

Compilation of Significant ED Comments

Note: This Agenda Item has been prepared **for information only**. A comprehensive summary of the significant comments received on the Exposure Draft (ED) of [Proposed Revisions to The Code Addressing Tax Planning And Related Services](#), and the Task Force’s related analysis of significant issues and proposals are presented in **Agenda Item 9-A**.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

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

No	Respondent	Respondent Comments
1	Accounting Professional & Ethical Standards Board Limited	<p>APESB is not aware of any other considerations, including jurisdiction-specific considerations that may impact the proper application of the proposed provisions.</p> <p>An Australian stakeholder noted that different jurisdictions may have an established term higher than the IESBA term ‘credible basis.’ Therefore, to avoid arbitrage opportunities, the stakeholder was of the view that additional guidance could be provided to outline how the IESBA term interacts with each jurisdiction’s laws and regulations.</p>
2	American Institute of Certified Public Accountants	<p>If the stand-back test remains as drafted, we could have a challenge adopting it under our current U.S. regulatory structure, as described under Taxpayer Protections.</p> <p>We agree that “credible basis” is best defined by specific laws, regulations and judicial decisions and will vary by jurisdiction. Since positions may change over time, we recommend that proposed paragraphs R380.11 and R280.11 be amended as follows because any lack of clarity and specificity on what laws and regulations were used to determine credible basis could expose the PA to challenge when changes in laws and regulations occur.</p> <p>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 <u>at the time of the professional accountant’s evaluation of</u> for the arrangement.</p> <p>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 <u>at the time of the professional accountant’s evaluation of</u> for the arrangement.</p>

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No	Respondent	Respondent Comments
3	Association of Chartered Certified Accountants	<p>As highlighted in our response to Question 1, while we generally agree with the proposed provisions, we are mindful that in many jurisdictions, tax advisory and compliance services are not protected or formally regulated activities. As a result, TP and related services are often provided by non-professional accountants, such as lawyers and other individuals who may be from different professions or who may have no professional qualifications at all. Such individuals are not under the purview of the Code and may not be subject to a similar and equally rigorous set of ethical and independence requirements.</p> <p>We believe that it is important to be mindful of considerations of global operability and practicality. Accordingly, we recommend that IESBA works closely with other professions whose members are similarly involved in providing such services, so that ethical requirements and objectives are aligned and met, while maintaining the Code as a gold standard of professional ethical requirements. Regardless of minor differences between professional standards, a unified message highlighting the importance of ethical tax behaviours, and of professional advisers in demonstrating those behaviours, will help to achieve the underlying goals of the Code.</p> <p>Just as there are a range of advisers, there are also a range of taxpayer behaviours to consider. Different taxpayers will respond differently to knowing that their adviser is subject to a rigorous ethical code, and it is important not to dilute the provisions of the Code in order to “appeal to” those taxpayers who would prefer to explore TP which would not pass the credible basis test.</p> <p>At this juncture, to mitigate the above concerns, and to address situations where TP activities/services are provided by non-professional accountants, we think it may be timely for IESBA to consider developing profession-agnostic ethical requirements for TP and related services, similar to the approach taken for IESBA’s Sustainability Project where the IESBA has committed to readying profession-agnostic ethics and independence standards for all sustainability assurance providers (both professional accountants and non-professional accountants). We believe that it is generally more effective to regulate behaviour (i.e., individuals providing TP and related services) rather than defined classes of individuals (i.e., professional accountants). However, we are mindful that there may be implementation and enforceability challenges stemming from the fact that non-professional accountants are likely to be beyond the purview of the Code unless specifically implemented at the respective jurisdiction level.</p>
4	BDO International	<p>We are not aware of any other material considerations, that may impact the proper application of the proposed provisions but note that there are jurisdictions such as the United States where the current regulatory guidance (e.g., the U.S. Treasury Department’s Circular 230) is being reworked and it is unknown if the revised guidance will result in</p>

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		<p>inconsistencies in applying IESBA's proposed guidance. We recommend that the IESBA considers recommending disclosures for uncertain tax positions within the annual financial statements.</p> <p>It is important for the ED to clarify the interaction of the proposed requirements contained in it with local laws, regulations and practices, particularly as it relates to the establishment of a credible basis. For example, there is the concept of:</p> <ul style="list-style-type: none"> a) a “defendable position” in the Netherlands, b) a “reasonable basis” and/or “more likely than not” in North America, c) “not highly contrived” and/or “not contrary to the intention of Parliament” in the United Kingdom and d) “likely to prevail” and/or “at least arguable” in South Africa.
5	Chartered Professional Accountants Canada Public Trust Committee	<p>The PTC is not aware of any jurisdiction specific considerations that may impact the proper application of the proposed provisions in Canada.</p> <p>However, the PTC would like to highlight that Canada is a jurisdiction which has a General Anti-Avoidance Rule (GAAR). This Rule acts to negate any tax benefit from “abusive” tax transactions that satisfy the letter of the law but are found to be contrary to the spirit or underlying policy of the legislation. Therefore, the PTC notes that countries with a GAAR will likely have a legal framework that supports some of the objectives of this Exposure Draft.</p>
6	CPA Australia	<p>CPA Australia’s membership covers many countries and jurisdictions with varying degrees of regulation of tax professionals. Australia, for example, has a government regulator, established by federal legislation, responsible for the registration and regulation of tax practitioners – the Tax Practitioners Board (TPB). Except for legal practitioners, providers of tax services are required to be registered as a tax agent with the TPB. Tax practitioners registered by the TPB are obliged to adhere to a Code of Professional Conduct under the Tax Agent Services Act 2009, must meet CPD requirements and may be liable to disciplinary proceedings by the TPB. Tax agents are not required to be, but in many cases are, a member of a professional accounting association such as CPA Australia.</p> <p>In contrast our members in New Zealand (and in many other jurisdictions) may provide tax services without necessarily needing to register as a tax agent with the NZ revenue authority (or relevant jurisdictional authority). Even when registered, there are minimal standards with which they must comply. In such jurisdictions, a tax agent acts as an intermediary for tax compliance purposes and their status as a tax agent may not be relevant to the provision of tax</p>

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		<p>services such as TP services. Other jurisdictions simply do not regulate advisors who provide taxation services for a range of reasons, including the responsibility ultimately resting with the taxpayer, the high regulatory burden and more urgent government priorities.</p> <p>We are supportive of efforts to establish consistent, practical and fair TP standards for PAPPs and PAIBs globally, particularly in jurisdictions where regulations, guidance or tax administration capacity may not be well-developed. However, the requirements should not seek to exceed the standards set by governments in jurisdictions where the regulatory framework is well-established. CPA Australia’s global membership will be impacted in different ways depending on the jurisdiction in which they operate.</p>
7	European Federation of Accountants and Auditors for SMEs	<p>We have highlighted some jurisdiction specific issues elsewhere in this response.</p> <p>We believe that guidance that is more principles-based than prescriptive in nature will facilitate the effective adoption and implementation by SMPs and minimize the likelihood of jurisdiction specific challenges.</p>
8	European Tax Adviser Federation	<p>Our members would only recommend having more guidance for evolving situations. For example, they reported some cases when the tax authority’s interpretation has changed over the years, without however any change in the relevant facts and circumstances. It is also possible that, after a period of silence, the tax authority expresses an opinion which may be divergent with the professional accountant’s initial one.</p>
9	Grant Thornton International Limited	<p>GTIL is not aware of any material considerations, including jurisdiction specific considerations, that may impact the proper application of the proposed provisions.</p> <p>However, IESBA does need to understand the implications the proposed requirements could have in jurisdictions with robust requirements for tax planning services, including tax laws and rules.</p>

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10	Hong Kong Institute of CPA	<p>With regards to paragraphs R280.6 and R380.6, it seems excessive and may not be helpful to set a precedent to state that a PA must obtain an understanding of certain specific tax laws and regulations, including anti-avoidance laws. Obtaining an understanding of all relevant laws and regulations is a core part of professional competence, i.e., one of the fundamental principles of the Code.</p> <p>While it may be inexplicitly assumed, we consider it better to state that a PA's obligation concerns only laws and regulations in jurisdictions in relation to which they are advising on a TP.</p> <p>Furthermore, the intention and scope of anti-avoidance rules in individual cases (which may differ from jurisdiction to jurisdiction) is subject to debate, which can be resolved only by decisions handed down by courts from time to time. So, the requirement to obtain an understanding of, and advise the employing organization or client to comply with anti-avoidance rules is not always practicable, for example, when a PA is involved in advising a client who wishes to challenge an interpretation of the rules by the revenue authority ("RA").</p> <p>On the other hand, we suggest that the definition of "regulations" should be made clear. The RA may have a stated practice that is not necessarily explicitly stated in the law. The fact that a practitioner takes a position that differs from the RA's practice should not put the practitioner in conflict with the proposed provisions on "credible basis in laws and regulation." Reference should also be made to "established practices" in relation to determining whether there is a credible basis for a TP arrangement, because where the law is silent, unclear or ambiguous, there may be a body of established practice that provides a credible basis for a TP arrangement.</p> <p>For the reasons stated above, we suggest the IESBA to modify relevant paragraphs as follows: Paragraphs R280.11 and R380.11, to cover laws, regulations "and/ or established practices"; Paragraphs 280.11 A1 – A2 and 380.11 A1 – A2, to cover established practices, i.e.,</p> <p>"...the tax planning arrangement does not have a credible basis in laws, regulations or established practices..."</p> <p>"... based on the relevant tax laws, regulations and established practices at the time".; and</p> <p>Paragraphs 280.11 A2 and 380.11 A2, we consider the word "tax" is not necessary, as per paragraphs R380.11 and 380.11 A1.</p>

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11	IFAC Small and Medium Practices Advisory Group (SMPAG)	Our comments elsewhere in this section have flagged some jurisdiction specific issues, generally, guidance that is principles based rather than detailed guidelines make it easier for SMPs to adopt and minimize the likelihood of jurisdiction specific challenges.
12	Independent Regulatory Board for Auditors	<p>Yes, there would be jurisdiction-specific considerations that would need to be taken into account and that may impact the proper application of the proposed provisions.</p> <p>In South Africa, the Tax Administration Act, Section 223(3), states that:</p> <p>“SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer -</p> <ol style="list-style-type: none"> a. Made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and b. Was in possession of an opinion by an independent registered tax practitioner that: <ol style="list-style-type: none"> i. Was issued by no later than the date that the relevant return was due; ii. Was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and iii. Confirmed that the taxpayer’s position is more likely than not to be upheld if the matter proceeds to court”. <p>As mentioned in paragraph 4.2 above, the “more likely than not” position indicates that the PA must confirm that there is a more than 50% chance of success of the taxpayer’s position, should the matter proceed to court. This threshold is in fact lower than the “credible basis” threshold proposed.</p>
13	Institut der Wirtschaftsprüfer in Deutschland e.V.	We are not aware of any other considerations that may impact the application to the proposed provisions. In the light of the international application of the Code, we do not believe that jurisdiction-specific considerations should be included.

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14	Institute of Certified Public Accountants of Uganda	ICPAU believes that tax planning and related services may be challenged in cross-border situations because by its nature tax is jurisdictional.
15	Institute of Chartered Accountants of Nigeria	We are not aware of any existing jurisdiction-specific consideration that may impact the proper application of the proposed provision. However, if any jurisdiction-specific consideration arises in the future, we shall notify the Board.
16	Institute of Chartered Accountants of Scotland	We have outlined above the principles and standards in PCRT, which is the code of conduct in the UK, and which we consider is broadly the same as the IESBA Code, although the documents are different in style.
17	Institute of Financial Accountants	<p>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.</p> <p>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.</p>
18	Instituto dos Auditores Independentes do Brasil	No. The laws and regulations in each jurisdiction should be observed.

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19	Japanese Institute of Certified Public Accountants	As we commented in Question 2, in Japan, it is the exclusive duty of certified public tax accountants to provide any tax-related services to others, which is prohibited to be provided by other than certified public tax accountants. When applying the provisions of this ED in Japan, it is necessary to discuss whether to apply the Code to services performed by a CPA who is also qualified as a certified public tax accountant. Considering that there are several jurisdictions as well as Japan with similar systems in place, we suggest that the IESBA should consider the existence of such a system where professionals only with CPA license cannot treat taxation matters and develop the provisions of the Code.
20	Malaysian Institute of Certified Public Accountants	<p>In jurisdictions which adopt common law system where interpretation of tax legislation is affected by the prevailing court decisions, the determination of credible-basis threshold and application of the proposed provisions may be more difficult compared to jurisdictions which adopt civil law system. This is because the interpretation of tax law in common law jurisdictions may change more frequently which makes it less predictable.</p> <p>The courts may have a different view on the interpretation of tax laws. Of the tax cases that have gone to the courts on transfer pricing issues, decisions have been made in favour of taxpayers in the cases of KPHDN v Proctor & Gamble (Malaysia) Sdn Bhd (2022) (HC), CFE Ltd v KPHDN (2022) (SCIT) and SEO Sdn Bhd v KPHDN (2021) (SCIT). A transfer of technical know-how to a related overseas company was held to be of an income nature and taxable in Malaysia in the case of Keysight Technologies Malaysia Sdn Bhd v KPHDN (2022) (HC). Applying the tax laws may not be clear as shown in the above cases. These are the gray areas.</p>
21	National Association of State Boards of Accountancy	NASBA suggests that IESBA provide a pathway to address differences among jurisdictions when advising on multi-jurisdictional TP arrangements.
22	Pennsylvania Institute Of Certified Public Accountants	The exposure draft seems to suggest that legal settlements are viewed negatively by stakeholders. While abuses have occurred in past, legal settlements are common in the United States. The U.S. tax system has a robust regulatory process (e.g., for taking a tax return position, etc.). The exposure draft appears to attempt to redefine this process without having the requisite authority.

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23	PKF (Durban)	<p>In terms of the South African Tax Administration Act No. 28 of 2011, section 223(3) states that "SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer:</p> <ul style="list-style-type: none"> (a) made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and (b) was in possession of an opinion by an independent registered tax practitioner that <ul style="list-style-type: none"> i. was issued by no later than the date that the relevant return was due; ii. was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and iii. confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court". <p>In the South African context, the "more likely than not" position indicates that the PA must confirm that there is a more than a 500/o chance of success of the taxpayer's position should the matter proceed to court. I am of the view that this threshold is in fact lower than the "credible basis" threshold proposed as well as the "likely to prevail" threshold contained in section 604.4.</p> <p>Hence, we are of the view that paragraph 380.11 A2 would supersede the credible basis test as the domestic legislation would override this provision. We however recommend that this be confirmed in the Code under section 380.</p>
24	Price Bailey	<p>Developing jurisdiction neutral guidance in this area is challenging.</p> <p>Much of a professional accountant's analysis in this area could end up relying on both objective and subjective assessments of the intentions of a jurisdiction's tax administration functions as well as the legislature itself. Also, it is not unusual for different government departments to operate at cross purposes to one another, e.g. one government department might be keen to allow reliefs for overseas investment whilst the tax authorities will be keen to maximise tax income. This has significant implications for an analysis of the 'legislature's intent' as part of credible basis.</p>

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		<p>The exposure draft contains some useful examples of circumstances where such uncertainty might arise (380.15 A2) but paragraph 50 of the explanatory memorandum also makes reference to identifying “specific scenarios to understand the extent to which PAs consider the legislature’s intent”. We hope that IESBA receives some useful responses to its request below for specific examples / comments, which it can further develop and publish alongside the revisions, given the specific and unique nature of the new provisions.</p> <p>We have an anti-abuse rule (the GAAR) in the UK which looks at tackling highly contrived arrangements and which as a fundamental gateway has the “double reasonableness test” - this sort of ‘stand back’ test is entirely reasonable and requires HMRC to show that the arrangements “cannot reasonably be regarded as a reasonable course of action”. This recognizes that there are some arrangements which some people would regard as a reasonable course of action while others would not. The ‘double reasonableness’ test sets a high threshold by asking whether it would be reasonable to hold the view that the arrangement was a reasonable course of action. It considers the actual planning in the round. If one were to focus instead just on “likelihood of success” and wider stakeholder perceptions (for example of the impact on the tax base of a single or multiple jurisdictions) this may create difficulties because some arrangements may be contrived and likely to succeed and some not contrived but unlikely to produce a subjectively assessed ‘fair’ tax outcome.</p> <p>Does IESBA have a view on how the new provisions will apply in the context of special economic zones such as free ports? In some jurisdictions such zones may not be commonly encountered but it might be helpful to view these as analogous to a cross border scenario where it will be difficult to assess a credible basis for tax planning by reference to normal rules in a geographic zone where the normal rules don’t apply.</p>
25	PricewaterhouseCoopers International Limited	<p>Taxpayers should always be entitled to legal and tax representation in case of a dispute with the tax authority, whether at the administrative level or in court, regardless of whether the position taken by the taxpayer has a credible basis in laws.</p> <p>We suggest that a section be added to R380.11 as follows: “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 professional accountant from assisting and representing the client before the tax authority, in administrative appeal or in court, following a dispute with the tax authority.”</p>
26	Public Accountants and Auditors Board Zimbabwe	<p>The PAAB is not aware of any specific issues in Zimbabwe that may impact the proper application of the proposed provisions. However specific issues will only be brought up once the definition of what public interest is has been updated.</p>

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27	RSM International	No. As indicated above, adoption of the credible basis threshold avoids jurisdiction-specific considerations. A credible basis threshold is universally comprehensible, and both proposed 280.11 A3 and 380.11 A3 provide useful criteria by reference to which Professional Accountants can assess whether a credible basis exists.
28	Saudi Organization for Chartered and Professional Accountants	We think the IESBA's proposals could encourage a better role by PAs in providing Zakat ("religious duty similar in substance to tax but the beneficiaries are specified by Islamic principles") planning (ZP) because the core element of compliance with Zakat laws is ethical more than legal. Those required to pay Zakat (individuals or corporations) have a religious obligation to pay Zakat (ethical commitment to consider the right of underprivileged people in their accumulated wealth). Thus, we believe that the proposed changes to improve ethical requirement with regard to TP services would have positive impact on services related to Zakat (including ZP). We also believe the same principles in the draft can be applied equally to other government's fees and levies.
29	South African Institute of Chartered Accountants	<p>Yes, there will be jurisdiction-specific considerations that will have to be taken into account that may impact the proper application of the proposed provisions based on the legislation of a jurisdiction as highlighted in our response in question 4 where legislation may allow PAs to object and appeal decisions by the Revenue Services, etc.</p> <p>Furthermore, in terms of the South African Tax Administration Act No. 28 of 2011, section 223(3) states that –</p> <p>“SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer -</p> <p>(a) made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and</p> <p>(b) was in possession of an opinion by an independent registered tax practitioner that—</p> <p>(i) was issued by no later than the date that the relevant return was due.</p> <p>(ii) was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and</p> <p>(iii) confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court”.</p>

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		SAICA therefore recommends that the IESBA allows for the adoption of the proposed amendments based on the tax legislations and processes in each jurisdiction.
30	Subcommittee for the Ethics Code Setting, Federation of Accounting Professions	<p>From Thailand’s overview perspective, some issues may affect the application of the provisions proposed in Section VII.E as follows:</p> <ol style="list-style-type: none"> 1. Tax ruling or tax consultation of the Revenue Department is not regarded as a law and is not applicable in general. Therefore, taking tax consultations for analysis in consideration of suitability and impact on clients’ tax planning may be uncertain and clear conclusions may not be reachable. 2. Disclosure: Most professional accountants (PAs) in Thailand are information providers on behalf of their clients. Therefore, the straightforward disclosures outlined in the revised provisions of this Code of Ethics may be impractical. 3. International transactions: Paragraph 59 discusses the complexities of international tax planning. Legal consulting services may have a wide range and variety of service scope and depends on the legal jurisdiction of each country, Professional Accountants (PAs) may have a limitation on the application of national law, international law, the Convention for Double Taxation Avoidance and Tax Evasion Prevention, or other international conventions related to taxes. Thus, it may be necessary to consult and seek advice from other professionals who practice under the laws of that country, which may be not feasible in practice.
31	Taxation Institute of Hong Kong	<p>The term “regulations” in the provisions needs to be more specific and provide more guidance on how it is defined. The local tax authorities may have their own different set of practice which tax practitioners would need to follow as best practice or align with the local law. Nevertheless, the tax practitioners may often propose tax position with arguments that could be different from the tax authorities view, and this should not simply put the practitioner in conflict with the so called “credible basis in laws and regulation” in the current proposal.</p>