



Ernst & Young  
200 George Street  
Sydney NSW 2000 Australia  
GPO Box 2646 Sydney NSW 2001

Tel: +61 2 9248 5555  
Fax: +61 2 9248 5959  
ey.com/au

4 October 2024

Mr Channa Wijesinghe  
Chief Executive Officer  
Accounting Professional & Ethical Standards Board Limited  
Level 11, 99 William Street  
Melbourne VIC 3000

By e-mail: [sub@apesb.org.au](mailto:sub@apesb.org.au)

## **EY Submission**

### **Exposure draft proposed revisions to APES 110 Code of Ethics for Professional Accountants for tax planning and related provisions**

Dear Mr Wijesinghe

EY is pleased to provide feedback on the Accounting Professional & Ethical Standards Board Limited (APESB) exposure draft which proposes revisions to *APES 110 Code of Ethics for Professional Accountants* (APES 110) concerning Tax Planning and Related Services, issued for consultation on 11 July 2024.

The proposed amendments to APES 110 adopt changes made in the final pronouncement of *Revisions to the Code Addressing Tax Planning and Related Services* issued by the International Ethics Standards Board for Accountants (IESBA) in April 2024, with some adjustments to the APES 110 for certain terminology used and a departure from the IESBA code in relation to documentation requirements.

Our comments focus on the requirements for professional accountants in public practice (PAs).

EY provided feedback with recommendations to the APESB in May 2023 in response to the IESBA's proposed amendments to the IESBA code addressing tax planning and related services. EY Global also made a submission directly to IESBA.

We note that various amendments were made in the final IESBA code changes, including some which addressed our feedback and recommendations, disappointingly some of the concerns we raised were not addressed by IESBA. In light of the release of the final IESBA standard we wish to make two suggestions to APESB in the context of the adoption of the standard in Australia which would work to ameliorate some of our concerns.

### *1. Alignment with IESBA*

There is significant benefit from having APES 110 aligned with IESBA pronouncements without variation (other than on terminology as necessary). This is consistent with APESB's approach to the IESBA Code.

**We recommend** that APES 110 section (R)380.26 should be aligned with the IESBA section 380.26 to specify that a PA in public practice **"is encouraged to"** (reflecting the terminology in the IESBA standard) document the items listed rather than that they **"shall document"** (as contained in the current APES draft), so as to achieve consistency with the IESBA code **but also as the PA may not be in a position to document all of the listed items on each piece of advice.**

A "shall" requirement assumes that the advice will always be given in a context where the PA is in a position to judge and document all seven of the bulleted points.

If there is an ongoing relationship with the client, it may be possible to prepare such a range of documentation, as the client is more likely to provide feedback on the advice. However, there is no obligation on the client to respond or share their response to the advice with the PA.

In other engagements, the PA may have no interactions with the client after the delivery of their final advice which completes the engagement. As such, they may not be in a position to address (for instance) the last three bullet points in the provision.

An "encouraged" requirement, supported by appropriate guidance, would allow some flexibility such that particular documentation applies only where interactions are within the scope of the engagement or a broader relationship of the PA with the client. This would ensure these points are not seen as obligating the PA to take steps beyond their engagement and where they may have no capacity to complete the requirement in any case.

In contrast, a "shall" requirement may be difficult to comply with in cases where a particular listed item is not relevant to the services provided and the information is not readily available. We point in particular to the item to document "The identity of the ultimate beneficiaries". This information may not have been provided for the purpose of the services provided if the services did not impact such parties. Further, in many cases it can be difficult to identify the ultimate beneficiaries, for example where entities are not held through transparent entities. Finally, if the client does not accept the advice, but does not reveal this to the PA, the PA would be unable to discharge the obligation to document such disagreement with the client.

### *2. Further Guidance*

We had previously identified a number of issues where we felt the material required further clarification based on the IESBA drafting. To the extent those issues remain within the IESBA Code **we recommend** that APESB develop further detailed guidance for the application, and clarification of the operation of, the revised APES 110.

Items to be addressed in this context are in particular:

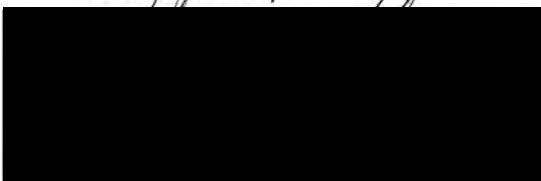
- The credible basis test
- The stand-back test
- Second opinion requirements.

The elements that need further clarification drawn from the underlying issues highlighted in our prior submission are set out in Appendix A.

\* \* \* \* \*

- Should you have any questions in relation to this submission or wish to discuss these matters in further detail, please do not hesitate to contact Craig Jackson ([craig.w.jackson@au.ey.com](mailto:craig.w.jackson@au.ey.com) or 02 9248 4905), Tony Merlo ([tony.merlo@au.ey.com](mailto:tony.merlo@au.ey.com) or 03 8575 6412) or Leigh Walker ([leigh.walker@au.ey.com](mailto:leigh.walker@au.ey.com) or 03 9288 8454).

Yours sincerely



Craig Jackson  
Partner - Taxation

## Appendix A

### Particular areas of additional guidance required for new code items

We recommend that additional detailed guidance is developed by APESB to address issues with complying with the following new code items:

- The credible basis test (section R380.12)
- The stand-back test (sections 380.14 to 380.16)
- Second opinion requirements (section 321).

The following draws from our previous submission on the draft IESBA code proposals with references updated to the proposed APES 110 changes. The issues identified reflect the matters on which we consider supplementary guidance should be provided by APESB.

#### Credible basis test (section R380.12)

We are concerned that the lack of clarity around the level at which this threshold is met may create further uncertainty. While the (*IESBA*) explanatory material suggests this is a standard lower than 'likely to prevail', this is not currently clear from the (draft) standard itself. We suggest this should be made clear. As this is not included in the standard, we would suggest that further guidance should be provided which addresses the operations of this test.

While the guidance in section 380.12.A4 is useful in outlining the sources of information the professional accountant (PA) may use to form this view we consider there should also be guidance on:

1. A list of factors which should not be relied upon by the PA in forming the view. This may include:
  - The potential for the transaction underlying the advice not being reviewed by a revenue authority
  - The potential for the transaction not being detected or identified by a revenue authority
  - The reliance on a transaction being presented in a manner which knowingly disguises the true nature or parties to the transaction
  - The reliance on assumptions concerning knowingly incorrect facts.
2. Guidance on how to balance the factors listed and how to determine if the threshold has been met or failed. Currently this appears to be left to the PA's professional judgement. Given the potential for sanctions, we think guidance to assist with this professional judgement would be useful.

### **Stand-back test (sections 380.14 to 380.16)**

The additional requirement for the PA to consider all the consequences goes beyond what an advisor would typically be expected to do. There is a need for guidance to be provided given it requires the PA to form views over areas in which they may have little or no professional skill.

We consider further guidance should be provided on the weighing of the type of factors listed in section 380.14 given this would normally be a role for management of the client not the PA.

Based on the current wording, there appears to be some ambiguity with regard to the communication of the result of applying the test to the client. Further guidance on this should be provided.

On one construction, it would seem that section R380.15 requires the PA to not recommend (i.e. abstain from providing the advice), or to recommend against, a transaction where there is a credible basis for the transaction but the PA has formed a view that other factors weigh against it. We are concerned that this may be placing the PA in a quasi-management role, which we consider to be inappropriate. Guidance should be provided on how this can be navigated.

We are also concerned with the list of other factors which are required to be considered and the absence of guidance on how to weight such factors, creating further challenges for the stand-back test. Guidance on this should be provided.

An example of this is the requirement to consider the impact on the tax base of a particular jurisdiction. While this may have social impacts on that jurisdiction or impact on multiple jurisdictions, such impact may be negative in some jurisdictions and positive in others. How a PA would do this assessment given the conflicting factors is left unexplained; is the PA required to carry out some form of mathematical assessment, i.e. negative impact in Jurisdiction A is less or more significant than the positive impact in Jurisdiction B; is a positive impact to be discounted or assessed in equal terms? Or is it to be assessed only on the basis of the Jurisdiction in which the PA is located?

Our view is that such assessment should be the role of the client not the PA but the operation of the standard will impose that obligation on the PA, as a result, they should be provided with guidance on how to appropriately assess this.

We are concerned that section 380.14.A2 in an Australian context may put the PA in breach of their obligations under the Tax Practitioners Board (TPB) code of conduct. Accordingly we believe guidance should be provided on this, with confirmation that actions taken under this will not place the PA in breach of their obligations under this code of conduct, or acknowledges that the TPB code of conduct which has legislative force should take precedence.

### *Multiple Jurisdictions*

It is unclear if section 380.16.A1 is intended to form guidance for the stand-back test or to be independent guidance - we believe this should be clarified in additional guidance.

### **Second opinion requirements (section 321)**

We submit that section 321 is appropriate in certain circumstances but does not allow for the range of circumstances in which a second opinion may be sought.

We consider the provisions are valid if the client is 'opinion shopping' in search of a favourable opinion, i.e. the client received a negative opinion from one PA and is looking for a favourable opinion from second to use that opinion to support a transaction the first PA advised was not credible.

However, where the second opinion is being sought for other reasons, we believe guidance should be provided on how the PA is to navigate this requirement. An example is if the client is seeking a true second opinion to support a transaction. That is, where a PA or other advisor has provided advice in relation to a transaction which they consider to be credible, but the client is seeking further comfort in relation to the transaction. In this instance, it may be inappropriate to require the PA to review the original opinion and interact with the initial PA or other advisor, as this runs the risk of the second advisor being tainted by the views of the first advisor rather than forming a truly independent opinion. In doing so, this could create a self-interest threat in it may encourage the second advisor to 'be consistent' so as to not upset the client. It may also create an intimidation threat if the primary advisor is seen as someone of 'greater' standing in the relevant community than the PA providing the second opinion. Guidance should be provided on how to manage these threats.

We are further concerned and believe additional guidance should also be provided on how to manage the requirement that the opinion be based on the same facts. Our concern is that in forming an opinion, a PA is likely to ask for factual information from the client. If they assess that additional facts are required, they should not be precluded from seeking these in order to form their opinion. We agree that there is an issue if they have fewer facts but the guidance seems to limit the ability to base the opinion on broader or greater facts. We believe guidance should be provided on how to manage this.