SUBMISSION: DRAFT NOTICE ISSUED IN TERMS OF SECTION 255 OF THE TAX ADMINISTRATION ACT

1. Please find below SAICA’s response to the request for comments on the draft electronic communications rules public notice issued in terms of section 255 of the Tax Administration Act 28 of 2011 (“TAA”).

Comments

Purpose of section 255

2. Section 255 of the TAA seeks to regulate electronic communications between SARS and other persons.

3. It is acknowledged that section 255(1)(c) does provide for procedures for electronic record retention by SARS but the current proposed rules go much further than mere retention and covers all electronic records and data and how they are dealt with, not just electronic communications.

4. The scope of the newly inserted rules 8(2) and 9(2)-(6) seeks to go beyond just the mere regulating of electronic communications, but inserting security protocols between SARS officials and agents, including grounds for secrecy classifying of data into these regulations.

5. Submission: In our view the proposed amendments go beyond what section 255 was intended for and should more appropriately be dealt with under the SARS Act or the TAA confidentiality provisions. We therefore have reservations as to the appropriateness of the amendments. It also seems inappropriate that information classifying protocols are inserted by regulation rather than by statute.
Access to MISS

6. The Minimum Information Security Standards (MISS) are now specifically incorporated into a regulation which regulates public matters.

7. However, notwithstanding our best efforts and that of various universities contacted, we have not been able to secure a copy of this notice but only the regulations in terms of which they were issued.

8. It is therefore worrisome that these standards were not made publicly available if they are now to regulate certain public relations.

9. **Submission:** The MISS should be made available to the public and be issued together with the final notice should they be incorporated into the document.

Scope of MISS

10. The following extract from a research paper on MISS states:

1Minimum Information Security Standards of 1996 (MISS)
MISS is an official government policy document (approved by Cabinet) dealing with information security. According to MISS, the security standards set out must be maintained by all government institutions that handle sensitive and/or classified material as ‘this will ensure that the national interests of the Republic are protected’ (Preface). MISS provides motivation for the application of its set of security standards by arguing that, ‘the mere fact that information is exempted from disclosure (from PAIA in this case), does not provide it with sufficient protection’ (Introduction, p. 1). It then proceeds to list four categories of classification (restricted, confidential, secret and top secret) that must inform the handling of ‘sensitive’ information. This raises the issue of serious conflict with the access intent of PAIA since the continued application of MISS to dealing with ‘sensitive’ information (much like PAIA) effectively pre-empts, through a non-transparent and internalised process of decision-making, access rights that are clearly set out under PAIA. In other words, it creates a ‘double jeopardy’ scenario in relation to ‘sensitive’ information, particularly as applied to accessing information dealing with human rights violations. Further, it is unclear to what extent MISS policies and the work of the recently formed inter-departmental committee set up to deal with issues of classification/declassification, will coincide or contradict each other. Without such clarity, decisions around classification and declassification will continue to remain in the hands of the National Intelligence Agency (NIA). This is all the more worrying for those seeking access to ‘sensitive’ documents dealing with human rights violations, given that the National Intelligence Agency (NIA) has just been granted a five-year exemption from the disclosure of information requirements of PAIA (Terreblanche and Bell, 2003).

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1 State of Access to Information in South Africa, research report by Dr D McKinley July 2003 (http://www.ritecodev.co.za/csvrorig/docs/trc/stateofaccess.pdf)
11. If the purpose of incorporating MISS is to allow SARS powers to now clarify “sensitive information” as “secret and top secret”, again these regulations are inappropriate as it should be the prerogative of parliament to decide whether SARS would have such powers of classification and in what circumstances.

12. As already noted, confidentiality of information is dealt with in both the SARS Act and the TAA and it is unclear why regulations are used as an instrument to provide further powers in this regard?

13. It would seem that the dangers of abuse seem to outweigh any benefit to the country.

14. **Submissions:** Should SARS require further powers of restriction, this should be done in terms of legislation and not regulations.

**Storage mediums**

15. The scope of the rules has now been extended to not only include electronic communications which was its purpose, but now also storage mediums as a distinct addition.

16. However, even though storage medium is added to the definition of information system, it is in itself not defined as to what it means.

17. If it means things like portable drives and memory sticks, it is unclear how these logically form part of an “information system” that deals with “electronic communications” of data messages.

18. Furthermore, no rules are added to actually deal with delivery and receipt of data by storage medium as opposed to electronic communications as these are in reality distinct from electronic communications.

19. **Submission:** It is submitted that storage medium should be defined and the rules should also deal with delivery, receipt, verification of data etc. of storage mediums. Context of how storage mediums form part of the “information system” in relation to sending data messages for the purposes of section 255 should also be provided.

**Alternate electronic addresses**

20. The addition of rule 4(2)(a)(iii) is welcomed.

21. However, the problem it seeks to properly solve is that of legal delivery which taxpayers have for some time questioned whether the SARS efilng system by itself achieves.

22. **Submission:** It is therefore submitted that the obligation to send a notice of an electronic filing transaction is not sufficient to deal with the actual problem of legal delivery and that this requirement, together with onus of proof of delivery etc. should be also dealt with in section 251-254 TAA.
Destruction of SARS and taxpayer records

23. We retain our opposition to the right of SARS to destroy records, including taxpayer records held by SARS after 5 years, even though in practice this has not been done. This provision goes much further than even section 97(4) TAA which only relates to assessments.

24. The fact that SARS in contrast seems to be adding taxpayer historical data from 20 years ago to taxpayer profiles, and in our view correctly so, makes this rule even more peculiar.

25. A further concern is that SARS’ modernisation has compelled taxpayers to use a data platform for which they retain no historical record of as the e-filing data cannot be exported. It also provides no record of evidence as to submission or delivery, merely on payment.

26. As has been clearly illustrated by problems raised in the various SARS National Stakeholder meetings, the taxpayer’s inability to prove submission is becoming more and more problematic as SARS exclusively retains this ability.

27. The ability to destroy records also begs the question of transparency and proper record keeping practices where allegations of impropriety surface.

28. How this power operates in relation to the prescripts of the auditor general and the National Archives of South Africa Act 1996 is also unclear.

29. Submission: We retain our opposition to the right of destruction by SARS of records and the current practice of retaining historical records begs the question as to why practically this right exists as it is in our view neither needed nor appropriate from a good governance perspective or to achieve the intention of the legislation in section 255.

Yours sincerely

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