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

280.4 A1 Professional accountants play an important role in tax planning by contributing their knowledge, skills and experience to assist employing organizations meet 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. Equally, accountants have a responsibility to assist employing organizations in meeting their responsibility to pay taxes and not seek to avoid it through tax evasion or by taking advantage of tax minimization arrangements that, although not prohibited by tax laws and regulations, might still create threats to compliance with the fundamental principles.

Description of Tax Planning and Related Activities

280.5 A1 Tax planning comprises a broad range of activities designed to assist an employing organization in structuring its affairs in a tax-efficient manner, including taking a position on a current or future tax return

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.
- Structuring an employing organization's 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.
- Structuring a non-profit employing organization's business to avoid breaching its non-profit status.
- Structuring an 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 that 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 performing tax planning activities.

Non-compliance with 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.
- 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. This understanding shall include:

(a) The goals of the tax planning; 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 Advising on or Recommending a Tax Planning Arrangement

R280.12 If a professional accountant is involved in advising on or recommending a tax planning arrangement for an employing organization, the accountant shall only do so if the accountant has established a credible basis in laws and regulations for the arrangement.

280.12 A1 If 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.

280.12 A2 What is a credible basis will vary from jurisdiction to jurisdiction. Whether a tax planning arrangement will prevail is ultimately a matter to be determined by a court or other

appropriate adjudicative body. Actions that a professional accountant might take to 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 a common 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.

R280.13 In determining whether to proceed with the advice or recommendation on the tax planning arrangement, the professional accountant shall consider the reputational, commercial and wider economic risks and consequences arising from the way stakeholders might view the arrangement.

280.13 A1 The reputational and commercial risks and consequences might relate to business implications for the employing organization 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's business.

280.13 A2 An awareness of the wider economic risks and consequences might take into account 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.

Multi-jurisdictional Tax Benefit

280.14 A1 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.

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 a credible basis 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.

R280.16 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.

280.16 A1 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 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.
- 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

280.17 A1 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 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 to take in 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.
- 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 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 of the employing organization.

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 based on common practice that has not been challenged by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax 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.
- Consulting with an expert within or outside the employing organization in the relevant tax areas.
- 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 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.

Disagreement on the Tax Planning Arrangement

R280.18 If the professional accountant disagrees with accountant's immediate superior or other responsible individual within the employing organization that a proposed tax planning arrangement has a credible basis in laws and regulations, the accountant shall:

(a) 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) Advise them not to pursue the arrangement.

R280.19 If the immediate superior or other responsible individual within the employing organization determines to pursue the tax planning arrangement, 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;

(c) Communicating the details of the arrangement and the difference of views to the employing organization's external auditor; and

(d) Resigning from the employing organization.

280.19 A1 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.

Documentation

280.20 A1 When performing a tax planning activity, a professional accountant is encouraged to document:

- 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.

280.20 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.
- 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.