



Thursday, 18 May 2023

Ken Siong
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UNITED STATES OF AMERICA

Submission via www.ifac.org

Dear Mr Siong

Submission on Exposure Draft: Proposed Revisions to the Code Addressing Tax Planning and Related Services

We welcome the opportunity to comment on the above Exposure Draft (“**the ED**”).

We support IESBA’s decision to identify and analyse the ethical implications of developments that have occurred in tax planning by professional accountants (“**PAs**”) and determine whether there is a need for enhancements to the Code of Ethics (“**the Code**”) or for further actions.

We consider that IESBA should reconsider whether the introduction of two new sections in the Code is the best approach to addressing stakeholder concerns regarding tax planning (“**TP**”). We hold this view because:

- PAs who perform tax planning (as described in proposed sections 280 and 380) are subject to all the current provisions of the Code – including but not limited to the fundamental principles - and should be (and in our experience generally are) behaving in a manner that is consistent with proposed sections 280 and 380.
- Unlike audit and accounting standards, tax technical standards (tax laws and regulations) and terminology remain very jurisdictionally based. Stakeholder concerns regarding TP would be better addressed in each jurisdiction by anti-avoidance legislation, backed up by local application and enforcement of the Code by IFAC member bodies.
- In IESBA’s attempt to take these jurisdictional differences into consideration and to ensure that certain tax planning activities are captured by the proposed amendments to the Code, IESBA has made generalisations/compromises in, and has chosen terminology for, proposed sections 280 and 380 that may not be readily understood or easily complied with by PAs, especially Small and Medium Practices (“**SMPs**”) and those who work in Small and Medium Entities (“**SMEs**”), in individual jurisdictions. The confusion caused by this lack of clarity may impose significant and unnecessary additional compliance costs on PAs, professional bodies and regulators. In particular, the descriptions of “tax planning” and “related services” are so wide that they will effectively capture most tax advisory and compliance services including those where there is no or very little uncertainty about the appropriateness of the tax treatment recommended (i.e. routine tax services). This wide scope may cause PAs, who perform routine tax services and already comply with the Code, additional and unnecessary compliance costs in considering and documenting how they are complying with proposed sections 280 and 380, as applicable. As noted below, of particular concern is the “stand-back” test, which we consider is completely unnecessary in the context of routine tax services.

- This approach also sets a precedent that the IESBA may add new sections to the Code when stakeholders express concerns about the services provided by PAs. Such a development would run counter to the Code being principles-based and would make the Code longer and more unwieldy – a criticism already levelled – and would act as a barrier to compliance with the Code by PAs.

Alternative actions that the IESBA could consider include:

- issuing an interpretation statement for TP that can be used by individual jurisdictions to create or update existing tax services standards in a manner that will be understandable to PAs in those jurisdictions and can be more easily enforced by professional bodies and regulators; and /or
- creating an ethical framework for dealing with uncertainty. This topic is not specific to tax planning. Such an approach would be more consistent with a principles-based Code.

Should IESBA proceed with its proposed approach, our primary comments on the ED proposals are as follows:

- As noted above, we believe that the proposed broad definitions of ‘tax planning’ and ‘related services’ will capture routine tax advice regarding the interpretation of tax legislation and more administrative activities such as compilation and return filing as well as the egregious structuring transactions that are intended to be addressed by the proposals. Inevitably this will impose additional compliance costs on PAs and their businesses and clients. Accordingly, we do not agree with IESBA’s very broad description of TP as detailed in Section VII.A of the explanatory memorandum (“**the EM**”).
- The fact that the scope extends to ‘related services’ means that the proposed Sections will apply to PAs undertaking tax return compilation services, notwithstanding scope of work limitations contractually agreed as part of letters of engagement. A limited scope return compilation engagement is likely to exclude consideration of tax matters for which separate commercial, tax or legal advice has been obtained from third parties. This will of itself create practical compliance challenges.
- We have significant concerns about the stand-back test. In our view it is too subjective and will impose additional and, in some cases, unnecessary costs on PAs, in circumstances in which jurisdiction specific anti-avoidance legislation does not require similar considerations. Accordingly, we strongly recommend that the IESBA reconsiders the need for the stand-back test or at the very least reconsiders the drafting of it.
- We anticipate that many PAs, who are SMPs or who work in SMEs, will not appreciate that they are engaged in tax planning activities as defined by the Code for which there may be heightened compliance requirements. At a minimum the proposed amendments will need to be accompanied by a comprehensive education campaign and detailed guidance.

Appendix A provides our responses to the specific questions raised in the ED.

Appendix B provides information about Chartered Accountants Australia and New Zealand.

If you have any questions about our submission, please contact me or Tracy Bignell, Senior Adviser (NZ) Professional Standards at tracy.bignell@charteredaccountantsanz.com.

Yours sincerely,



Peter Vial FCA

Group Executive – New Zealand & Pacific

Appendix A: Responses to specific questions

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?

As noted in our cover letter, we consider that the IESBA should reconsider its approach to addressing TP.

However, if IESBA chooses to proceed with the approach as described in Section VI of the explanatory memorandum ("**the EM**"), in order for the accountancy profession to fully address stakeholder concerns about TP, PAs will need to understand and comply with proposed sections 280 and 380 and professional bodies will need to be able to enforce the Sections.

In this regard, we request that IESBA consider clarifying certain aspects of the proposed sections. Please refer to our responses to questions 2, 6, 9, 10, 11 and 12.

Description of Tax Planning and Related Services

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

We do not agree with the IESBA's very broad description of TP as detailed in Section VII.A of the EM.

In our view the IESBA should define TP in line with the description used by the Organisation for Economic Co-Operation and Development ("**OECD**"). Paragraph 26 of the EM confirms that the IESBA believes that the OECD description is closer to what should be the focus of the new sections by "dealing with arrangements to minimise tax liability". It then notes, without further explanation, that the IESBA considered that the term "tax efficiency" would be more neutral than "tax minimisation". In our view, defining TP by reference to "structuring [] affairs in a tax efficient manner" (i.e. to "tax efficiency") broadens the definition of TP well beyond a focus on the egregious tax structuring intended to be targeted and brings within scope a whole range of tax advisory and compliance engagements that should not be within scope. From a tax administrative perspective "tax efficiency" can refer to efficiency of revenue collection or ease of compliance with regulatory and legal requirements. "Tax efficiency" could include, for example, the adoption of a particular tax treatment under legislation that offers a taxpayer a choice of treatments. Accordingly, as noted in our cover letter and reiterated below, we consider that there is enough uncertainty about the scope of proposed sections 280 and 380 with the use of the terms "tax planning" and "related services" without adding a further broad term "tax efficiency" into the mix.

Further, we note that in our experience, especially for PAs in SMPs and SMEs, the term TP is generally used to describe "formal tax structuring assignments" undertaken by larger firms for sophisticated clients rather than the TP as detailed in Section VII.A and described in paragraphs 380.5 A1 and 280.5 A1

For PAs in SMPs and SMEs, taxation services are usually split between "tax advisory services", of which "formal tax structuring assignments" is a subset, and "tax compliance services", which broadly equates to "related services". While tax minimisation is the objective of most tax advisory services, in practice most of these services are confined to advising clients and employing organisations on compliance with existing laws and regulations because structuring options, especially in the SME sector, are limited by legislation. However, the requirements and guidance material in proposed sections 380 and 280 apply equally to these other tax advisory services as they do to "formal tax structuring assignments" as the interpretation of existing law and regulations can be uncertain and/or the employing organisations and clients may not want to accept the resulting advice.

If the IESBA intends all "tax advisory services" to be captured within the scope of proposed sections 380 and 280 as the wording of paragraphs 380.5 A1 and 280.5 A1 implies, we recommend that the IESBA make this interpretation very clear by adding additional examples to proposed paragraph 380.8 A1 and 280.8 A1 that

clearly encapsulate the more routine assignments with which PAs in SMPs and SMEs are most familiar. For example.

- *Advising [an entity / the employing entity] on how its tax affairs should be conducted in accordance with laws and regulations.*

Proposed sections 380 and 280 are predicated on the assumption that all related services neatly follow the associated tax planning service. This is often not the case for PAs in SMPs and SMEs. Instead, tax advisory services (especially advice on matters such as the utilisation of tax losses or capital distribution strategy) are often provided as part of the tax return preparation process. Accordingly, we recommend that IESBA consider adding the following sentence to the end of paragraphs 380.5 A3 and 280.5 A3:

“These [services / activities] might be provided subsequent to or concurrently with the linked tax planning [service / activity].”

Role of the PA in Acting in the Public Interest

3. Do you agree with the 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?

We agree with the intent of IESBA’s proposals as explained in Section VII.B of the EM regarding the role of the PA acting in the public interest in the context of TP. We agree with the views expressed by participants of the roundtables described in section VII.B of the EM (in particular, paragraph 36) and with the conclusion reached by IESBA in paragraph 38 of the EM.

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?

We agree with the intent of 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 of the EM. In particular, we support the IESBA’s decision not to define the term “credible basis” in order to allow individual jurisdictions to define this concept themselves based on their own commonly understood and accepted definition of what is acceptable practice. We agree with the observations shared by roundtable participants described in para 51 of the ED.

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

Please see commentary under questions 2, 6, 9, 10, 11, and 12.

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?

While we support the *intent* of the proposals regarding the stand-back test, as described in Section VII.F of the EM, we have significant concerns about paragraphs R380.12 and R280.12 as drafted. In our view the paragraphs are too subjective and will impose additional and, in some cases, unnecessary costs on PAs, in circumstances in which jurisdiction specific anti-avoidance legislation does not require similar considerations. In particular, they do not:

- acknowledge that the stand-back test will be unnecessary in situations where there is no or very little uncertainty about the appropriateness of the tax treatment recommended – in these situations, PAs will incur additional and unnecessary compliance costs to consider and document how they are complying with the stand-back test.

- specify when the consideration of reputational, commercial and wider economic consequences should occur (although this might be implied by surrounding paragraphs).
- provide the PA with a reference point for their considerations - this might be achieved by adding reference to the reasonable and informed third party test.

Accordingly, we recommend that the IESBA consider clarifying these requirements. For example, by amending paragraphs R380.12 and R280.12 to read.

Where the uncertainty regarding the credible basis on which tax planning arrangement is predicated is more than inconsequential, the professional accountant shall exercise professional judgement and consider the reputational commercial and wider consequences that could arise from the way stakeholders might view the arrangement before recommending or otherwise advising on the tax planning arrangement in order to determine, using the reasonable and third-party test, whether any of these possible consequences might adversely impact the PAs decision to recommend or otherwise advise on the tax planning arrangement.

Further, paragraph 65 of the EM states that the stand back test is not about tax morality, tax justice or tax fairness. It also states that the PA is not expected to carry out research on the economic consequences, other than giving the matter due consideration based on the PA's general awareness and understanding of the current economic environment in the context of TP. However, these comments that provide parameters to the nature and extent of the considerations expected of PAs are not included in the application material in paragraphs 380.12 A1 and 380.12 A2. We recommend that the IESBA includes these comments in the application material to clearly define expectations in perpetuity.

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?

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

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

- The types of threats that might be created in the gray zone;**
- The factors that are relevant in evaluating the level of such threats;**
- The examples of actions that might eliminate threats created by circumstances of uncertainty; and**
- The examples of actions that might be safeguards to address such threats**

sufficiently clear and appropriate?

We consider the proposed guidance on the matters outlined above is sufficiently clear and appropriate in relation to the application of the conceptual framework as outlined in Section VII.H of the EM.

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?

We agree with the intent of the proposals outlined in Section VII.I of the EM 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 organisation regarding a TP arrangement.

However, in our experience, junior PAs can form views that, on further discussion and investigation, are misinformed. Accordingly, we recommend that the IESBA considers augmenting to section 280 to encourage the PA to first discuss the facts and circumstances and interpretations of law with others to seek to resolve any misunderstandings or difference of opinions (i.e. consistent with its suggested actions for dealing with misleading information (220.8 A1 - 220.8 A2) or pressure (270.3A4)) before taking the actions required by paragraphs R280,19 and R280,20 without just cause.

Documentation

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

We agree with the intent of IESBA's proposals regarding documentation as outlined in Section VII.J of the EM.

However, the wording of paragraphs 380.23 A1 and 280.21 A2 does not assist PAs to determine the appropriate nature and extent of the documentation that they should keep. In our experience, the existence of this guidance material can cause confusion for PAs working in or with SMEs with under or over documentation (and additional cost) the result. Similarly, these PAs might fail to make the linkage between documentation and quality management. Accordingly, we recommend that the IESBA considers providing additional application material to clarify these issues. For example – after paragraph 380.23 A1:

The nature and extent of this documentation is a quality management and risk matter to which the professional accountant should apply professional judgement and the reasonable and informed third party test. The level of uncertainty present in the tax planning arrangement might be an important consideration in determining the documentation required.

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?

We agree with the intent of the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third-party provider except for the referring member always being responsible for ascertaining the credibility of the TP product or arrangement developed by a third party. While that expectation may be reasonable for taxation specialists it seems unreasonable for SMPs, who may not have the knowledge or expertise necessary to determine the validity of the tax analysis and conclusions provided by a tax expert. Accordingly, we recommend that the IESBA clarifies the wording of paragraph 380.22 A1 including reference to paragraphs R320.10 - 320.10 A1.

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?

We support the intent of the IESBA's proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L of the EM.

However, IESBA may wish to re-word the second bullet point of 380.14 A2 as it seems to imply that "it's acceptable if everyone else is doing it" which might not be correct depending on the facts and circumstances of the situation.

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?

We support the proposed consequential and conforming amendments to Section 321 as described in Section VII.M of the EM.

Appendix B: About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 135,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world.

We actively engage with governments, regulators and standard-setters on behalf of members and the profession to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand.

Our support of the profession extends to affiliations with international accounting organisations.

We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.