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7 October 2022

Chief Executive Officer
Accounting Professional and Ethical Standards Board Limited (APESB)
Level 11
99 William Street
Melbourne Victoria 3000
Australia

By email: sub@apesb.org.au

Dear Channa,

Proposed Amendments to Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)

CPA Australia represents the diverse interests of more than 170,000 members working in over a 100 jurisdictions and regions. We make this submission on behalf of our members and in the broader public interest.

In principle, CPA Australia supports adoption of the international Code of Ethics for professional Accountants (and the wording therein), as issued by the International Ethics Standards Board for Accountants (IESBA). However, CPA Australia has concerns about the APESB's proposed amendments to APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the "Code") outlined in the aforementioned Exposure Draft (ED), issued in July.

These concerns include the:

- apparent contradictions between Sections 120 and 600 of the Code that are created by the proposed revisions
- assumption that readers of an auditor's report understand differences between public interest entities and entities that are not, as well as differences between various types of independence requirements for audits
- use of words in the same paragraphs or sections, that appear to be advising members of contradictory actions – e.g., "being confident" and having a "high level of confidence", something being "likely" and something having "a high probability", and members identifying when something "will not" occur and when it "might" (in terms of having the opposite meaning).

Using wording in APES 110 that differs from the wording used in revisions issued by the IESBA, in the international Code, may potentially lead to APES 110 being considered (by IESBA and the International Federation of Accountants (IFAC)) as not being issued in compliance with that international Code. Alternatively, it might be considered that the international Code has not been adopted in Australia. Judgments as to whether the revised wording in APES 110 is as stringent as the wording in the IESBA Code would need to be made to determine that compliance or adoption.

Moreover, recent discussions between the APESB and key stakeholders about the wording of the proposed revisions included in this ED (refer paragraphs in Section 604) shows that consideration is being given in Australia to making changes to the wording issued by the IESBA. Discussion has ensued with respect to making changes that will lead to alignment with another/other jurisdictions. Additionally, wording has been proposed in this ED which does not align with any other jurisdiction—that is, Option 1 for proposed paragraph **AUST R604.4**. It is known that different approaches are being taken by some jurisdictions with respect to the wording of paragraphs in Section 604.

These are critical considerations for the APESB as it assesses feedback on this ED and as it finalises the publication of revisions to APES 110. As such, we encourage the APESB to give due consideration to whether the wording changes issued by the IESBA, and detailed in this ED, are appropriate.

CPA Australia makes the following general observations and comments for consideration by the APESB.

- **Paragraph R600.16 (and R603.5, R604.15, R604.19, R604.24, R605.6, R606.6, R607.6, R608.7, and R610.8).** The wording of these paragraphs does not seem appropriate. It appears to contradict another part of the Code and potentially undermines the Code's foundation.
    - These paragraphs indicate that the provision of a non-assurance service is prohibited on the basis that it "might create a self-review threat" (*emphasis added*). It is not clear why there is a focus on establishing a prohibition on the basis that one specific threat might be created? Logic suggests that if there is a concern that the mere possibility of a threat being created leads to an impairment of independence, then the prohibition should surely be extended across all potential threats. It is not clear why this specific threat has been singled out. It poses the question: should there be a blanket prohibition on the provision of any non-assurance service by auditors of public interest entities (PIEs), if that is the intent of the APESB (or the IESBA) in proposing these revisions to the Code? The APESB might wish to re-consider the wording of these ten paragraphs (refer Recommendations below).
    - The prohibition of a service on the basis that a threat might be created appears to contradict Section 120 *The Conceptual Framework* of the Code, or at least renders that section redundant with respect to these ten paragraphs. Paragraph R 120.3 states:

        > *The Member shall apply the conceptual framework to identify, evaluate and address threats to compliance with the fundamental principles set out in Section 110.*

        In the case of the ten paragraphs listed above, the member is being directed to disregard R120.3. That is, the ten paragraphs are written in a manner which does not require the identification of a threat, but merely recognition of the possibility that a threat might occur. Moreover, the ten paragraphs do not require the member to evaluate or address potential threats. The wording of the ten paragraphs also seems to contradict, or at the least renders redundant, proposed paragraph R400.12 and 600.1.

        If the proposed wording is retained, the APESB should clarify and explain for members this apparent contradiction. It should consider explicitly noting that in complying with these ten paragraphs, that Section 120 and paragraphs R400.12 and 600.1 should be ignored. Alternatively, the wording of these ten paragraphs should be re-considered (refer Recommendations below).
    - As a direct consequence of proposed paragraph R600.16, paragraph 604.12.A2/AUST 604.12.A2 has been drafted to state that the provision of tax advisory and tax planning services "will not create a self-review threat" if certain conditions are met. Again, this does not seem appropriate. Arguably, self-review threats are created in these circumstances. The conditions listed at 604.12.A2/AUST 604.12.A2, (a), (b) and (c) are, arguably, ways in which an identified threat can be addressed to reduce that threat to an acceptable level. That is, in such situations the member is seemingly being asked to apply the conceptual framework (Section 120), as recommended in paragraph R600.17 (b). The APESB may wish to re-consider the wording of proposed paragraph 604.12.A2/AUST 604.12.A2.
    - Paragraph 600.15.A2 – which is a not a requirement – states that:

        > *Where the provision of a non-assurance service to an Audit Client that is a Public Interest Entity creates a self-review threat, that threat cannot be eliminated, and safeguards are not capable of being applied to reduce that threat to an Acceptable Level.*

        This paragraph appears to be the "authority" (explanation) by which the prohibition of certain services is based (see next dot point). However, it is disconnected from the ten paragraphs noted above, by virtue of the fact that it discusses the creation of a threat and not the possibility that a threat "might" be created.

- The "identify, evaluate and address threats" approach is a fundamental foundation of the Code. The application of this approach and the exercise of professional judgement by the member are essential to the effective implementation of the Code. However, in parts of the Code the APESB (and IESBA) has recognised that it does not wish to allow members the ability to exercise their professional judgement and has prohibited certain actions, without reference to the conceptual framework. That is, clear rules have been included in the Code. For example, proposed paragraph **R400.13** is a clear prohibition that does not reference threats but merely states a firm shall not assume management responsibility. Similarly, paragraph **R601.6** does not reference threats, or potential threats, but is a clear prohibition that states that a firm "shall not provide accounting and bookkeeping services". The APESB may wish to consider the use of clear prohibitions for the ten paragraphs noted above.

  Recommendations:

  CPA Australia recommends that the APESB considers using wording in Section 600 that differs from that of the IESBA for these proposed revisions. It should consider:

  - Removing references to the wording "**might create**" and continue to focus on the identification (and subsequent evaluation and addressing) of threats, in line with Section 120 and paragraph **R400.12**. Indeed, consideration might be given to deleting paragraph **R600.16**
  - Including clear prohibitions of certain services, where deemed appropriate, in those paragraphs where the "might create" wording has been used.
  - The impacts that the changes in the first two dot points (above) will have on other paragraphs in the Code.
  - Rewording paragraph **604.12.A2/AUST 604.12.A2** to recognise that self-review threats are likely to be created, but that these threats can be addressed to reduce them to an acceptable level by means of the examples provided. (The APESB will need to consider the responses to the Specific Comment questions (refer Attachment) when re-wording this paragraph and other related paragraphs in Section 604.)

- **Paragraph 600.15.A1**. This paragraph states:

  When the Audit Client is a Public Interest Entity, stakeholders have heightened expectations regarding the Firm's Independence. These heightened expectations are relevant to the reasonable informed party test used to evaluate a self-review threat created by providing a non-assurance service…….

  This paragraph seems to explain why there are different independence requirements for audits of public interest entities, vis-à-vis audits of those entities that are not public interest entities. However, it is arguable that most users/readers of an auditor's reports would not be able to describe the difference between a public interest entity and another entity, and nor would they know the different independence requirements that apply to different audits. While audit oversight bodies and certain regulators would have heightened expectations, it is not clear that this assertion applies more generally.

  Moreover, it is difficult to explain to many users/readers of an auditor's report that—as the IESBA noted when it consulted on these changes to the Code—additional independence requirements do not equate to different levels of independence. That is, the IESBA posits that even if users of an auditor's reports do have heightened expectations and additional independence requirements are imposed, the "level" of independence relevant to the different types of audits remains unchanged.

  The APESB might consider clarifying and explaining these concepts in a guidance note or staff paper, that can be used to assist in educating the broader public on these complex and nuanced issues.

- **Paragraphs 600.20.A1 to paragraph R600.24**. These paragraphs are challenging to understand. The APESB might consider whether these paragraphs can be simplified, or whether simplified guidance can be

developed to assist in implementing these paragraphs. In paragraphs R600.21 (a) (ii) and R600.22 (a) reference is made to firms concluding or determining that threats to independence "will not" be created. As noted earlier, in other proposed new paragraphs reference is made to the possibility that threats "might" (rather than "will") be created. Moreover, in one paragraph—600.20.A2—discussing how a firm might agree a process to communicate with Those Charged with Governance, the third dot point discusses services that "would not" create threats, while the fifth dot point refers to services that "might" create a threat.

It is not clear that these terms are compatible in their use in this section of the Code. That is, on the one hand the APESB is seeking members to be definitive about when threats will not occur, while on the other hand members are being asked to behave in a particular manner when a threat might exist. Arguably, it may be challenging for members to comply with the former in certain circumstances, as the "possibility" that a threat might occur may be ever present.

- It is unfortunate that the IESBA's project on *Tax Planning and Related Services* is currently still underway, and so will be completed after revisions have been made to the independence requirements that relate directly to the provision of tax planning and related services. This timing issue highlights a major concern that CPA Australia has with IESBA's apparent "auditor independence first" approach to its projects and work on the Code. This means that, as its primary focus, the IESBA continues to revise the International Independence Standards (IIS), which then it uses to inform revisions to other sections of the Code, including, for example, requirements in Part 2 applicable to the ethics requirements for Professional Accountants in Business. Not only has this created a significantly increasing number of pages and requirements in the Code over the last five to seven years, but it has also meant that the Code is becoming ever-increasingly difficult to interpret, understand and implement, especially for those professional accountants who are, work in, or provide services to, small- and medium-sized entities. Monitoring compliance with the Code has also become significantly more challenging.

  CPA Australia suggests that the APESB considers these issues and challenges and determines whether adoption of all revisions and changes made by the IESBA are necessary and appropriate in the Australian context. For example, when the aforementioned *Tax Planning and Related Services* revisions are issued by IESBA—and an additional 17 pages would potentially need to be added to the Code (as currently proposed by IESBA)—the APESB should carefully consider whether to proceed to make conforming changes to APES 110, if the requirements already included in APES 220 *Taxation Services* are sufficient to address the matters detailed in those IESBA revisions.

Responses to specific questions asked in the ED are included in the **Attachment** to this letter.

If you have any queries about this submission, please don't hesitate to contact Ms. Melissa Read, Senior Manager, Professional Standards, Professional Standards and Business Support on melissa.read@cpaaustralia.com.au or +61 (0) 481 476 275 or me on gary.pflugrath@cpaaustralia.com.au or +613 9606 9941.

Yours sincerely,

[redacted]

Dr Gary Pflugrath
Executive General Manager
Policy and Advocacy

Attachment

Requests for Specific Comments

The responses below should be read in conjunction with, and should consider, the observations made in the covering letter. However, these responses are restricted to the specific questions being asked. That is, for example, as noted in the covering letter CPA Australia is not supportive of the approach whereby prohibitions on the provision of certain non-assurance services are based only on the possibility that a threat might be created. This impacts the wording of paragraphs in Section 604. However, these impacts are not being considered in our responses below.

Request for Specific Comment 1 – **Do you support APESB's proposed Option 1 to address concerns relating to tax services by amending the threshold to 'almost certain to prevail'? Please provide reasons and justification for your response.**

CPA Australia does not support Option 1.

Feedback received indicates that there is nothing in the Australian taxation environment that would justify the use of a higher threshold than that which is proposed by IESBA. Indeed, in the Australian taxation environment the concept of "reasonably arguable position"—which is a lower threshold than "almost certain to prevail"—is the starting point for all discussions with the ATO. It seems unreasonable to expect auditors/firms to have to meet a higher threshold, or burden of proof, than is required by the Taxation Commissioner and the courts.

Request for Specific Comment 2 – **Do you support APESB's proposed Option 2 to address concerns relating to tax services by including guidance to clarify and establish the "firm is confident is likely to prevail" as a high threshold? Please provide reasons and justification for your response.**

CPA prefers Option 2.

Given the global nature of the taxation services that many firms provide, it will assist adoption and implementation by them if the APESB was to remain consistent with the global standard issued by IESBA. While it is known that several jurisdictions will be deviating from the global standard, one can anticipate that the revisions issued by IESBA may be adopted in the majority of jurisdictions.

However, CPA Australia does not support the inclusion of paragraph **AUST 604.4.A1.1**.

The use of the wording "high level of confidence" conflicts with the wording in the preceding two paragraphs which describes the threshold as being that the firm "is confident". Additionally, suggesting that there is a need to determine that there "is a high probability" that a tax treatment will prevail contradicts paragraph **R 604.4**, where the threshold test is "likely" to prevail. Arguably, the inclusion of **AUST 604.4.A1.1** is tantamount to requiring that a threshold of "almost certain" be used, which CPA Australia does not support (refer response to Specific Comment 1). The introduction of additional, seemingly contradictory and undefined terms will lead to greater uncertainty and confusion.

For the same reasons, CPA Australia also does not support the inclusion of **AUST 604.12.A2.1**.

Request for Specific Comment 3 – **Do you foresee any practical challenges in implementing the documentation requirements in proposed paragraphs AUST R604.4.1 and AUST R604.12.1? Please provide reasons and justification for your response.**

CPA Australia makes the following observations, based on feedback received, as to potential challenges in implementing the documentation requirements in proposed paragraphs **AUST R604.4.1** and **AUST R604.12.1**.

- Many firms will have a range of procedures in place to review risks and oversee decisions (e.g., "two pairs of eyes", sign-off by a legal department). Therefore, rather than requiring that documentation be provided for each individual service provided and decision made, it may be more appropriate to require that firms have in

place processes (which might be subject to review) to ensure that all relevant considerations are made, and that conclusions are reached only after full consideration of all relevant information.

- Moreover, it has been suggested to us that in terms of documentation, the need to determine the likelihood of a view prevailing would often require advice from senior legal advisers (e.g., a KC or an SC). This advice will be protected by legal professional privilege and cannot be disclosed. Furthermore, it would be too costly, time-consuming and onerous to get this advice for every transaction, but—similar to the approach used by the ATO—firms may receive legal advice on the interpretation of a taxation law or provision and then apply that in their work. The advice provided to a client will often then reference the relevant provisions, rulings and case law upon which the advice is based but will not disclose the advice itself.

Request for Specific Comment 4 – **Do you agree that the term 'tax avoidance' is inappropriate to use in proposed paragraphs AUST R604.4 (Option 1) or R604.4 (Option 2)? What alternative terminology could APESB use instead? Please provide reasons and justification for your response.**

CPA Australia does not think it is inappropriate to use the term "tax avoidance" in proposed paragraphs AUST R604.4.

In the Australian context, the term "tax avoidance" is used in a number of situations (e.g., Part IVA of the Income Tax Assessment Act 1936 is referred to as the General Anti-Avoidance Rules (GAAR) and Diverted Profits Tax falls under the Multinational Anti-Avoidance Legislation (MAAL)). Problems are created primarily when discussion of "anti-avoidance" turns to the use of terms such as the "spirit of the law" and the "intent of the law". These are terms that the APESB should avoid using.

Feedback received indicates that, at a practical level, no firm or advisor is likely to ever openly state or document that the significant purpose of a piece of advice, or service provided, is tax avoidance. What they might do is to seek legal opinion of whether the anti-avoidance rules might apply, and whether they have a "reasonably arguable" position.

Other Comment

The Tax Practitioners Board (TPB) regulates the provision of tax services in Australia. Its Code of Conduct imposes requirements on tax agents with respect to, for example, the provision of lawful advice. The APESB might consider the provisions within the TPB Code to assist in informing decisions that need to be made as a consequence of this ED. In doing so, an important question to consider is whether it would it be appropriate for the APESB to impose a higher or alternative standard on professional accountants providing taxation services, than that imposed by the Australian regulator of tax services.