Hong Kong Institute of
Certified Public Accountants
香港會計師公會

50th Anniversary

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Program and Senior Director
International Ethics Standards Board for Accountants
529 Fifth Avenue, 6th Floor
New York, NY 10017
The United States of America

Dear Sirs,

The IESBA Exposure Draft
Proposed Revisions to the Code Addressing Tax Planning and Related Services

The Hong Kong Institute of Certified Public Accountants ("HKICPA") is the only statutory body in Hong Kong that sets auditing and assurance standards, ethical standards, financial reporting standards as well as sustainability disclosure standards for professional accountants in Hong Kong. We welcome the opportunity to provide our comments on the captioned IESBA Exposure Draft ("ED").

The HKICPA appreciates the IESBA's work in this area and time and effort in organizing global webinars on the ED and explaining the changes.

Overall, we support the IESBA's approach to addressing tax planning ("TP") and related services by creating two new, Sections 380 and 280, in the *International Code of Ethics for Professional Accountants (including International Independence Standards)* ("the Code").

We also generally agree with the IESBA's description of:

- TP (Section VII.A of the Explanatory Memorandum ("EM"))
- Role of the professional accountant ("PA") in acting in the public interest (Section VII.B of the EM)
- 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 (Section VII.E of the EM)

However, with respect to paragraphs R280.6 and R380.6, the intention and scope of anti-avoidance rules in individual cases (which may differ from jurisdiction to jurisdiction) is subject to debate, which can be resolved only by decisions handed down by courts from time to time. So, the requirement to obtain an understanding of, and advise the employing organization or client to comply with anti-avoidance rules is not always practicable, for example, when a PA is involved in advising a client who wishes to challenge an interpretation of the rules by the revenue authority ("RA").

We also have concerns on the proposed "stand-back test" in paragraphs R280.12 and R380.12. With regard to a TP arrangement, there is a wide range of stakeholders involved and they will not all have the same views and perceptions. It is nearly impossible for a PA to determine those views and how much weight should be given to each. Accordingly, we would suggest this provision to simply point out that there could be reputational, commercial and wider economic implications associated with a particular TP arrangement, which a PA should be aware of and should consider, as appropriate.

Other key comments we have included:

- In paragraphs 380.17 A2 and 380.17 A4, to be explicit as to who "ultimate beneficiaries" are.

- In section 280, to consider whether it is too extreme to require a PA to escalate the situation in circumstances where there may just be a good faith difference of view over whether a particular TP arrangement has a credible basis in laws and regulations.

- Given that a TP engagement might not necessarily result in a "deliverable" by the PA, we suggest the IESBA to consider if further guidance for TP engagements' client and engagement acceptance is necessary and include them in Section 320 *Professional Appointments*.

Our responses to the specific questions are included in the attachment. We trust that our comments are of assistance to you. If you have any questions regarding the matters raised above, please contact Selene Ho, Deputy Director of the Standard Setting Department (selene@hkicpa.org.hk).

Yours faithfully,

Cecilia Kwei
Director, Standard Setting Department

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?**

   Overall, we have no particular issue with the two new Sections approach.

   A general point to make about Section 280 is that it assumes that the PA's relationship is only with the employing organization whereas, in fact, there may be another relevant relationship between the PA and an external professional adviser engaged by the employing organization (who may or may not be a PA) who is recommending or advising on a particular TP arrangement. We therefore suggest the IESBA to include guidance to address the circumstance, for example, recognizing the employing organization's potential use of an external tax expert and the PA's consideration (being an employee of the employing organization) in this regard.

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 generally agree with the description.

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?**

   We generally agree with the proposals.

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 generally agree with the proposals.

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

   With regards to paragraphs R280.6 and R380.6, it seems excessive and may not be helpful to set a precedent to state that a PA must obtain an understanding of certain specific tax laws and regulations, including anti-avoidance laws. Obtaining an understanding of all relevant laws and regulations is a core part of professional competence, i.e., one of the fundamental principles of the Code.

   While it may be inexplicitly assumed, we consider it better to state that a PA's obligation concerns only laws and regulations in jurisdictions in relation to which they are advising on a TP.

Furthermore, the intention and scope of anti-avoidance rules in individual cases (which may differ from jurisdiction to jurisdiction) is subject to debate, which can be resolved only by decisions handed down by courts from time to time. So, the requirement to obtain an understanding of, and advise the employing organization or client to comply with anti-avoidance rules is not always practicable, for example, when a PA is involved in advising a client who wishes to challenge an interpretation of the rules by the revenue authority ("RA").

On the other hand, we suggest that the definition of "regulations" should be made clear. The RA may have a stated practice that is not necessarily explicitly stated in the law. The fact that a practitioner takes a position that differs from the RA's practice should not put the practitioner in conflict with the proposed provisions on "credible basis in laws and regulation." Reference should also be made to "established practices" in relation to determining whether there is a credible basis for a TP arrangement, because where the law is silent, unclear or ambiguous, there may be a body of established practice that provides a credible basis for a TP arrangement.

For the reasons stated above, we suggest the IESBA to modify relevant paragraphs as follows:

- Paragraphs R280.11 and R380.11, to cover laws, regulations "**and/ or established practices**";

- Paragraphs 280.11 A1 – A2 and 380.11 A1 – A2, to cover established practices, i.e.,

  "…the tax planning arrangement does not have a credible basis in laws, regulations **or established practices**…".

  "… based on the relevant tax laws, regulations **and established practices** at the time".; and

- Paragraphs 280.11 A2 and 380.11 A2, we consider the word "tax" is not necessary, as per paragraphs R380.11 and 380.11 A1.

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?

We have concerns about the proposed "stand-back test" in paragraphs R280.12 and R380.12. It appears to require a PA to "second guess" what views stakeholders might have. However, it is unclear as to who are the stakeholders – RAs, civil society, the media or the PA's peer groups. Potentially, there is a wide range of stakeholders involved in a TP arrangement and they will not all have the same views and perceptions. It is nearly impossible for a PA to determine those views and how much weight should be given to each.

Accordingly, we would suggest this provision to simply point out that there could be reputational, commercial and wider economic implications associated with a particular TP arrangement, which a PA should be aware of and should consider, as appropriate.

Similarly, in the second/ third bullet of paragraphs 280.14 A2 and 380.14 A2, the question arises of which different stakeholder perceptions should be considered and how much weight should be given to each.

From reading paragraphs 280.12 A1 and 380.12 A1, "*The reputational and commercial consequences might relate to… the profession of a prolonged dispute with the relevant tax or other authorities*" might imply that a PA should think carefully about the implications for the client/ employing organization and the profession before entering a potentially prolonged dispute with the RA. While these are definitely issues to be considered, it is impossible to determine the certain outcome of tax disputes upfront and they can take a long time to resolve, especially where the court is involved, even though the taxpayer's position may be upheld in the end. The ING Baring case in Hong Kong, for example, took more than 10 years to be resolved, ultimately by the Court of Final Appeal, and in favour of the taxpayer. Hence, we feel uncertain as to the message the guidance is seeking to convey. While a PA should advise the client on the possible implications of challenging a particular tax treatment, the PA should also pursue a fair tax treatment for the client, even though the circumstance might attach a negative connotation and perhaps also an important point of law is at stake. As shown in the ING Baring case, it may be in the public interest to obtain a definitive interpretation of unclear or ambiguous provisions of tax law through the court despite the client's prolonged dispute with the RA.

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 generally agree with the proposals.

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;

In paragraphs 380.17 A2 and 380.17 A4, in the first bullet point in each case, it may need to be made more explicit who "ultimate beneficiaries" refers to and why, other than for the purposes of general transparency, it is important in the situations covered specifically by this section to establish their identity. Clearly, PAs should know their clients and be familiar with the client's business and, in many jurisdictions, a PA may be required, e.g., by anti-money laundering laws and regulations to establish the identity of ultimate beneficial owners. However, it may need to be spelled out more clearly here why knowing the identity of ultimate beneficiaries (and who are the ultimate beneficiaries of a TP arrangement – the client entity, the major shareholders, or all shareholders?) is a factor in evaluating level of threats and may act as a safeguard to address the threats identified. Our comment in this regard also applies to paragraphs 280.17 A2 and 280.17 A4 in relation to a PA's employing organization.

(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?

Other comments: The linkages between the CF Section VII.H and other preceding sections may need to be made clearer. This section does not seem to flow naturally from the discussion of the "credible basis in laws and regulations" and addressing the "gray zone".

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?**

   In Section 280, it may be extreme to require that a PA to escalate the situation in circumstances where there may just be a good faith difference of view over whether a particular TP arrangement has a credible basis in laws and regulations. The process should be commenced only where, for example, the PA considers that no reasonable professional person in that position could take the view taken by the PA's immediate supervisor.

   As for Section 380, should the PA encounter disagreement with the client and follow R380.20 to advise the client, we would suggest sub-bullet (a) to add "those charged with governance" as an example, i.e., "*Communicating internally to the appropriate level of management and/or those charged with governance, the details of the arrangement and the difference of views*".

Documentation

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

    We generally agree with the IESBAs proposals regarding documentation as outlined in Section VII.J, particularly where there is, or may be, some difference of view over a specific TP arrangement. If the matter is non-controversial, there may not be a need to document all the matters referred to in paragraphs 280.21 A1 and 380.23 A1, and certainly not in any great detail.

    With respect to the last bullet of paragraphs 280.21 A1 and 380.23 A1, in case of a PA's disagreement with his/her immediate supervisor, management, those charged with governance or the client, we would suggest the PA's documentation to demonstrate compliance with the fundamental principles and the provisions in section 280 or 380.

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?**

    In paragraph 88 of the explanatory memorandum, it is stated that, "where a PA is referring a client to a provider of TP products or arrangements to meet the client's needs, the PA would need to inform the client of the PA's relationship with the external provider. In addition, the PA should ascertain the provider's competence in developing the TP product

or arrangement." These issues do not seem to be covered in the ED and, in any case, a distinction should be drawn between a situation in which a PA is recommending a particular TP provider or TP arrangement, and one in which the PA is just being asked for a second opinion by the client. This distinction could have an impact on, for example, the degree of due diligence that the PA might be expected to do on the TP provider.

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?

The proposal seems somewhat vague. Should a PA consider disclosure just on the basis that it involves a tax benefit in more than one jurisdiction and there is no tax treaty between them? It would be better to set out some additional factors that might make consideration of disclosure more appropriate, e.g., a situation of potential double non-taxation.

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 generally agree with the proposed consequential and conforming amendment. However, we consider prima facie Section 321 covers only the provision of a second opinion to an entity that is not an existing client. That may not always be the situation in relation to providing a second opinion on a particular TP arrangement, which could be requested by an existing client.

We also have other comments on the proposed consequential and conforming amendments:

- Section 320 *Professional Appointments*: Given the nature of the engagement where there might not be a "deliverable" by the PA, we suggest the IESBA to consider if further guidance in Section 320 for TP engagements' client and engagement acceptance is necessary. For instance, as part of the client and engagement acceptance, the PA should communicate clearly to the client the circumstances under which he/she may not be able to recommend a TP arrangement to avoid being held for breach of engagement contract before accepting the engagement.

- Consequential impact of Section 380 on the profession: Currently, there are tax professionals who may not be members of a professional accounting organization (e.g., The Taxation Institute of Hong Kong). Section 380 would only require members of the professional accounting organization to comply with the Code but would not be extended to such other tax professionals. The IESBA is encouraged to reach out to regulators to express the importance of consistency in engagement performance and adhering to the high ethical values in the Code including those tax professionals who may not be members of the professional accounting organization.

- End -