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By email: KenSiong@ethicsboard.org

Dear Mr Siong

COMMENTS ON THE IESBA'S PROPOSED REVISIONS TO THE CODE ADDRESSING TAX PLANNING AND RELATED SERVICES

The Independent Regulatory Board for Auditors (IRBA) is both the audit regulator and national auditing standard setter in South Africa. Its statutory objectives include the protection of the public by regulating audits performed by registered auditors; and the promotion of investment and employment in South Africa.

The IRBA adopted Parts 1, 3, 4A and 4B of the International Ethics Standards Board for Accountants (IESBA) International Code of Ethics for Professional Accountants (including International Independence Standards) (Code). This was prescribed in April 2023 as the Code of Professional Conduct for Registered Auditors (the IRBA Code) in South Africa, with certain additional national requirements. The IRBA Code, with its Rules Regarding Improper Conduct, provides the basis for disciplinary action against registered auditors.

We appreciate this opportunity to comment on the proposed Revisions to the Code Addressing Tax Planning and Related Services, which have been developed by the IESBA. The CFAE has considered the amendments to the IESBA Code relating to Part 3 – *Registered Auditors Performing Professional Services* – Proposed Section 380. The IRBA, however, has not adopted Part 2 – *Professional Accountants in Business* – Proposed Section 280, though this is also part of the exposure draft. As such our comments are limited to the proposed Section 380.

These comments have been prepared by a CFAE task group that comprises representatives from medium-sized and small firms, academics, the South African Institute of Chartered

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Established in terms of the Auditing Profession Act 26 of 2005 (as amended).

Accountants and the South African Revenue Service. They are presented under the following sections:

- A. General Comments;
- B. Specific Questions and Responses; and
- C. Request for other General Comments.

If you require further clarity on any of our comments, please email ychoonara@irba.co.za.

Yours faithfully,

Signed electronically

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A. GENERAL COMMENTS

1. Overall, the IRBA is supportive of the IESBA's decision to develop a principles-based framework, leveraging the fundamental principles and the conceptual framework of the Code, to guide ethical conduct of professional accountants (PAs) in public practice when providing tax planning (TP) and related services to clients, or performing these activities for employing organisations.
2. We suggest that the IESBA considers the following matters, as it continues with finalising the proposed amendments to the Code:
 - As TP and related services are not only provided by PAs, the IESBA could play an advocacy role to influence other professional bodies to implement a similar framework in their Codes of Professional Conduct. Practitioners are of the view that the proposals are seen to be anti-competitive, as they may not be applicable to other professions involved in providing these services.
 - It is noted that Parts 4A and 4B of the Code address the services and potential threats to independence in the provision of tax services (which include tax planning and related services); however, this is limited to tax services rendered to audit and review clients. Section 604 of the Code is comprehensive and provides for certain safeguards to be in place for these services to be rendered. As Section 604 of the Code is limited to audit and review clients and the proposed new Section 380 addresses tax planning and related services to all clients, (i.e., individuals and corporate clients), we suggest that the basis of the new section be aligned to Section 604, but that it not be as stringent.
 - Balance the Code amendments with guidance material as there is a concern that the Code is becoming too lengthy. Section 380 includes various lists of examples that could be contained in guidance material, instead of including them in the Code. There is also a concern that long sentences, and multiple lists or examples will make the Code difficult to read and apply. We suggest that the application material (bulleted lists – i.e., paragraphs 380.8.A1, 380.11.A3, etc.) be moved/repurposed as implementation guidance, or summarised into two or three lists, with the paragraphs cross-referenced to these lists.
 - Evaluate whether paragraph R380.6 (Anti-avoidance Laws and Regulations) should remain as a standalone requirement, or it would be sufficient to include a reference to it in paragraph 380.7.A1.
 - Paragraph R380.18 refers to “shall explain the basis”, but it is unclear as to whom this explanation will be given. Therefore, we suggest that a clarification be provided in this regard.
 - Developing support guidance for clients of the PAs.
 - The proposed new Section 380 mentions the threats relating to contingent fee arrangements, with a cross-reference to paragraph 330.4 A1-A4 of the Code. There is a jurisdictional requirement (R330.4 SA) of the IRBA Code that specifically prohibits registered auditors from charging contingent fees for the preparation of an original or amended tax return. This is because contingent fees for these services can create a

self-interest threat to objectivity that cannot be eliminated, and safeguards are not capable to reduce the threat to an acceptable level. We encourage the IESBA to consider this requirement as an amendment to the Code. Paragraph R330.4 SA reads as follows:

“A registered auditor shall not charge contingent fees for the preparation of an original or amended tax return, as contingent fees for these services create a self-interest threat to objectivity that cannot be eliminated, and safeguards are not capable of being applied to reduce the threat to an acceptable level”.

B. SPECIFIC QUESTIONS AND RESPONSES

Proposed New Section 380

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

Response

- 1.1. We support the IESBA's approach to addressing TP by creating the proposed new Section 380 in the Code, in light of the unique nature of tax planning and related services.

Description of Tax Planning and Related Services

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

Response

- 2.1 We agree with the IESBA's description of TP, as detailed in paragraph 380.5 A1.
- 2.2 We suggest that in bullet point 1 of paragraph A380.5.A2, a reference to international structuring or cross-border transactions be included.
- 2.3 We question the inclusion of tax compliance services based on a TP position that another party recommended to a client. The extent of work that would be required of the PA in carrying out the compliance work is unclear, as well as whether this could amount to providing a second opinion.
- 2.4 Further, there is no clarity in paragraph 380.5.A3 on which services are excluded from related services.
- 2.5 We therefore suggest that the examples mentioned in paragraph 380.5.A3 be removed.

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?*

Response

- 3.1 Acting in the public interest in the context of TP is subjective and the practical application of this principle could be difficult. PAs would attempt to balance the needs of the fiscus while ensuring the most tax-efficient position for their clients (shareholders), as clients engage the relevant PA services and expertise for that reason. The public interest, as noted in paragraph 34 of the Explanatory Memorandum (EM), may at times result in a conflict of interest for the PA that is beyond his/her control when it comes to which stakeholder included in the "public interest" category takes preference.
- 3.2 It should also be noted that case law in South Africa allows taxpayers to arrange their affairs legally in such a way that they can pay the minimum amount of tax.

- 3.3 We are uncomfortable with the reference to “tax evasion” in paragraph 380.4.A2, as this may create confusion; hence, we suggest that any reference thereto be deleted.
- 3.4 Section VII, paragraph 26, of the EM specifically mentions that “the IESBA, however considered that the term ‘tax efficiency’ would be more neutral than ‘tax minimization’”. We agree that the term tax efficient is a more neutral concept, with no negative connotations. However, in the ED, paragraph 380.4.A2, the phrase “tax minimization arrangement” is used. This phrase, in our view, has negative connotations that possibly allude to some type of “tax scheme” that would be considered as rather aggressive tax planning. We therefore proposed that this wording be changed to “tax efficiency structures or measures”.
- 3.5 Further, paragraph 380.4.A2 refers to “such assistance”, but it is unclear as to “which assistance” is referenced. Therefore, we suggest that a clarification be provided in this regard.
- 3.6 Paragraph 380.4.A3 mentions an “adjudicative body”, whereas Section 604 of the Code refers to a “tribunal or court”. While it is accepted that the term “adjudicative body” is used multiple times in the Code, we believe that “tribunal or court” is more appropriate in the context of a tax matter (particularly a tax dispute). We note that paragraph 604.27.A2 of the Code reads as follows: “What constitutes a ‘tribunal or court’ depends on how tax proceedings are heard in the particular jurisdiction”.
- 3.7 We suggest that paragraph 380.4.A3 be reworded to read as follows: “However, it is ultimately for a tribunal or court or ~~other appropriate adjudicative body~~ to determine whether a tax planning arrangement complies with the relevant 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 an employing organization, as described in Section VII.E above?*

Response

- 4.1 We note that the intended meaning of “credible basis” is not addressed, and it would be open to interpretation and inconsistent application by PAs. We suggest that the IESBA clearly articulates what is meant by credible basis.
- 4.2 In the South African context – in terms of the Tax Administration Act No. 28 of 2011, Section 223(3)(b)(iii) – the “more likely than not” position indicates that the PA must confirm that there is a more than 50% chance of success of the taxpayer’s position, should the matter proceed to court. This threshold is in fact lower than the “credible basis” threshold proposed. As such, we are of the view that paragraph 380.11 A2 would supersede the credible basis test, as the domestic legislation would override this provision.

- 4.3 We also question whether this list of “procedures” (described as examples) that a PA may undertake to determine a credible basis will be viable or practical, as it is very comprehensive and long. The number of the actions that the PA may need to take is also unclear.
- 4.4 Further, we suggest that paragraph 380.11.A2 should clarify that the equivalent local laws and regulations will prevail.
- 4.5 In respect of paragraph 380.11.A3, bullet point 7, acceptance by the relevant tax authority is not a requirement, as the issue is whether it would be defensible in court. As such, we suggest that bullet point 7 be reworded to read as follows: “considering how likely the proposed arrangement would be successfully defended in court or accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed”.
5. *Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?*

Response

- 5.1 Yes, there would be jurisdiction-specific considerations that would need to be taken into account and that may impact the proper application of the proposed provisions.
- 5.2 In South Africa, the Tax Administration Act, Section 223(3), states that:
- “SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer -*
- a. Made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and*
 - b. Was in possession of an opinion by an independent registered tax practitioner that:*
 - i. Was issued by no later than the date that the relevant return was due;*
 - ii. Was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and*
 - iii. Confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court”.*
- 5.3 As mentioned in paragraph 4.2 above, the “more likely than not” position indicates that the PA must confirm that there is a more than 50% chance of success of the taxpayer’s position, should the matter proceed to court. This threshold is in fact lower than the “credible basis” threshold proposed.

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?*

Response

- 6.1 In principle, we agree with the stand-back test (except for the wider economic consequences as noted in comment 6.4 below).
- 6.2 We suggest that further clarity be provided for the following:
- What is expected of the PA when saying “to consider”?
 - What exactly is meant by “consequences”?
 - If a client has been informed of the possible consequences of the arrangement, are there any further expectations from the PA?
- 6.3 From reading R380.12, it appears that a conflict of interest may arise, as there would be wider economic consequences when structuring a transaction in a tax-efficient manner. As such, we suggest that paragraph R380.12 be reworded as follows: “In addition to determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgement and consider the reputational, commercial and wider economic consequences that could arise. ~~from the way stakeholders might view the arrangement~~”.
- 6.4 Further, we consider that it is too far-reaching for the PA to consider the wider economic impact. The proposal that the PA should have “an awareness of the wider economic consequences of the tax planning arrangement on the tax base in that country or the relevant impacts of the arrangement on the tax bases of multiple jurisdictions, where the client operates” implies that the PA is required to have a working knowledge of multiple tax jurisdictions. In practice, the tax expertise of most PAs is limited to specific tax areas (for example, there are corporate tax specialists, value-added tax specialists, payroll tax specialists, etc.). This is mainly due to the complexities of tax law within each specific jurisdiction. Therefore, it is highly unlikely that a PA advising on a specific tax planning arrangement that may involve other tax jurisdictions would be aware of the “relative impact of the arrangement” in the other jurisdictions in which the client operates. To obtain such awareness, the PA would likely be required to engage the services of other PAs in those specific jurisdictions. That, though, could result in additional costs that may not be recoverable from the client, as such an engagement would not be within the scope of the services requested from the PA. This could have a huge commercial and operational impact on small and medium-sized practices, and other practices.
- 6.5 We suggest that this reference to a “relative impact of the arrangement..” be deleted and that paragraph 380.12.A2 be reworded as follows:
- “An awareness of the wider economic consequences might take into account the professional accountant’s understanding of the impact of the tax planning arrangement on the tax base of the jurisdiction, ~~or the relative impacts of the~~*

~~arrangement on the tax bases of multiple jurisdictions, where the client operates”.~~

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?*

Response

- 7.1 We agree with the IESBA’s proposals, as outlined in Section VII.G, which describe the gray zone of uncertainty.
- 7.2 However, we suggest that the list of sub-bullets under the third bullet point of paragraph 380.15 A2 be moved/repositioned as implementation guidance.
- 7.3 Paragraph R380.16 is also unclear on the steps that would need to be followed by the PA after discussing the uncertainty with the client. We suggest that the following paragraphs under paragraph R380.16 be referenced:
- R380.11 – Consideration of a credible basis.
 - R380.12 – Performing the stand-back test.
 - 380.23.A1 – Encouraging documentation of the discussion with the client.
- 7.4 The application material in deterring circumstances that might give rise to uncertainty in paragraph 380.16.A1 would have already been considered by the PA and should not be repeated here. Therefore, we suggest that it be deleted.
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?*

Response

- 8.1 The heading to this section is “Potential Threats Arising from Providing a Tax Planning Service”. However, in the EM, potential threats are discussed as part of the gray zone. We suggest that clarity be provided on whether these threats are only considered when dealing with the gray zone or have relevance to all tax planning services.
- 8.2 We further propose that a cross-reference to the self-review threat contained in paragraph R604.15 of the Code be added.

8.3 In relation to paragraph 380.17.A1:

- Bullet point 3: The term “significant fee” is used. We suggest that clarity be provided as to what is considered to be a significant fee.
- Bullet point 4: This should be deleted, as the PA would have to consider and apply the credible basis provisions.

8.4 In relation to paragraph 380.17.A2:

- This provides a comprehensive list of potential factors in evaluating the potential threats that may arise. Our view is that some of these factors could be problematic, impractical and subjective, as further indicated below.

The number of jurisdictions involved and the nature of their tax regimes

- As noted in our response to question 6, PAs generally specialise in a specific area or areas of tax within one jurisdiction. The expectation that a PA should be aware of the nature of the tax regime in another jurisdiction is unlikely.
- The term “nature” is rather vague and requires further clarification.

The significance of the potential tax savings

- The term “significance” is subjective. We suggest that further clarity be provided in this regard.

The nature and amount of the fee for the tax planning service

- We are of the view that this criteria is subjective.
- We suggest that the term “nature” be clarified regarding whether it applies to how the fee is determined (e.g. time spent vs the contingency fee based on tax savings).
- Clarification and guidance are also required in respect of “the amount”. Would this amount be considered in relation to a percentage of the tax saving, again, possibly alluding to the charging of contingent fees?

The known previous behaviour or reputation of the client, including its organizational culture

- We note that this would likely be considered during the client acceptance stage of the engagement and should then not be repeated here.
- We suggest that bullet points 11 and 12 be combined and reworded to read as follows:

“Whether there is pressure being exerted by the client or another party on the professional accountant and the degree of urgency in implementing the tax planning arrangement.”

- Further, bullet point 13 would likely have been considered during the client acceptance stage of the engagement and should be considered for deletion.

8.5 In relation to paragraph 380.17. A4:

- Paragraph 380.17. A4 contains examples of actions a PA may take to implement safeguards to address a threat. It is noted that a lot of emphasis is placed on determining the identity of the ultimate beneficiaries, so much that paragraph 380.17. A5 specifically provides steps that a PA may take to identify the ultimate beneficiary. Certain tax services or tax planning does not require the PA to have full knowledge of the ultimate beneficiary, even if one finds themselves in the gray zone. We suggest that clarity be provided with regard to the emphasis on the requirement to identify the ultimate beneficiaries and the examples listed in paragraph 380.17.A5.

Disagreement 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?*

Response

- 9.1 Yes, we agree that where the PA disagrees with management, this needs to be communicated as noted in R380.19.
- 9.2 Our view is that the requirement under R380.20 – to advise the client where it decides to pursue the tax planning arrangement, despite the PA's advice to the contrary – may be problematic, on the basis that the PA who rendered the advice to not pursue the arrangement may not be informed by the client of the action taken. We therefore suggest that this paragraph be reworded to start as follows: *"Where a PA is aware or becomes aware that a client decides to pursue the tax planning arrangement ..."*.
- 9.3 Further, we suggest that paragraphs R380.19 and R380.20 be combined, as the actions and engagement would practically take place at the same time.
- 9.4 Also, paragraph R380.21 is unclear regarding under which circumstances an PA/audit firm should withdraw from the professional relationship in its entirety. We suggest that further clarity be provided in this regard.

Documentation

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

Response

- 10.1 Yes, we agree with the IESBA's proposals regarding documentation, as outlined in 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?*

Response

- 11.1 Paragraph 380.22.A1 states that "provisions in this section apply". Should this therefore rather be a requirement ("shall") than application material?
- 11.2 Further, paragraph 380.22 A1 refers to "where a client approaches the accountant for advice on a tax planning product or arrangement developed by a third party". This scenario would imply a second opinion that, at times, the PA may be aware of; or the client may not have disclosed to the PA that they are in fact providing a second opinion, for various reasons such as not wanting to taint that PA's view on the transaction. So, we propose that the reference to second opinions be included.

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?*

Response

- 12.1 We disagree with the IESBA's proposals regarding a multi-jurisdiction tax benefit, as described in paragraph R380.14.
- 12.2 Paragraph R380.14 implies that the PA is required to have a working knowledge of multiple tax jurisdictions to know about such tax benefits and to make such a recommendation to the client. In practice, the tax expertise of most PAs is limited to specific tax areas (for example, there are corporate tax specialists, value-added tax specialists, pay as you earn specialists, etc.). This is mainly due to the complexities of tax law within each specific jurisdiction. Therefore, it is unlikely that a PA advising on a specific tax planning arrangement that may involve other tax jurisdictions would be aware of the tax benefits to be derived therefrom in the other jurisdictions in which the client operates.
- 12.3 Further, our opinion is that it may be difficult to disclose this information to the tax authorities, where there is no mechanism to facilitate such disclosure.
- 12.4 In addition, the concept of "significance of the tax benefits in the relevant jurisdictions" in the first bullet point of paragraph 380.14.A2 requires further clarification. We are assuming that this means the quantum. But is a PA meant to merely apply professional judgement to determine what would be a significant tax benefit in the relevant jurisdictions?

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?*

Response

13.1 We suggest that clarity on what “other service provider” means be provided, as this term is considered too vague. When a second opinion is sought on other matters, the initial opinion is provided by either the “existing” or “predecessor” accountant; and the glossary contains definitions for both. Based on the fact that the respective definitions for an “existing accountant” and a “predecessor accountant” include the carrying out of tax services for a client, the insertion of “other service provider” is not necessary, unless further clarity is provided with regard to a possible inclusion of a legal tax professional, for instance.

C. REQUEST FOR OTHER GENERAL COMMENTS

In addition to the request for specific comments above, the IESBA is also seeking comments on the matters set out below:

- *SMEs and SMPs – The IESBA invites comments regarding any aspect of the proposals from SMEs and SMPs.*
- *Tax Authorities – The IESBA invites comments on the proposals from a regulatory perspective from members of the tax regulatory community.*
- *Developing Nations – Recognizing that many developing nations have adopted or are in the process of adopting the Code, the IESBA invites respondents from these nations to comment on the proposals, and in particular on any foreseeable difficulties in applying them in their environment.*
- *Translations – Recognizing that many respondents may intend to translate the final changes for adoption in their own environments, the IESBA welcomes comment on potential translation issues respondents may note in reviewing the proposals.*

Response

We have no other general comments to add, other than what is already addressed elsewhere in this letter.
