Tax Planning and Related Services—
Summary of Feedback from Roundtables and Preliminary Task Force Views

I. Background

Global Roundtables

1. In early March 2022, the IESBA announced that it would host a series of global virtual roundtables on its Tax Planning and Related Services (Tax Planning) project. The roundtables aimed to bring together a broad range of stakeholders to discuss the state of play on the topic of tax planning (TP) and explore how the IESBA could formulate a proposed ethical framework to guide professional accountants in business (PAIBs) and professional accountants in public practice (PAPPs) when providing TP services. The TP Task Force (TPTF) will consider the feedback from the roundtables as it develops the proposed ethical framework.

2. The three global virtual roundtables were organized to cover specific regions – April 25th for the Americas, April 26th for EMEA,1 and April 28th for Asia Pacific. Excluding observers, close to 100 delegates participated in the events. They represented various stakeholder groups, including regulators and public authorities, representatives of the legal profession, national standard setters, preparers, professional accountancy organizations, firms, and academia. Observers included a member of the Public Interest Oversight Board (PIOB). The Appendix provides an overview of the participation at the three roundtables and the jurisdictions represented.

3. A briefing note was provided to the participants in advance of the roundtables, providing the background and rationale for the project. It also set out the discussion topics on which participants’ feedback was sought. The briefing note is attached for reference as Agenda Item 5-B. Each roundtable consisted of one breakout session, with participants assigned to three separate groups. During the breakout session, participants discussed the questions set out in the briefing note. At the end of the breakout session, all participants reconvened in a plenary session to hear report-backs on the highlights and key takeaways from the discussion in the breakout groups.

4. The input received was rich and diverse. The discussions highlighted how intertwined, complex, and multi-dimensional the ethical considerations can be in addressing TP services. Not surprisingly, the interactions between tax laws of different jurisdictions in cross-border situations were noted as an area needing particular care and sensitivity. Furthermore, while many shared similar views on the questions, there were also some differences.

5. The discussions generated some initial practical observations, which the TPTF took into account in formulating the preliminary views on the matters set out in this paper. The TPTF will undertake further analysis and synthesis of the roundtable feedback in integrating the different elements of the proposed framework. The TPTF acknowledges that the way forward will need to balance the public interest (PI) benefits of the proposed ethical framework with considerations of global operability, practicality, and scalability to the users of the Code.

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1 Europe, the Middle East, and Africa
Proposed Ethical Framework

6. As discussed at the March 2022 IESBA meeting, the TPTF is of the view that focusing on developing a principles-based framework is the appropriate way forward because of the wide variety of tax laws, regulations and practices around the world, i.e., global applicability is an important consideration. Equally, it will be important to avoid being drawn into analyzing the merits of particular tax strategies planned or adopted by employing organizations or clients, judging the merits of the tax regimes or strategies of jurisdictions, or debating tax policy.

7. To assist PAs in exercising judgment in navigating the complexities and uncertainties of TP and deciding on the appropriate course of action in the circumstances, the proposed ethical framework will guide PAs to:

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

8. The following sections highlight several overarching themes and messages heard across the three roundtables and the TPTF’s preliminary views on the matters raised.
II. Common Themes from Roundtable Keynote Presentations

9. During the three roundtable sessions, the TPTF invited several keynote speakers actively involved in various TP-related roles to share their high-level perspectives on the topic. The TPTF found the following common themes in the key messages from the speakers:

Dealing with the Ethical Dimension of Tax Planning is Not Necessarily Straightforward

- The topic of TP continues to be challenging due to a number of characteristics or idiosyncrasies such as:
  - Determining and balancing an employing organization’s or a client’s interest versus the public interest. There is a tension in trying to strike this balance.
  - Understanding the intent of the tax legislation, which can be time-consuming and complicated. This challenge is compounded by the fact that each jurisdiction has its own legal regime and national interest to protect. One jurisdiction’s economic tax benefit may be another jurisdiction’s base erosion and profit shifting.

- TP is an area where all key players, from policymakers to regulators, preparers, firms and professional bodies, have a role to play in working together towards promoting tax advisers’ ethical behavior.

Navigating the Uncertainties around Tax Strategies

- When it comes to TP, PAIBs and PAPPs may often be able to navigate the complexities and uncertainties arising from multi-jurisdictional transactions in today’s e-commerce world. For example, many of the larger firms have an internal tax code of conduct or a framework that assists them in navigating the challenging aspects of multi-jurisdictional transactions. At a minimum, the firms are guided by their internal policies or code to take a position where the tax strategy has a credible basis in law, there is economic substance to it to withstand scrutiny in a court of law, and the tax strategy is not artificially contrived.

- In meeting their ethical obligations under their firms’ tax code of conduct, PAs are expected to have access to all the relevant facts and circumstances, and to ensure appropriate disclosure of information by their clients.

- PAs are to perform an appropriate level of due diligence regarding the information provided by their employing organizations or clients. Importantly, to guard against reputational risks, PAPPs are expected to carry out appropriate KYC (Know Your Client) and UBO (Ultimate Beneficial Owner) procedures prior to, or as part of, client/engagement acceptance or engagement performance.

Communication and Documentation

- In addition to ensuring that there is a credible basis in tax law as noted above, PAs in some of the large firms are encouraged by their firms’ tax codes of conduct to cooperate with local

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2 The keynote speakers ranged from practitioners in firms to representatives from academia, a non-governmental organization (NGO), a tax authority, a securities regulator and a professional accountancy body.

3 According to the firms, these internal codes of conduct or frameworks are developed based on the fundamental principles of the IESBA Code.
tax authorities by communicating any matters that are required to be disclosed under the local tax laws and regulations, subject to prior agreement with their clients.

- Taking into account the specific facts and circumstances of their employing organizations or clients, it is essential in today’s environment that PAs discuss broader considerations, including the economic, commercial, and reputational risks involved, when providing the tax advice. PAs should be able to confidently articulate and defend their professional judgment in advising on particular tax strategies.

III. Gray Zone

Background

10. From the fact-finding phase leading to the project, the TPTF noted that several jurisdictions have tax regulations that deal with TP practices they consider “aggressive.” These include general anti-avoidance rules (GAAR) and targeted anti-avoidance and mandatory disclosure rules. The TPTF also noted that jurisdictions might use several approaches to encourage legal compliance and discourage “aggressive” TP practices and behavior.

11. The IESBA has agreed that it would not be feasible to define “aggressive tax avoidance” on a global basis. The TPTF acknowledges that it may be challenging to develop ethics provisions on TP for PAs without a clear definition of “aggressive tax avoidance.” Instead, some stakeholders have suggested that the TPTF explore the notion of unacceptable TP practices and behavior and consider whether it is possible to codify indicators of unacceptable behavior by PAs.

12. In this regard, the TPTF has noted that conceptually, TP services can fall within a broad ethical spectrum from what is considered clearly legal to what is clearly illegal. Along this spectrum, ethical considerations apply to all PAs providing TP services. However, the perception of PAs’ unethical behavior in carrying out TP activities that, while not illegal, are perceived as unacceptable tends to arise within the boundaries of what the TPTF has termed the “gray zone.”

13. The TPTF has observed that TP practices within the gray zone might create threats to compliance with the FPs. The TPTF considered whether the gray zone could be further categorized into TP practices that are “uncertain” (i.e., they deal with situations where it is uncertain whether a particular TP strategy would be considered appropriate) and TP practices that are “improper” (i.e., the TP would be viewed as unacceptable from an ethical perspective).

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4 [https://www.ethicsboard.org/meetings/june-9-11-14-25-2021-virtual](https://www.ethicsboard.org/meetings/june-9-11-14-25-2021-virtual)
Roundtable Discussions

14. Participants noted that a significant challenge is the issue of what the appropriate terminology should be. They shared that numerous international organizations have attempted to address the issue and faced significant challenges in developing an appropriate term that could work globally. There was a view that what is “improper” could also relate to the red zone as what is illegal would clearly be improper. A few participants offered suggestions for alternative terms or approaches. One suggestion was to use the term “reasonable” instead of “appropriate” or “proper” when referring to TP. Another suggestion was to focus on good practical guidance without necessarily defining the gray zone. This would recognize that the gray zone is more context-sensitive, both from the societal or broader sustainability perspective and from the employing organization’s or client’s perspective.

15. Participants shared that the TPTF’s proposal for described terms, as discussed at the March 2022 IESBA meeting, suggests that TP activities can be easily categorized into uncertain and egregious subgroups within the gray zone when the situation can be a lot more complex in practice. Some also viewed the description of unacceptable tax planning as embodying an element of moral judgment that they encouraged the TPTF to avoid.

16. Several participants also expressed that the legality and economic substance of transactions are relevant considerations when determining what is acceptable TP. In particular, it was felt that a distinction needs to be made between whether a transaction that has been consummated is structured in the most tax-efficient way and whether the transaction has as its primary or sole motivation tax avoidance. Those participants therefore observed that the intent behind the TP arrangement or transaction or its business purpose is a critical consideration.

17. Other participants noted that uncertainty is the key issue rather than the treatment of the tax scheme itself. It was noted that the main concern for PAs is the ambiguity around tax treatments and whether these will withstand public perceptions or the scrutiny of a court of law. For example, it was observed that a tax strategy that has substance in a given year might be deemed inappropriate five years later. In all the roundtable discussions, participants encouraged the IESBA to highlight the importance of PAs having an inquiring mind and exercising professional judgment in all scenarios.

Preliminary Task Force Views

18. As noted in some jurisdictions, the economic substance of a transaction will prevail over its form when the form does not reflect, or is inconsistent with, the economic substance. Unacceptable TP might be deemed to refer to any tax strategy that is inconsistent with its economic substance.

19. The TPTF also acknowledges that it may be challenging to develop ethical provisions for PAs without a clear definition or description of the issue at hand in relation to TP services. In this regard, the TPTF will explore suggestions provided by participants around the issue of terminology and whether it would be feasible to delineate the gray zone by providing guidance on relevant contextual considerations as well as considerations of economic substance and commercial purpose.
Matter for IESBA Consideration

1. Do IESBA members agree with the Task Force’s views above?

IV. Role of the Professional Accountant in Acting in the Public Interest

Background

20. At the March 2022 IESBA meeting, the TPTF highlighted the benefits of having PAs provide TP services as they play a significant role in supporting and enhancing the effectiveness of the tax system. Indeed, TP is so important for employing organizations and clients that tax advisory services constitute a significant part of the profession’s activities worldwide.\(^5\)

21. During the fact-finding phase of the project, stakeholders indicated that PAs carrying out TP services play an essential public service role in serving employing organizations’ or clients’ interests according to laws and regulations, i.e., by facilitating compliance with tax laws and regulations. Nevertheless, in recent times, public concerns have risen significantly about the role tax advisers play in assisting tax avoidance by wealthy individuals and corporations alike, especially in the light of news headlines about developments such as the “Paradise Papers”\(^6\) and the “Pandora Papers,”\(^7\) and multinational companies utilizing sophisticated TP strategies to minimize their taxes.

22. Further, stakeholders are now calling for greater transparency and accountability and better governance in TP, given the increased stakeholder focus on sustainability goals. The momentum generated by the markets’ marked shift towards Environmental, Social, and Governance (ESG) imperatives has increased scrutiny on businesses relative to sustainability goals. Given this shift in societal perceptions and expectations, TP practices that previously have not given cause for stakeholder concerns may no longer be seen as acceptable.

23. Consequently, questions have been asked about what the ethical expectations are or should be for advisers providing TP services. Public mistrust of professional tax advisers has risen to such a level that legislation is being considered to regulate tax advice and tax advisers in some major jurisdictions such as the EU.\(^8\) While the IESBA cannot address the role of all tax advisers, the Code does set the ethical bar for PAs, who constitute a large segment of the tax adviser population.

Roundtable Discussions

Common Themes

24. Many participants across the three roundtables acknowledged the general expectation that PAs should guide their employing organizations or clients in understanding the tax laws and regulations and cooperating with the tax authorities. There was agreement that PAs who provide the tax advice must comply with the tax legislation. Participants generally believed that the very nature of PAs helping their employing organizations or clients to obey the law is an embodiment of PAs acting in

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\(^5\) The global tax management market is expected to grow from USD 18.9 billion in 2021 to USD 32.5 billion by 2026, at a Compound Annual Growth Rate (CAGR) of 11.5% during the forecast period (https://www.marketsandmarkets.com/PressReleases/tax-management.asp).

\(^6\) See, for example, the UK House of Commons Briefing Paper, The Paradise Papers (November 2017).

\(^7\) See, for example, https://www.bbc.com/news/world-58780561.

\(^8\) See, for example, https://www.accountancyeurope.eu/tax/tax-policy-220107/?mc_cid=73311ac0b2&mc_eid=589f32087.
the PI. Some participants expressed the view that the notion of acting in the PI when carrying out TP activities is closely linked to the approval from the tax authority in the particular jurisdiction. Thus, they believed that if the tax authority agrees with a particular tax treatment or structure at the time of consultation, the PA has acted in the PI. There was also a view that legislators and regulators consider the PI when they develop tax laws and regulations, and therefore complying with those laws and regulations should be sufficient.

25. Participants also shared a general acceptance that PAs play a role in protecting the PI by providing their employing organizations and clients with high-quality TP advice. Some participants commented that it is up to the PA if they can rationalize that they have served the PI by providing high-quality advice. By providing high-quality advice, the PA is perceived to be improving compliance within the tax system and generally improving tax collection in the particular jurisdiction. Participants suggested that in providing high-quality tax advice, PAs need to consider the risk profiles of their employing organizations or clients and the reputational risks to the PAs.

26. On balancing an employing organization’s or client’s interests with the PI, some participants shared the perception that a PA plays a crucial role in protecting the PI. Participants generally agreed that it is a balancing act, especially when employing organizations and clients may receive different advice from different parties.

Challenges

27. Some participants questioned which parties are captured under the notion of “public interest” – society at large, legislators, or shareholders and regulators of the capital markets? There was a perceived challenge concerning understanding who is considered the public and the interests of those groups of individuals for whom PAs are expected to act.

28. Some participants shared that the PI does not necessarily equate to public or popular opinion as the perception of TP varies from jurisdiction to jurisdiction. It was noted, for example, that promoting tax minimizing strategies is a norm in some jurisdictions such as the United States. However, it is perceived negatively in other jurisdictions such as Australia. Another example that was raised is that a loss-making entity is not required to pay taxes under the current financial reporting rules.\(^9\) However, public concerns may arise regarding whether the entity is paying its “fair share” of taxes when it has a healthy cash balance and cash flow. While the entity has complied with current laws and regulations, the public may perceive it to be avoiding its tax obligations. A contrasting view expressed is that in certain jurisdictions, it is considered in the PI to not ‘overtax’ individuals or entities to encourage cash flow back into the economy, i.e., via investments.

29. Some participants believed it may be difficult to determine what is in the PI, especially in situations where multiple jurisdictions are involved in cross-border transactions. It was observed that each jurisdiction would perceive the PI differently. So, it was argued that it would become an impossible task to determine what would be in the PI. Each jurisdiction would try to protect its sovereignty by determining its tax regime for competitive or other reasons. The reality, therefore, is that tax laws can differ quite considerably among jurisdictions.

30. An illustration of a specific challenge that can arise in determining how best to act in the public interest with respect to a cross-border situation was given in one of the roundtables. This illustration

\(^9\) [IAS 12 Income Taxes]
was about an asset that an entity could recognize in two different ways in two jurisdictions, thereby enabling the entity to take advantage of tax depreciation in both jurisdictions. Both deductions would still be legal. However, if the PA were to advise the entity to show the asset only once on its balance sheet in one of the jurisdictions, the PA would be depriving it of the benefit in the other jurisdiction. In such a case, it was suggested that perhaps the way to preserve the PI would be for the PA to advise the entity to be transparent about the situation in its tax filing in each jurisdiction, thereby leaving it to the relevant tax authority or legislature to determine the need for any specific rulemaking. At the same time, the PA would fulfill their responsibility to serve the employing organization’s or client’s interests.

31. Some participants also observed that complexity increases because tax policies can be influenced by the political changes in the particular jurisdiction.

**Preliminary Task Force Views**

32. The TPTF heard participants’ concerns about the various complications that can arise with trying to define the PI when it comes to TP. Several factors such as reputational risks, perception issues, and interpretation of tax legislation were suggested as being relevant in considering what acting in the PI means with regards to TP. In general, participants felt that the PI operates within the confines of the law. At the same time, some participants also noted the need to recognize that the PI incorporates an element of social responsibility in terms of employing organizations and clients paying their “fair share” of taxes.

33. These observations indicate that this project should not attempt to define or describe the public interest in the abstract. Instead, they suggest that the Code should:

   (a) Acknowledge that a large part of what acting in the PI means for PAs is for them to assist their employing organizations or clients comply with tax laws and regulations;

   (b) Recognize that employing organizations and clients share a responsibility to society to pay their legally assessed (or “fair”) tax dues. In this regard, PAs’ PI role is to advise them in meeting that responsibility and not seek to avoid it through tax evasion or by taking advantage of tax minimization strategies that would be contrary to the intent behind the tax legislation or would otherwise be considered improper; and

   (c) Speak to the relevance of reputational risks to the employing organizations and clients on the one hand, and to the profession on the other, as being an important aspect of the PI given that reputational damage can have far-reaching consequences to them and their stakeholders.

34. Across all the roundtable discussions, the TPTF agrees with participants that PAs are expected to exercise their professional judgment in carrying out TP services. Participants’ view is that regardless of the services being undertaken, whether it is in TP or otherwise, and whether they are for an employing organization or a client, PAs must provide high-quality advice and support full compliance with laws and regulations.

35. The TPTF believes that the role of the PA is systemic to how the tax system operates. While this project aims to address the ethical behavior of PAs who provide TP services broadly speaking, the guidance will particularly be helpful to PAs operating in the “gray zone” of uncertainty as PAs must
ensure that their employing organizations or clients understand the appropriate tax treatment within the relevant laws and regulations.

### Matter for IESBA Consideration

2. Do IESBA members agree with the Task Force’s views above?

### V. Ethical Framework – Specific Elements

36. At the March 2022 IESBA meeting, the TPTF presented an outline of an ethical framework to provide practical guidance that would be globally applicable without being overly prescriptive. In doing so, the TPTF highlighted specific elements of the framework that would require further discussions with stakeholders. These specific elements were incorporated into questions for discussion in the roundtable briefing note and debated as part of scenario analysis in the breakout groups. These elements are discussed in the following sections.

#### A. INTENT OF LEGISLATION

**Background**

37. During the fact-finding phase preceding the launch of the project, stakeholders commented that in providing TP services, PAs might sometimes navigate situations where the legislative intent behind tax laws is unclear or uncertain. Through question 2 in the briefing note, the TPTF presented some scenarios to the roundtable participants to obtain their views as to the extent to which PAs should consider the legislature’s intent, the approach PAs should take if the situation concerns a cross-border transaction involving multiple jurisdictions, and whether their assessment would change if the tax strategy could be considered artificial or contrived.

**Roundtable Discussions**

**Common Themes**

38. Participants noted that understanding the legislature’s intent is an essential part of applying the tax legislation. It was noted that in some jurisdictions, a PA is perceived to be acting negligently if the PA did not consider the legislation’s intent.

39. Several participants noted that it is sometimes difficult to understand the intent of legislation unless this intent has been documented. Typically, domestic laws and international tax treaties can be referred to when PAs attempt to interpret the relevant legislation. For domestic law, participants suggested that PAs can review the legislation’s history which would explain the parliamentary discussions and the context for how the legislation came about. Regarding tax treaties, many countries are party to a convention on the interpretation of the relevant laws. So, participants expected that PAs would proceed with the letter of the tax provisions, but look at the context, object, and purpose of the relevant laws or treaty.

40. Across all the roundtables, participants agreed that PAs need to gather all the relevant facts and circumstances as the first step, especially in determining if a particular tax transaction would stand scrutiny in a court of law. Participants also agreed that PAs should not succumb to pressure from the employing organization or client to adopt a particular tax strategy. Participants felt that PAs need to be satisfied with all the relevant details and consult with others if they are unsure. There
was general agreement that PAs should use their professional judgment and perform their due diligence, especially when dealing with transactions in the gray area.

41. Participants generally expected PAs to work through a response framework in dealing with uncertain circumstances, taking into account how much latitude the court system provides in that jurisdiction. In addition, some participants suggested that PAs should look at rulings regarding specific matters to gather insight into what the legislature intended. It was noted that the PA's responsibility is to inform and educate the employing organization or client about the law's intent so that they can understand the underlying risks, if any, of the transaction. Participants also commented that it would be essential for PAs to know how to document these risks, and it was felt that jurisdictions have different definitions of sufficient evidence. In these circumstances, it was noted that the PA's level of competence would come into question.

42. Some participants also wondered whether preapproval from, or advance consultation with, tax authorities would be advisable. The general view among participants is that despite preapproval from the tax authorities and appropriate documentation in place, the public may still have an opinion on the particular tax matter that differs from the legislation's intent, and it was felt that this could lead to reputational damage. There is therefore a tension in determining if what is considered legal would also be viewed as ethical in the public's perception.

43. Lastly, participants generally agreed that PAs should not be involved in transactions that are or would be perceived as artificial or contrived. In this regard, it was noted that it is often not clear whether a transaction is artificial and contrived. There is more than one element for PAs to consider and it was agreed that they should use their professional judgment to determine the substance of the entirety of the tax scheme or transaction.

Challenges

44. Participants generally agreed that there can be complexity in cross-border transactions involving multiple jurisdictions with differing PI considerations. It was also noted that tax legislation can have a temporal effect where a PA might be sanctioned under a given rule, but the court might determine that the rule no longer applies a few years later. Participants cautioned that it might be challenging to codify this in the Code beyond simply referring to the need for PAs to exercise their professional judgment.

45. A general concern raised by a few participants relates to a court of law taking a different view on a tax matter than the PA despite the PA taking appropriate steps to ensure that the tax treatment would not be challenged in court. It was observed that PAs often have done their due diligence but yet face public scrutiny for advising on a transaction that provides a tax benefit. In these circumstances, participants shared an expectation that PAs would exercise their professional judgment and seek advice from other specialists if uncertain about specific tax treatments.

Preliminary Task Force Views

46. The TPTF observed that intent is a subjective matter open to interpretation and different treatment in different jurisdictions. Nevertheless, the TPTF agrees with participants that PAs need to adhere to the intent of the tax legislation. The intent of the legislation is important as it affects the scope of services that could be provided. The TPTF agrees that determining the law’s intent is not always straightforward. However, the PA has an obligation to understand it, particularly when the PA is
advising on a complex transaction and there is the potential to move away from the legislation’s original intent. In summary, the TPTF believes that PAs should consider the legislature’s intent, although they need to be mindful of the risk that the tax treatment might not prevail in court at some point in the future.

47. With respect to dealing with the complexities of cross-border transactions, which may be compounded by evolving tax laws, the TPTF agreed that there is a potential for polarization given that there may be conflicting considerations as between different jurisdictions that PAs need to balance. Participants generally agreed that PAs who are not equipped with the necessary expertise or experience to advise the client in these circumstances need to rely upon the judgments of other firms or, if applicable, other firms within their network, that have the appropriate competencies and trust that these firms operate within the same ethical framework. The TPTF concurs with this view.

48. The TPTF also agrees that if a PA is involved in providing TP advice in cross-border transactions, the PA has a responsibility to be informed about the various complexities associated with those transactions and to develop the professional competence to deal with them. This is consistent with the FP of professional competence and due care. For the PA, it is a matter of not just adhering to the letter of the law but also being able to attest to being ethical in carrying out professional duties. In particular, a PA is expected to apply an inquiring mind and not advise on, or engage in, transactions that are unlikely to prevail in a court of law.

49. In summary, the TPTF is of the view that the Code could assist PAs in navigating through complex matters by guiding them to apply the conceptual framework to the TP facts and circumstances, i.e., what types of threats might be created and what actions, including safeguards, might address the threats. This should include guidance on how to navigate situations where the legislative intent behind tax laws is unclear or uncertain.

B. THRESHOLD FOR AFFIRMATIVE ADVICE

Background

50. As discussed at the March 2022 IESBA meeting, the TPTF believes that developing an ethical framework in the Code to guide PAs’ behaviors and actions concerning TP can go a long way towards supporting the profession’s role and reputation in tax planning. The TPTF recognizes that while the Code does not override laws and regulations, ethics is broader than the law and can guide behaviors and actions where the law is silent or unclear.

51. Question 3 in the roundtable briefing note asked participants how a PA would approach their advice to an employing organization or client if they were uncertain that the tax treatment will prevail based on the applicable tax law or regulation. Participants were also asked about what specific factors the PA should consider in exercising their judgment.

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

11 Paragraph 110.1 A1(e) of the Code states that PAs are to comply with the fundamental principle of professional behavior, which means complying with relevant laws and regulations, behaving in a manner consistent with the profession’s responsibility to act in the PI in all professional activities and business relationships, and avoiding any conduct that they know or should know might discredit the profession.
Roundtable Discussions

52. As a general matter, participants commented that it is important to explain the situation to the employing organization or client and be fully transparent about the risks. In this regard, participants generally agreed that it would be beneficial for the PA to explain to the employing organization or client the PA's assessment of the likelihood that the transaction would prevail. It was agreed that whether this threshold is less or greater than a 50% chance of success is subject to debate in different jurisdictions. In that case, participants expected that the PA would also explain the risks involved and advise the client against taking unnecessary risks.

53. Many participants were of the view that if the threshold was less than 50%, the PA should not advise the employing organization or client to proceed. This, however, was not a universal view as some participants indicated that the generally accepted threshold in their jurisdictions is lower than 50%, and in some jurisdictions such as the U.S., significantly lower than 50%. Participants were of the view that if it would be beneficial for disclosure to be made by the employing organization or client to the tax authority if the PA were to advise pursuing a tax strategy for which the likelihood to prevail is less than clear. It was accepted that in circumstances where the particular tax treatment involves cross-border transactions across multiple jurisdictions with differing tax regimes, the degree of uncertainty may increase considerably.

54. In circumstances of uncertainty, participants generally agreed that PAs should perform their due diligence by reviewing any precedents about whether the tax authority is likely to challenge the tax strategy. Participants noted that transparency around the exercise of professional judgment and making appropriate disclosure to the tax authority would be important, especially when there might be a need to explain that there is commercial substance to the transaction. In such circumstances, participants also agreed that it would be important for PAs to document the rationale for their judgments and decisions.

55. Participants shared some scenarios where a TP strategy or transaction has a very low likelihood of success, though it is not illegal. It might be one where the tax treatment might be 10% or 20% likely to prevail in court. In these circumstances, participants reinforced the importance of disclosure and documentation, and for the PA to advise the employing organization or client of the risks involved.

56. If the PA has reason to believe that the tax strategy is inadvisable and the client disagrees with the PA's assessment, participants commented that the PA should communicate their reservations to the employing organization or client. The PA might also consider seeking expert advice. If the expert advice aligns with the PA's assessment, participants agreed that the PA might need to decide whether to retain the client or resign from the engagement and client relationship if the client has not changed their position.

57. Participants noted that the PAs has an obligation under the Code to have an inquiring mind in gathering all the relevant facts and circumstances and in making the judgments that form part of their advice to the employing organization or client. Some participants mentioned that in all circumstances, PAs should take the necessary steps to establish a credible basis for their advice. Participants, however, shared that what is a credible basis could vary from jurisdiction to jurisdiction as it depends on judgment.

58. Where an employing organization or client is perceived to be engaged in illegal activities, participants expected the PA to escalate the matter within the employing organization or client, such as to those charged with governance or whistleblower ombudspersons, consider reporting these
activities to an appropriate authority, and consider the need to extricate themselves from the employment or client relationship.

**Preliminary Task Force Views**

59. The TPTF broadly agrees with participants’ feedback on the topic of the threshold for affirmative advice. Consistent with the Board’s recent discussions in the non-assurance services (NAS) project regarding the meaning of the phrase “likely to prevail,” the Task Force believes that it would not be appropriate to ascribe a numerical probabilistic measure to it. Doing so would convey a false sense of accuracy, all the more so given participants’ feedback that there is a range of numerical probabilities commonly understood and accepted in different jurisdictions. The phrase is effectively a term of art used in the Code to convey that the PA has a high degree of confidence in their judgments and assessments and that they can stand behind their advice if challenged. Ultimately, the TPTF agreed with the participants that the PA should not advise the employing organization or client to proceed if they believe it is unlikely the tax treatment will prevail, i.e., the PA has not been able to establish a credible basis.

60. The TPTF believes participants also provided useful feedback that largely affirms the TPTF’s views about some of the relevant considerations for PAs in operating in the gray zone, including the need to undertake appropriate due diligence, consideration of transparency to the tax authority, documentation, and consideration of whether to continue the employment or client relationship in case of disagreement.

**C. Referral to a Provider of Packaged Tax Planning Products**

**Background**

61. Question 4 in the roundtable briefing note asked participants for views about the ethical considerations for a PA if the PA is contemplating introducing a client to a firm that specializes in developing TP products for sale to the public. Participants were also asked whether the PA should disclose to the client any commission or referral fee from the external provider.

**Roundtable Discussions**

62. As a general matter, participants agreed that if a PA is referring a client to another firm so that the client can benefit from expert advice, this is a positive outcome for the client. That said, where the PA is referring the client to a provider of packaged TP products to meet the client’s needs, participants commented that the PA would need to inform the client of the PA’s relationship with the external provider. Participants felt that the PA should ascertain that the provider has the appropriate knowledge and expertise in developing the TP product. Some participants were of the view that the PA would still be responsible for ascertaining the reliability and consequences of the particular product, including its impact on the client or the client’s financial statements.

63. Generally, participants felt that PAs should proceed with caution when referring a client to an external provider of packaged TP products. They expected that the PA would advise the client of the risks, not least to limit the PA’s exposure to litigation and reputational risks should the product fail to stand up to scrutiny by the tax authority or in a court of law. Participants agreed that the PA should advise the client or otherwise liaise with the external provider to make sure that the TP product is appropriately tailored to the client’s specific circumstances. Some participants were also
of the view that the PA should ascertain that the provider is complying with a professional Code of Conduct.

64. If the PA receives a commission or referral fee for the introduction, participants were almost unanimously of the view that the commission or referral fee should be disclosed to the client. Participants felt that this would need to be disclosed to the client before the actual referral is made so that the client understands the full context and expectations. It was felt that such disclosure would also enable the PA to maintain objectivity.

65. Participants noted that the practice concerning referral fees varies across jurisdictions. In some jurisdictions’ codes of conduct, for example, in the U.S., PAs are expected to disclose any referral fees to clients as an important safeguard against threats to the PAs’ objectivity. In other jurisdictions such as Germany, referral fees are prohibited. Participants also noted that the Code contains guidance on disclosure of commissions or referral fees that would apply in these circumstances, but that this might be an area that could be enhanced or expanded.

Preliminary Task Force Views

66. There seems to be general consensus among participants about the thought process and considerations that PAs should apply where they have the opportunity to refer a client to an external provider of TP products. The TPTF agrees that there should be some element of due diligence on the part of the PA concerning the TP products being sold by the provider and the background, reputation and competence of the provider. It would also be important to ascertain that the TP product can be tailored to the client’s specific circumstances.

67. With respect to any commission or referral fee the PA may receive from the external provider, the TPTF is of the view that the current provisions in the Code may need to be revisited for potential enhancement in the light of the roundtable feedback on this particular matter.

D. IMPACT OF LEGAL OPINION WHEN DEALING WITH UNCERTAINTY

Background

68. Concerning uncertain TP strategies, participants were asked, as part of Question 5 in the roundtable briefing note, for views as to what the PA’s responsibility and actions should be if there is a legal counsel’s opinion that the TP strategy is effective.

Roundtable Discussions

69. Participants generally agreed that a legal opinion does not mean that the PA need not exercise their professional judgment. Participants generally expected PAs not to defer to legal opinion or judgment unconditionally. If the legal counsel’s opinion indicates that the planning is effective, participants agreed that the PA would have to be very careful where they thought the TP was ineffective because they still have a responsibility to escalate the matter to the relevant parties. Participants believe that regardless of the legality of the TP strategy, the PA would need to consider the ethical dimension of the case in question. For example, there might be a risk of reputational harm despite the arrangement’s legality. Participants agreed that ultimately, the PA is responsible

12 Paragraph 55 (2) WPO
13 Paragraphs 330.5 A1- A2 of the Code
for communicating the risks and rewards of undertaking such TP strategy with the employing organization or client.

70. Participants also felt that PAs should be encouraged to avoid situations where they cannot access all the relevant facts and circumstances to take a position as they could run the risk of being seen as incompetent or not having complied with laws and regulations.

Preliminary Task Force Views

71. The TPTF agrees with participants that it may be helpful for the employing organization or client to obtain a second opinion where the situation is particularly uncertain, and a legal opinion may well serve to reinforce the PA’s views. Equally, where the PA’s view conflicts with the legal counsel’s opinion, the TPTF is of the view that the PA should first understand the reasons for the difference of view and discuss the matter further within the employing organization or with the client, escalating it as needed with the relevant parties at the employing organization or client.

72. Regardless of whether the PA agrees with the legal opinion, the TPTF agrees with participants that the employing organization or client should be made aware of the risks, reputational or otherwise, of pursuing a TP strategy for which the likelihood of its prevailing is uncertain. The TPTF is of the view that, ultimately, it is the PA’s responsibility to exercise their professional judgment to assess the legal opinion and make the final decision before proceeding with the transaction. The PA has a responsibility to not do anything that would undermine the profession’s reputation or the reputation of their employing organization or client.

<table>
<thead>
<tr>
<th>Matter for IESBA Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Based on the feedback received from the roundtable discussions, do IESBA members agree with the TPTF’s views with respect to various specific elements above in developing an ethical framework?</td>
</tr>
<tr>
<td>4. Do IESBA members have other views or observations on the roundtable feedback?</td>
</tr>
</tbody>
</table>

VI. Broader Considerations

73. Participants across the three roundtables also raised several broader considerations, including the following:

Environmental, Social and Governance (ESG) Considerations

74. In the last few years, there has been a significant shift in investor concerns and societal expectations for companies to pursue more sustainable business models. There is also an increasing recognition among stakeholders that there is greater value in the notion of companies pursuing “profitable solutions for the people and the planet” than in serving the interests of shareholders exclusively.

75. TP has become an essential part of the increasing focus among investors and other stakeholders on how companies measure up against ESG performance indicators. Additionally, stakeholders have a greater awareness of what it means for a PA to act in the PI and there has been a shift in perceptions regarding what is in the PI. In particular, what may have been regarded as creative and skillful tax planning in the past may now be perceived differently.
76. Governments and investors globally are seeking greater transparency and better governance by companies in answering the call for more robust ESG practices. Companies, in particular, have a pivotal role to play as their decisions around tax strategies and policies have implications for their business and stakeholders. Stakeholders have pressed for companies’ disclosure of their tax policies and strategies in their annual reports or financial statements.

77. Participants shared that tax policies and strategies should be key considerations as companies chart their ESG journey. The push for better transparency around tax policies and strategies has gained ground in recent years. For example, in December 2016, the United Kingdom introduced new tax governance requirements for large entities to publish their tax strategies related to UK taxation. This includes details of tax legislation compliance, how UK taxes are managed, and tax planning. Failure to publish these tax strategies within the time limit could lead to penalties being imposed on the businesses.

Professional Development

78. A common message the TPTF heard during the roundtable discussions is that several large firms have internal frameworks based on the FPs of the IESBA Code and various good practice guidelines from the industry. As noted in discussions with these firm stakeholders, their professional staff undergo training on real-life case studies of tax transactions on which the firms have provided advice. In addition, in fulfilling their obligations under the Code, PAs in those firms will use their training to make informed judgments when facing an ethical dilemma. It was acknowledged that there is a greater need to keep up with changes in tax legislation and interpretations of tax law by the tax authorities and the courts, and to be sensitive to public perceptions.

79. Participants also shared that PAs need to maintain their competence via continuous professional development. It was argued that PAs should not view the training activities as a compliance exercise but rather as a critical need to ensure that they do not breach the FPs of Professional Competence and Due Care and Integrity when carrying out TP activities:

- A PA must have the appropriate competence to understand and evaluate the business and legal aspects of TP. When advising a client, the PA has a duty to serve the client’s interests within the applicable laws, regulations and professional standards.
- If the PA knew they lacked the expertise to at least ask the right questions, this demonstrates a lack of fair dealing or integrity on the part of the PA.

80. During the roundtable discussions, participants also shared that keeping up with the changes in tax legislation and interpretations of tax law by the tax authorities may be challenging for small and medium practices (SMPs) as they may not have the same level of access to training resources to keep up with professional development needs.

Matter for IESBA Consideration

5. Do IESBA members have any feedback on the roundtable participants’ broader observations as summarized above?

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14 For example, BDO, Deloitte, EY, Grant Thornton, KPMG and PwC
## Analysis of Roundtable Participation

### 1. Categories of Stakeholders

<table>
<thead>
<tr>
<th>Stakeholder Group</th>
<th>The Americas</th>
<th>Europe, Middle East, and Africa</th>
<th>Asia Pacific</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulators/Public Authorities</td>
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<td>2</td>
<td>4</td>
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<td>Representatives from the Legal Profession</td>
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<tr>
<td>Preparers/PAIBs</td>
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<td>8</td>
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<td>Firms</td>
<td>14</td>
<td>7</td>
<td>9</td>
<td>30</td>
<td>31</td>
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<tr>
<td>Professional Bodies(^{15})</td>
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<td>18</td>
<td>11</td>
<td>39</td>
<td>41</td>
</tr>
<tr>
<td>Academia</td>
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<td>1</td>
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<td>4</td>
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<tr>
<td>Other organizations</td>
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<tr>
<td>Observers</td>
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<td>0</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total number of participants</strong></td>
<td><strong>32</strong></td>
<td><strong>34</strong></td>
<td><strong>31</strong></td>
<td><strong>97</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

\(^{15}\) Some of the Professional Bodies have responsibilities for setting ethics standards in their jurisdictions.
2. Jurisdictions Represented (Excluding Observers)

Note: G-20 countries in bold.

<table>
<thead>
<tr>
<th>#</th>
<th>The Americas</th>
<th>Europe, Middle East, and Africa</th>
<th>Asia Pacific</th>
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<tr>
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<td>Hong Kong SAR</td>
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<td>Mexico</td>
<td>India</td>
<td>Indonesia</td>
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<td>4.</td>
<td>USA</td>
<td>Italy</td>
<td>Japan</td>
</tr>
<tr>
<td>5.</td>
<td></td>
<td>Netherlands</td>
<td>Malaysia</td>
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<tr>
<td>6.</td>
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<td>South Africa</td>
<td>New Zealand</td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td>UK</td>
<td>Singapore</td>
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</tbody>
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