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Mr. Ken Siong
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Exposure Draft: Proposed Revisions to the Code Addressing Tax Planning and Related Services

Dear Mr. Siong,

Ernst & Young Global Limited, the central coordinating entity of the Ernst & Young organization, welcomes the opportunity to offer its views on the Exposure Draft, *Proposed Revisions to the Code Addressing Tax Planning and Related Services* (the ED), issued by the International Ethics Standards Board for Accountants (the "IESBA" or the "Board").

As a public accounting, auditing and tax services firm, our responses are directed primarily to the proposals included in Section 380 addressing the proposed ethical framework for Professional Accountants in Public Practice ("PAPP"). However, we encourage the Board to consider the potential applicability of our responses to the proposals included in Section 280 addressing Professional Accountants in Business ("PAIB").

While we understand the Board's desire to address public concerns related to tax avoidance schemes and tax strategies that are perceived to be aggressive, we do not believe revisions to the Code are necessary to address these concerns. Rather, we believe the Code's robust conceptual framework already provides an ethical framework that sufficiently addresses the expected behaviors of Professional Accountants ("PA") when providing any professional service, including tax planning and related services.

Rather than revisions to the Code, we believe the Board's concerns with regard to ethical behaviors expected of PAs when providing tax planning and related services could more effectively be addressed through materials outside of the Code, for example Staff Questions & Answers or case studies. While we do not agree that the proposed revisions to the Code are necessary, if the Board decides to proceed with the proposed revisions described in the ED, we offer our views as described below for each of the questions identified by the Board.

Thirteen specific questions were identified on which the Board welcomed respondents' views and we have organized our response accordingly. Our comments are set out below.

Proposed New Sections 380 and 280

1. Do you agree with the IESBA's approach to addressing TP by creating two new Sections 380 and 280 in the Code as described in Section VI of this memorandum?

If the Board decides to proceed with the proposed revisions, we agree with the IESBA's approach to addressing TP by creating two new Sections 380 and 280 in the Code.

Description of Tax Planning and Related Services

2. Do you agree with IESBA's description of TP as detailed in Section VII.A above?

We partially agree with the IESBA's description of tax planning and related services ("TP&R Services") as detailed in Section VII.A of the Explanatory Memorandum (the "EM").

We agree with the IESBA's description of tax planning services ("TP Services") in proposed paragraph 380.5 A1, noting that it is largely consistent with the extant definition provided in paragraph 604.11 A1. The proposed definition takes a neutral stance in that it does not portray TP Services as inherently inappropriate or unethical, and we believe this is important for an acceptable definition of TP Services. However, the description in paragraph 604.11 A1 includes "advising on the application of tax law or regulation," and we believe this should likewise be included in the description provided in proposed paragraph 380.5 A1 to maintain consistency.

However, with regard to the definition of related services ("Related Services") as it pertains to PAPPs in proposed paragraph 380.5 A3, the Board is proposing to include services that are provided by "another party" that are based on or linked to the TP Service. We believe more clarification is needed as to the applicability of the ethical framework to "another party" as it is not clear which other parties this is intended to capture, and why the other party's service would create a threat to the fundamental principles for the PAPP. It is not uncommon for a client to separately engage parties to provide either TP Services or Related Services. These separately engaged services might not be within the scope of the services for which the PAPP was engaged to provide. For example, a client might engage the PAPP to provide the original TP Service, but separately engage another party for Related Services to assist with resolving a dispute with the tax authority based on the tax position that the PAPP recommended. Likewise, the client might engage another party to provide the TP Service and then separately engage the PAPP for Related Services to prepare the client's tax return that reflects the position in the tax planning arrangement. In the first example, the PAPP may not be aware of the service provided by another party, or in the second example the PAPP's Related Service will be performed well after another party provided the original TP Service. In these two examples, it is unclear how the PAPP would apply the proposed ethical framework to the TP Services or the Related Services that were provided by another party. The Board should consider either removing "another party" from the definition in proposed paragraph 380.5 A3, or further explaining how the PAPP should apply the proposed ethical framework to Related Services provided to the client by an unrelated other party.

If the PAPP engages another party to provide the TP Service or Related Services to the client, and the other party is under the direct supervision of the PAPP, then it is clear that the PAPP would need to apply the ethical framework and ensure that the other party, under the direct supervision of the PAPP, also applies the ethical framework.

Role of the PA in Acting in the Public Interest

3. Do you agree with IESBA's proposals as explained in Section VII.B above regarding the role of the PA in acting in the public interest in the context of TP?

The responsibility of a PA to act in the public interest is a well-established principle within the Code, featuring prominently throughout the Code, including in the very first paragraph. As the Board explains in paragraph 37 of the EM, the purpose of proposed paragraphs 380.4 A1 through 380.4 A3 is not to define or describe the public interest as it relates to TP&R Services, but rather to explain what it means for a PA to act in the public interest when providing TP&R Services. If the

Board decides to proceed with the proposed revisions, we believe the proposed paragraphs are helpful in that they specifically focus on the PA's role in meeting the public interest when providing TP&R Services - that is, as explained in the EM, to contribute their knowledge, skills and experience when providing TP&R Services thereby enabling their client or employing organization to meet its tax planning goals while yet complying with tax laws and regulations.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

4. Do you agree with the IESBA's proposals regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or employing organization, as described in Section VII.E above?

If the Board decides to proceed with the proposed revisions, we do not take exception to including the concept of a credible basis in laws and regulations in the ethical framework for TP&R Services, and agree that the PA should establish reasonable grounds for their tax planning recommendation or advice, as explained in paragraph 58 of the EM. We agree with the Board's view expressed in paragraph 58 of the EM that the likely-to-prevail threshold in Section 604 is a higher threshold than the credible-basis threshold, and believe this point is critical for a proper understanding and effective implementation of proposed paragraph R380.11. Therefore, we recommend that this point be included in the proposed revisions, or be made clear in the Basis for Conclusion or other potential non-authoritative material the Board might consider. Such an explicit acknowledgement by the Board would bring clarity for firms and other stakeholders that the credible-basis threshold is a lower threshold than the likely-to-prevail threshold.

With regard to the actions that a PAPP might take to determine that there is a credible basis listed in proposed paragraph 380.11 A3, we agree that these are relevant but would suggest replacing the word "Reviewing" is some of the items with "Understanding," since the term "Reviewing" may not convey that a level of understanding is needed, in particular for the following items:

- Reviewing Understanding the relevant facts and circumstances, including the economic purpose and substance to the arrangement.
- Reviewing Understanding the relevant tax legislation.

5. Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?

No, we are not aware of any other considerations that may impact the proper application of the proposed provisions.

Consideration of the Overall Tax Planning Recommendation or Advice

6. Do you agree with the proposals regarding the stand-back test, as described in Section VII.F above?

No, we do not agree with the proposals regarding the stand-back test. We believe the test described in proposed paragraphs R380.12 through R380.13 goes beyond the responsibility to consider the public interest, does not align with proposed paragraphs 380.4 A1 and 380.4 A2, is

too ambiguous to be applied in practice, and is unnecessary in light of the extant requirement to apply the reasonable and informed third party test.

The Code explains in paragraph 100.6 A4 that in acting in the public interest, a PA considers the interests of other stakeholders. However, in paragraphs 63 and 64 of the EM, the Board expresses a view that the ethical framework needs to consider how the overall tax planning recommendation or advice might be perceived by stakeholders, and proposes in paragraph R380.12 to require the PA to consider how stakeholders might view (i.e., perceive) the reputational, commercial and wider economic consequences of the tax planning arrangement. In this case, considering the views and perceptions of other stakeholders would seem to be extending the PA's responsibility beyond what paragraph 100.6 A4 requires of a PA in acting in the public interest. Clearly, within what is considered to be the public interest, there will be multiple stakeholders with differing and competing views and perceptions. For example, those who might support the expansion of commercial activities for job growth in a jurisdiction might view tax incentives for businesses to relocate to the jurisdiction as being in the public interest; whereas, those who oppose further expansion of commercial activity because of environmental impact concerns would not view the granting of the tax incentives to be in the public interest. If the public or sanctioned authority decides to enact tax laws granting the tax incentives, it is assumed it has done so with the greater public interest in mind despite the fact that some of the stakeholders within that jurisdiction will not perceive the tax incentive to be in the public interest. The proposed stand-back tests would require the PA to consider the views and perceptions of the multiple stakeholders rather than the greater public interest, and therefore would extend the PA's responsibility beyond considering the public interest.

As noted in our response to question three above, the proposed application material in paragraphs 380.4 A1 and 380.4 A2 are helpful in specifically focusing on the PA's role in meeting the public interest with regard to TP&R Services - that is, to contribute their knowledge, skills and experience to assist clients in meeting their tax planning goals while complying with tax laws and regulations. The stand-back test, which is focused on how stakeholders might perceive the tax arrangement, is not aligned with the proposed application material in paragraphs 380.4 A1 and 380.4 A2, which is focused on assisting clients in meeting their tax planning goals while complying with tax laws and regulations.

The stand-back test is also quite ambiguous and would be difficult to apply in practice. The focus on stakeholders' views and perceptions within the public interest will create significant ambiguity as to which stakeholders' views should be considered, and which one should be determinative in the PA's consideration of the various consequences that could arise. Additionally, perceptions and views are often shaped and formed by incomplete or biased information. In this context, predicting, understanding and mitigating the negative impact of news reporting, activist groups and other public commentators is an area of expertise and specialization for subject matter experts such as corporate relations, public relations and/or investor relations and not the PA. Further, there could potentially be a significantly large number of factors that would impact the reputational, commercial and wider economic consequences that would need to be considered as to render the entire exercise of the stand-back test as futile and ineffective. Some of these factors could even be unrelated to the tax issue or matter and could skew stakeholders' views of the tax planning arrangement.

Finally, the Code already includes the reasonable and informed third party test, which sufficiently addresses the considerations contemplated by the Board in its proposed stand-back test. Paragraph 115.1 A1 of the Code states that "[c]onduct that might discredit the profession includes conduct that a reasonable and informed third party would be likely to conclude adversely affects the good reputation of the profession." Providing or recommending tax planning arrangements

that would have adverse reputational, commercial or wider economic consequences for the client, the tax base of the jurisdiction or the profession would ultimately affect the good reputation of the profession. Therefore, complying with the fundamental principle of professional behavior by considering impacts on the reputation of the profession would include consideration of the consequences of TP&R Services provided to clients, as contemplated by the proposed stand-back test. The Board acknowledges this in paragraph 66 of the EM. And in applying the reasonable and informed third party test when complying with the fundamental principle of professional behavior, the PA takes into consideration the views of a third party that are shaped by the knowledge of all the relevant facts and circumstances, which is much more persuasive than the potential uninformed or biased views or perceptions of stakeholders that would need to be taken into consideration in the proposed stand-back test.

Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone

7. Do you agree with the IESBA's proposals as outlined in Section VII.G above describing the gray zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement?

If the Board decides to proceed with the proposed revisions, we do not take exception with the IESBA's proposals with regard to the gray zone of uncertainty and its relationship to determining that there is a credible basis for the tax planning arrangement.

We agree with the Board that the ability to establish a credible basis will vary depending on the degree of certainty that exists in the underlying factors surrounding the tax planning arrangement - i.e., the higher the overall degree of certainty in the underlying factors, the more credible the basis will be for the PA's assertion that there are reasonable grounds for the tax planning advice or recommendation.

8. In relation to the application of the CF as outlined in Section VII.H above, is the proposed guidance on:

- a) **The types of threats that might be created in the gray zone;**
- b) **The factors that are relevant in evaluating the level of such threats;**
- c) **The examples of actions that might eliminate threats created by circumstances of uncertainty; and**
- d) **The examples of actions that might be safeguards to address such threats sufficiently clear and appropriate?**

We generally believe the application material provided in proposed paragraphs 380.17 A1 through 380.17 A5 is sufficiently clear and appropriate.

Disagreements with Management

9. Do you agree with the proposals outlined in Section VII.I above which set out the various actions PAs should take in the case of disagreement with the client or with the PA's immediate superior or other responsible individual within the employing organization regarding a TP arrangement?

If the Board decides to proceed with the proposed revisions, we agree with the proposals as reflected in proposed paragraphs R380.19 through R380.21.

We note that when the client is an individual taxpayer, the considerations included in proposed paragraph R380.20 (a) and (c) would not be relevant. Therefore, the Board should consider the following edits to the last sentence of R380.20:

"In doing so, the accountant shall consider advising the client to make full disclosure of the arrangement to the relevant tax authorities. In addition, when the client is an entity, the account shall consider advising the client to:

- (a) Communicate internally to the appropriate level of management the details of the arrangement and the difference of views; and
- ~~(b) Make full disclosure of the arrangement to the relevant tax authorities; and~~
- ~~(c)~~ Communicate the details of the arrangement and the difference of views to the external auditor, where applicable."

Documentation

10. Do you agree with the IESBA's proposals regarding documentation as outlined in Section VII.J above?

If the Board decides to proceed with the proposed revisions, we agree with the IESBA's proposals regarding documentation as reflected in proposed paragraphs 380.23 A1 and 380.23 A2.

Tax Planning Products or Arrangements Developed by a Third Party

11. Do you agree with the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third party provider?

No, we do not fully agree with the IESBA's proposals as reflected in proposed paragraphs 380.22 A1. We believe it is unreasonable and impracticable, and would have detrimental, unintended consequences to the public interest, to extend the PA's responsibilities for the work performed by a third party tax service provider when the PA has only made a referral and is not jointly engaged by the client, or is asked by the client for advice on a tax planning product or arrangement developed by a third party.

It is in the public interest for a PA to refer a client to another tax service provider with specialized knowledge when the PA does not possess the competencies to service the client, thereby facilitating the client's compliance with tax laws. When the client engages the referred tax service provider separately from the PA, it will be under commercial terms and conditions to which the PA is not a party. Further, the PA will not have access to the full breadth of technical details of the tax arrangement, or would not possess the competencies to fully understand the details, if this is the reason for making the referral in the first place. Under these conditions, it is unreasonable and impracticable to hold the PA responsible for the tax product or arrangement of the referred third party tax service provider. A clear example of this would be when the PA is engaged to prepare the tax return of the client when the referred third party tax service provider has provided the tax product or arrangement. In many jurisdictions, the PA who prepares the tax return is responsible to the client for the accuracy of the return based on the information provided and the PA is typically not required to audit the amounts or verify information provided by a client or third party.

This could also have a detrimental, unintended consequences for the public interest. It is in the public interest for the PA to refer the client to a third party tax service provider when the PA does

not possess the competencies to service the client. When referring a client to a third party tax service provider, the PA should satisfy the fundamental principles, in particular professional competence and due care and professional behavior. This would involve the PA being satisfied that the third party tax service provider has sufficient competence and expertise such that the client receives competent professional services based on the PA's referral, as well as the PA being satisfied that the third party tax provider has a credible reputation such that the PA would not be associated with referring a client to a third party that might discredit the profession. But if the PA must then take responsibility for the referred third party's tax product or arrangement under the proposed ethical framework, especially when the PA does not have the technical expertise in the first place (and hence the referral), this could lead to a reluctance of PAs to make referrals leaving it up to the client to find their own third party tax service provider. Since the client may not know an appropriate third party (and hence the need for a referral) or may not exercise the same level of professional responsibility in satisfying themselves as to the technical expertise and credible reputation that a PA would, there could potentially be a detrimental consequence to the public interest because there will be a reluctance by the PA to make a referral.

When the client asks the PA for advice on a tax planning product or arrangement developed by a third party, we understand that the PA would need to apply the proposed ethical framework with regard to the PA's own advice as it relates to the third party's tax planning product or arrangement. However, as discussed in our response to question two above, it is not clear how the PA can apply the ethical framework to another party that is not under the direct supervision of the PA, and why the service of another party would create a threat to the fundamental principles for the PA. If the Board decides to proceed with the proposed revisions, the Board should consider making it clear that when the client approaches the PA for advice on the tax planning product or arrangement developed by a third party, the provisions of proposed section 380 apply only with regard to the PA's advice pertaining to the third party's tax planning product or arrangement.

If the Board decides to proceed with the proposed revisions, we agree with the proposals reflected in proposed paragraphs 380.22 A2 and 380.22 A3.

Multi-jurisdictional Tax Benefit

12. Do you agree with the IESBA's proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L above?

No, we do not agree with the IESBA's proposal regarding a multi-jurisdiction tax benefit. We believe mandatory disclosure requirements should be dealt with by the relevant international or domestic tax laws. In addition, it is not clear what a "tax benefit" in this context means.

Also, for similar reasons as discussed in our response to question six with regard to stakeholder perceptions, we do not believe a relevant factor for the PA to consider is the "[s]takeholders' perceptions of the client if the facts and circumstances were known to the stakeholder" as noted in the last bullet point of proposed paragraph 380.14 A2. Instead, if the Board decides to retain these proposed revisions, we believe reference should be made to the reasonable and informed third party test, which we believe is more persuasive than the perceptions of stakeholders.



Proposed Consequential and Conforming Amendments

13. Do you agree with the proposed consequential and conforming amendments to Section 321 as described in Section VII.M above?

If the Board decides to proceed with the proposed revisions, we agree with the proposed consequential and conforming amendments to Section 321 as described in Section VII.M of the EM.

We would be pleased to discuss our comments with members of the International Ethics Standards Board or its staff. If you wish to do so, please contact Tone Maren Sakshaug (tonemaren.sakshaug1@qa.ey.com) or John Neary (john.neary1@ey.com).

Yours sincerely,

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