Tax Planning and Related Services—
Fact Finding Update

Observations from Conversations from Stakeholders

1. Using insights gained from conversations with stakeholders during its outreach activities (see discussion agendas in the Appendix), the TPWG performed an analysis of each of the five fundamental principles (FPs) and the conceptual framework (CF) to articulate the ethical expectations on professional accountants (PAs) performing tax planning activities. The purpose of this exercise is to develop a view as to whether the FPs and CF are sufficient to address behavioral issues identified by various stakeholders who work in, or are otherwise close to, this area.

2. The analysis to date has yielded several observations that the TPWG is now evaluating further in terms of what, if any, responses would be appropriate for the IESBA to consider. These observations are as follows:

   - Stakeholders concur with the observation[1] that there is not "one set" of global ethical principles applicable to PAs across jurisdictions which is enforced by professional bodies upon their members. Where the Code is adopted as a basis of guidance for their members, the ethical behavior expected of PAs performing tax planning services is the same across the CF and five FPs in an interrelated manner.

   - From a regulatory and societal standpoint (see also next point), tax practices which demonstrate the concepts of **transparency**, **fairness** and **accountability** are essential in today's environment.

   - There is an increased focus on Environmental, Social and Governance (ESG) reporting. ESG[2] is sometimes used synonymously with corporate social responsibility, responsible investing, and sustainable investing. One of the areas in question is the practice of optimizing structures to ensure optimal dividend payments for investors. Increasingly, corporate tax has become a leading governance consideration, specifically corporate income tax responsibility and disclosure targeting aggressive tax[3] strategies.

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[1] See paragraph 9 - Agenda Item 8 Tax Planning and Related Services Cover Note (December 2019)

[2] https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/corporate/2020/esg-what-does-it-mean-and-why-is-it-important-for-you/

[3] The WG has made references to 'aggressive tax' and 'tax planning' throughout this document. The WG acknowledges that these terms are not defined in the Code. As the WG continues its fact-finding work, the WG will consider whether a definition of 'aggressive tax planning' is required. According to published literature, the conventional view of the line between the different concepts of "tax planning," "tax evasion" and "tax avoidance" is as follows:

- Tax planning involves using tax reliefs for the purpose for which they were intended – it is not tax avoidance. For example, claiming relief on capital investment.
- Tax evasion occurs if the planning structure involves some form of deception, fraud, false statement or sham in fact, including concerted efforts to impair, impede and obstruct tax enforcement – e.g., mischaracterized transactions, false book entries, false statements made during tax examinations, and under-reporting of income.
  (*Tackling Tax Avoidance, Evasion, and Other Forms of Non-Compliance* (March 2019), HM Revenue & Customs (HMRC), HM Treasury United Kingdom)

- Threats to compliance with the FPs do not clearly capture the "complexity" risk. The TPWG also heard that there is a "cultural"[4] dimension impacting the behavior of PAs carrying out tax planning activities.
- As the influences of "complexity" risk and changing societal perceptions of aggressive tax planning practices intensify, the criticality and value of professional judgment will increase.

3. These observations are further discussed under the themes below.

Ethical Behaviors of Professional Accountants in Tax Planning

4. The IESBA received overwhelming support from stakeholders on its initiative to address the topic of tax planning.[5] Whilst there is no perceived lack of a general framework or fundamental principles of ethics applicable to tax planning activities,[6] the TPWG was informed that there is a lack of guidance on how PAs can *identify, evaluate and address ethical risks related to tax planning*.

5. As noted from discussions with certain professional accountancy organizations[7] (PAOs), there are standards/guidance they have provided to their members who perform tax planning services. Where the expected ethical behavior of PAs carrying out tax planning activities is based on the IESBA Code, there is consensus that the five FPs are interrelated. This view was also shared by practitioners[8] who confirmed that their firms' policies and procedures follow the principles of the Code.

6. As discussed at the December 2019 IESBA meeting, the TPWG is of the view that the behavior expected of PAs performing tax planning services is the same for all PAs across the five FPs in an interrelated manner. As a result, missing or not fully understanding the threat to compliance with one FP might create a risk of non-compliance with another FP.

- The term "tax avoidance" has different meanings in different jurisdictions. For example, in some jurisdictions "tax avoidance" is used to describe when a taxpayer takes advantage of all legal opportunities to minimize its federal income, gift, or estate tax obligations through claiming permissible deductions and credits (https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf). In contrast, other jurisdictions use the term "tax avoidance" for situations that often involve contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter, but not the spirit of the law. Avoidance is considered legitimate, even if sometimes involving aggressive planning (UK HMRC).

The WG intends to present its preliminary recommendation at the June 2020 meeting.

[4] The WG references "cultural" as being geographical and generational diversity.

[5] IESBA Strategy and Work Plan (SWP) for 2019-2023

[6] Respondents to the IESBA's SWP 2019-2023 consultation paper have raised concern about creating additional standards on this topic due to its complexity and the difficulty of achieving consensus at the global level.

[7] AICPA, UK professional accountancy bodies

[8] KPMG, PwC

7. The TPWG is considering option(s) to address the inter-related nature of the impact of tax planning on the FPs:

   Option A

   Develop overarching material[9] in Part 1 of the Code that will assist PAs comply with the FPs and apply the CF.

   The TPWG is of the view that such material is not suitable as it might give ethical considerations relating to tax planning activities an undue emphasis in the Code over other ethical considerations relating to the behavior of PAs when performing other services. Such an emphasis on one activity will detract from the Code's principles-based approach and make it more prescriptive.

   Option B

   Develop material under one or more specific FPs, such as objectivity and professional competence and due care, to explain the expected behavior of PAs performing tax planning activities.

   With respect to developing material for one or more FPs, the TPWG is of the view that such an approach would contradict stakeholders' views and its own view that the expected behavior of PAs performing tax services is the same for all PAs across the five FPs in an interrelated manner.

   Option C

   Develop material outside of the Code itself (such as staff Q&As or case studies) on the types and magnitude of the threats that are created when PAs perform tax planning activities.

   This approach is consistent with several comments received from stakeholders who cautioned against adding more material to the Code and suggested guidance would be more beneficial.

Transparency, Fairness and Accountability

8. As noted by stakeholders, the topic of tax planning is complex due to the differing tax regimes and interpretation of the law across jurisdictions. Global and regional organizations such as the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the European Commission (EC) are making a concerted effort to address the topic of tax planning as a matter of global importance. These organizations have issued policies and guidance to aid national tax authorities and administrations achieve a certain level of cohesion in addressing issues of tax planning across borders, given growing public criticism of multinationals' ability to shift profits and reduce their tax bills by taking advantage of national tax provisions.

9. While the specific focus of this initiative during Phase 1 centers on what involvement in tax planning means in terms of implications on a PA's **ETHICAL** behavior and responsibility to comply with the FPs, the TPWG observed that the frameworks used by international policy makers include considerations of **FAIRNESS** and **TRANSPARENCY**, as well as **ACCOUNTABILITY**. For example:

   - OECD/G20's Inclusive Framework on Base Erosion and Profit Shifting (BEPS) and country by country reporting rules.

     OECD's country by country reporting rules, which came into force in June 2018, are mandatory for listed businesses. They require companies to provide detailed tax information to tax

[9] In this instance, the WG has yet to establish if there is a need for a new requirement and/or application material and will make its recommendation in the final report to the Board expected in September 2020.

authorities in the jurisdictions where they operate in an effort to encourage corporations to disclose their tax practices. The OECD rules are inter-jurisdictional.

- In May 2018, the EU Council adopted new rules to increase transparency to deter aggressive cross-border tax planning practices (known as "DAC 6"). Non-compliance with reporting requirements will attract penalties as will be established in the national legislation of the respective EU Member States.
- Principles for Responsible Investment (PRI) [10] supports a global network of over 2,000 signatories to incorporate *Environmental, Social and Governance* (ESG) factors into their investment and ownership decisions. These signatories include some of the world's most influential asset owners, investments managers and service providers, including Canada Pension Plan Investment Board and BlackRock[11]. The PRI worked with global investors on corporate tax responsibility to produce its Engagement guidance on corporate tax responsibility in 2015. In 2017, the PRI and the investors worked together to supplement the guidance with the Investors' recommendations on corporate income tax disclosure .The publication is a set of disclosure recommendations developed by investors to strengthen corporate income tax disclosure across tax policy, governance and risk management areas.[12]
- The Global Reporting Initiative (GRI), a sustainability standard setter, issued its first global standard for public reporting on tax, GRI 207: Tax 2019, setting out requirements for greater levels of tax transparency reporting. It is calling on global businesses to use the framework to provide detailed public information about their tax practices.

10. The OECD/G20 BEPS Initiative as well as the current fairness-oriented public discussion regarding the taxation of multinationals highlight the importance and complexity of today's business models. Whether they are operating in compliance or advisory services, stakeholders[13] commented that PAs play a vital role in advancing the effort of these global initiatives. The TPWG will further consider how and at what level (other than from an overall societal perspective) the concepts of fairness and transparency interact with the Code.

[10] The PRI is independent. It encourages investors to use responsible investment to enhance returns and better manage risks but does not operate for its own profit. It engages with global policymakers but is not associated with any government. It is supported by, but not part of, the United Nations (https://www.unpri.org/pri/about-the-pri). **[Agenda Item 4-C]**

[11] KPMG - Corporate Tax: A Critical part of ESG (2019)

[12] https://www.unpri.org/tax-avoidance

[13] Accountancy Europe

Environmental, Social and Governance & Corporate Social Responsibility Reporting and Tax

11. Corporate Social Responsibility (CSR) [14] is an evolving business practice that incorporates sustainable development into a company's business model. It is reported to have a positive impact on social, economic and environmental factors.[15] As noted, the TPWG has found that reporting tax strategies is part of a company's consideration for CSR reporting. Increasingly, corporate tax has become a leading governance consideration, specifically corporate income tax responsibility and disclosure targeting aggressive tax strategies.

12. The TPWG found that there is momentum for enhanced reporting outside the traditional financial reporting framework. For example, in March 2019, the Global Reporting Initiative[16] noted that only a handful of companies disclosed their environmental performance two decades ago and as of today, 93% of the world's largest companies (by revenue) report ESG[17] information. In Q3 2019, FactSet reported 31 S&P 500 companies citing "ESG" on earnings calls.

13. Tim Mohin, Chief Executive of the Global Reporting Index (GRI), explained: "In the past decade there has been a tremendous upswing in interest coming from the financial sector. With over 90% of the largest companies now filing sustainability reports (85% of the S&P 500), the data is plentiful. A recent study from Oxford University found that more than 80% of mainstream investors now consider ESG-information when making investment decisions. And the numbers are compelling – globally, there are now $22.89 trillion of assets being professionally managed under responsible investment strategies, an increase of 25 percent since 2014. This number is so large it needs context – it exceeds the GDP of the entire US economy." [18]

14. Although much of the global attention within the ESG sector has been placed on the environmental component, social and governance issues are equally important. As multinational corporations engage in CSR, these organizations may endorse tax disclosure[19] describing the principles of **transparency**[20] and **accountability**. Disclosure is viewed as a mechanism to highlight that these organizations do not encourage or promote tax evasion and adopt aggressive tax strategies that are deemed 'unacceptable' by the general public.[21]

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[14] The European Commission has defined CSR as the responsibility of enterprises for their impact on society and, therefore, it should be company led. Companies can become socially responsible by integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations following the law. Public authorities play a supporting role through voluntary policy measures and, where necessary, complementary regulation. (https://ec.europa.eu/growth/industry/corporate-social-responsibility_en)

[15] https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html

[16] Refer to **agenda item 4-B**

[17] The Financial Times Lexicon defines ESG as "a generic term used in capital markets and used by investors to evaluate corporate behavior and to determine the future financial performance of companies."

[18] https://www.forbes.com/sites/susanmcpherson/2019/01/14/corporate-responsibility-what-to-expect-in-2019/#273ab11e690f

[19] Deborah L. Paul and T. Eiko Stange, Wachtell, Lipton, Rosen & Katz, 'Tax and ESG' (February 22, 2020), https://corpgov.law.harvard.edu/2020/02/22/tax-and-esg/#more-127066

[20] SSE PLC (https://sse.com/media/270263/SSE-Tax-Policy.pdf), Tullow PLC (http://www.tullowoil.com/Media/docs/default-source/5_sustainability/tullow_2013_transparency_report.pdf?sfvrsn=4)

[21] J.M. Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility' (2014), Boston University Law Review

Fine Line Between Tax Planning and Inappropriate Aggressive Tax Planning

15. Associated with increased transparency in tax strategies disclosure, the general view is that corporations should be able to abide by the letter of the law when planning their tax strategies. Due to complexity of the tax regimes across jurisdictions, there may be instances where a certain tax strategy is perceived as inappropriately "aggressive" as the courts have relied on the spirit of the law or the intention behind letter of the law.[22]

16. PAs may face serious penalties[23] where an arrangement is considered as inappropriately aggressive by the tax authorities. PAs should not engage in aggressive tax planning solely for the purpose of tax avoidance for example, via creation of artificial transactions.[24] At the end of the day, PAs are viewed to have an ethical responsibility for undertaking the degree of risk that distinguishes tax planning from inappropriate aggressive tax planning[25] on behalf of their clients.

Leadership in Promoting Ethical Behavior – The Role of PAs and their Accountability

17. The TPWG noted academic literature which examined the role of PAs as ethical leaders in their organizations.[26] The perception of PAs as ethical leaders was also shared by stakeholders whom the TPWG consulted during the outreach program in Q1 2020. Practitioners echoed the relevance of Section 200[27] of the Code which specifies an expectation for PAs to encourage and promote an ethics-based culture in their organizations, considering their position and seniority within those organizations.[28]

18. In considering the role of PAs as ethical leaders, the Role and Mindset Task Force also proposed inclusion of new language in Subsection 115, *Professional Behavior*, which specifically requires PAs to behave in a manner that is consistent with the profession's responsibility to act in the public interest.

19. The TPWG will explore whether, and if so how, the Code can be positioned to play a greater role in assisting PAs assess the ethical risks relating to tax planning activities and thereby contribute towards strengthening public trust in PAs.[29]

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[22] Hansrudi Lenz, 'Aggressive Tax Avoidance by Managers of Multinational Companies as a Violation of Their Moral Duty to Obey the Law: A Kantian Rationale' (2018), Journal of Business Ethics

[23] Luxembourg-leaks, Panama Papers, Paradise Papers

[24] Artificial transactions serve little or no purpose other than to produce the advantage of tax avoidance. It involves operating within the letter, but not the spirit, of the law (https://www.gov.uk/guidance/tax-avoidance-an-introduction).

[25] Dr. Veerinderjeet Singh, President Malaysian Institute of Certified Public Accountants (MICPA); Chair - Tax Practice Committee, Malaysian Institute of Accountants (MIA)

[26] Darius Fatemi, John Hasseldine, Peggy Hite, 'The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice' (2018), Journal of Business Ethics

[27] Part 2, *Professional Accountants in Business*, Section 200, *Applying the Conceptual Framework – Professional Accountants in Business*, paragraph 200.5 A3

[28] Agenda Item 5-A IESBA Technology Initiative Phase 1 Final Report (December 2019)

[29] Donna D. Bobek, Amy M. Hageman, Robin R. Radtke, 'The ethical environment of Tax Professionals: Partner and Non-Partner Perceptions and Experiences' (2010), Journal of Business Ethics

Criticality of Professional Development in Assisting the PA Exercise Professional Judgment

20. At the December 2019 IESBA meeting, the TPWG shared with the Board views from stakeholders who have cited the increasingly important role of professional judgment expected of PAs as businesses evolve in a world of complex business structures brought about by the borderless ecosystem of e-commerce.

21. For PAs, in carrying out their obligations under the Code, they will use their training to make an informed judgment when faced with an ethical dilemma. For example, the TPWG heard from some stakeholders [30] that there is a greater need to keep up with changes in tax legislation and interpretations of tax law by the tax authorities and the courts, as well as be sensitive to the perceptions of the public.

22. From stakeholders' feedback,[31] it was noted that it is important for PAs to maintain their competencies via continuous professional development. PAs should not view the training activities as a compliance exercise but rather as a critical need to ensure that they do not breach the fundamental principles of *Professional Competence and Due Care* and *Integrity* when carrying out tax planning activities:

    - The PA must have the appropriate competencies and skills to sufficiently understand and evaluate the business and legal aspects of tax planning. When advising a client, the PA has a duty to serve that client's interests within the applicable national professional standards, laws, or regulations.

    - If the PA knew the PA lacked the expertise to at least ask the right questions, then this demonstrates a lack of fair dealing or *integrity* on the part of the PA.

The Conceptual Framework and Fundamental Principles – Other Factors for Consideration

23. As various stakeholders[32] have shared, the subject of tax planning is fraught with complex questions, from the differences in jurisdictional treatment to compliance with the letter but not the spirit of the law, to the societal expectations in today's economic climate.

24. A global organization[33] indicated that in one of the studies it is undertaking, there is a clear divergence across generations (i.e., baby boomers versus Generation X, Y or Z) with respect to the expected behavior of PAs in performing tax planning activities. A particular tax scheme adopted 20 years ago may not be acceptable at present.[34] Whilst initial observations are inconclusive, the TPWG noted that societal expectation is shifting as more cases come to light where tax practitioners may not have acted in the public interest by promoting the adoption of certain inappropriate tax avoidance schemes.

25. The TPWG also noted the OECD's work on Tax Morale. The OECD has recently re-analyzed the results of a survey of business perceptions on tax certainty to identify the constraints and concerns businesses face in paying in taxes around the world. The study is amongst a few which examine the relevance of tax morale to explain the level of tax compliance versus tax evasion, and its implications on fiscal policy implementation.

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30 AICPA, MICPA/MIA, UK Professional Accountancy Bodies, Accountancy Europe

31 AICPA, MICPA/MIA

32 AICPA, MICPA/MIA, UK Professional Accountancy Bodies, Accountancy Europe

33 OECD

34 https://www.ft.com/content/c44d1baa-1dac-11e9-b126-46fc3ad87c65

26. As discussed at the December 2019 IESBA meeting, the TPWG reflected on whether the IESBA should consider any new category of threat such as "complexity" threat, or address this potential gap in the Code via some other means.

27. Considering the feedback from various stakeholders, it is an area that the TPWG views as extending beyond its Terms of Reference.[35] As noted in the paragraphs above, tax planning activities will continue to be a matter for global consideration as we move towards an e-commerce world where boundaries are not as well-defined. There are key socio-economic and institutional drivers across jurisdictions which affect societal perception of tax avoidance schemes.

28. The Code does not prescribe varying levels of behavior expected of PAs based on social, moral or political contract. In carrying out their duties, there is a need for PAs to take into account these external environment factors whilst assessing their compliance with the FPs of the Code. As mentioned in paragraph five above, the FPs operate in an inter-related manner. Section 120 of the Code specifies that PAs need to identify, evaluate and address the threats to compliance with the fundamental principles by eliminating or reducing them to an acceptable level.

Matter for Consideration

1. IESBA members are asked to share any comments, questions or reactions to the preliminary themes described above.

[35] Para 4 - While a baseline understanding of tax planning methods or approaches is required for this initiative, the Working Group will focus on the ethical behavior of professional accountants and will not comment on the merits of any particular tax positions or the application of any particular tax schemes.

APPENDIX

Agenda Discussion with Academics/Professional Bodies

- How tax practitioners rate the ethical climate in the tax practice arena in X jurisdiction
- Current public sentiment or perceptions regarding tax practitioners' ethical conduct when providing tax planning advice to clients and employers in X jurisdiction
- What is considered to be "acceptable" vs "aggressive" vs "unacceptable" (but not illegal) tax planning
    - Whether there has been or can be delineation of a 'safe' space within which tax practitioners operate when there is ambiguity in interpreting the intent of the law
    - Views as to the relationship between being aggressive and being unethical with regard to tax planning
    - Whether a tax practitioner can be both ethical and aggressive when providing tax advice to clients or employers
- The role of culture in influencing behaviors with respect to tax planning, and what can be done to promote a more ethical mindset among tax practitioners
- Views on a general or conceptual framework of behavior on which tax practitioners should base their tax planning advice
- Specific resources that have been made available to tax practitioners X jurisdiction or that IBFD has issued on the topic of tax planning
- Views on what further actions IESBA should consider in addressing the topic of tax planning (beyond having this project in place)

Agenda Discussion with Global Body

- The organization's views as to what is acceptable tax planning beyond strict compliance with the letter of the law
    - How tax agents should determine what the spirit of the law is when undertaking tax planning for their clients or employers
- The organization's views about the role of ethical considerations in issues of aggressive tax planning
- The extent to which ethical considerations, if any, for tax agents have been factored in the organization's policy discussions
    - If so, what are these considerations?
    - If not, views on what an ethical framework should comprise
- How ethics and ethical standards can be elevated to a more central role in discourse among policy makers and taxpayers
    - How ethical leadership can be fostered on the global stage with regards to tax planning practices
- The role of public sentiment or perceptions in influencing policy-making at national and international levels

- The role of culture in influencing behaviors with respect to tax planning, and what can be done to promote a more ethical mindset among tax agents
- Opportunities for future interactions

Agenda Discussion with Practitioners

- The main elements of the framework your organization use to guide the development of tax planning advice to clients
  - General approach taken when developing such advice, including when there is ambiguity in interpreting tax laws
  - The extent to which this framework is based on the principles and guidance in the IESBA Code
- What your organization considers to be "acceptable" vs "aggressive" vs "unacceptable" (but not illegal) tax planning
  - Whether your organization has delineated the boundaries of a 'safe' space within which tax practitioners operate when there is ambiguity in interpreting the intent of the law
  - Views as to the relationship between being aggressive and being unethical with regard to tax planning
  - Whether a tax practitioner can be both ethical and aggressive when providing tax advice to clients
- Views as to whether the IESBA Code is sufficiently robust and adequate in guiding the behavior and mindset of tax practitioners
  - Views as to areas within the Code that would merit enhancement to better support tax practitioners in navigating the ethical dimension when providing tax planning advice
- Specific resources that have been made available to tax practitioners within the your organization's network to support their tax planning work
- Views on other matters IESBA should consider as it evaluates potential changes to the Code or other actions on the topic of tax planning

Agenda Discussion with Politicians

- The role of public sentiment or perceptions in influencing policymaking at national, regional and international levels
- The role of culture in influencing behaviors with respect to tax planning, and what can be done to promote a more ethical mindset among tax agents
- Views as to what is "acceptable" tax planning beyond strict compliance with the letter of the law
  - How tax agents should determine what the spirit of the law is when undertaking tax planning for their clients or employers
  - Whether a tax agent can be both ethical and aggressive when providing tax advice to clients
- Views about the role of ethical considerations in issues of aggressive tax planning

- How ethics and ethical standards can be elevated to a more central role in discourse among policy makers and taxpayers
    - How ethical leadership can be fostered on the global stage with regards to tax planning practices
- Views as to the need for an ethical framework for all tax agent