

MARKED UP FROM EXPOSURE DRAFT

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, self-review, 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 ~~Activities~~ Services

- 280.4 A1 Professional accountants play an important role in tax planning by contributing their ~~knowledge, skill~~expertise 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' role is to use their expertise and experience to assist ~~advise~~ their employing organizations ~~on how best to meet in achieving~~ their tax planning goals ~~and. In addition, accountants play an important role in assisting employing organizations meet~~ing their tax obligations ~~and not seek to circumvent them through tax evasion.~~ However, when accountants provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 280.4 A3 It is ultimately for a tribunal, court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

Description of Tax Planning ~~and Related~~ Activities

- 280.5 A1 Tax planning activities ~~comprise a broad range of~~ are advisory activities designed to assist

an employing organization in planning or structuring its affairs in a tax-efficient manner.

280.5 A2 Tax planning activities cover a broad range of topics or areas. Examples of such tax planning activities include:

- Advising management on structuring the employing organization's international operations to minimize its overall taxes, including through transfer pricing practices.
- Advising on transfer pricing arrangements taking into account tax-related transfer pricing guidelines.
- Advising management on the utilization of efficient ways to utilize available tax losses in a tax-efficient manner for the employing organization.
- Advising the employing organization on how to on the structuring of 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 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 A3 Tax planning activities do not include activities that are generally referred to as tax compliance or tax preparation, which are activities to assist the employing organization in fulfilling its filing, reporting, payment and other obligations under tax laws and regulations. However, if a tax activity comprises both tax planning and tax compliance, the portion that relates to tax planning would be covered by this section.

280.5 A4 This section applies regardless of the nature of the employing organization, including whether it is a public interest entity.

Related Activities

~~280.65~~ A1 There might be circumstances where a professional accountant is involved in performing a related activity for an employing organization that is based on or linked to a tax planning arrangement developed by a third-party provider. In such circumstances, the provisions of this section apply to the underlying tax planning arrangement.

280.6 A2 Examples of such related activities include:

- ~~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, a~~Assisting the employing organization in resolving a dispute with the tax authority on the 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.~~arrangement.~~
- Representing the employing organization in administrative or court proceedings regarding the tax planning arrangement.
- Implementing the tax planning arrangement for the employing organization.
- Advising the employing organization on an acquisition where the valuation depends on the tax planning arrangement established by the target.

Compliance with Laws and Regulations

280.7 A1 This section does not address tax evasion, which is illegal.

Anti-avoidance Laws and Regulations

R280.86 ~~Where there are in some jurisdictions,~~ laws and regulations, including those that might be ~~are often~~ referred to as anti-avoidance rules, that limit or prohibit certain tax planning arrangements. ~~A~~a professional accountant shall obtain an understanding of those laws and regulations and advise the employing organization to comply with them when providing tax planning activities.

Non-compliance with Tax Laws and Regulations

280.78 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

280.89 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.
- Engaging experts to advise on relevant aspects of the tax planning arrangement.

- Deciding whether to accept and implement the professional accountant's recommendation or advice on 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.
- Making appropriate disclosure of tax strategy, policies or other tax-related matters in the financial statements or other relevant public documents in accordance with applicable reporting requirements.
- Ensuring that the employing organization's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

Responsibilities of All Professional Accountants

R280.910 As part of performing a tax planning activity for an employing organization, the professional accountant shall obtain an understanding of the nature of the tax planning activity, including:

- (a) The purpose, facts and circumstances of the tax planning arrangement; and
- (b) The relevant tax laws and regulations.

280.119 A1 A professional accountant is expected to apply knowledge, expertise professional competence 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.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

R280.124 A professional accountant shall recommend or otherwise advise on a tax planning arrangement for an employing organization only if the accountant has determined that there is a credible basis in laws and regulations for the arrangement.

280.124 A12 The determination of whether there is a credible basis involves the exercise of professional judgment by the professional accountant. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.

280.124 A12 If the professional accountant determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R280.124 does not preclude the accountant from explaining to the accountant's immediate superior or other responsible individual within the employing organization the accountant's rationale for the determination or advising on an alternative arrangement that has a credible basis.

~~280.11 A2 The determination of whether there is a credible basis involves the exercise of professional judgment. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.~~

280.12 A3 Paragraph R280.12 also does not preclude the professional accountant from assisting the employing organization to remediate or rectify a tax planning arrangement which lacks a credible basis. This includes, for example:

- Assisting the employing organization to restructure a tax planning arrangement to achieve a credible basis as part of a tax dispute resolution service.
- Agreeing appropriate changes to the tax planning arrangement with the employing organization to achieve a credible basis as part of representing the employing organization in administrative or court proceedings.

280.12~~4~~ A~~34~~ Examples of Actions that a professional accountant might take to determine that there is 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, professional 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 legal counsel or other 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.

R280.13 If the professional accountant becomes aware of circumstances that might impact the previous determination of the credible basis, the accountant shall re-assess the validity of that basis.

Consideration of the Overall Tax Planning Recommendation or Advice

R280.1~~42~~ In addition to determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.

280.1~~42~~ A1 The reputational and commercial consequences might relate to personal or business implications to the employing organization or implications to the reputation of the employing organization and the profession of a prolonged dispute with the relevant tax or other authorities. The implications to the employing organization might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential

adverse consequences for the employing organization.

280.142 A2 An awareness of the wider economic consequences might take into account the professional accountant's general understanding of the current economic environment and 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.

R280.153 If, having considered the matters set out in paragraph R280.124, the professional accountant decides not to recommend or otherwise advise on 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 this and explain the basis for the accountant's conclusion.

Tax Planning Arrangements Involving Multiple Jurisdictions

280.146 A1 There might be circumstances where a professional accountant becomes aware that Aa employing organization ~~might is~~ obtaining 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.

280.146 A2 Relevant factors the professional accountant might consider in determining whether to make such disclosure include:

- The significance of the tax benefit in the relevant jurisdictions.
- Stakeholders' perceptions of the employing organization if the facts and circumstances were known to the stakeholders.
- Whether there are globally or nationally accepted principles or practices regarding disclosure of similar situations to the tax authorities in the relevant jurisdictions.

Circumstances of Uncertainty

280.157 A1 In determining whether there is a credible basis for the tax planning arrangement Aa 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 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.

280.157 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- 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 arrangement.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

R280.168 Where there is uncertainty as to whether a ~~proposed~~-tax planning arrangement is or will be in compliance with the relevant tax laws and regulations, a professional accountant shall discuss the uncertainty with management and, if appropriate, those charged with governance.

280.168 A1 The discussion serves a number of purposes, including:

- Explaining 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~~ when establishing the basis on which the tax planning advice is provided.
- Obtaining any additional information from management and, if appropriate, those charged with governance that might reduce the uncertainty.
- Discussing any reputational, commercial or wider economic consequences in pursuing the ~~proposed~~-tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the employing organization, including consideration of disclosure to the relevant tax authorities.

Potential Threats Arising from Performing a Tax Planning Activity

280.179 A1 Performing a tax planning activity for an employing organization might create a self-interest, self-review, advocacy or intimidation threat. For example:

- A self-review threat might be created when a professional accountant has recently provided a valuation service to the employing organization for tax purposes, the output

of which is then relied upon or is a key input to a tax planning service for the employing organization.

- 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 which the accountant previously advised on before a tax authority when there are indications that the arrangement might not have a credible basis in 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, in a way that might influence the accountant's determination that there is a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant faces potential dismissal over the position the employing organization is insisting on pursuing regarding a tax planning arrangement.

280.179 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 expertise 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.
- The extent to which the ~~proposed~~ professional accountant is aware that the tax planning arrangement reflects an 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.
- Whether it is a tax planning arrangement from an off-the-shelf package with little modification for the employing organization's specific circumstances.
- The organizational culture of the employing organization.

280.179 A3 Examples of actions that might eliminate such threats include:

- Advising the employing organization to structure the tax planning arrangement so that it is consistent with an existing tax interpretation or ruling issued 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.

280.179 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the employing organization to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the employing organization to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Engaging an internal or external expert who has the necessary knowledge, skills and experience to advise the employing organization on the proposed tax planning arrangement.
- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another professional accountant) 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 conclusions reached by the professional accountant with respect to the tax planning arrangement.
- 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.

280.179 A5 Examples of Ssteps 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 having regard to the principle of confidentiality.
- Reviewing the employing organization's tax records, financial statements and other relevant corporate records.
- Researching relevant public records.

Communication of Basis of ~~the Tax Planning~~ ~~Arrangement~~ Recommendation or Advice

R280.2018 A professional accountant shall explain to management and, if appropriate, those charged with governance the basis on which the accountant recommended or otherwise advised on a tax planning arrangement to the employing organization.

Disagreement on the Tax Planning Arrangement

R280.2119 If the professional accountant disagrees with the accountant's immediate superior or other responsible individual within the employing organization that a tax planning arrangement that the employing organization would like to pursue has a credible basis, the accountant shall:

- (a) Inform the immediate superior or other responsible individual within the employing organization, and if appropriate, those charged with governance, of the accountant's assessment;
- (b) Communicate to them the potential consequences of pursuing the arrangement ~~in the event of an adverse ruling~~; and
- (c) Advise them not to pursue the arrangement.

R280.220 If the immediate superior or other responsible individual within the employing organization decides to pursue the tax planning arrangement, despite the professional accountant's advice to the contrary, ~~the accountant shall take steps to disassociate 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, if any.

280.220 A1 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 whether there is a ~~the~~ need to resign from the employing organization.

280.220 A2 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

280.243 A1 When performing a tax planning activity, a professional accountant is encouraged to document on a timely basis:

- The purpose, circumstances 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 considered, the judgments made, and the conclusions reached in advising the employing organization on 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.
- Any disagreement with the accountant's immediate superior, management and, where applicable, those charged with governance.

280.243 A2 Preparing such documentation assists the accountant to:

- Consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.
- Develop the accountant's analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made or changed.
- 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.