

Ref# 689253/wb

14 September 2018

For attention: Mr Simon Manyama
National Treasury

Submitted electronically: CommentDraftLegislation@treasury.gov.za

Dear Mr Manyama

Draft Financial Matters Amendment Bill

The South African Institute of Chartered Accountants (SAICA) is the home of chartered accountants in South Africa – we currently have over 44,000 members from various constituencies, including members in public practice ($\pm 30\%$), members in business ($\pm 50\%$), in the public sector ($\pm 5\%$), education ($\pm 2\%$) and other members ($\pm 13\%$). In meeting our objectives, our long-term professional interests are always in line with the public interest and responsible leadership. SAICA is currently the only professional accountancy organisation that has been accredited by the Audit Regulator in South Africa, the Independent Regulatory Board for Auditors (IRBA).

We welcome the opportunity to comment on the draft Financial Matters Amendment Bill (draft Bill). Our comments in the annexure is confined to the proposed amendments to the Auditing Profession Act, No.26 of 2005 (APA) on pages 8 to 18 of the draft Bill.

Please do not hesitate to contact us should you wish to discuss any of our comments. You are welcome to contact Willie Botha (willieb@saica.co.za) or Thinus Peyper (thinusp@saica.co.za) or Juanita Steenekamp (juanitas@saica.co.za).

Yours sincerely

Willie Botha
Senior Executive – Assurance and Practice

ANNEXURE: DETAILED COMMENTS

SAICA'S APPROACH TO RESPOND

SAICA's approach to informing its members of the proposed amendments, and to gather information to inform our comment letter can be summarised as follows:

- SAICA communicated the Draft Financial Matters Amendment Bill to its members through its Standards and Legislation Newsletter.
- SAICA established a working group consisting of members of SAICA's Assurance Guidance Committee, Assurance Leaders Forum, Legal and Compliance Committee as well as SAICA's Legal division to discuss the amendments and provide any input they may have on the proposed amendments to the APA.

Our overall comments and comments on specific themes are described under sections A and B respectively.

A. OVERALL COMMENTS

It is not entirely clear from the draft Bill what the objective and purpose of the amendments are in all instances and what specific problems or challenges the Bill is intended to address. Although the accompanying Memorandum provides some general information in this regard, there are various instances where respondents' ability to provide comprehensive comments may be limited, since the proposed changes refer to or imply, inter alia, criteria to be set, processes to be determined and matters to be referred to if deemed appropriate.

We do not question the IRBA's legitimate right and duty to review its processes and make revisions to improve efficiency and effectiveness as a responsible regulator. The proposed amendments may very well have positive outcomes in the context of the issues or challenges that it addresses, but because the draft Bill does not set out a complete picture, some assumptions have to be made in commenting on the proposed changes to specific sections.

As far as we could ascertain, stakeholders have only been made aware that the APA will be amended, together with some general information and communications regarding the types of amendments that were being considered, but have not been formally consulted on the extent of the proposed amendments prior to the proposed amendments being included in the draft Bill and released for public comment. The short comment period is also not conducive to duly considering the proposed amendments and the impact they may have on the profession and other relevant stakeholders. The SAICA working group raised a specific concern in that the draft Bill was not communicated by the IRBA to all registered auditors.

In the absence of a fuller understanding of the specific problems or challenges which the draft Bill is intended to address and their impact, some of the proposed amendments could even be seen to diminish or dilute the functions of the Regulatory Board (the board) and introduce a risk that the outcome of some of the processes could be open for challenge.

In our view, the Bill will have to include transitional provisions to indicate how cases and hearings that are in progress will be dealt with when the Bill is enacted.

B. COMMENTS ON SPECIFIC THEMES

Reference to a policy framework

Amendment of section 4 of the APA

Section 4(2A) refers to a 'policy framework'. It should be clarified what the intention of the policy framework is and what information it will contain. The policy framework should be publicly available and go through a public comment process in the same manner as the IRBA Disciplinary Rules and any amendments thereto.

In our comments that follow we indicate that clarity is required in respect of eligibility criteria of the members of the Regulatory Board, investigation committee, disciplinary committee and panels. We suggest that the policy framework should inter-alia:

- Prescribe the criteria, necessary skills, expertise and experience in more detail.
- Include detailed criteria of when a member's term of office may be terminated.
- Include detailed procedures regarding the process to follow during hearings and after hearings.
- Describe the type of sanction that may be imposed for certain offences.
- Describe when it would be appropriate to publish a finding and a sanction imposed.

Members of the Regulatory Board

Amendment of section 11 of the APA

As stated in section 11(2), we agree that it is important that the members of the Regulatory Board should, collectively, have appropriate knowledge and experience in auditing, but suggest that criteria be developed to indicate the extent of knowledge and experience required. We would be concerned with how the Regulatory Board will effectively function without such knowledge and experience.

We further agree that members of the board should be independent, as required in section 11(4), but do not necessarily agree that the board members may not include registered auditors. SAICA analysed how boards of international regulators are constituted and determined that all the members of these boards are in most instances independent of the profession. Independent of the profession does not necessarily mean that all the members are non-practitioners, for example some members have not been responsible and accountable (i.e. performed) an audit for a certain number of years. In a smaller number of instances the majority of the board members were non-practitioners.

An option that was suggested during our working group meeting is to have an independent board that are multi-stakeholder representative so that no single stakeholder have undue influence and that eligibility criteria should be developed for members who are from the profession. For example, registered auditors who are retired or have not performed an audit for a specified period could be seen as independent of the profession and be eligible for appointment to the board.

We believe that section 11(8) relating to independence requirements of the board members are important and required, but suggest that subsection (c) be clarified, i.e. what is meant by 'conduct business with an RA'? Most members of the board will in some way conduct business with a registered auditor, for example when the organisation they represent are being audited.

Continuing to hold office

Amendment of section 12 of the APA

We agree with the possible extension to hold office for a further three months' period after serving for a three year term. Should the successor not be appointed in the three months, we are unsure about how this will then be dealt with.

Meetings of the Regulatory Board

Amendment of section 20 of the APA

Section 20(5) is amended to state that the committees of the Regulatory Board must meet as and when it is required. In our view it is good governance to prescribe a minimum number of times that the board and its statutory committees should meet, in addition to when the board determines it necessary to have meetings.

Investigating and disciplinary committees and the panel approach consisting of some members of the disciplinary committee

Amendment of section 24 of the APA

Section 24(1) states that individuals of the investigating committee should have 'requisite' legal expertise. We believe that the original wording 'significant' legal expertise should be retained. We also suggest that the investigating committee should have auditing expertise as the nature of investigations are often technical from an auditing point of view, including the ability to appropriately evaluate and challenge potentially complex technical matters.

Extant section 24(2) contained appropriate requirements regarding the composition of the disciplinary committee. The suggestion is that this section be reinstated in order not to diminish or dilute the capacity and capabilities of the committee.

As stated in section 24(2) and (3) we agree with the appointment of a disciplinary committee that consists of as many members as the board determines necessary. This will enable the IRBA to deal with hearings more efficiently and effectively through the appointment of a panel consisting of members from the greater pool of disciplinary committee members (i.e. various panels can simultaneously deal with different disciplinary cases). However, a matter that is unclear is how "The Regulatory Board must appoint ..."; i.e. who at the board will be responsible for these appointments and what is the process involved, for example the nomination of individuals to be appointed to the disciplinary committee.

Sections 24(1), (3) and (4), should also describe the eligibility criteria when an individual will have the necessary skills, knowledge and expertise for the respective committees and panel. It should be clarified whether members of the disciplinary committee may be registered auditors (also refer to our comment above, regarding members of the investigating committee).

Section 24(9), in particular subsection (b)(iii), which states that the Board may terminate the appointment of a member of the disciplinary committee if they "acted in a manner that is inconsistent with this Act" is a very broad provision. Again, certainty and transparency would be enhanced if criteria of when the board may terminate the appointment of a member of the disciplinary committee are developed.

Reportable irregularities

Amendment of section 45 of the APA

We agree with the amendment made to Section 45 as it aligns with the IRBA Guide for Registered Auditors, Reportable Irregularities (RI Guide). It is appropriate for the auditor to complete the reporting process before resigning or being removed as auditor of an entity.

Since the effective date of the APA and the implementation of the RI Guide, there have been discussions at the Committee for Auditing Standards (CFAS), a standing committee of the IRBA, in respect of some difficulties in implementing the reportable irregularity requirements (for example, linked to the matter of liability). The members of CFAS have previously submitted proposed amendments to the Secretariat that could assist with implementation. It is suggested that these proposed amendments be considered while the APA is being amended and that the legislator should consult with the IRBA in this regard.

Investigations – Referring matters to a professional body

Amendment of section 48 of the APA

In terms of the amendment in section 48(2A)(a), the Regulatory Board may, if it deems it appropriate, refer a matter brought against a registered auditor to a professional body accredited in terms of section 32(2) for investigation.

SAICA is currently the only professional body that is accredited by the IRBA (although we recognise that there may be other accredited professional bodies in future, also taking into account ongoing developments regarding the comprehensive regulation of the accountancy profession). We have the following concerns with this proposed amendment, also in the context that the draft Bill is not sufficiently clear in this regard and one therefore has to make certain assumptions:

- We don't believe that SAICA has a mandate over registered auditors or the work that they perform as Registered Auditors. In more general terms, we would like to understand whether it is possible for a regulator to effectively outsource certain of its legislated functions and how that would impact its mandate.
- The scope of the matters that are proposed to be referred to an accredited professional body should be specified – it is currently open to what the Regulatory Board deems appropriate. An important consideration would also have to be what the professional body is able to practically accommodate. As mentioned, above, a concern was raised that a statutory body such as the IRBA may not be able to delegate its obligations to discipline registered auditors to a voluntary membership body such as SAICA, which does not have the same powers of investigation as the IRBA does. For example, SAICA is only able to obtain information from a complainant and from members and associates.
- While SAICA may request documentation and attendance at a hearing from its members, SAICA does not have powers of subpoena as the IRBA does and this will be a challenge in terms of investigating and finding evidence to successfully prosecute complex matters.
- It has to be considered whether the professional body has appropriate and sufficient staff to perform this function.
- The additional costs involved to perform this function is of concern to SAICA and the question arises on how will SAICA be responsible to cover these costs, for example, the additional staff and disciplinary committee meetings that will be required. Funding for potential applications for judicial review through the courts also need to be planned for,

as one complex application for judicial review may involve a substantial cost to defend and even where a legal costs order is granted, the successful party is not able to recover 100% of the costs spent in defending a review.

- Professional bodies are autonomous and independent bodies, and the IRBA's intention to determine the processes and procedure of investigations undertaken by these bodies could have the effect of fettering their autonomy and independence.
- SAICA as an independent body can also come to the conclusion not to investigate a particular matter. It should be clarified whether the Regulatory Board may only refer a matter to an accredited professional body to investigate or does it include that the professional body concerned will perform a disciplinary process. For example, if SAICA will only perform the investigation, the draft Bill does not describe how the process will work after the investigation is completed.
- Should the Bill require the professional body to sanction the registered auditor, the sanction will have to be in line with the SAICA requirements and again we are concerned with regards to SAICA's powers to sanction members who are registered auditors in their capacity as Registered Auditors.
- It is uncertain whether and, if so, what the link is between the requirement for an accredited professional body to perform the investigation and section 49(1) which states that the Regulatory Board must charge a registered auditor with improper conduct if the investigating committee recommends that sufficient grounds exist for a charge to be preferred against such a registered auditor.

Investigations – Law relating to privilege

Amendment of section 48 of the APA

It is not clear why extant section 50(10)(d) has been moved from the disciplinary process to section 48(5)(g) relating to the investigating committee investigating a charge of improper conduct. The legislator should determine the effect or impact of this change on the disciplinary process.

Disciplinary process – Convening a hearing

Amendment of section 50 of the APA

In section 50(1) it is not clear for which matters the board may decide to consider a case without constituting a disciplinary hearing; i.e. when the board may decide to deal with a matter directly without following a formal disciplinary process. The criteria or considerations that have to be taken into account to make this decision should be described. It is further not clear if it will be the full board or a sub-committee of the board that will consider such cases.

Again, without certainty around the intended purpose of the amendments in section 50(1) it is difficult to form a fully informed view. In particular, it is not possible to assess the implications of introducing this discretion for the Regulatory Board to decide upfront to either deal with a case directly, without a disciplinary hearing, or to proceed to appoint a panel to conduct a disciplinary hearing. Consider the following:

- One could assume that the process being proposed in section 50(1)(a) is intended to address the current Consent Order process where a registered auditor is presented with a charge sheet, has an opportunity to plead guilty and have a sanction which has been pre-determined imposed without the necessity of leading evidence by either party, or the necessity for a disciplinary hearing. We support this concept, but the process must be much more clearly set out, if this is the intention of section 50(1)(a).

- If this process is not directed at the Consent Order process, other issues could be raised, for example, whether and, if so, how such power of the Regulatory Board links to the principles of natural justice including that both parties have the opportunity to be heard; the common law principles, the Constitution and the Promotion of Administrative Justice Act, 2002 (“PAJA”). Could such process that empowers the Regulatory Board to decide on a matter of alleged improper conduct without affording the accused the opportunity to make representations or providing an avenue for the accused to refer the board’s decision to a formal disciplinary hearing within the IRBA structure, be viewed as diminishing the right to procedural fairness?
- It would be important to understand to whom the various responsibilities in this regard will be delegated. For example, whether this function will be delegated to an official of the IRBA or an oversight committee, and its composition.
- Lastly, the SAICA working group raised a question regarding whether a registered auditor would have rights regarding being heard, providing representations and addressing the board in mitigation of sentence (and other related rights), when a case is decided without a disciplinary hearing.

Proceedings after disciplinary process

Amendment of section 51 and 51A of the APA

We have noted that the sanctions in sections 51(3)(a) and 51A(3)(a) differ in that the Regulatory Board cannot cancel the registration of a registered auditor or disqualify a registered auditor on a temporary or permanent basis. The reasoning for the proposed changes are not clear, although we deduce that it might be linked to the mandate of cases to be dealt with by either the Regulatory Board or a panel in accordance with section 50(1)(a) or (b), respectively (also refer to our comments under the heading “Disciplinary process – Convening a hearing”, above) .

Some additional matters that should be considered:

- Clarifying and setting out criteria for when a specific sanction may be imposed.
- It is not clear what is meant by “non-monetary sanction”, we suggest that the term be defined or further described (section 51(3)(a)(iii) and section 51A(3)(a)(iii)).
- Setting out criteria for when and in which manner the finding and sanction are published (section 51(5) and section 51A(5)).