



# PROPOSED REVISIONS TO THE ETHICAL CODE PUBLISHED BY THE INTERNATIONAL ETHICS STANDARDS BOARD ADDRESSING TAX PLANNING AND RELATED SERVICES

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ICAEW welcomes the opportunity to comment on the proposed revisions to the Ethical Code published by the International Ethics Standards Board (IESBA) on 17 February 2023 in relation to the provision of tax planning and related services, which is available from this [link](#).

For questions on this response please contact the Tax Faculty at [taxfac@icaew.com](mailto:taxfac@icaew.com) quoting REP 41/23.

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## PROPOSED REVISIONS TO THE CODE ADDRESSING TAX PLANNING AND RELATED SERVICES

This response is divided into three sections, as follows:

- A General comments**
- B Responses to the request for specific comments in para 103**
- C Other comments on the drafting not included in Section B above**

### A GENERAL COMMENTS

1. In principle we support IESBA's initiative to strengthen the existing ethical code as it applies to tax work. ICAEW and a number of other bodies have been actively involved over many years in formulating and developing ethical standards in tax, in particular the development of our *Professional Conduct in Relation to Taxation* code.

#### The UK's Professional Conduct in Relation to Taxation

2. As IESBA members will be aware, in the UK four IFAC member bodies (AAT, ACCA, ICAEW and ICAS) together with three other professional bodies involved with tax (the Chartered Institute of Taxation, the Association of Tax Technicians and the Society of Trust and Estate Practitioners), have published a code known as **Professional Conduct in Relation to Taxation** (PCRT). This was first published in 1995 and its foundation is the five fundamental ethical principles in the IESBA Code but set in a tax context.
3. The PCRT has been revised regularly since 1995 and, in 2017, the existing five fundamental principles were supplemented by an additional five standards which build on the fundamental principles. The standards also include a clear requirement that members must not create, encourage or promote certain tax planning arrangements which are, in summary, highly contrived and/or artificial arrangements designed to exploit loopholes in the existing tax law or which are contrary to the clear intention Parliament or any relevant legislative body.
4. In addition to the seven signatory bodies to the PCRT, some other professional bodies advising on tax have adopted the PCRT. In addition the Law Society **guidance for solicitors advising on tax** notes that solicitors advising on tax should be familiar with the PCRT. In 2017 the Solicitors Regulatory Authority, the body which regulates UK solicitors, published a warning notice in relation to tax (which was updated in 2019) which states:

*Accountancy bodies have worked with HMRC to produce a statement of Professional Conduct in Relation to Taxation (PCRT). This is published on the websites of the accountancy bodies (and is liable to change). We welcome this statement and say that: "These standards reflect our own principles, particularly that solicitors must be honest and act with integrity, and uphold the rule of law."*

*We therefore expect you to be familiar with the PCRT and adhere to its standards.*

5. Further, HM Revenue & Customs (HMRC), the UK's national tax authority, has acknowledged that PCRT is an acceptable basis for dealings between members and HMRC. HMRC's own published '**agent standard**' largely replicates, and cross references to, the provisions in the PCRT.
6. Given the widespread adoption and support for the PCRT referred to above, it represents the de facto 'industry ethical standard' for those working in tax in the UK. We would also note that although tax is primarily a national responsibility, the PCRT standards referred to above have been adopted or formed the basis for statements internationally, see for example the statement by Accountancy Europe **Accountants & Tax – Do the right thing** and section 5 Tax Schemes and Arrangements of the Australian Accounting Professional and Ethics Standards Board statement **APES 220 Taxation Services**.

7. Much of the IESBA proposals follow the approach adopted in the PCRT, albeit with some differences. An analysis of the provisions in the PCRT and the IESBA draft shows that taken as a whole the two codes are substantially similar in effect, albeit with some differences. However, the drafting of the two documents is somewhat different. Given that the PCRT has become the de facto standard in the UK and applies to a broader range of advisers and stakeholders than just IFAC bodies, we are keen to explore whether we might be able to reconcile the PCRT requirements and the IESBA proposals in a way that maintains the well-established and understood nature of the PCRT in relation to UK matters.

### **Credible basis**

8. Concern has been expressed about the 'credible basis' test. In principle we support the use of 'credible basis' and would note that 'credibility' is a term used in the law of evidence such that, in establishing the facts the evidence can be believed. However, the particular concern is that, by itself, the credible basis test doesn't go far enough because it is important that forming a credible view must be based not only on a complete understanding of the law but on a proper analysis of the actual facts of the tax planning and actual intended purpose.
9. The PCRT also uses a similar 'credible view' test but is a two-part test: tax planning should be based on a realistic assessment of the facts and on a credible view of the law. The PCRT test was formulated after an extensive consultation exercise and after discussions with leading counsel. It was also formulated to address various tax avoidance schemes which purported to be based on a credible view of the law but which were held to fail on the fundamental principle that the claimed facts upon which the tax reliefs depended did not stand up to scrutiny – for example that the claimed carrying on of a trade upon which the tax reliefs depended was not borne out by the actual facts of the case ([2014] UKFTT 175 (TC)).
10. We appreciate that the first bullet in section 380.11.A3 refers to reviewing the relevant facts and circumstances, but this section is framed in terms of actions the professional accountant might take rather an essential first step in establishing whether there is a credible basis. We would suggest the inclusion of this test in R380.11.

### **Compliance costs**

11. Concerns have been expressed about the potential costs in complying with the proposed IESBA code. These include, for example, concerns about the potential costs of applying the 'stand back' test in R380.12 and R380.13, although we recognise that para 65 of the commentary makes it clear that IESBA does not intend the professional accountant to carry out research into the economic consequences.
12. Members have also expressed concerns about the impact on smaller and medium sized businesses which are unlikely to have dedicated compliance departments. When evaluating threats, for example, para 380.17 A2 et seq set out extensive matters to consider which could include potentially onerous compliance requirements which may be difficult to undertake in practice.
13. There is a danger with imposing potentially onerous requirements on professional members that the costs become disproportionate and could result in taxpayers deciding to use non-professional advisers who are not bound by such onerous requirements, thus defeating the policy objective.

### **Retrospectivity**

14. It will be important to ensure that the proposals which are adopted apply prospectively to tax planning services undertaken after the date that the amended Code is implemented, i.e. are not retrospective.

## **B RESPONSES TO THE REQUEST FOR SPECIFIC COMMENTS IN PARA 103**

### **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?**

15. We acknowledge the difficulty in framing one code which works for both members in practice and members in business. Therefore, in principle we support IESBA's approach of inserting two new sections, namely section 380 for professional accountants in practice (PAPP) and section 280 for professional accountants in business (PAIB).
16. That said, we would expect the proposed requirements for both sectors to be broadly similar.

### **Description of Tax Planning and Related Services**

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

17. We agree in principle with the IESBA's description of tax planning activities set out in 380.5 A1 as comprising "a broad range of activities designed to assist a client, whether an individual or and entity, in structuring its affairs in a tax-efficient manner." Tax-efficient could be seen as a pejorative term so we would encourage any guidance etc to make it clear that 'tax-efficient' does not imply adoption of an aggressive tax strategy but could mean, for example, adopting a tax strategy that maximised certainty of treatment, thus minimising the scope for challenge and correction later.
18. However, we are concerned that some of the examples listed in the following section are unhelpful and send out a conflicting message. If IESBA has settled on the term 'tax-efficient' as a neutral term, then it should be used in all the bulleted examples listed. As it is, the first two refer to tax minimisation and the second bullet has an unhelpful reference to transfer pricing arrangements. We suggest that these bullet points are amended as follows:
  - Advising an individual on tax-efficient ways to structure their investment, retirement or estate planning objectives.
  - Advising an individual business owner on structuring their ownership and income from the business in a tax-efficient manner.
  - Advising an entity on structuring its international operations in a tax efficient manner.
  - Advising on utilizing available losses in a tax-efficient manner.
  - Advising an entity on how to structure its capital distribution strategy in a tax-efficient manner.
  - Advising an entity on arranging its employee compensation strategy in a tax-efficient manner.
19. Concerns have been raised about the scope of 'related services' in section 380.5.A3. The definition includes, as examples, tax compliance and dispute resolution. Whilst similar principles are likely to apply to each type of work as they do for tax planning, they may not always be identical. Consideration should be given as to whether further guidance or clarification is needed on what are 'related services' for these purposes and whether any principles identified might need to be modified to reflect the particular circumstances of the related service.

### **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?**

20. We believe that professional accountants have a public interest duty to properly advise taxpayers on their potential options and choices granted by governments under the tax law and to ensure that the taxpayers submit a correct and complete tax return and pay the right amount of tax at the right time.

21. We agree with IESBA's proposed guidance in 380.4 A1 describing how professional accountants 'help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.'

### **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?***

22. See general comments above. We appreciate the difficulty in formulating a test which will be acceptable internationally and the credible basis is a reasonable starting point. While we believe that the credible basis test sets an appropriate principles-based test, we note that the PCRT also includes additional requirements which go further than this, namely a requirement for a realistic assessment of the facts upon which any advice or recommendations are made and that members must not create, encourage or promote certain arrangements that are likely to indicate abusive tax arrangements. Given the public interest concerns about members recommending, for example, highly contrived and artificial arrangements. IESBA should keep this test under review. We also think that IESBA should consider publishing further guidance on the application of the credible basis test.

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

23. None that we are aware of in relation to the UK.

### **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?***

24. In principle we support the inclusion of a 'stand-back test' in R380.12. Such a test is implicit within the PCRT and we would expect members of a PCRT member body to consider the potential economic and reputational impact on the client, the member and the reputation of the profession.
25. However, we have some concerns about the inclusion of 'wider economic consequences' as a factor in 380.12 A2. We note that it is mentioned in paragraph 65 of the Explanatory Memorandum (but not in the main text) that a member is not expected to conduct additional research as part of the stand-back test but nevertheless this could be an extremely onerous and costly exercise. It is important (as noted in the general comments above) that any burdens are proportionate to the risk. We suggest that IESBA considers the practicalities of including this factor.

### **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?***

26. We refer to our comments above in relation to the proposed credible basis test and that establishing a realistic assessment of the facts is essential.
27. See our comment in section C on our proposed amendment to para 380.15.A2.

**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?**

- 28. The proposed guidance appears reasonable.
- 29. We consider that there could be some interlinkage between consideration of the grey zone and the stand-back test and wonder whether it would be advantageous to cross reference the two sections.

### **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?**

- 30. The proposals look reasonable.

### **Documentation**

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

- 31. We note the comments in respect of documentation. We appreciate the fine line between producing documentation for its own sake, thereby incurring extra costs for no obvious benefit, and ensuring that an adviser can at a later date support and where appropriate defend the judgements made as being in accordance with the code. Timely prepared appropriate documentation is a sensible risk management strategy which will help support judgements made, if required at a later date.
- 32. The PCRT includes a mandatory requirement that members should keep notes on a timely basis of the rationale for the judgments made, but that members are not required to complete paperwork for its own sake. We believe that this is a reasonable provision which helps to protect the member.

### **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?**

- 33. We agree with the comments made in respect of third party arrangements. The PCRT includes various provisions on this topic. In principle, we support IESBA's conclusion in para 88 that the professional accountant should still be responsible for ascertaining the credibility of the particular TP product or arrangement, especially where the accountant will be submitting the tax return as agent. However, we are concerned that the word 'ascertaining' could be perceived as potentially too high a hurdle in that it could be taken as a requirement to audit or reperform the work of the third party. We would suggest that the work required may often be more about giving appropriate consideration as to the credibility of a particular arrangement, taking into account all the facts and circumstances.
- 34. We also agree with IESBA that the responsibilities of the accountant are no different than if the accountant were the creator of the tax planning product or arrangement. We also agree with the IESBA conclusions on commissions in para 90. Aside from the fact that proper disclosure is required, acceptance of commission is likely to be regarded by the courts and public opinion as accepting some degree of responsibility for the arrangements.

35. Our concern with section 380.22.A1 is that it could be interpreted that it is acceptable for the professional accountant to refer clients to a third-party adviser who promotes aggressive tax planning arrangements unless the professional accountant receives a referral fee or commission for so doing. We believe that the professional accountants' responsibilities are wider and are not limited only to cases where the professional accountant receives a referral fee or commission. This wider responsibility is particularly likely to occur where the professional accountant submits the relevant tax return which includes arrangements, the advice for which was provided by others.
36. The wording needs to be strengthened to make it clear that a professional accountant is likely to maintain a responsibility to the client in respect of a third-party arrangements entered into and especially where the outcome of any such planning is reflected on a tax return submitted by the professional accountant regardless of whether or not a referral fee or commission was paid to the professional accountant.

### **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?**

37. We are concerned that this provision could impose potentially onerous and unreasonable compliance burdens on advisers. The adviser may not act for the client in all relevant jurisdictions so may not be aware of the actual tax benefits accruing in other jurisdictions. There may also be data protection/client confidentiality matters. Ultimately, and while the section is framed in terms of 'might advise the client to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions', the question of disclosure would be for the client to decide.

### **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?**

38. Yes.

## **C OTHER COMMENTS ON THE DRAFTING NOT INCLUDED IN SECTION B ABOVE**

### **Para 380.4.A2**

*In addition, accountants play an important role in assisting clients meet their tax obligations and not seek to circumvent them through tax evasion.*

39. We believe that there should also be a stand-alone, unequivocal, statement that professional members should not be involved in any arrangements that might amount to, or facilitate, tax evasion (or even perceived as such). We suggest:

"Professional Accountants should never be knowingly involved in tax evasion, unless it is to assist clients to take appropriate corrective action to regularise their affairs with the Tax Authorities. Further guidance on non-Compliance with Laws and Regulations is given at Para 380.7.A1 below."

### **Para 380.4 A3**

40. As it stands this is a correct statement of fact. However, it would be helpful to include at the beginning of that sentence "While the professional accountant will need to exercise professional judgement as to whether any tax planning complies with tax laws and regulations, it is ultimately for the courts etc".

### **Para R380.9**

41. We suggest the addition of a fourth bullet (d)

“(d) an understanding of the facts and a realistic assessment of them.”

#### Para 380.11 A3

Sixth bullet point - *Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.*

42. We suggest that the word “successfully” is inserted before “challenged by the relevant tax authorities”.

Seventh bullet point - *Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.*

43. This use of the word “if” implies that the relevant facts and circumstances may not be disclosed. We suggest that the wording is amended as follows:

“Considering how likely it is that the proposed arrangement would be accepted by the relevant tax authorities given that all the relevant facts and circumstances should be adequately disclosed and especially where any arrangements are likely to be challenged or if the agreement of the relevant tax authority is being sought to an arrangement.”

#### Para R380.12

*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 . . . .*

44. We believe that establishing that there is a credible basis for any tax planning arrangement is by reference to the legal position applied to the actual facts of the case. The consideration of potential reputational, commercial and wider economic circumstances is a separate matter. We suggest this is reworded as:

“The professional accountant shall exercise professional judgment in determining that there is a credible basis for the tax planning arrangement. In addition, the professional accountant should also consider the potential reputational, commercial, and wider economic consequences that may arise from the way stakeholders might view the arrangement.”

#### Para 380.12 A2

*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.*

45. We recommend that this sentence is deleted. If the tax planning arrangement produces a tax charge that might be lower than expected, it will inevitably have an impact on the tax base. In addition, the professional accountant acting for even a large client is rarely able to professionally estimate the impact of planning on a government’s tax base, if the planning is pursued by other individuals or business entities.

#### Para 380.14.A1

46. At the end of the paragraph, we suggest adding “noting that any decision about what to disclose ultimately rests with the client unless the professional accountant is required to disclose by law.”

#### Para 380.14 A2

47. We suggest the addition of a fourth bullet point as follows:

“the extent to which there is a method of disclosure appropriate for the type of transaction in the law and practice of the relevant jurisdictions.”



### Para 380.15 A2

First bullet - *Difficulty in establishing an adequate factual basis*

48. As noted above, we think that in order to underpin any analysis of the legal position, establishing a realistic assessment of the facts is essential. We propose that the above wording should be amended as follows:

“Difficulty in establishing a realistic assessment of the facts which will form the basis on which a credible view of the law can be taken.”

### Para 380.16 A1

Second bullet - *Considering any assumptions that might need to be made or changed*

49. See comments already made above about the need for tax planning to be based on a realistic assessment of the facts. In a similar manner to our comment in Para 380.15 A2 above, we believe it is essential that any assumptions reasonably required are reasonable and realistic and should not be changed to fit an outcome that is not justified on the facts. We suggest that the above wording is amended as follows:

“Considering whether any assumptions made when establishing the facts on which TP is provided are reasonably required and have a reasonable and realistic basis.”

### Para 380.17. A1

*Providing a tax planning service to a client might create a self-interest, advocacy or intimidation threat.*

50. We believe that that this section should emphasise that professional accountants run a risk of self-interest and advocacy threats where they are actively promoting a client to adopt a particular position. We suggest it is reworded as follows:

“Providing a tax planning service and/or promoting tax planning arrangements to a client might create a self-interest, advocacy or intimidation threat.”

### Para 380.17 A5

*Steps a professional accountant might take to establish the identity of the ultimate beneficiaries include, for example*

51. We would note that the professional accountant might be required to undertake such steps in order to comply with, for example, money laundering and any associated ‘know your client’ rules. We suggest that this wording is amended to make this clear, as follows:

“Steps a professional accountant might take to establish the identity of the ultimate beneficiaries (noting that such steps might be required under existing anti money laundering/know your client rules) include, for example”

### Para R380.20

*If the client decides to pursue the tax planning arrangement, despite the professional accountant’s advice to the contrary, the professional accountant shall take steps to be disassociated from the arrangement. In doing so, the accountant shall consider advising the client. . .*

52. We note that this section imposes a mandatory duty to ‘take steps to disassociate’ themselves from the client’s/employer’s course of action. While we appreciate that there may be no option other than to disassociate in many such circumstances, we suggest that consideration be given to whether this should be qualified by the addition of “to the extent possible and necessary in complying with the fundamental principles”, or by saying instead that the “professional accountant shall consider whether there is a need to disassociate themselves and to take such possible and necessary steps in upholding the general principles”.