical than a party who perceives the public interest as residing in the payment of higher taxes by profit-making organisations for example. In addition, if legislation permits a form of tax planning that some might regard as 'aggressive' (and others might not), the professional accountant will feel pressure to act in the financial interests of their client or employer, rather than disadvantage their client or employer relative to other taxpayers. Competitive disadvantage is also a factor when considering those accountants who are not members of an IFAC member body.
4. We welcome the recognition, on page 7 of the Consultation, that SMPs will lack the resources of the large accountancy firms that have developed proprietary guidelines on tax planning. As a result, there is a danger that professional accountants within SMPs will feel compelled to adopt a more cautious approach to applying the Code's framework. We are concerned that the measures proposed by the IESBA could disadvantage some SMPs and would do little to address the alleged public mistrust in professional tax advisers referred to in the Consultation.² Indeed, it may be argued that public trust in tax advisers relies on professional accountants being trusted to serve the best interests of their clients and employers (which entails both tax efficiency and caution against possible reputational damage).
5. While we recognise that 'what is legal is not necessarily ethical', there is a risk that attempts to draw a line (or equip professional accountants to draw a line) between what is ethical and what is not (although it is permitted by legislation) may have unintended consequences. We are concerned that it may take the place of legislative change, which is the responsibility of governments - to provide greater clarity in the public interest.

Questions raised in the Consultation

Question 1: 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?

6. We note the issues regarding tax planning services identified in the Consultation, concerning the significance of the financial impact they have on clients and employers, the role taxes play in meeting jurisdictions' policy goals, and the complexity of the subject of tax planning.³ This combination of factors will make it difficult for any two people to agree on the ethical course of action.
7. The challenge is to construct a framework that can bring about consistent, ethical decision-making. While the creation of two new sections to the Code would appear to be the logical approach, they must be drafted so widely – applying to all types of client and employer – that their impact is bound to be minimal. As drafted, we believe the requirements and guidance are unclear, such that they risk

¹ *Proposed Revisions to the Code Addressing Tax Planning and Related Services*, February 2023, page 6

² *Proposed Revisions to the Code Addressing Tax Planning and Related Services*, February 2023, page 7

³ *Proposed Revisions to the Code Addressing Tax Planning and Related Services*, February 2023, page 9

confusion and disengagement with the principles embedded in the Code. This is especially true in respect of professional accountants in SMPs and SMEs.

Question 2: Do you agree with IESBA's description of TP as detailed in Section VII.A above?

8. The IESBA's proposed description is that 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*'. Broadly, we agree with this description. However, it might be simplified to provide a single definition, which would be supported by different examples in each of the two new sections of the Code.
9. In the context of serving a client or employer, structuring affairs in a tax-efficient manner entails seeking to minimise the client's (or employer's) tax liability, and we consider it might be unhelpful to obscure that fact by avoiding the word 'minimise'. Therefore, we propose a simplified description for tax planning, that it '*comprises a broad range of activities designed to assist a client or employer in structuring their affairs in order to minimise their tax liability*'. Including this in the Code's Glossary would help to streamline sections 380 and 280.
10. The description of tax planning may have an impact on the work of tax authorities and regulators in IFAC member states, including the current project of HM Revenue & Customs in the UK on raising standards in tax advice. It is possible that the UK definition will correspond, to a great extent, with the definition of tax adviser in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) regs 2017: '*a firm or sole practitioner who by way of business provides material aid, or assistance or advice, in connection with the tax affairs of other persons, whether provided directly or through a third party, when providing such services*'. While these two descriptions do not appear to contradict each other, the IESBA must be mindful that relevant definitions exist in UK and EU law.

Question 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?

11. How the public interest is best served by professional accountants is a fundamental question at the root of this Consultation. We are pleased that the IESBA recognises 'the benefits of having PAs provide TP services as they play a significant role in supporting and enhancing the effectiveness of the tax system'.⁴
12. The Consultation is helpful in setting out various factors considered by roundtable participants when considering where the public interest lies. We are clear that public perception is a significant factor and the public expects a professional accountant to help clients and employers to comply with the law. The consultation goes on to state that the need for professional accountants to preserve the interests of clients and employers as well as the public interest is a 'balancing act'. However, we would argue that the two are not in conflict, as serving the interests of the client or employer meets the expectations of the public and so serves the public interest also. This is particularly true in the case of professional accountants serving the needs of SMEs and individual taxpayers.
13. The reputation of the profession serves the public interest as well as the interests of the profession. However, the IESBA must be mindful of the fact that not all accountants are members of an IFAC member body.
14. We would respectfully challenge the statement that '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'. A more nuanced view might be that any such criticism is primarily of the wealthy individuals and organisations, rather than their advisers who are performing the role for which they were engaged.

⁴ Proposed Revisions to the Code Addressing Tax Planning and Related Services, February 2023, page 11

15. Similarly, we note that the Consultation does not provide a source for the assertion that stakeholders have a greater awareness of what is in the public interest and that 'what may have been regarded as creative and skillful TP in the past may now be perceived to be "tax avoidance"'.⁵
16. We support the contextual guidance provided in proposed paragraphs 380.4 A1 and 280.4 A1, and would only add, in each case, that this description of tax planning services also enhances trust in professional accountants, and so makes it easier for clients and employers to access professional help. This point is omitted from the proposed paragraphs discussing the professional accountant's public interest role.
17. Proposed paragraphs 380.4 A3 and 280.4 A3 both state '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'. The purpose of this statement is unclear. The perceived implication might be that the responsibilities of the professional accountant and their client or employer are, therefore, less important.

Question 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?

18. The Consultation acknowledges that what is legal is not necessarily ethical, and yet the phrase 'credible basis in laws and regulations' appears to bring the focus back to legal compliance rather than ethical behaviour. Therefore, the term 'laws and regulations' should be more clearly explained in the context of these proposed paragraphs.
19. We believe it is unclear, from proposed Sections 380 and 280, what the 'thought process' should be. Nevertheless, we consider a 'credible basis' for the tax advice to be a reasonable concept.
20. The various actions provided as examples in paragraphs 380.11 A3 and 280.11 A3 are helpful. However, they suggest a significant resource is required to be able to exercise the required judgement – resources that may not be available to an SMP.

Question 5: Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?

21. We believe that the drafting of the proposed paragraphs can (and must) be made simpler and clearer. For example, paragraphs R380.6 and R280.6 simply need to highlight the fact that the laws and regulations with which the professional accountant must comply (with reference to the fundamental principle of *professional behaviour*) include a jurisdiction's anti-avoidance rules.
22. Each of Sections 380 and 280 includes paragraphs headed 'Responsibilities of All Professional Accountants'. This is incorrect, and potentially unclear, as one relates to professional accountants in public practice and the other to professional accountants in business. We also believe that paragraphs R380.9 and R280.9 are unnecessarily detailed, as they simply need to refer the reader to the fundamental principle of professional competence and due care.

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

23. We agree that it is often important to perform a 'stand-back test' when considering the nature of advice that is about to be provided to a client or employer. However, there is no definition of 'stakeholder' in this context, and it would seem that such a definition would be as problematic as the definition of 'public interest'.

⁵ Proposed Revisions to the Code Addressing Tax Planning and Related Services, February 2023, pages 17 and 18

Question 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?

24. We broadly agree. In particular, we agree that it is not appropriate to seek to define what is meant by 'credible basis'. However, some guidance would be helpful. (To whom does the basis have to be credible?) Although it is acknowledged that 'what is a credible basis in laws and regulations will vary from jurisdiction to jurisdiction' and over time,⁶ this challenge is not addressed in the proposed paragraphs.

Question 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?

25. These proposed paragraphs are perhaps the most significant in this Consultation, and their significance must not be obscured by additional text that is unclear, controversial or of little value.
26. We support the framework set out under (a) to (e) (proposed paragraphs 380.17 A1 to A4 and 280.17 A1 to A4). However, its impact is weakened by the inclusion of threats that are likely to arise in *any* relationship with a client or employer (eg having a personal financial interest or relying on a high level of fees or salary). Therefore, the significance of the *advocacy* threat is at risk of being overlooked.

Question 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?

27. It appears this question may be related to paragraphs 380.8 A1 and 280.8 A1, which set out the responsibilities of clients, management and those charged with governance. However, we feel that these paragraphs lack context and add nothing to these proposed Sections of the Code, which should focus on the responsibilities of professional accountants.
28. In general, we would agree that, where a client determines to pursue a tax planning arrangement despite the professional accountant's advice, the professional accountant should disassociate themselves from that engagement and should consider withdrawing completely from the professional relationship where the disagreement would give rise to ongoing threats to compliance with the fundamental ethical principles. We have reservations concerning the 'more measured approach' taken by the IESBA in relation to professional accountants in business. To simply say that the professional accountant should *consider* resigning is insufficient, as ongoing threats to compliance with the fundamental principles are equally likely to exist in business as in public practice.

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

29. We support the proposals and agree that documentation should be encouraged, rather than required.
30. As drafted, paragraphs 380.23 A1, 380.23 A2, 280.23 A1 and 280.23 A2 appear prescriptive. To avoid this impression, we recommend reversing the order of paragraphs A1 and A2, leading with what must be achieved by effective documentation.

⁶ Proposed Revisions to the Code Addressing Tax Planning and Related Services, February 2023, page 16 and paragraphs 380.11 A2 and 280.11 A2

Question 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?

31. In our opinion, the proposed paragraphs are lacking. It would be helpful to remind the reader that the engagement letter with the client will set out the professional accountant's responsibilities in respect of any advice to be provided by a third party.
32. The existing provisions of Section 330 of the Code, in respect of commission received, are adequate. Therefore, paragraphs 380.22 A1 to A3 are unnecessary.

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

33. In our opinion, the IESBA's proposals appear reasonable.

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

34. Care should be taken to always ensure that amendments to the Code are necessary and do not detract from important messaging. It is proposed to add the term 'service provider' to Section 321, although the term is not defined and does not appear in the existing Code. It appears that this proposed change is not as a result of the proposed revisions specifically relating to tax planning and related services, but rather to address an existing problem – that there is no definition of 'accountant'.
35. The only other amendment to Section 321 is to include within second opinions the application of 'laws and regulations, such as tax laws and regulations'. If the application of laws and regulations is not thought to be included within 'other standards and principles', then the words 'laws and regulations' may be added to the text but, as drafted, the text would be unduly complex and so lacking in clarity.

Conclusion

36. Proposed paragraphs 380.2 and 280.2 might be amended to place more emphasis on the advocacy threat, which is clearly and directly related to the professional accountant's need to serve the best interests of their client or employer. In determining the ethical course of action, there is an advocacy threat to objectivity and, possibly, integrity. However, it may be argued that the proposed paragraphs are incorrect in claiming that advocacy threatens competence and due care. Furthermore, while the threat to professional behaviour is thought to exist, it will always be problematic to assert that, in serving their client or employer, a professional accountant has acted contrary to the public interest or that they should have known that their conduct might discredit the accountancy profession.
37. We agree that a professional accountant has an obligation to their client or employer to consider the risk that acting on any advice provided might cause reputational damage, and to inform the client or employer about that risk.
38. In general, we are concerned that the proposals within the consultation seek to address a matter of public perception, rather than a matter of public interest (which is extremely complex). We would prefer the IESBA to take a high-level approach (which would be less controversial) and simply provide guidance relating to how issues concerning aggressive tax planning may be addressed with reference to the conceptual framework.
39. The costs and benefits of the proposed changes are difficult to quantify. Nevertheless, we are concerned that the costs – especially to SMPs and SMEs – of implementing the changes to the Code, as proposed, would outweigh the benefits.

Contact details

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