Ref#: 213242
Call for comment

15 July 2008

South African Revenue Service
Private Bag X923
PRETORIA
0001

By e-mail: acollins@sars.gov.za

Dear Sir / Madam

CALL FOR COMMENT: REVISED DRAFT REGULATION OF TAX PRACTITIONERS BILL

We refer to your call for comment regarding the abovementioned Bill issued on 4 June 2008. Set out below please find SAICA’s comments, which have been sourced from Chartered Accountants around the country, the SAICA leadership team and members of our National Tax Committee.

1. The most significant changes – as highlighted in the newsletter accompanying the revised Draft Bill – are:

   1.1 The requirement that tax practitioners (“practitioners”) who are under the statutory regulation of another relevant statutory body (e.g. the Independent Regulatory Board for Auditors (“IRBA”) or any Law Society etc.) will only be subject to the disciplinary or other procedures of that other statutory body. However, these tax practitioners will still be required to register with the Independent Regulatory Board for Tax Practitioners (“the Board”);

   1.2 The softening of the harsh penalties for errant practitioners. No criminal sanction will now be taken. Errant practitioners can be struck off the practitioners’ roll or be suspended for a period. Those practitioners who commit fraud are liable to prosecution under existing legislation;

   1.3 The removal of the requirement that practitioners keep “audit” files on their clients and report any irregularities in their clients’ tax affairs to the South African Revenue Service (“SARS”). Clients of practitioners who are unhappy with the service they receive, or in the event that SARS notice something suspicious in the tax affairs of a client of a tax practitioner, can report that to the Board;

   1.4 The Board will now comprise of seven members of which at least three members must be practitioners and one a SARS representative. The SARS representative will have no voting rights nor sit on the investigative and disciplinary committees.
2. These changes are welcomed, however, there are regrettably still a number of uncertainties or situations which have not been dealt with.

3. **Background to comments**

3.1 A well-functioning tax system cannot operate without practitioners. Competent, qualified practitioners are the backbone of a well functioning tax system. As tax laws become progressively more global and more sophisticated, the need for well informed competent practitioners becomes greater.

3.2 Professional organisations like SAICA and their member representatives have and continue to provide consistent input into the formulation of legislation and regulations. The collective wisdom and acquired knowledge of practitioners as represented by professional bodies is a critical ingredient in this well functioning tax system.

3.3 The prime difference between the role of practitioners and SARS is that the primary loyalty of practitioners is to their clients (within the ambit of the law) and not SARS. An important function of the regulation of tax advisors is to help strike an appropriate balance between loyalty to the system and loyalty to the client.

3.4 It is generally accepted that the purpose of the regulation of practitioners is the protection of clients from unscrupulous or incompetent tax advisors as well as ensuring efficient and effective tax collection through consistent and proper application of tax law. The regulatory interest of SARS is therefore similar to that in other areas of consumer protection.

3.5 It is our firm belief that public interest is best served by ensuring the competence and quality of practitioners whilst also ensuring that an adequate number of practitioners are available to serve the public. Regulation that is incorrectly framed might have the unintended consequence of limiting the ability of the market to consistently produce enough practitioners with the end result that the cost and quality of tax advice suffers. This would impact directly on the application and interpretation of tax law, again, with the unintended consequence of increasing the burden of tax administration (by SARS).

4. Our comments on the proposed legislation are outlined below. The document is structured into two distinct parts. The first presents an accreditation model as an alternative to the current proposal contained in the Bill. The second covers specific comments on the Bill as it is currently drafted.

5. **Full accreditation model**

SAICA continues to support a full accreditation model. This was previously referred to in our joint submission to SARS (Appendix A), dated 8 January 2008 (comments provided on the first Draft Regulation of Tax Practitioners Bill). We reproduce some of our earlier comments which are still applicable as follows:

The current Bill envisages a new body to govern tax practitioners. However, there are a number of bodies that currently govern the activities of their members in a manner appropriate to support the principles which SARS wish to achieve.

Professional bodies like SAICA operate in a very regulated environment. SAICA, for instance, is regulated in each of the following areas:
• Our education and training process is regulated as an ETQA (Education and Training Quality Assurer) through bodies like SAQA (South African Qualification Authority) and relevant to the auditing profession by the IRBA (Independent Regulatory Board for Auditors)
• Our code of conduct, investigative and disciplinary processes are monitored and reviewed annually by the IRBA
• Our requirement that members comply with CPD (Continuing Professional Development) is monitored and reviewed by, amongst others, the IRBA and IFAC (International Federation of Accountants)

Although not a statutory body as envisaged in the Bill, SAICA operates within the confines of various pieces of legislation, is accredited by various statutory bodies and remains a member of various international organisations (IFAC, Global Accounting Alliance, etc). This accreditation and global recognition ensures continued protection of public interest by ensuring the quality, competence and commitment to continuous learning of all professionals registered with the Institute. SAICA must comply with the minimum accreditation requirements prescribed by each of these bodies failing which it will be struck off as an accredited member. Practitioners who belong to such professional bodies already meet the minimum requirements as articulated by SARS in the current version of the Bill. In this manner only tax practitioners who are not already a member of such a body need join the new body for tax practitioners (alternatively we recommend a transitional period be allowed for the market to create professional bodies to cater for these tax practitioners).

In this manner a double layer would not be created, as is the case with the current proposed draft Bill, which sees members (of professional bodies that meet the requirements) being members of a number of different bodies.

The Bill should then set out the minimum requirements (as articulated in the Bill) pertaining to:

- training and education requirements
- continued professional education requirements
- a code of conduct
- disciplinary procedures

It is our opinion that the role of the Board is to set the minimum standards related to each of these areas. Where professional bodies can demonstrate that they meet / exceed these minimum criteria as stipulated by the Board through the Bill, such professional bodies should then be granted full accreditation. The Board should, on a regular basis review the activities of the professional body to ensure that it continues to meet the minimum requirements as stipulated. Where a professional body fails to demonstrate that it meets those requirements on a consistent basis, its accreditation should be removed.

This model has a number of advantages, including:
• Protecting the public interest. The designations held by members of professional bodies will proactively alert members of the public to the competence of the relevant practitioner
• This model allows for proactive monitoring of the quality and competence of tax practitioners and sufficient reactive measures through continued accreditation of professional bodies coupled with consistent and reliable investigative and disciplinary procedures
• Reducing the number of members the 'Board' directly regulates by accrediting professional bodies
• Managing the potential added cost of establishing and running the Board by regulating a handful of professional bodies as compared to individuals
• Reducing the ultimate added cost to business of doing business by effectively managing the cost of this regulatory structure

For specific details of SAICA’s various accreditations achieved, kindly refer to 5.1 below.

IRBA and its functioning

Much reference is made to the IRBA and its functioning. The IRBA was established to act as an oversight and regulatory body over the attest function in the public interest. Its objectives are markedly different to those articulated in this Bill.

The IRBA accredits professional bodies against defined criteria (Annexure 2). This accreditation allows individuals who have gone through the qualification process of the professional body to act as Registered Auditors (RAs). The attest function performed by an RA is then regulated by the IRBA. It is not the intention of the Board to regulate tax practices in the same manner. It is the intention of the Board to prescribe minimum education standards, a code of conduct and sound investigative and disciplinary processes. These functions are adequately managed by various professional bodies and are accredited as being adequate. The IRBA places reliance on a professional body delivering competent, qualified practitioners as a proactive measure in ensuring the continued quality of the audit profession.

6. Specific comments on the Bill

6.1 Clause 2 and 3(2)

Clause 2 of the Bill provides as follows:

“The purpose of this Act is to regulate the tax practitioner profession to ensure that tax practitioners are appropriately qualified, have the necessary experience, adherence to ethical practices and are held accountable for their professional conduct”

In light of the above we confirm that the SAICA as an institution conforms with the purpose of the Bill. Potential members go through a rigorous education and training model in qualifying as Chartered Accountants. The syllabus and content of the training programme is consistently reviewed to ensure that it incorporates current market requirements, legislation and other relevant standards to ensure the continued competence and knowledge base of entry level Chartered Accountants. Subsequent to becoming a member of SAICA, members have to comply with a code of professional conduct failing which results in disciplinary action being instituted by the IRBA and/ or SAICA. All Chartered Accountants have to also demonstrate a commitment to continuing professional development which is strictly monitored by SAICA on a continuous basis. The CPD requirement is essential in ensuring the continued competence and knowledge base of already qualified Chartered Accountants.

In addition to our pursuit of excellence in ensuring the knowledge base and technical capability of our members, SAICA have also an already established infrastructure to serve its members within the tax fraternity including, but not limited to:

• The National Tax Committee;
- The Integritax monthly tax publication;
- A dedicated position for Project Director: Tax as well as an assistant to this position;
- A national and regional infrastructure which includes regional committees comprising of tax practitioners who regularly deliberate tax related matters from legislation through to administration;
- Conceptualization and delivery of learning events in the form of seminars, workshops, e-learning and related materials focused on ensuring the continued relevance of members tax knowledge;
- A query resolution system which responds to tax and other queries from members.

Clause 3(2)(d) of the Bill provides that certain sections of the Bill are not applicable to persons whose profession is regulated by law through a statutory body. Such persons are equated in the Bill with those persons who are registered with the IRBA or are admitted attorneys and advocates. As a result, these persons will not be disciplined by the Board but by their membership bodies. SAICA is not a statutory body and as such its members who are not registered with IRBA are not covered by this subsection.

SAICA is currently the only body in South Africa to have met the requirements of full accreditation by the IRBA to monitor and manage the training of registered auditors. SAICA have complied with the accreditation requirements in the following areas:

- Stringent pre-qualification processes with high quality, relevant content
- Appropriate delivery of pre-qualification content both academically and ‘on the job’
- Continuing professional development of its members;
- Disciplining and ethical conduct of members where appropriate;
- Financial and operational viability;
- Maintaining a register of members in prescribed form;
- Programmes endeavouring to achieve representivity of its membership base across sectors; and
- Appropriate technical support and guidance available to its members

Further, SAICA is also accredited by the SAQA as an ETQA. The SAICA ETQA has for a number of years complied with the SAQA quality assurance requirements and it is considered by the SAQA Authority to have constantly met its obligations or mandate by delivering activities that support and promote the objectives of the National Qualifications Framework. SAICA have complied with the accreditation requirements in the following areas:

- Capacity and resources
- Minimisation of duplication
- Acceptable Quality Management System
- Processes for accreditation of providers
- Promotion of quality among providers
- Monitoring of provision by providers
- Assessment and moderation matters
- Certification of learners
- Co-operation with other bodies
- Recommendation of standards and qualifications
- Acceptable database
- Submission of reports to SAQA
SAICA is also a member of IFAC and have complied with their international compliance programme.

This clearly demonstrates that SAICA have the resources and capability to comply with accreditation criteria of any regulatory body at any level, be it local or international. This experience of working with regulatory bodies and complying with their requirements has prepared SAICA to have a similar relationship with the Board.

We therefore recommend that the Bill be amended in particular clause 3(2)(d) to provide for recognition or accreditation of non-statutory professional bodies that are able to comply with a minimum set of criteria that SARS can prescribe with regard to professional qualifications, competence, ethics or disciplinary rules and procedures. This section could be amended by inserting the words ‘or an accredited professional body’ after the word ‘statutory’ in section 3(2)(d).

In light of our recommendation we would also like to suggest that clause 6(p) be amended to include the words ‘after consultation with the Minister accredit professional bodies as contemplated in section 3(2)(d) and’ before the word ‘prescribe’.

Changes proposed above will ensure that SAICA members who are Tax Practitioners are treated equally as those registered with the IRBA or the provincial law societies.

6.2 We recommend that registered Tax Practitioners who are also members of other regulatory and professional bodies who meet these or additional criteria defined by SARS, e.g. IRBA and SAICA, and who pay membership fees to these bodies, be excluded from the duty of paying fees levied in terms of the Regulation of Tax Practitioners Act (once promulgated). Alternatively, we suggest a reduction in fees that are payable to the Board for these members. Having to contribute to two regulatory bodies would be an undue burden for these Tax Practitioners. Apart from increasing the cost to business of doing business, structures like these only add to the burden of costs already carried by financial advisors with the resultant unintended consequence of decreasing and making less attractive the option of practicing as a professional advisor.

6.3 The principle of recognizing the IRBA, amongst others, will not, in our opinion, assist SARS and/or the Board in complying or meeting the objectives articulated in the Bill. If the function of the Board is to prescribe minimum education and qualification standards, the IRBA is not the body to provide such assurance. The IRBA is a regulator in the audit area and focuses on audit and accounting (IFRS) competence. SARS would be better positioned to prescribe minimum standards to professional bodies rather than regulators. SARS would also be better positioned to regulate professional bodies (as the IRBA does) rather than another regulator.

6.4 We suggest that entities be permitted to register as a Tax Practitioner with one Tax Practitioner number. Considering that ultimately it is the firm, and not the individual Tax Practitioner, that is responsible for the advice given by Tax Practitioners it employs, and the partners in that firm have unlimited joint and several liability. Accordingly, it is recommended that the respective firm also be issued with a Tax Practitioner number.

6.5 The Bill uses the terms “employer” and “connected person”. We recommend that these terms be defined. We recommend that the term “employer” should be
defined in the normal context and not the wide context as used in the Fourth Schedule of the Income Tax Act.

6.6 It is of concern that the Board will determine their own remuneration, albeit in consultation with the Minister. In our opinion this should be independently determined.

6.7 The Bill envisages all tax practitioners registering with the Board. However, all tax practitioners are currently registered with SARS. This registration should simply be transferred to the Board. Alternatively, there needs to be some interim measure whereby registration with SARS is not null and void immediately on promulgation of the Bill due to removal of s 67A i.e. some kind of transition period.

6.8 We are concerned that improper conduct is not defined. This is a central issue which should be dealt with within the Act instead of leaving to the discretion of the Board.

6.9 Clause 6 grants the Board powers to purchase immovable property, employ persons to assist in the performance of its functions, borrow and raise money etc. Our concern here is that there are already a number of established bodies that the Board will compete with. In this regard the duties of the regulator must be clearly separated from that of professional bodies.

6.10 Clause 7(2) of the Bill indicates that the Minister may, as an interim measure, appoint members of the tax practitioner profession who are not registered. We suggest that this should refer to tax practitioners who are currently registered under the Income Tax Act and whose names have been provided to the Board.

6.11 Clause 24(1) refers to “an” registered tax practitioner. This should be “a” registered tax practitioner.

6.12 Clause 23 refers to registration, which relates to natural persons. We are of the opinion that “advice” should be defined and should cater for direct and indirect advice.

6.13 In terms of paragraph 23(2)(a) a person who completes a tax return for no consideration need not register. We are not sure if our concerns are covered by clause 23(2)(b). For example an insurance broker who completes the tax return of a client for free (due to commission received on other products provided) might be exempt from registration, although indirectly remunerated by other fees received. If this is covered by clause 23(2)(b) we recommend that this be clarified in the Bill.

6.14 We note that the exemption for persons involved purely in a tax litigation matter, which was in the first draft version is no longer included. If an advocate is briefed to appear in one tax case he/she will have to register before doing so.

6.15 In some clauses reference is made to an “individual” (e.g. clause 24), but in general the term natural person is used. We would prefer that the word “individual” is replaced where applicable.

6.16 A “fit and proper” test is provided for in clause 25(1)(c). This is subjective and possibly open to abuse in denying registration to applicants. If an applicant passes the objective requirements that are provided for, they should be registered.

6.17 We note that in terms of clause 27(b) a registered tax practitioner may not “… knowingly employ in connection with the practice of that tax practitioner any person whose name has been removed from the register of registered tax
practitioners by virtue of a finding of improper conduct and punishment imposed on the person …”. As a result, such persons who have been removed from the register would not be allowed to work with a field of their expertise in future. We propose this stance for repeat offenders only and propose that an offender be allowed to work under the supervision of a registered tax practitioner until such time as he/she is considered rehabilitated.

6.18 Clause 33 refers to publication of notice of removal from the register. This should require that the reason for removal be given since retirement and resignation are very different from removal due to disciplinary reasons etc.

6.19 In respect of the clause 39(3) of the Bill it is suggested that the disciplinary committee should not be permitted to amend a charge sheet or a charge at any time after the commencement of the disciplinary hearing. This will ensure clarity for the accused as to what charges he/she actually faces. This would be appropriate as in criminal proceedings with the disciplinary proceeding parallel, the prosecution may not amend the charge. Further, without such clarity, the Practitioner will be unable to prepare a proper defense, and this may result in unreasonable costs being incurred and proceedings being drawn out indefinitely.

6.20 Clause 39(11) seems to contravene the audi alteram partem rule, or at least deny the accused (tax practitioner) the right to cross-examine the witnesses on the record submitted. There should be more clarity on this issue provided.

6.21 It is recommended that clause 40(4) of the Bill be amended to provide clarity regarding the costs involved in disciplinary procedures. It seems unjust and inequitable to leave the determination of such costs to the discretion of the investigating committee. We suggest that the High Court tariff be used to determine costs.

6.22 SARS should consider the possibility of giving practitioners legal privilege even if they are not lawyers.

7. Issues requiring clarification

7.1 The question of whether tax officials may practice as tax advisors or alternatively what processes and requirements SARS will impose in order to ensure that its officials are appropriately qualified.

7.2 We are of the opinion that, regardless of the circumstances, the basic rule should be that an official of the tax administration is prohibited from engaging in any form of private tax practice whilst employed by SARS. The reason for this incompatibility between public and private tax practice is that it is impossible to serve two masters at the same time. There would be a clear conflict of interest between loyalty to the tax administration on the one hand and loyalty to the client on the other.

7.3 This incompatibility should not be confused with the duty of the tax official to help some kinds of taxpayers file their tax returns. These services should be limited to small taxpayers with simple tax returns reporting fixed salaries or pensions. They should not be open to taxpayers with important sources of revenue.

7.4 Another consideration is whether a tax official can enter into private tax practice after leaving SARS. Tax officials often resign from their official duties to accept lucrative consulting jobs in the private sector.
8. Regulation of international tax consulting services

8.1 The Draft Bill and SARS for that matter are not addressing the situation where South African taxpayers may need international tax services. This could have serious consequences for South African taxpayers involved in the international market. The fact that the South African economy has opened up since 1994 seems to be ignored. It is noted that countries that regulate local practitioners only usually face a problem in dealing with foreign practitioners or in applying the regulations to tax consulting services that cross borders. Failure to address this issue before the introduction of the regulations could be detrimental to South Africa's ability to attract inbound foreign investment or outbound expansion by South African entities.

8.2 Advice regarding the tax implications of cross-border or international transactions and investments will inevitably involve consideration of local tax laws and the tax laws of the jurisdiction in which the other party to the transaction or investment is resident. In the case of multinational corporations, it is likely that the tax implications in many jurisdictions, where various branches of the company are resident, will have to be taken into account before the details of a transaction can be finalised.

8.3 It is common cause that the local practitioners who provide advice on domestic taxation are unlikely to have sufficient knowledge of relevant foreign tax systems to advise on all aspects of the foreign law. To obtain that information, a taxpayer will quite likely require the advice of a foreign tax consultant or alternatively, the South African practitioner may obtain the advice from a foreign tax consultant. The qualifications required of (and supervision of) foreign tax consultants may depend on how the advice is provided. The advice could also be sought directly by a taxpayer in the country or through a tax consultant practicing in the country. In both cases, the advice can be sought in a number of ways, such as asking an expert abroad to provide advice; arranging for a foreign advisor to visit the country for a brief period; using a foreign expert who is resident in the country; or having the tax analysis be done in another country where a multinational is based or has operations.

8.4 Various commentators regarding the regulation of practitioners suggest it is difficult to regulate the provision of this sort of advice. Excessive regulation might result in simply pushing businesses to seek tax advice offshore.

8.5 The contribution these foreign tax advisors could make to the South African market should also be recognised as these foreign tax advisors may enhance the international technical expert knowledge of the tax profession of South Africa which will further give South African entities a competitive advantage when it participate in international economic transactions.

Please do not hesitate to contact me should you require further information.

Yours faithfully

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The South African Institute of Chartered Accountants