

#614249

18 May 2017

**For attention: Mr T Khambule  
Director General  
Department of Human Settlements**

Email:  
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Dear Sir

**SAICA SUBMISSION ON PUBLICATION OF THE DRAFT PROPERTY PRACTITIONERS BILL,  
2016**

In response to your request for comments on the Draft Property Practitioners Bill, 2016 please find comments prepared by The South African Institute of Chartered Accountants (SAICA).

We thank you for the opportunity to provide comments on this document and we would like to urge the department to engage with us, should you wish to discuss the comments. We would appreciate the opportunity to discuss our comments as we recently dealt with issues arising out of the Sectional Titles Scheme Management Act and Regulations which unfortunately did not have clear requirements.

Yours sincerely,

Juanita Steenekamp  
Project Director: Governance and Non-IFRS Reporting

**THE SAICA COMMENT LETTER IS ORGANISED AS FOLLOWS:**

- Section 1: General discussion
- Section 2: Transitional provisions
- Section 3: Audit requirements
- Section 4: Detail comments relating to individual sections of the Bill

**Section 1: General discussions**

1. The specification of services in terms of the Estate Agency Affairs Act Regulations was expanded in the Government Gazette, dated 17 July 1981, No.R. 1485. The schedule added a definition of a body corporate, developer, Sectional Titles Act, share block company and a unit. It states that collecting or receiving
  - by any person to or on behalf of a developer or a body corporate in terms of the Sectional Titles Act, in respect of a unit or proposed unit;
  - money on behalf of a share block company payable by the holder of a share in such a company or his nominee,
  - money in consideration of a promise or an undertaking by the person receiving such money or his agent or nominee to make available to such person, his agent or nominee, information or details of immovable property or any business undertaking with a view to ringing potential buyers, sellers, lessors, lessees or occupiers thereof into contact with one anotherare identified as services in terms of the Estate Agency Affairs Act Regulations.

The services identified do not seem to be included in the Property Practitioner's Bill. It would seem prudent to make provision for these services as it previously was not regulated by any specific law. If it is the intention of the legislature that the collecting or receiving of money (services typically provided by managing agents) must be regulated by the Property Practitioner's Bill then these services and persons providing these services must be included.

2. A deeming provision included in the Estate Agency Affairs Act Regulations, in the Government Gazette, dated 9 September 1986, No.R.1922 deemed an independent contractor to be an employee of an estate agent. This does not seem to have been addressed.
3. The property practitioner is required to maintain trust accounts in compliance with sections, including sections 53(1); 53(2); 53(3); 53(5); 53(10); 53(11); 53(15); 54(1) – (4).

In addition to these requirements, regulations should be issued that contain more detailed rules that expand on the requirements and prescribe how the trust accounting records should be maintained and administered. This would serve to ensure consistency in practice and also allow for rules to be prescribed that combat known risks relating to trust monies. Furthermore, it would provide more robust criteria against which the auditor could examine the trust accounts.

It is important that any regulations also be issued for public comment, since the provisions could be significant in terms of the application of the Act.

## **Section 2: Transitional provisions**

Section 75(6) in the transitional provisions in the Bill, state that all regulations in terms of the Estate Agency Affairs Act, 1976 remain in full force and effect as if they had been made in terms of or under this Act. We do not believe that this is a practical situation as the regulations were drafted from a specific viewpoint of the extant Act. In some cases the requirements as per the Regulations was not transferred to the Bill and therefore the Regulations cannot be enforced. There can also be instances of conflicting requirements.

We refer to some regulations that we are aware off:

- **Section 1 Specification of services**  
Refer to discussion under point 1 that these services be included in the definition of property practitioner in the Bill
- **Section 1 Independent contractor deemed to be an employee of an estate agent**  
Refer to discussion under point 1 that these services be included in the definition of a property practitioner in the Bill
- **Section 8 Code of Conduct**  
The Code of Conduct is dealt with in section 60 of the Bill. The current Code would need to be reviewed on whether it still meets the requirements of the Bill
- **Section 8 Standard of training of estate agents**  
Section 8 of the extant Act states that the Board shall encourage and promote the improvement of the standard of training of services rendered by estate agents.  
Section 3(f) states that the Bill provide for the education, training and development of property practitioners and candidate Property Practitioners;  
Section 9(g) states that the Board must advise the Minister on education and development of property practitioners  
The Bill does not deal at all with candidate Property Practitioners except for section 63, dealing with supervision. This might need to be addressed to ensure that the Bill allows for regulations in terms of candidate Property Practitioners and their training
- **Section 8C Appeal regulations**  
The Bill in section 30(2) only allows for appeals in relation to a fine that has been imposed. There are no other appeals allowed. In terms of the Section 8C appeal regulations, appeals can be lodged in terms of the following:
  - (i) the decision finding the estate agent charged not guilty of conduct deserving of sanction;
  - (ii) the decision finding the estate agent guilty of conduct deserving of sanction;
  - (iii) the penalty imposed by the committee of inquiry;
  - (iv) the order made in terms of section 30(7)(a) of the Act;
  - (v) the decision not to make an order contemplated in section 30(7)(a) of the Act;
  - (vi) any other aspect of the committee of inquiry's decision or the proceedings thereat, not mentioned above.The transitional provisions need to take account of the changes in when appeals are allowed.

- **Section 16 Issuing of fidelity fund and registration certificates; Section 16 Exemption of first year fidelity fund certificates applicants; Section 16 Late payment penalties**  
Fidelity fund certificates are dealt with in section 46 and there is no allowance for the fund to exempt applicants for the first year. The transitional provisions would need to take account of issues that are no longer allowed in terms of the new Act.
- **Sections 29 and 32 Trust account of an estate agent and investment of trust moneys**  
Trust accounts are dealt with in sections 53 and 54 of the Bill. A transitional provision should be included to ensure the effective date for applying sections 53 and 54. In addition to the above comments, the current regulations relating to sections 29 and 32 of the current Act will have to be amended to refer to the correct sections of this Bill. The regulations will also have to refer to the latest auditor's report/(s) required for purposes of the audit of a property practitioner as contemplated in sections 53 and 54.
- **Section 30 Conduct deserving of sanctions**  
The conduct deserving of sanctions need to be referenced to the Bill.

With regards to the effective date property practitioners would need to be able to phase in the requirements of the Bill. Property practitioners would need a period on which to transition to the Bill, for example the Bill could be made effective for all financial year ends after a certain period, or something similar.

### **Section 3: Audit requirements**

SAICA has specific comments on the audit requirements in the Bill. The following deal with the requirement to cause an audit to be performed:

- S53(5)(b) – This section in essence requires that the property practitioner's trust accounts and business accounts be audited by the same auditor as contemplated in section 53(1)(b), within 6 month of the end of his/ her/ its financial year.
- S54(4)(b) – This section in essence requires the property practitioner's trust accounting records and business accounting records to be audited by an auditor within six months of its financial year end.

The term 'audit' has a very specific meaning in terms of the Auditing Profession Act and therefore the Estate Agency Affairs Board (EAAB) should determine what their needs are and for what purpose an 'audit' is required.

With reference to the property practitioner's business, the business accounting records as such cannot be the subject matter of an audit as contemplated in section 54(4), since "*fairly to reflect and explain the state of affairs*" does not represent suitable criteria for purposes of an audit; i.e. it does not meet the relevant precondition for performing an audit in accordance with the auditing pronouncement that have been adopted for use by registered auditors in South Africa.

In business in general, and taking cognisance of the EAAB's current auditing arrangements relating to estate agents, business accounting records are used to prepare a business's financial statements relating to a particular financial year/ period. Such financial statements are prepared in accordance with a financial reporting framework which may comprise recognised financial reporting standards (such as International Financial Reporting Standards) or a basis of

accounting as determined by the business itself (i.e. an entity-specific basis of accounting). If the financial reporting framework is acceptable, the auditor would be able to perform an audit of those financial statements in accordance with International Standards on Auditing. Therefore, the Act should require the property practitioner to prepare financial statements on an annual basis and cause those financial statements to be audited.

If the intention of the legislator is rather focused on the business accounting records in the context of the risks associated with trust monies not being deposited and utilised as such or being inappropriately recorded as business funds (and the risks of fraud associated with this), then consideration should be given to include specific rules by way of regulation dealing with the interaction between a property practitioner's business and trust accounting records and the appropriate flow and control of funds between "trust" and "business". When the auditor then performs the audit of the trust accounting records, it will ensure that appropriate attention is also given to the examination of the business accounting records.

In SAICA's view it is necessary that the requirements/ rules in relation to the maintenance and administration of trust accounting records by a property practitioner, including the link to the property practitioner's business accounting records are adequately described, as discussed above.

Once there is certainty that the auditor's examination of the trust accounts are not done in isolation, but includes reference to the business accounting records, there may be an opportunity for the legislator to reconsider whether there is a need for an audit of the financial statements of all property practitioners. The audit requirements in this regard could then rather be driven by other legislation that is applicable to the form of entity of the property practitioner's business (e.g. the Companies Act) and specific public interest considerations that may be prescribed in regulations to the Property Practitioners Act.

The audit requirements in relation to property practitioners' trust accounts also need to be refined further. The auditor's report that is currently being used in relation to the audit of estate agents' trust accounts in terms of the extant legislation falls outside the scope of the international auditing and assurance standards that have been adopted for use in South Africa. There is an opportunity now to correct this.

The requirement should be along the following lines: *Every property practitioner must cause his, her or its trust accounting records as contemplated in [include sections] to be audited by an auditor as prescribed, to enable the auditor to express an opinion/ conclusion on whether the trust accounts of the property practitioner for the financial year/ period under consideration were maintained, in all material respects, in compliance with sections 53(1)(a), 53(1)(b), 53(1)(c), 53(1)(d), 53(2), 53(3), 53(5)(a), 53(5)(b), 53(5)(c), 53(10), 53(11), 53(15), 54(1), 54(2) and 54(4) of the Property Practitioners Act and the related requirements/ rules prescribed by regulation under the Property Practitioners Act.*

<b>Section 4: Detail comments relating to individual sections of the Bill</b>	<b>Issue</b>	<b>Suggested change</b>
<p><b>Section 1 Definitions</b> Definition of auditor “auditor” means a person registered in terms of section 37 or 38 of the Auditing Profession Act, 2005</p>	<p>The definition of auditor refers to “person”, but it is an individual and firm that register with the IRBA. The definition should therefore be aligned to the definition of ‘registered auditor’ in the Auditing Profession Act, namely: an individual or firm registered as an auditor with the Regulatory Board.</p>	<p><u>“registered auditor” means an individual or firm registered as an auditor in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005)”</u></p>
<p>No definition of immovable property</p>	<p>Immovable property is not defined in the Bill. The extant Act includes a definition of immovable property. The question arises on whether shares would constitute immovable property.</p> <p>South African Property Practice and the Law (Delpont), published by JUTA states that immovable property according to the definition of business undertaking includes land, premises, and buildings. It also amongst others extend to any form of commercial operation according to the above extract. Certain exclusions also exist for example <i>any interest in immovable property, other than a right or interest registered or capable of being registered under the Mining Titles Registration Act, 1967 (Act No. 16 of 1967);</i></p>	<p>SAICA requests that immovable property is defined.</p>
<p><b>Section 1 Definitions</b> Definition of Property practitioner</p>	<p>The definition of property practitioner is very long and onerous. It is unclear on whether a managing agent is included in the definition, “It includes any person who for remuneration manages a property on behalf of another” which could refer to a managing agent.</p> <p>The Community Scheme Ombud Services Act defines a managing agent:</p>	<p>The Bill should clarify whether it is applicable to managing agents as it is unclear.</p>

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<b>Section 4: Detail comments relating to individual sections of the Bill</b>	<b>Issue</b>	<b>Suggested change</b>
	<p>“<b>managing agent</b>” means any person who provides management services to a community scheme for reward”</p> <p>The Sectional Titles Schemes Management Regulations, 2016 defines a managing agent:</p> <p>“<b>managing agent</b>” means any person who provides scheme management services to a body corporate for reward, whether monetary or otherwise, including any person who is employed to render such services</p> <p>In the definition of property practitioner “person” and “business undertaking” is not defined. Therefore the definition of a property practitioner would appear to refer to any natural person or juristic person conducting his /her / its business in any form of entity, either alone or in a partnership. It can also include a trust in terms of sub-section (d) of the definition.</p>	<p>A clarification regarding the forms of practice for a property practitioner would contribute to the understanding and interpretation of the requirements applicable to property practitioners. Certain forms of practice, for example a company, may be subject to requirements in addition to that of the Property Practitioners Act and alignment in interpretation and application would be required.</p>
<p>No definition of “Business undertaking” as referred to in Section 1, definition of property practitioner</p>	<p>The Bill does not contain a definition of a business undertaking. It is therefore unclear on whether a property practitioner could include a business broker, someone who assists in either selling a business together with a property or the selling of shares of an entity that includes the property that the entity is utilising.</p> <p>The South African Property Practice and the Law (Delpont), published by JUTA states the following with regards to business undertaking and the extant Act: <i>“The sale or purchase of business undertakings i.e. the activity of a business broker is also brought within the definition of an estate agent and (although the</i></p>	<p>SAICA would request that a definition of business undertaking is included with reference to the issues, or that the reference to a business undertaking is removed.</p>

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	<p><i>term business undertaking is nowhere defined in the act) it is submitted that the term is wide enough to include any form of commercial operation which has its object...the making of profit for the owner or operator. Again, many sales of business undertakings are effected indirectly by way of sale of shares or the member's interests in the company or close corporation owning same, in which event the definition will not apply unless the immovable property on which the business is conducted is included in the sale and the immovable property is a major asset of the company or close corporation. (Reference is also made by Delport to case law on the meaning of "business undertaking": Moodley v Estate Agents Board)."</i></p> <p>This interpretation includes various transactions and the activities of business brokers / advisors which might have unintended consequences of including persons as property practitioners unintentionally.</p>	
<p><b>Section 53(1)</b> “(1) Every property practitioner- (a) must open and keep one or more separate trust accounts, which must contain a reference to this section, with a bank registered in terms of the Banks Act, 1990, (Act No. 94 of 1990); (b) must immediately after opening a trust account contemplated in paragraph (a) appoint an auditor as prescribed; (c) must immediately after opening a</p>	<p>These sections do not contain requirements relating to the interest received on money in trust or invested in a separate savings or other interest-bearing account. The extant Act requires interest to be paid over to the Fidelity Fund. We recommend that a similar requirement be included in the Bill or alternatively in subsequent regulation.</p> <p>Section 53(1)(b) refers to an auditor being appointed as prescribed. There is no prescribed method to appoint an auditor in the extant Act or the Bill.</p>	<p>SAICA recommends that a similar requirement be included in the Bill to pay interest to the Fidelity Fund.</p> <p>SAICA recommends that this section be amended to identify how the auditor must be appointed.</p>

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trust account as contemplated in paragraph (a) and appointing an auditor as contemplated in paragraph (b), provide the Authority as prescribed with all information in respect of such account or accounts and such auditor; and (d) or his, her or its responsible or designated employee, as the case may be, must immediately deposit all <i>trust money</i> held or received by or on behalf of that property practitioner in the relevant trust account.”	There is no definition of “trust money”	SAICA recommends that a definition of “trust money” is included.
<b>Section 53(2)(b)</b> “(b) property practitioner must as prescribed provide the Authority with all information in respect of such account”	If the current regulations is not replaced then this section cannot be implemented.	Regulations should prescribe the manner in which information must be submitted
<b>Section 53(3)</b> “A property practitioner must retain all trust money deposited in terms of subsection (1) or invested in terms of subsection (2), until he, she or it – (a) Is <i>lawfully entitled</i> to such money, or (b) Is <i>lawfully instructed</i> in writing to make payment therefrom to any person”	Definition of “lawfully entitled” and “lawfully instructed” is not included.	SAICA recommends that definitions of “lawfully entitled” and “lawfully instructed” is included and/or should be further described in regulation.
<b>Section 53(4)</b> “(4) Any bank which manages trust	If the current regulations is not replaced then this section cannot be implemented	Regulations should prescribe the manner in which information must be submitted

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accounts for the purposes of this Act must from time to time as prescribed submit a certificate to the Authority declaring the interest in that account”		
<p><b>Section 53(5)</b> “(5) Every property practitioner must – (a) keep <i>separate accounting records</i> of all monies deposited by him, her or it in his, her or its trust account and of all monies invested by him, her or it in any savings or other interest-bearing account contemplated in subsection (2); (b) balance his, her or its <i>books and records</i> relating to any account contemplated in paragraph (a) at intervals of not more than one month, and cause them as well as all his, her or its <i>business accounts</i> or any other account into which moneys are deposited in connection with any property transaction to be audited by the same auditor contemplated in subsection (1)(b), within six months after the final date of the financial year of the property practitioner concerned; and (c) <i>administer the accounts</i> referred to in subsections (1) and (2) in the prescribed manner”</p>	<p>Section 53(5) deals with the requirements to keep and maintain accounting records. Although mention is made of business accounts in sub-section (b) it only refers to having the business accounts audited and not in respect of keeping and maintaining business accounts. Section 54(4) is interpreted as referring to both the property practitioner’s trust accounting records and business accounting records.</p> <p>Furthermore, “accounting records” is not defined in the context of both the property practitioner’s trust accounts and business accounts, which could lead to uncertainty with respect to the interpretation and application of the requirements relating to “separate accounting records”, “books and records” and “business accounts”.</p>	<p>SAICA would suggest that “accounting records” also be generally defined in relation to both a property practitioner’s trust and business. For example: “<b>accounting records</b>” means information in written or electronic form concerning the property practitioner’s trust accounts as required in terms of this Act, including but not limited to records of all transactions involving trust monies, general and subsidiary ledgers and other documents and books used in the administration of the trust accounts, and, in relation to the property practitioner’s business as such, information in written or electronic form concerning the financial affairs of the business as required in terms of this Act, as well as in terms of any other Act that may be applicable to the form of entity of the property practitioner’s business, including but not limited to, records of assets, liabilities, income and expenses, general and subsidiary ledgers and other documents and books used in the preparation of financial statements of the business.</p> <p>Regulations should prescribe the manner in which the trust accounts should be administered.</p>

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<b>Section 4: Detail comments relating to individual sections of the Bill</b>	<b>Issue</b>	<b>Suggested change</b>
<p><b>Section 54</b> contains further requirements with regard to keeping <i>accounting records</i> and other documents.</p>		
<p><b>Section 53(6)</b> “(6) A property practitioner must forthwith after receipt of an <i>audit report</i> contemplated in subsection 5(b) submit that report to the Authority ...”</p> <p><b>Section 53(7)</b> “(7) Despite subsection (5), the Authority may on good cause at any time order a property practitioner by notice in writing to submit to the Authority within a period stated in such notice, but not less than 30 days, an <i>audited statement</i> prepared by an auditor fully setting out the state of affairs in respect of the matters referred to in subsection (5)(a).”</p>	<p>Sections 53(6) and 53(7) refers to the <i>audit report</i> and the <i>audited statement</i>. This seems to indicate that there are two different documents, a report and a statement. The acceptable term in accordance with International Standards on Auditing is “auditor’s report”</p>	<p>The reference should be corrected to refer to the “auditor’s report”.</p>
<p><b>Section 53(8)</b> “(8) The Minister may prescribe circumstances under which a property practitioner may be exempted from keeping a trust account.”</p>	<p>This section allows for a Property Practitioner to be exempted from keeping trust accounts under certain circumstances, as prescribed by the Minister. We welcome this requirement, since it caters for certain practical circumstances which may occur in practice. However, the following question arises, that requires consideration:</p> <ul style="list-style-type: none"> <li>• If a property practitioner is exempted from keeping trust accounts there would also not be a</li> </ul>	<p>This requirement should be clarified and if a property practitioner is exempted from keeping a trust account then the appointment of the auditor needs to be waived. The decision needs to be taken if this property practitioner still would require there business accounts (financial statements) to be audited.</p>

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	<p>need to appoint an auditor to audit such accounts.</p> <ul style="list-style-type: none"> <li>• However, will there still be a requirement to appoint an auditor to audit the property practitioner's business accounts?</li> </ul>	
<p><b>Section 54(4)</b> “In addition to the duties contemplated in section 54, a property practitioner must in respect of his, her or its activities – “(a) keep in one of the official languages at an address in the Republic the accounting records that are necessary <i>fairly to reflect and explain the state of affairs</i> (i) of all monies received or expended by him, her or it, including monies deposited to a trust account referred to in section 53(1) or invested in a savings or other interest -bearing account referred to in section 53(2); (ii) of all his, her or its assets and liabilities; and (iii) of all his, her or its financial transactions and the financial position of his, her or its business; and ...”</p>	<p>Subsection (a)(ii), read together with the introduction sentence, is not clear in terms of the assets and liabilities that are referred to. It should be clarified that the accounting records refer to the “business of being a property practitioner” as it could in the case of a sole practitioner be interpreted as including the person’s own/ personal assets and liabilities.</p>	<p>Subsection (ii) should be clarified in terms of the requirement of the legislator, on whether the “assets and liabilities” referred to are only related to the property practitioner’s business <i>as such</i>. For example, the phrase “as such” could be added to the end of the introduction sentence of section 54(4) as follows: “In addition to the duties contemplated in section 54, a property practitioner must in respect of his, her or its activities <u>as such</u> – ”</p>