This agenda paper details proposed revisions to draft Section 280 in response to feedback from the Board during the September 2022 IESBA meeting AND comments received on a progressed draft by November 4. Task Force explanations for the proposed revisions are contained within the comment boxes. This version is marked up against the version presented to the Board on September 16, 2022.

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 have a responsibility 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 avoid them through tax evasion. However, when accountants provide such assistance, it might involve certain tax minimization arrangements that

Commented [CV1]: Advance Comments from Board Nov 4:

The Task Force considered the comment that the extant sentence might imply that PAs have an obligation to advise employing organizations on how best to meet their tax planning (TP) goals, even when not asked by the employing organizations, or a fiduciary duty to do so.

The Task Force proposes to clarify that PAs play a role in advising employing organizations to meet their TP goals, rather than a responsibility to do so.
although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles which need to be addressed.

280.4 A3 It is ultimately for a court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with tax laws and regulations.

Description of Tax Planning and Related Activities

280.5 A1 Tax planning services comprises 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 tax burden, including through transfer pricing practices.
- Advising management on efficient ways to utilize available tax losses for the employing organization.
- Advising Structuring the employing organization’s 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 Structuring 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 or not it is a public interest entity.

Compliance with Laws and Regulations

Anti-avoidance Laws and Regulations

R280.6 In some jurisdictions, there are tax laws and regulations, including those that are often referred to as anti-avoidance rules, that limit or prohibit certain tax planning arrangements. These laws and regulations are often referred to as anti-avoidance rules or measures. A professional accountant shall obtain an understanding of those laws and regulations and comply with them when providing tax planning services.
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 affirmative advice on or recommendation regarding 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.

Responsibilities of All Professional Accountants

R280.9 If a professional accountant is involved in performing a tax planning activity for an employing organization, the accountant shall obtain an understanding of the nature of the tax planning activity. This understanding shall include:

(a) The goals, 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.

R280.11 A professional accountant shall explain to management and, if appropriate, those charged with governance the basis on which the accountant advised or recommended a tax planning arrangement for the employing organization.
Basis for **Affirmatively** Advising on or Recommending a Tax Planning Arrangement

R280.12 A professional accountant shall only **affirmatively** advise on or recommend a tax planning arrangement for an employing organization if the accountant has determined that there is a credible basis in laws and regulations for the arrangement.

280.12 A1 If the professional accountant determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R280.12 does not preclude the professional accountant from explaining to the accountant’s immediate superior or other responsible individual within the employing organization the accountant’s rationale for the determination.

280.12 A2 The determination of what is credible, what is a credible basis will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time and will be a matter of professional judgment. Whether a tax planning arrangement will prevail is ultimately a matter to be determined by a court or other appropriate adjudicative body.

280.11 A3 Actions that a professional accountant might take to determine that there is establish 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 Advice or Recommendation

R280.123 In determining that there is a credible basis for in developing the advice or recommendation on the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the potential reputational, commercial and wider economic consequences that **might-could** arise from the way stakeholders **would-might** view the arrangement.

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

280.123 An awareness of the wider economic risks and 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.

R280.134 If after having considered the matters set out in paragraph R280.123, the professional accountant decides not to proceed with providing the tax planning affirmatively advice or recommendation 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 the decision and explain the basis of that decision.

**Tax Planning Arrangements Involving Multiple Jurisdictions**

280.14 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 either one or both jurisdictions.
- The likelihood that the tax benefits will continue to be available to the employing organization if no action is taken in either jurisdiction to address the matter.
- 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 establish-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.
- 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.

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 nature of the uncertainty with management and, if appropriate, those charged with governance.

The discussion serves a number of purposes, including:

- Sharing 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 eliminate the uncertainty.
- Discussing any reputational, commercial or wider economic risks and consequences in pursuing the proposed tax planning arrangement.
- Discussing potential courses of action to mitigate the risks, including consideration of disclosure to the relevant tax authorities.

Potential Threats Arising from Performing a Tax Planning Activity

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, even though there are indications that the arrangement might not have a credible basis in tax 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, and in a way that might influence the accountant’s determination that there is a credible basis the professional accountant has doubts as to whether the proposed arrangement is consistent with the intent of the relevant tax laws and regulations.

- Self-interest and intimidation threats might be created when a professional accountant faces potential dismissal over a difference of views about the position the employing organization is insisting on pursuing in regards to 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.
- 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 extent to which the proposed tax planning arrangement reflects common and 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 tone at the top organizational culture of the employing organization.

Commented [CV18]: The Task Force is proposing replacing the word “doubtful” to better convey the threat of significant influence upon the PA’s determination that there is a credible basis.

Commented [CV19]: The Task Force is proposing replacing the phrase “differences of views” to clarify that the threats arise from the position that the employing organization insists on pursuing which the PA disagrees with, rather than just based on differing views.

Commented [CV20]: Advance Comments from Board Nov 4:

The Task Force considered the comment to move the example to be closer to the top of the list, and is of the view that it would be better placed below the example which speaks to relevant tax laws and regulations.
280.17 A3 Examples of actions that might eliminate threats created by circumstances of uncertainty include:

- Engaging an external expert who has the necessary knowledge, skills and experience to advise the employing organization on the proposed tax planning arrangement.
- Structuring the tax planning arrangement so that it is consistent with an existing tax interpretation or ruling issued by the relevant tax authorities.
- Structuring the tax planning arrangement based on common practice that has not been challenged 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.
- Structuring the tax planning arrangement so that it has a clear economic purpose and substance.
- Structuring the tax planning arrangement based on common practice that has not been challenged by the relevant tax authorities.
- Consulting with an expert within or outside the employing organization in the relevant tax areas.
- Obtaining an opinion from an appropriate legal counsel 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 decisions made by the professional accountant with respect to the tax planning arrangement.
- Obtaining an opinion from independent an appropriate legal counsel regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- 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.
- Reviewing the employing organization’s tax records, financial statements and other corporate records.
- Researching relevant public records.

Commented [CV21]: Feedback from September 2022 Board Meeting:
The Task Force considered comments from Board members to revisit the examples of actions that would eliminate threats versus actions that are safeguards.
The Task Force is of the view that an existing tax interpretation or ruling would be able to eliminate threats created by the uncertainty.

Commented [CV22]: Feedback from September 2022 Board Meeting:
The Task Force considered comments from Board members to revisit examples of actions that would eliminate threats versus actions that are safeguards.
The Task Force is of the view that structuring a TP arrangement based on established practice that has not been challenged is actually a safeguard as it does not completely eliminate the threat.

Commented [CV23]: Feedback from September 2022 Board Meeting:
The Task Force considers that the legal opinion can be obtained from within the PA's employing organization or from an independent party, so long as it is from an appropriate legal counsel.
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 advised or recommended a tax planning arrangement to the employing organization.

Disagreement on the Tax Planning Arrangement

R280.198 If the professional accountant disagrees with accountant’s immediate superior or other responsible individual within the employing organization that a proposed tax planning arrangement that the employing organization would like to pursue has a credible basis in laws and regulations, the accountant shall:

(a) Inform the immediate superior or other responsible individual within the employing organization of the accountant’s assessment;

(b) Communicate to them the reputational, commercial and wider economic risks and consequences of pursuing the arrangement in the event of an adverse ruling; and

(b)(c) Advise them not to pursue the arrangement.

R280.19 If the immediate superior or other responsible individual within the employing organization decides determines to pursue the tax planning arrangement despite the professional accountant’s advice to the contrary, the professional accountant shall take steps to be disassociated 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.

R280.20 A1 As part of communicating the matters set out in paragraphs R280.19 and R280.20, a professional accountant may consider it appropriate to raise the relevant matters with those charged with governance of the employing organization.

R280.20 A2 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 resigning from the employing organization.

R280.20 A31 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.
280.210 A1 When performing a tax planning activity, a professional accountant is encouraged to document on a timely basis:

- The goals and economic purpose 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 the accountant considered, the judgments made and the decisions taken in 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.

280.210 A2 It is in the interest of a professional accountant to prepare documentation relating to the tax planning arrangement in a timely manner. Such documentation assists the accountant to:

- Develop the accountant’s analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made.
- 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.