

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**.

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?

No	Respondent	Respondent Comments
1	Accountancy Europe	<p>Accountancy Europe agrees with the proposals, acknowledging that professional accountants often face uncertainty when deciding whether a tax planning arrangement is legal or illegal – the grey zone.</p> <p>The grey zone can arise from lacunas in the wording and the legislators’ intentions behind the legislation, imprecise drafting of tax law, differences in interpretation of laws or contrary decisions in legal cases. It occurs in domestic tax legislation and is even more prevalent when dealing with tax arrangements that cross borders.</p>
2	Accounting Professional & Ethical Standards Board Limited	<p>APESB supports the concept of the grey zone of uncertainty and the proposed requirement to discuss the uncertainty with the client. However, APESB believes the consideration of uncertainty in tax planning arrangements should be considered before determining whether there is a credible basis for the tax planning arrangement and, as suggested in question 4 above, these sections should be relocated.</p>
3	American Institute of Certified Public Accountants	<p>The discussion of uncertainties with the client as described in R380.16 and R280.16 should not be required for the same reason we noted under Taxpayer Protections.</p>
4	BDO International	<p>Paragraphs 380.15 A1 & R380.16</p> <p>BDO agrees with the intention behind the description of the gray zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement.</p>

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		<p>It is BDO's experience that discussing the uncertainty with the client, as outlined in proposed paragraph R380.16 of the ED is currently best practice in many jurisdictions. Uncertainty in a proposed TP arrangement is not considered to be unusual.</p> <p>For the list of circumstances provided in paragraph 380.15 A2, the first two bullets (difficulty in establishing an adequate factual basis and adequate assumptions) would appear to suggest that the arrangement should not go ahead at all, rather than just making it uncertain. It is hard to understand how an arrangement could fail bullets 1 and 2 and still have a credible basis. The rest of the bullets provide more appropriate circumstances of uncertainty. Some explanation of this difference would be helpful (or alternatively bullets 1 and 2 should be removed from the list of circumstances).</p>
5	Chartered Accountants Ireland	<p><u>Uncertainties arising in assessment credible basis:</u></p> <p>Please see our comments to question 4 and recommendation to include application guidance 380.15 A1 to 380.15 A2 and 280.15 A1 to 280.15 A2 as a continuation of guidance arising in respect of actions outlined under 380.11 A3 and 280.11 A3.</p> <p><u>Multiple uncertainties:</u></p> <p>380.15 A1 to 380.15 A2 and 280.15 A1 to 280.15 A2 prompt sufficient consideration of various circumstances that may give rise to uncertainty. However, it is only reasonable to expect the professional accountant to make their client or employing organisation aware of any risks or uncertainties pertaining to the tax planning arrangement that they can reasonably expected to be aware of. The 'third party test' outlined in the conceptual framework would be a suitable proxy for 'reasonableness'.</p> <p>The IESBA acknowledge in their introduction to the Exposure Draft the increased complexity and therefore relevance of further consideration in situations, e.g. cross border transactions, where there is ambiguity regarding what is acceptable. Application guidance 380.15 A2 and 280.15 A2 highlights some of these circumstances but we would also add that multiple conflicting uncertainties can exist.</p> <p><u>Discussing with the client or employing organisation:</u></p> <p>We agree with the requirement to discuss the uncertainties with the client (380.16) and while the subsequent application guidance in 380.16 A1 is helpful, the uncertainty may remain even after these types of discussions. It is important to distinguish between the professional accountants responsibly to communicate the uncertainties they have</p>

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		<p>identified and the internal governance and risk management responsibilities of the client which will assess those uncertainties in context of their circumstances and ultimately decide whether to proceed with the tax planning advice.</p> <p>The situation can be different for a professional accountant in business who may not always have access to management or those charged with governance and it is also possible that an organisation’s culture or governance mechanisms may frustrate such access. We recommend inclusion of “direct report” to 280.16 as follows: <i>“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 <u>their direct report for the assignment and/or management and, if appropriate, those charged with governance</u>”</i></p>
6	Chartered Professional Accountants Canada Public Trust Committee	<p>The PTC generally agrees with the proposals describing the gray zone of uncertainty; however, recommends that the IESBA consider adding additional examples to help clarify the proposals.</p> <p>For example, the PTC notes that “adequate factual basis” and “adequate basis of assumptions”, are unclear in the first two bullets of proposed paragraphs 380.15 A2 and 280.15 A2. It is also not clear how they differ from the other circumstances listed under the same paragraph. The PTC recommends that these paragraphs include additional clarification or examples.</p> <p>The PTC observes that proposed paragraph R380.16 only refers to “...relevant tax laws and regulations...” when discussing the uncertainty of a TP. However, the PTC believes that there are additional resources such as legal precedents and tax rulings to which the PA should also refer. Accordingly, the PTC recommends adding the following language to broadly capture such material:</p> <p>“Where there is uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws, regulations, jurisprudence and other authoritative resources...”.</p> <p>Finally, the PTC thinks that it would be helpful if the IESBA referenced or included the list of actions in proposed paragraph 380.11 A3, that help determine credible basis in proposed paragraph R380.16. This will assist in the application of the requirement.</p>
7	CPA Australia	<p>CPA Australia supports the recognition of uncertainty in the provision of TP services and the intention to provide guidance on how PA’s may respond.</p>

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		<p>PAs' primary value is supporting taxpayers in understanding and navigating complex tax laws and regulations and supporting clients in interactions with tax authorities. Where tax laws are clear, tax reporting is increasingly automated with PAs performing more of an oversight role than completing or checking forms. As a result, uncertainty and the gray zone is where many PAs commonly operate, and these TP services are required by not only the client but also the tax authority.</p> <p>In many jurisdictions, it is acknowledged that tax authorities do not have the capacity or capability to determine the application of tax laws to all the arrangements and transactions that occur in the economy. As such, PAs perform a critical role in supporting clients to ensure the basis of their TP arrangements are credible, and to support tax authorities to develop relevant interpretive guidance and resolve queries and disputes.</p> <p>CPA Australia is concerned with the inconsistent language of proposed paragraphs 380.15 A1 and 380.16. Much of proposed section 380 refers to a tax planning arrangement requiring a “credible basis” in laws and regulations, in particular paragraphs 380.11 and 380.12. However, paragraphs 380.15 A1 and 380.16 refer to a tax planning arrangement’s “compliance with relevant tax laws and regulations”, rather than “having a credible basis in laws and regulations”. We are of the opinion that the wording of paragraph 380.16 is more definite than IESBA’s description of “grey zone” area of uncertainty intends. We have the same concerns with the same language used in paragraph 380.14A1.</p> <p>CPA Australia recommends the term “will be in compliance with the relevant tax laws and regulations” be replaced with “has a credible basis in relevant tax laws and regulations” in proposed paragraphs 380.15 A1 and R380.16.</p> <p>The comments above in relation to section 380, apply equally in respect of paragraphs 280.15 A1 and 280.16 in proposed Section 280.</p> <p>CPA Australia agrees with the requirement in paragraph 380.16 for a PA to discuss with the client the uncertainty of an arrangement, as outlined in paragraph 380.15 (similarly in paragraph 280.16), and observes this absolute requirement is consistent with paragraph 380.13. For the reasons set out at 6 above, CPA Australia considers the fourth purpose of the discussion at paragraph 380.16 A1 to be inappropriate and recommend its removal.</p>
8	Deloitte Touche Tohmatsu Limited	<p>Deloitte Global supports the proposed approach, but we have noted the following observations with respect to circumstances included in paragraph 380.15 A2:</p>

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		<ul style="list-style-type: none"> - It is unclear what the circumstances would be that are described as “Difficulty in establishing adequate basis of assumption”. We suggest this bullet point is deleted. Similarly, we suggest that the second bullet point in paragraph 380.16 A1 "Considering any assumptions that might need to be made or changed" is also deleted. - The last bullet point introduces the concept of “ultimate beneficiaries” which is not referred to elsewhere in the ED. We recommend that the Board consider providing more context as to why the identity of ultimate beneficiaries is of importance in the context of tax planning.
9	Ernst and Young Global Limited	<p>If the Board decides to proceed with the proposed revisions, we do not take exception with the IESBA's proposals with regard to the gray zone of uncertainty and its relationship to determining that there is a credible basis for the tax planning arrangement.</p> <p>We agree with the Board that the ability to establish a credible basis will vary depending on the degree of certainty that exists in the underlying factors surrounding the tax planning arrangement – i.e., the higher the overall degree of certainty in the underlying factors, the more credible the basis will be for the PA's assertion that there are reasonable grounds for the tax planning advice or recommendation.</p>
10	European Federation of Accountants and Auditors for SMEs	<p>We agree.</p> <p>We believe it is reasonable to discuss the nature of uncertainty with the client where such uncertainties exist. The current proposals seem to suggest that the gray zone is a current or future consideration. We wonder whether this ought to be extended to the past, at least as a transitional measure until such time as the proposals have had time to be fully adopted and implemented.</p>
11	European Tax Adviser Federation	<p>ETAF acknowledges the difficulty for professional accountants, and tax professionals in general, to navigate through this grey zone of uncertainty, and therefore welcomes the IESBA proposals.</p> <p>We agree with the IESBA that in such situations the professional accountant should explain to the client the risks of an uncertain tax planning arrangement. We believe that if there is a chance that the proposed arrangement could be not fully compliant with the relevant tax laws and regulations, the client should know and the professional accountant should assess the legal and financial risks involved.</p>

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		<p>Moreover, if the uncertainty about whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations is caused by insufficiently clear tax standards, we believe that discussing the nature of the uncertainty not only with clients but also with tax authorities would minimize the risk for the client but could also be seen as an example of the professional accountant acting in the public interest.</p>
12	Grant Thornton International Limited	<p>Defining what is meant by ‘gray zone’ is extremely difficult and its interpretation may vary widely in jurisdictions.</p> <p>Certain provisions regarding identification of threats when applying the conceptual framework suggest that the professional accountant should determine the identity of the ultimate beneficiaries of a tax planning arrangement. GTIL believes this could be too broad in scope and could impose additional costs on the professional accountant.</p> <p>Such a requirement, especially when combined with the stand-back test, may create in fact or appearance liability exposure of the professional accountant to parties not in privity of the contract with the professional accountant. As such, this proposal runs counter to law and legal precedent in many jurisdictions.</p> <p>Accordingly, GTIL request the Board to remove this provision from the proposed standard.</p>
13	IFAC Small and Medium Practices Advisory Group (SMPAG)	<p>We agree that it is reasonable to discuss the nature of uncertainty with the client where such uncertainties exist. The current definition and guidance in R380.16 and R280.16 along with the explanatory memorandum imply that the gray zone would be a current or future consideration. The proposed revisions fail to acknowledge that the past may be relevant for gray zone considerations too. For example, past advice may place a client within an arrangement that is in the gray zone and subsequently becomes subject to challenge by the tax authorities, a PA may then subsequently be assisting that client to navigate the situation. It would be counterintuitive for a PA to step away from such activity in these circumstances, engagement would be a more appropriate solution for all parties.</p>
14	Independent Regulatory Board for Auditors	<p>We agree with the IESBA's proposals, as outlined in Section VII.G, which describe the gray zone of uncertainty. However, we suggest that the list of sub-bullets under the third bullet point of paragraph 380.15 A2 be moved/repositioned as implementation guidance.</p> <p>Paragraph R380.16 is also unclear on the steps that would need to be followed by the PA after discussing the uncertainty with the client. We suggest that the following paragraphs under paragraph R380.16 be referenced:</p> <ul style="list-style-type: none"> • R380.11 – Consideration of a credible basis.

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		<ul style="list-style-type: none"> • R380.12 – Performing the stand-back test. • 380.23.A1 – Encouraging documentation of the discussion with the client. <p>The application material in deterring circumstances that might give rise to uncertainty in paragraph 380.16.A1 would have already been considered by the PA and should not be repeated here. Therefore, we suggest that it be deleted.</p>
15	Institute of Chartered Accountants in England and Wales	<p>We refer to our comments above in relation to the proposed credible basis test and that establishing a realistic assessment of the facts is essential.</p> <p>See our comment in section C on our proposed amendment to para 380.15.A2.</p>
16	Institute of Chartered Accountants of Scotland	<p>The gray zone in tax planning will always be difficult to define, and enforcing any rules that apply in the gray zone will also be uncertain, because there cannot be a clear line or certainty around what is acceptable or unacceptable if the actions are lawful, i.e. they are not illegal. The test of legality rests with the courts.</p> <p>The checklist provided in proposed new paragraph 380.15.A2 gives a useful list to consider when seeking to establish the level and cause of uncertainty; it may help the tax practitioner to distil their position.</p>
17	Institute of Financial Accountants	<p>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, this challenge is not addressed in the proposed paragraphs.</p>
18	Instituto dos Auditores Independentes do Brasil	<p>We agree with the IESBA’s proposals in Section VII.G of the Exposure Draft (Describing the “Gray Zone” of Uncertainty). Such situations must be discussed with the client/management and, if appropriate, TCWG of the organization.</p>
19	International Bar Association Tax Committee	<p>Yes, we agree with the approach of describing the gray zone of uncertainty and providing guidance for determining a credible basis for the TP arrangement in such situations. In our view, consultation with tax authorities or seeking an</p>

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		<p>advance ruling, wherever permissible under relevant domestic legislation, may be added in the last bullet of para R380.16 A1 and R281.16A1. Such measures have also been referred to in R380.17 A3 and R281.17 A3.</p>
20	Japanese Institute of Certified Public Accountants	<p>We agree with the proposal. However, we believe that the following points need to be addressed.</p> <p>Since different jurisdictions have different ways of defining tax treatment, there may be divergent interpretations as to the scope of what documents are included in “laws and regulations,” and we believe that criteria for judging in each jurisdiction will be necessary.</p> <p>Japanese tax laws contain many expressions such as “unreasonably expensive” and “unavoidable circumstances,” and there are elements which are left to the taxpayer to consider, known as “indeterminate concepts.” In such areas, practice is established by “soft law” which has no legal source, such as notifications, advance ruling or FAQ published by tax authorities.</p> <p>If all areas that are not clarified by “laws and regulations” are “uncertain,” then many areas of Japanese TP practice will be subject to uncertainty, and professional accountants will have to consider the contents of “soft law” in the process of considering the “credible basis,” which is expected to impose an excessive burden on them. Considering the practical application in Japan, we believe that it is necessary to include “soft law” such as notifications, advance ruling or FAQ in the scope of “laws and regulations” and to add a clear explanation of the inclusion so that only those matters whose treatment cannot be determined by such “soft law” can be treated as “uncertain” and proceed to the consideration of the “credible basis.” To this end, we suggest that the IESBA should make more specific examples of the “credible basis” in paragraph 380.11 A3 and the “circumstances that might give rise to uncertainty” in paragraph 380.15 A2.</p>
21	Malaysian Institute of Accountants	<p>Overall, we are supportive of the description of the gray zone of uncertainty and its relationship in determining that there is a credible basis for the TP arrangement. However, similar to Question 1 above, we are of the opinion that the suggested proposals should take into account past events. Previous advice could have led clients into a gray zone scenario and the PA could be engaged to rectify this situation. It would be impractical for the PA to disassociate from such situations. To this end, we would propose for the IESBA to clarify or provide relevant examples of such situations.</p>

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22	Malaysian Institute of Certified Public Accountants	Yes. Where there are uncertainties that disallow the PAs to determine the credible basis of rules and regulations for the tax planning advice or solution, PAs are advised to exercise professional judgement to navigate such issues, as they are expected to uphold the public interest (i.e., this should help business align with the corporate governance agenda of the ESG initiatives) by ensuring that their clients are able to meet their tax obligations in the most efficient manner based on the tax rules and regulations.
23	Mo Chartered Accountants (Zimbabwe)	Similar to the stand-back provisions, incorporation of a current and look-forward provision will allow the PA to constructively and objectively determine the existence of a gray-area/s. This has to be considered in tandem with laws and regulations. When looking-forward the PA must determine ethical, reputational and professional requirements relating to the TP arrangement/transaction.
24	Pennsylvania Institute Of Certified Public Accountants	<p>The committees agree that there are various degrees of uncertainty and that it is not appropriate to categorize them into buckets or ascribe labels that indicate value judgments. The committees support an approach that provides examples of circumstances that might give rise to uncertainty and the requirement to discuss the uncertainty with the client.</p> <p>The proposed guidance at 380.16 A1 indicates that the discussion would provide an assessment of how likely the relevant tax authorities are to have a particular view. This is not always clear. Federally, for example, there are 11 circuit districts, each assigned a geographic region, and court decisions in one district are not necessarily binding in another. Accordingly, there could be diversity of "grayness" depending on the circuit district used as the "barometer." Perhaps it would be better phrased, "the professional accountant's assessment about the degree of uncertainty."</p> <p>The proposed guidance at 380.16 A1 indicates that the discussion would include the reputational, commercial, or wider economic consequences in pursuing the proposed tax planning arrangements. These variables may not be known.</p> <p>Furthermore, this tax-specific guidance does not belong in the Code but rather in a separate set of standards.</p>
25	PKF (Durban)	Tax planning services often involve uncertainty for various reasons as mentioned in 380.15 A2 however the PA would as a matter of course state this in the advice to the client in determining the "credible basis" or in the SA context the "more likely than not to be upheld in court" hence whilst I do understand the relationship between the gray zone and the credible basis, I do not think it is necessary for this to be specifically mentioned in the ED.

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		<p>However, should it still be considered necessary we wish to reiterate the point noted in the general comments with regards to the list of examples being included in a guidance document rather than the ED itself; and my response to question with regards to the concern raised that the list of circumstances/examples noted in 380.15 A2 will not be applied as a "check list" in the event that a PA is found to have provided advice that potentially falls within such Gray Zone.</p>
26	Price Bailey	<p>Yes, and it makes logical sense that any such uncertainties should be discussed with the client.</p>
27	Public Accountants and Auditors Board Zimbabwe	<p>The PAAB agrees with the description of the gray zone by outlining circumstances that might give rise to the uncertainty but however we believe the proposals are not clear on the relationship between the gray zone of uncertainty and the determination of the credible basis in laws and regulations for the TP arrangement.</p> <p>From our understanding, the gray zone refers to uncertainty as to whether a proposed TP arrangement will be in compliance with relevant tax laws and regulations.</p> <p>There is need for more guidance on how the PA can then determine whether or not there is a credible basis for the TP in light of circumstances that might give rise to uncertainties and if professional judgement will be exercised, the Code must highlight that point.</p>
28	RSM International	<p>Yes. Even if we can determine that there is a credible basis in laws and regulations for the tax planning arrangement, there may be circumstances that might give rise to uncertainty. In those cases we agree that it is appropriate to communicate this to our clients. The circumstances (examples) described in the proposed revisions will be helpful to consider as we provide the tax planning services.</p>
29	Saudi Organization for Chartered and Professional Accountants	<p>We agree with the IESBA's intent to cover "Gray Zones" which PAs may face in practice. However, we think that paragraphs (280.15, 280.16, 380.15 & 380.16) do not provide a unique topic that should be highlighted under a separate "title" or section. Alternatively, we think that the idea of "uncertainty" associated with such TP arrangement should be moved to be part of the discussion provided in paragraphs (280.11 & 380.11) or the immediate sections after since they are highly pertinent to the application of "credible basis" idea. Since the main concern with "uncertainty" or "Gray Zones" is that PAs would experience significant difficulties to implement the "credible basis" concept, it would</p>

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		make sense to move the section to be close to the discussion of "credible basis" idea to increase the understandability of the issue.
30	South African Institute of Chartered Accountants	<p>SAICA disagrees with the IESBA's proposal based on the following:</p> <p>(a) The ED does indicate what the IESBA articulates in the explanatory memorandum relating to the gray zone as a result PA's may does not have a background or understanding as to what paragraphs 280.17 A1 to A4 is trying to achieve. It is important the IESBA introduces the concept of the "gray zone" in the Code with a clear articulation of what it in means in order to achieve the desired outcome.</p> <p>(b) Also, TP services often involve uncertainty for various reasons as mentioned in 380.15 A2. However the PA would state this in the advice to the client in determining the "credible basis" or in the SA context the "more likely than not to be upheld in court" concept hence whilst some of the members do understand the relationship between the gray zone and the credible basis, it is not considered necessary for this to be specifically mentioned in the Code.</p>
31	Subcommittee for the Ethics Code Setting, Federation of Accounting Professions	<p>Agreed. Because considering whether the customer's tax planning is appropriate or not. There are many factors, which are uncertain and may change over time and contexts, that need to be considered. Therefore, Professional Accountants (PAs) should clearly discuss issues with clients, so they have thorough information for making a decision.</p>