

18 May 2023



**International Ethics Standards Board for
Accountants (IESBA)**

**Proposed Revisions to the Code
addressing Tax Planning and Related
Services**

Response from ICAS

International Ethics Standards Board for Accountants

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

About ICAS

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 23,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 11,000 of our members are based in Scotland and 10,000 in England.
2. The following submission has been prepared by the ICAS Ethics Board and Tax Board. The Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community; it does this with the active input and support of over 60 committee members.
3. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members into the many complex issues and decisions involved in tax and regulatory system design, and to point out operational practicalities.
4. ICAS was created by Royal Charter in 1854. The ICAS Charter requires its Boards to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

General comments

5. ICAS welcomes the opportunity to give its views on the IESBA Exposure Draft 'Proposed Revisions to the Code Addressing Tax Planning and Related Services', which was published in February 2023. We were pleased to be able to participate in earlier discussions and to attend the helpful roundtables hosted by IESBA at various stages in the development of the exposure draft.
6. IESBA's initiative to strengthen the existing Code of Ethics in relation to tax work is helpful, with its set of principles applying across jurisdictions; we note too that the coverage of the code is very similar to the UK Professional Conduct in Relation to Taxation (PCRT), although the style is quite different with PCRT having been tailored to the UK. We consider that the two codes can dovetail together well in that IESBA can cover cross border work whilst PCRT deals with UK.

Tax Ethics in the UK – PCRT

7. ICAS, as one of seven leading tax professional bodies in the UK, has been actively involved over many years in formulating and developing ethical standards in tax, which are in the Code 'Professional Conduct in Relation to Taxation' (PCRT) and its suite of supporting helpsheets. This has been developed by the 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). PCRT has been in existence since 1995.

8. The PCRT Code is built upon the five fundamental ethical principles in the IESBA Code, set in a UK tax context, and is a mandatory code. With effect from 2017, the five fundamental principles were supplemented by five standards, which our members must observe when advising on UK tax planning. They are:

Client Specific

Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.

Lawful

At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients' attention to where the law is materially uncertain, for example because the relevant revenue authority is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

Disclosure and transparency

Tax advice must not rely for its effectiveness on the relevant revenue authority having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

Advising on tax planning arrangements

Members must not create, encourage or promote tax planning arrangements or structures that: i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation; and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

Professional judgement and appropriate documentation

Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.

9. As well as the seven signatory bodies to the PCRT, some other professional bodies whose members advise on tax in the UK have also adopted PCRT and the Law Society [guidance for solicitors advising on tax](#) notes that solicitors advising on tax should be familiar with PCRT.
10. HM Revenue & Customs has long targeted tax avoidance activity and has acknowledged that PCRT is an acceptable basis for dealings between members; HMRC's own published 'agent standard' largely replicates the provisions in PCRT.
11. In summary, PCRT represents the de facto 'industry ethical standard' for those working in tax in the UK.
12. We have undertaken a mapping exercise between the two codes – the IESBA Tax Planning exposure draft and PCRT – and the analysis shows that the two codes are substantially similar in effect. However, the drafting of the two documents is somewhat different. Given that PCRT has become the de facto standard in the UK and applies to a broader range of advisers and stakeholders than simply the IFAC bodies, we are keen to explore reconciling 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

13. We are aware of some concerns about the adoption of the 'credible basis' test. PCRT also uses a similar 'credible view' test, albeit coupled with the need for any tax planning to be based on a realistic assessment of the facts and a credible view of the law. The PCRT test was formulated after an extensive consultation exercise and after discussions with leading counsel; we also note that 'credibility' is used in the law of evidence.

14. We believe that this test, taken as a whole, sets an appropriate threshold, so in principle we support its use.

The 'stand back' test

15. Concerns have also been expressed about the 'stand back' test in proposed new paragraphs R380.12 and R380.13 (and likewise in R280.12 and 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. It would be helpful however, if IESBA revisited this proposal and restricted it to a narrower test – in our view, this requirement is too wide in scope to be made mandatory. It would be impossible to properly police compliance. It may also prove costly to implement.

Specific questions

Proposed New Sections 380 and 280

Question 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?

16. As noted in our general comments above, IESBA's initiative to strengthen tax ethics amongst professional accountants is helpful.
17. Given that the Code already exists with the two separate parts for (i) professional accountants in business and (ii) professional accountants in public practice, it is understandable that this approach has been taken. 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).
18. That said, we would expect the proposed requirements for both sectors to be broadly similar, otherwise any differences between the two may cause difficulties in implementation across our membership. We also note that UK PCRT is a code that does not differentiate between PAPP and PAIB.

Description of Tax Planning and Related Services

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

19. We agree that it is important to establish a description of 'tax planning' to identify the professional services and activities that the Code would address.
20. We note that IESBA proposes the following description:
Tax planning comprises a broad range of [services/activities] designed to assist [a client, whether an individual or an entity/an employing organization] in structuring [the client's/the employing organization's] affairs in a tax-efficient manner
21. We accept IESBA's description of tax planning activities.
22. Whether the term used is 'tax planning' or 'tax efficient', both of these can be viewed as having negative connotations; this may be unhelpful. Any supporting documentation etc should make it clear that a negative interpretation is not necessarily applicable. In our view, tax planning means that an adviser provides independent advice on paying the right amount of tax at the right time and informs the client/employer of reliefs and allowances that the government has made available.
23. It may be that further guidance would be of assistance in interpreting 'related services' as some concerns have been raised about the potential scope suggested by new paragraph 380.5.A3.

Role of the PA in Acting in the Public Interest

Question 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?

24. We firmly believe that members of ICAS operate in the public interest by using their knowledge, skills and expertise to help facilitate a more efficient and effective operation of a jurisdiction's tax system. Tax agents are vital to the effective operation of the UK tax system - they support tax compliance by helping taxpayers to get their tax affairs right; they make complex tax systems workable for businesses and individuals and reduce the risk of unexpected tax costs for all taxpayers, all of which is in the public interest.
25. IESBA should be careful not to move away from a principles-based approach when considering what constitutes the 'public interest' because public opinion, client views, and government views on tax planning can change. For instance, in the UK what was deemed acceptable has moved quite considerably in the last 10 years, so it is important that any ethical code on tax planning should be principles-based only, or it may be subject to constant revision.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

Question 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?

26. As noted in our earlier comments above, we are aware of some concerns about the adoption of the 'credible basis' test. PCRT also uses a similar 'credible view' test, albeit coupled with the need for any tax planning to be based on a realistic assessment of the facts and a credible view of the law. The PCRT test was formulated after an extensive consultation exercise and after discussions with leading counsel; we also note that 'credibility' is used in the law of evidence.
27. We believe that this test, taken as a whole, sets an appropriate threshold, so in principle we support its use.

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

28. We have outlined above the principles and standards in PCRT, which is the code of conduct in the UK, and which we consider is broadly the same as the IESBA Code, although the documents are different in style.

Consideration of the Overall Tax Planning Recommendation or Advice

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

29. A 'stand-back test' in proposed new paragraph R380.12 makes sense, and such a test is included in PCRT, which states that it is expected that tax planning should include a consideration of the potential economic and reputational impact on the client, the member and the reputation of the profession.
30. As noted above, however, the test needs to be such that it can be applied, and enforced if necessary, and therefore it should not be drafted too widely or with subjective parameters – we consider that the factor of 'wider economic consequences' should be reconsidered.

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

Question 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?

31. The gray zone in tax planning will always be difficult to define, and enforcing any rules that apply in the gray zone will also be uncertain, because there cannot be a clear line or certainty around what is acceptable or unacceptable if the actions are lawful, i.e. they are not illegal. The test of legality rests with the courts.
32. The checklist provided in proposed new paragraph 380.15.A2 gives a useful list to consider when seeking to establish the level and cause of uncertainty; it may help the tax practitioner to distil their position.

Question 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?

33. The proposed guidance is helpful when considering a tax plan and potential threats.

Disagreement with Management

Question 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?

34. We are content with the proposals for dealing with tax planning situations where there is disagreement with the employer or client.

Documentation

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

35. We note the comments in respect of documentation. The PCRT says that Members are not required to complete paperwork for its own sake, but they should be prepared to identify, support and where appropriate defend the judgements they made in applying these requirements to their work.
36. Appropriate documentation, on a timely basis, is a standard risk management strategy that we recommend to all members in order to provide the most convincing way of demonstrating compliance with the principles after the event, to the benefit of the member and the client and to satisfy any wider public concerns. However, documentation of itself is a risk management strategy rather than an ethical consideration.

Tax Planning Products or Arrangements Developed by a Third Party

Question 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?

37. We agree with the comments made in respect of third party arrangements. It is an area of concern to our members and PCRT includes various provisions and guidance on this topic.
38. We agree that the professional accountant is responsible for ascertaining the credibility of the particular tax planning product or arrangement, especially where the accountant will be submitting the tax return as agent. We also agree with proposed new paragraph 380.22 A2 regarding commission; acceptance of commission is likely to be regarded by the courts and public opinion as accepting some degree of responsibility for the arrangements.

Multi-jurisdictional Tax Benefit

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

39. This provision may be difficult to comply with if different advisers are used in different jurisdictions.
40. In proposed new paragraph 380.14 A2 (the second bullet point), we are concerned about the proposition that one may take into consideration whether other taxpayers are doing something similar – this does not seem to be a sound basis for decision making in relation to ethical behaviour.

Proposed Consequential and Conforming Amendments

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

41. We are content with this proposal.



CA House, 21 Haymarket Yards, Edinburgh, UK, EH12 5BH
+44 (0) 131 347 0100
connect@icas.com
icas.com

 @ICASaccounting

 ICAS – The Professional Body of CAS

 ICAS_accounting

 ICAS_accounting