

Ref: #772050

16 October 2022

Email: CommentDraftLegislation@treasury.gov.za

Dear Sir/ Madam

Comments on the Maximum Monetary Fines in terms of the Auditing Profession Act

1. The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make submissions to National Treasury on the Proposed Maximum Monetary Fines in terms of the Auditing Profession Act 26 of 2005, as amended.
2. For ease of reference we have set out our main points in Annexure A.
3. In Annexure B, we have set out the fines imposed on various other professionals operating in different industries in South Africa. The information in this annexure has been compiled from publicly available information and no legal advice was sought.
4. SAICA would further promote and welcome the opportunity to engage with National Treasury on this submission.

Yours sincerely



Freeman Nomvalo
Chief Executive Officer

The South African Institute of Chartered Accountants

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ANNEXURE A: DETAILED COMMENTS

GENERAL MATTERS

Engagement

1. SAICA communicated the proposed fees to various interested parties and hosted various meetings with SAICA members, including specific engagements with small to medium-sized firms (both those who provide audit and non-audit services) and with larger firms. Furthermore, SAICA also consulted with the Legal and Compliance committee which constitutes of non-auditors but legal experts with experience in various industries.
2. Concerns were raised regarding the impact of the proposed fines on firms, on individual registered auditors and on the auditing profession as a whole. In particular, concern was expressed about the impact of the proposals on the IRBA's ability to attract young talent to the profession and to retain registered auditors in the profession. The proposed fines are likely to be a further deterrent to individuals who have an interest in joining or remaining within the profession. This is particularly concerning as the profession has already witnessed a decline in the number of registered auditors over the last number of years.
3. SAICA recognises the importance and need to have a strong and robust auditing profession in order to safeguard the capital markets and provide both investor confidence and assurance. Furthermore, SAICA recognises the important role that the regulator and the proposed sanctions play in safeguarding the capital markets. Our comments in this letter address concerns on the quantum of the proposed maximum fines as well as the need to provide additional guidance.
4. SAICA does not take lightly the significance of fines and penalties in the profession. Publication of fines without providing a suitably related framework or educating the public on the basis used to reach the proposals creates the impression that they are just intended to punish erring auditors, irrespective of the nature and context of possible indiscretions. The primary role of fines should be to protect the interests of the wider public which means that there is a need to educate the public on the considerations to be taken into account when imposing fines. Our view is that fines and penalties play an important role to:
 - 4.1 Promote investor and public confidence in the audit process and members of the auditing profession.
 - 4.2 Protect the public from poorly executed audits.
 - 4.3 Deter auditors and firms from breaching the relevant standards and requirements that they need to adhere to in order to perform high quality audit.
 - 4.4 Enhance and promote audit quality.



5. The proposed maximum fines released do not contain a framework on how the Enforcement Committee would evaluate the improper conduct linked to the fines to be charged. One would expect that the principle of proportionality should apply in reaching a decision on the appropriateness of a fine and that there would be mitigating factors that would be considered.
6. All parties engaged were of the opinion that the lack of a framework creates significant uncertainty in the profession.

7. Submission: The lack of engagement with the profession regarding the proposed fines has created uncertainty in the profession on the application thereof. While it remains the right of National Treasury to introduce new laws and regulations, it is important that there is a consultative approach to allow sufficient time for all parties involved to make the necessary representations.
8. It is submitted that a clear and objective framework that will be used in the process of applying the fines be developed and shared to assist auditors and firms to understand the process of the imposition of fines and penalties. Guidance should be issued that will provide clarity on the processes and considerations to be followed when determining the imposition of fines and penalties for registered firms and registered auditors. Transparency in this regard is very important to the profession. For example, in the United Kingdom, the Financial Reporting Council (FRC) has a Sanctions Policy that is available to the public that addresses in detail considerations to be made when imposing sanctions. The policy is advisory in nature, however, any deviations from its application where relevant need to be explained. Such a policy in the South African context would be useful in creating transparency and we urge National Treasury to consult with the IRBA in this regard. The FRC Sanctions Policy can be found on the following link: [FRC Sanctions Policy 2022](#).
9. It is submitted that the disciplinary process and the subsequent fines process and the framework to be applied should be clarified. The framework should give guidance on numerous factors that determine the seriousness of any breaches such as:

- 9.1 the nature of the breach
- 9.2 the level of responsibility of the registered auditor or the firm involved in the breach
- 9.3 the potential or actual financial loss as a result of the breach and corresponding impact on investors and the general public
- 9.4 How the fines will vary depending on intent, dishonesty, negligence, recklessness and/or incompetence.
- 9.5 The length of time that the breach occurred for.
- 9.6 Previous breaches by the same auditor or firm.



Application

10. The IRBA Disciplinary Rules apply to registered auditors. A registered auditor is defined as an individual or firm registered as an auditor or a registered candidate auditor.

11. Submission: Clarity needs to be provided on whether the proposed fines will also apply to registered candidate auditors. A concern in this regard is that the imposition of fines to registered candidate auditors will have a negative impact on the attractiveness and the sustainability of the profession in the future.

Proposed Fines

12. The proposed fines are viewed by members who commented to SAICA as excessive. Furthermore, the charges are on a 'per charge' basis with a potential to increase the quantum of the fines. An increase from the current maximum fine of R200 000 to a maximum of between R5m and R25 million is proposed. The fines may increase even further given the current proposals to increase them annually at the rate of the consumer price index. Currently, the country is grappling with high inflation meaning that these proposed fines could increase significantly in the short term.

13. Practices may find it even more challenging to attract and retain staff, as risk averse individuals may opt for less risky careers. This is particularly concerning as the average age of registered auditors is on the increase.

14. Many practices and registered auditors may decide that the perceived risk outweighs the benefit and may decide to deregister from IRBA and/or exit the profession in totality. This is particularly true for auditors with only a few audit clients.

15. As mentioned above, the potential impact of excessive maximum fines per charge could lead to a reduction in the number of audit firms registered with IRBA. Smaller compulsory audit clients would be unjustly prejudiced by a reduced number of smaller audit firms with simple and less complex structures. E.g. Body corporates and family-owned businesses with larger turnovers due to high value goods.

16. The auditing profession operates within a wider financial reporting ecosystem. A disproportionate focus on the auditing profession without looking at the other role players such as preparers of financial information and those charged with governance may further widen the audit expectation gap, threaten the audit profession and, potentially, have an adverse knock on impact on capital markets in which auditors play an important role. In proposing any reforms, SAICA would like to urge National Treasury to look at the entire financial reporting ecosystem to ensure proportionality as well as accountability at all levels.



17. The IRBA Disciplinary Rules as well as the proposed fines furthermore do not provide any clarity on how the fines will be imposed. There is no sliding scale or framework on how they will be enforced. The IRBA Disciplinary Rules do not indicate how the fines will be used to deter misconduct or poor behaviour of auditors. The current proposals do not take into account the seriousness, nature or extent of the misconduct.
18. The auditing profession will require clarity on the application of the fines on the type of misconduct. There is no clarity on how the fines will be implemented with reference to administrative errors or *bona fide* errors on audit files or incorrect audit opinions.

19. Submission: It is recommended that a framework be prepared to set out the method of how the fines will be calculated taking into account the nature, seriousness and extent of the misconduct.
20. It is submitted that the increase in fines will threaten the sustainability of the audit profession. Many practitioners, do not have the necessary funds to self-insure and insurance companies will not necessarily provide insurance for fines. The payment of a fine by an insurance policy goes against public policy and is therefore uninsurable.
21. Fines should be both fair and realistic and in line with fees imposed on other professions in South Africa. In this regard, please refer to Annexure B below for a desktop analysis that has been conducted by SAICA.
22. Fines should be proportionate, i.e., in line with the severity of the misconduct (e.g. most severe fine as a result of having given an inappropriate audit opinion)
23. Consumer Price Index inflationary increases should not be applied to the proposed fines as these could increase significantly in the short term given the high inflationary environment.
24. If misconduct has been proven, the severity of the misconduct i.e. the impact on public interest should take into account the amount of revenue generated by the firm in question (in the case of a firm) or in the case of an individual, the registered auditor's financial resources and employability. The absence of this may threaten the ability of the firm to continue to trade which may be a further detriment to the profession.
25. Other considerations, as also considered in the Financial Intelligence Centre Act, 2001 when concluding on fines include any loss suffered by any person as a result of the conduct, whether the person previously was found guilty of misconduct, whether the conduct was deliberate or reckless.
26. SAICA proposes that a risk-based model be adopted to categorise registered auditors when setting fines. The penalty should of course apply to the offence and the offence should be split between compliance and societal impact and should be categorised according to the impact to the profession.



Right to appeal

27. The APA is silent on an appeal or objections process except for the Promotion of Administrative Justice Act which allows the registered auditor to object against the administrative process used but not against the decision of the IRBA.
28. This does not seem to be a balanced approach. The registered auditor has no protection or method to object to any fine allocated. It is important that an appeals process is put in place given that the fines have the potential to put an individual registered auditor in a position where they are no longer able to apply their trade, as would be the case if the fine creates insolvency.
29. Other similar legislation allows the persons to which it applies a process to object. The Tax Administration Act 28 of 2011 allows taxpayers to appeal against a decision of SARS (sections 104 to 107) as well as setting out the sanctions in chapter 15.
30. The Financial Intelligence Centre Act 38 of 2001 deals with the right of appeal of any person or institution to the appeal board (section 45D) as well as the administrative sanctions (section 45C) applicable.
31. The Financial Sector Regulation Act 9 of 2017 deals with the right of appeal by a person as well as the sanctions, which is set out in various sections (sections 120, 154 and 171 to 174)
32. There is no mechanism where the registered auditor can object or appeal the IRBA's decision. Section 51 of the APA only allows the registered auditor to address the disciplinary committee as part of mitigation.
33. Submission: This request regarding an appeal process has been submitted numerous times. Registered auditors have no option but to take certain decisions with which they do not agree to the High Court for review.
34. It is submitted that an internal objections process for certain decisions be introduced similar to that of the Tax Administration Act to avoid the auditor having to take all matters on review or for relief to the High Court when senior management or an independent committee could have resolved the matter.
35. Given the potential extent of debate and/ or disagreement between the IRBA and registered firms and registered auditors, it may be appropriate to consider an Ombudsman for the audit profession, similar to Tax Ombudsman and the Ombudsman for Banking Services.
36. Establishing an appeals process would also be beneficial in decreasing litigation costs for the IRBA. The Road Accident Fund (RAF) serves as a living South African example of what can happen to an organisation if it is continuously involved in litigation.



Self-interest Considerations

37. Another concern that we would like to raise is on the blurred independence lines that appear to be crossed in the disciplinary processes of the IRBA. For the credibility and integrity of the regulator, it is important that any perceived conflicts of interest are addressed. The fact that there is very little division of power is evident in the in the sections dealing with the disciplinary process. Division or separation of powers is a fundamental principle of any fair disciplinary process. Currently, due to the lack of a clear distinction of responsibilities, IRBA is responsible for:

- deciding on whether to refer a matter for disciplinary hearing or not;
- appointing the disciplinary committee;
- constituting the disciplinary panel,
- determining the sanction, and
- being the recipients of the fines that they have determined.

In colloquial terms, one can argue that in the absence of a clear separation of powers, IRBA is judge, jury and executioner when it comes to the disciplinary processes. Ensuring clear separation of powers is important to prevent a situation where the motives and integrity of the regulator may be called into question.

Summary of Key Recommendations / Submissions

In line with the above, we respectfully object to proposals in terms of the amounts proposed, the absence of a clear framework for determining fines and the absence of an appeal process.

- It is recommended that a framework be prepared to set out the criteria for determining a fine taking into account the nature, seriousness and extent of the misconduct.
- A registered auditor's financial resources and employability should be considered in determining an appropriate fine
- An Appeals process must be introduced in order to avoid instances of High Court litigation that may place the integrity of the profession in disrepute
- The quantum of the fines relative to charges should not deter people from entering or remaining in the profession and for this reason a framework for the determination of a fine will be important



- The fines for registered auditors proposed should not be disproportionate when compared to other professional bodies and the broader financial reporting ecosystem

ANNEXURE B

Fines for Professionals in South Africa

NOTE: this information was compiled using the publicly available information and no legal advice was sought.

Profession	Regulator	Main Act	Notes	Fines	Appeal
Health Professionals	Health Professions Council of South Africa (HPCSA) https://www.hpcsa.co.za/	Health Professions Act, 1974	The following publication on the HPCA website (under "Judgements") indicate the outcome of guilty verdicts. https://www.hpcsa.co.za/Uploads/Publications/2022/Judgements/Guilty_Verdicts_13_Sept_2022.pdf	R20 000 to R70 000 and suspension	No appeal process found
Engineers	Engineering Council of South Africa (ECSA) https://www.ecsa.co.za/default.aspx	Engineering Profession Act, 2000 Fines: See Section 41 of the Engineering Profession Act, 2000 Adjustment of Fines Act, 1991: https://www.justice.gov.za/legislation/acts/1991-101.pdf	https://www.ecsa.co.za/regulation/RegulationDocs/EngProfAct46_2000.pdf	Caution, reprimand Fine – not exceeding fine equal to 1 year imprisonment determined in terms of Adjustment of Fines Act	Appeals process Appeal Procedure Document.pdf (ecsa.co.za)



Legal practitioners	Legal Practice Council (LPC) https://lpc.org.za/	Legal Practice Act, 2014 https://drive.google.com/file/d/1FJYvGi9j9Zx488JklAMOh1csBIBaZpdj/view Sanctions: section 40 Penalties: section 93		Fines Individual: Max of R136 000 per offence Suspension Pay compensation Withdraw fidelity certificate Warning Caution / reprimand Juristic entity: Max of R272 000 per conviction/transgression Suspension Warning Caution / reprimand Candidate Legal Practitioner Cancel / suspend vocational training Max fine of R27 000 per conviction Caution / reprimand Offences Fine and / or prison, not exceeding 2 years Various offences identified	S 41 Right of Appeal to Appeal Tribunal S 44 High Court may be approached
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Financial Service Providers	Financial Sector Conduct Authority (FSCA)	<p>The FSCA administers a number of Acts: https://www.fsca.co.za/Regulatory%20Frameworks/Pages/legislation.aspx</p> <p>Below is reference to one of these Acts: Financial Markets Act See section 109 for penalties</p>	Outcome of enforcement actions (the penalties are large): https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx	<p>Various fines depending on offences in terms of certain sections of the Act</p> <p>Offences related to S78,80, 81 on conviction can receive a fine up to R50 million or imprisonment not exceeding 10 years, or to both such fine and such imprisonment</p> <p>Offences as per S93(2) is liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment</p> <p>Contravention or failure to comply with provisions of S4, 7(1), 24, 25(1), 27(1),</p>	
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				<p>47(1), 49A(1), 54(1), 56(1) or a prohibition by the Authority referred in terms of S6 (7), commits an offence and is liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.</p> <p>Contravention or failure to comply with S73(1) - offence and liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years or to both the fine and such imprisonment.</p>	
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Property Practitioners	Property Practitioners Regulatory Authority	Property Practitioner Act		Maximum fine of R25 000 per contravention. Withdrawal for Fidelity Fund Certificate Up to 8% of fine imposed may be awarded to claimant Appeals process available	S 31 Adjudication Appeal Committee
Accountable Institution	FIC	Financial Intelligence Centre Act		FIC Act has two types of penalties for contraventions or acts of non-compliance with the FIC Act. Administrative sanction (S45C(3)) for non-compliance with the FIC Act which includes: Caution not to repeat the conduct which led to the non-compliance Reprimand; Directive to take remedial action or to	S45D – Appeal Board



				<p>make specific arrangements;</p> <p>Restriction or suspension of certain specified business activities;</p> <p>A financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.</p> <p>Criminal sanction for contraventions of certain offences.</p> <p>The maximum penalty for these offences are 15 years or a fine not exceeding R100 million.</p>	
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