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The CEO
Independent Regulatory Board for Auditors
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Dear Imre

IRBA Draft Guidelines for Determining Monetary Fines

We appreciate the opportunity to provide input into the Independent Regulatory Board for Auditors (IRBA)'s Draft Guidelines for Determining Monetary Fines for Registered Auditors and Registered Candidate Auditors (Draft Guidelines).

In drafting this comment letter, SAICA consulted with its members, specifically the large and medium sized firms as well as the small practices constituencies. We acknowledge and appreciate the efforts by the IRBA to respond to the calls made by the profession to develop a framework that intends to provide some guidance on how the monetary fines shall be effected. SAICA was one of the stakeholders that advocated for such a framework. It is our view that this is important in enhancing the public's trust in the auditing profession as well-articulated Draft Guidelines will give confidence to the public on the regulator's application of the principles of fairness, proportionality, predictability and transparency when it comes to the imposition of monetary fines. The primary purpose of the monetary fines is primarily to protect the public interests.

Our comments are divided into two sections:

Section A provides our general comments; and
Section B provides our specific comments on the various provisions in the Draft Guidelines.

Kind Regards

Patricia Stock
Chief Executive Officer

Section A: General Comments

1. While the Draft Guidelines focus on the monetary fines, SAICA is of the view that there should be an introductory section in the Draft Guidelines that explains how the monetary penalties may be used in combination with the other forms of non-monetary sanctions that the IRBA may apply. Non-monetary sanctions include reprimand, mandatory training, temporary or permanent suspensions of registered auditors and/or firms, as well as public disclosures of misconduct amongst others as included in section 51B of the Auditing Professions Act 26 of 2005 (APA). These non-monetary sanctions are very effective in the sense that they have a significant impact on the auditors' reputation and could serve as mitigating considerations in the determination of the final monetary fine imposed. Although non-monetary sanctions and monetary fines may be addressed in different IRBA documents, it is our view that the IRBA should consider addressing all types of sanctions in one document.

2. SAICA does acknowledge that it is understandable that the IRBA would still want some level of subjectivity even within the confines of the proposed framework as this allows the Enforcement/Disciplinary Committee to apply its discretion and judgement when making decisions on the severity of sanctions to impose. It is almost impossible that the Draft Guidelines will anticipate and address all types of situations that the IRBA Enforcement/Disciplinary Committee may have to encounter, therefore, our recommendation is that the document remains very principles-based with clear considerations of the principles that will be considered by the Committee in determining a monetary penalty.

Right of Appeal Process

3. One of the concerns SAICA had raised in the previous submission to the National Treasury when the proposed fines were introduced, was the absence of an appeals process within the existing IRBA legal framework.

4. The Auditing Professions Act, is silent on an appeal or objections process except for the Promotion of Justice Act which allows for the registered auditors to object against the administrative process followed but not against the decision of the IRBA.

5. We recommend the inclusion of a formal right of appeal process for auditors in South Africa. This is in line with the other professional disciplines in South Africa. For example, sections 104 -107 of the Tax Administration Act 28 of 2011 allows taxpayers to appeal against the decisions of SARS. Similarly, Financial Intelligence Sector Act 38 of 2001 deals with the right of appeal of any person or institution to the Appeal Board. The Financial Sector Regulation Act 9 of 2017 also deals with the right of appeal by persons. The right to appeal is a fundamental statutory right which should be included in the framework, which ensures initial determinations are held to a standard of fairness and impartiality within the bounds of the specialist tribunal.

6. The appeals process should allow for the auditors to at least challenge the procedural and substantive aspects of the findings and fines made by the regulator. For example, if an auditor believes that the fine imposed is disproportionate to the transgression, there should be a mechanism to appeal and review the decision comprehensively. By formalising such a process, the IRBA would also avoid situations where auditors are of the view that they have no choice but to take all matters on review or for relief to the High Court when an independent Ombudsman could have resolved the matter.

7. It is our view that establishing an appeals process would be beneficial in reducing the potential litigation costs that could be incurred by the IRBA. The Road Accident Fund is an example of an organisation that has been inundated with excessive litigation as a result of failing to establish an appeals process. It is advisable that such a situation is avoided at all costs as it could negatively impact and harm the public's confidence in the auditing profession.

Perceived Self-Interest Considerations

8. There is a potential self-interest that arises as a result of the little division of power in relation to the IRBA's disciplinary processes. While this may just be a perception, it is important that the IRBA addresses this issue as it may, from both the perspectives of the public and those the IRBA regulates, harm the reputation of the regulator.

9. Currently, IRBA is responsible for:
    a. Deciding on whether to refer a matter for disciplinary hearing or not;
    b. Appointing the disciplinary committee;
    c. Constituting the disciplinary panel;
    d. Determining the sanction;
    e. Being recipients of the monetary penalties and fines that they have determined; and
    f. Utilising these fines as they choose to.

    This creates self-interest considerations that could compromise the objectivity of the IRBA's Disciplinary committee, particularly given the increase in the quantum of the new fines set out by National Treasury.

10. The IRBA should consider an awareness or education drive to address these perceptions. An example of how the monetary penalties received by the IRBA could be utilised is by ensuring that these funds are ring fenced and allocated to a separate fund that is exclusively dedicated to initiatives aimed at supporting the profession at enhancing audit quality and attractiveness. This could help in addressing the concern that the penalties may become an additional revenue source for IRBA's operational activities. Failure to address this may cast doubt on the integrity and impartiality of the regulatory process.

Registered Candidate Auditors (RCAs)

11. SAICA understands that based on the current proposals, registered candidate auditors are subject to the same maximum penalties as the registered auditors. This is due to the fact that the framework has no guidance in terms of whether principles of proportionality will apply when dealing with improper conduct committed by RCAs. Such principles, if applicable, should be clearly stated in the framework as RCAs may not be in a position to exert the level of influence that Registered Auditors are able to in an audit engagement. RCAs work under the guidance and supervision of registered auditors and the principle of proportionality would dictate that this is considered in the framework. The Draft Guidelines are silent on this aspect and SAICA recommends that guidance is provided in this respect. For example, in the case where both the RCA and the registered auditor are implicated on the same matter, the Draft Guidelines do not distinguish between the two irrespective of the differences in accountability and responsibility.

    Applying the fines equally to registered auditors and RCAs could have a negative impact and be a deterrent on the attractiveness of new candidates to the profession as well as on the retention of those candidates that are in the profession already. There should be guidance that discretion on quantum of fines can be applied if the individual is an RCA. The minimum fines are exceptionally punitive for an RCA which is disproportionate to their level of accountability. Potentially, the Draft Guidelines should include guidance on the nature of transgressions that would impact an RCA specifically.

Small Practices

12. During our consultations with the small practices constituency, they highlighted the potential negative impact of the penalties on the small and medium practices. Concerns were raised about the impact of fines on the willingness of firms to take on audits in future. This could have an effect on the already strained SMP constituency and that there is a real going concern risk for these firms. Many emphasised that small and medium-sized businesses will not be able to afford the fees required to cover the cost of compliance, leading to adverse impact on audit quality and potential trouble for those firms.

13. Participants emphasised the need for better representation and understanding of SMPs by the IRBA in their resourcing. The roadshows over the past few years were welcome and acknowledged as a step in the right direction. However, there is need for more interactions between the IRBA and the SMPs.

B. Specific Comments

14. When imposing sanctions, there are factors that need to be considered by regulators when determining the type or level of sanction. This is normal in most pieces of legislation where the factors to be considered in determining an administrative fine by any tribunal or court are clearly

set out in the legislation to allow for any external party that conducts the review to apply the same criteria. These factors for consideration are often set out in the relevant legislation itself. E.g. Companies Act, section 175(2)(2); Protection Of Personal Information Act, section 109(3);

15. The Draft Guidelines currently state in paragraph 2.4 that, "*The Enforcement/Disciplinary Committee will continue to determine and impose appropriate monetary fines for improper conduct on a matter-by-matter basis including by taking into account the nature, gravity, and other relevant factors of the transgressions, and alignment, as far as is possible, to similar instances of improper conduct in other matters."* In paragraph 2.5, the Draft Guidelines state, *"Respondents who are found guilty of improper conduct may submit explanations/evidence in mitigation of the fine to the Enforcement/Disciplinary Committee."*

16. As per the IFIAR Report on 2022 Survey of Enforcement Regimes ,the factors included when determining the type or level of sanctions in most jurisdictions include:

Factors included as per IFIAR Report	**Included in determination of Severity of the transgression in the IRBA Draft Guidelines**	**Included as a mitigating factor in IRBA Framework**
Intentional nature of the conduct (state of mind)	Yes	
Gravity of the Violation	Yes	
Degree of Responsibility		Yes
Duration of the Violation	Yes	
Time Lapse since the violation		
Financial Strength of the Responsible Audit Firm or Individual Auditor		Yes
Amounts of Profits gained or Losses avoided	Yes	
Level of Cooperation		Yes
Previous Violations		Yes
Other (e.g. macro-economic and public interest)	Yes	

17. Based on the current wording of paragraph 2.5 of the Draft Guidelines, the mitigation submissions included in Annexure B appear to be only considered after the determination of the fines by the Enforcement Committee. In SAICA's view, the mitigation submissions should be part of the factors for consideration in the determination of the fines by the Enforcement Committee instead of being considered after the fact. It is our view that if these mitigation submissions were considered as part of the factors to be considered by the Enforcement Committee in determining the severity of the transgression, it would create more transparency

on the process followed. As noted in the IFIAR Report, these are often included upfront in most jurisdictions when determining the quantum of the fine.

18. Based on the above, SAICA's view is that the Draft Guidelines should explicitly delineate the factors to be considered (see table above) by the IRBA when determining the quantum of fines without having certain elements (e.g. mitigating submissions) in different parts of the Draft Guidelines. For example, a case involving a minor administrative error should be treated differently from one involving deliberate fraud. It is essential that these factors are clearly outlined upfront to provide transparency and predictability in the fining process, ensuring that each case is evaluated on its own merits.

19. In line with the other legislations; e.g. Companies Act as mentioned above, SAICA also recommends that the factors for consideration be clearly stipulated in the APA or other form of authoritative document as part of the proposed amendments that will be made to the Act.

Proportionality considerations

20. Reference to Annexure D: **Enforcement/Disciplinary Committee Considerations relating to whether a matter is High Priority or Priority**. With regards to the third consideration, '*Does the transgression have a material financial impact on third parties*,' clarity needs to be provided by the IRBA on the definition and criteria used to make this materiality determination. E.g. does this relate to audit materiality or the engagement client's own materiality? Similarly, the fourth consideration that refers to a *transgression causing harm to public confidence in the profession* needs to be clarified as it may be subject to various interpretations depending on who one engages with. Based on our consultations, there were strong views that leaving these criteria open-ended as they are could result in a situation where any type of transgression could be considered as high priority due to the subjective nature of the consideration. Failure to provide this clarity could leave the Draft Guidelines open to different interpretations and lacking in the predictability, consistency and transparency envisaged and expected from the Draft Guidelines.

21. In Annexure D, reference is made in the footnote that states, *"Elevated risk entities include entities that have a high public interest score in terms of the Companies Act and/or entities that act in a fiduciary capacity."* Clarity through quantum may need to be provided on what is a high public interest score. Clear thresholds also need to be clarified on acting in a fiduciary capacity.

22. The importance of providing further clarity in the provisions mentioned above is further heightened by the fact that only one of the four considerations needs to be satisfied in order for a matter to be categorised as a high priority matter. Providing clarity on these open-ended considerations would rebut the view that there is undue subjectivity and discretion in the hands of the Enforcement/Disciplinary Committee based on the current Draft Guidelines.

23. SAICA's view is that the four considerations used to determine whether a matter is high priority or not should be assessed in balance to each other instead of attributing excessive weighting to one element. The distinction between priority and high priority matters should be more precise, particularly regarding the potential impact on public confidence and the material impact on third parties. It is crucial to ensure that the guidelines do not inadvertently categorise all matters, including minor transgressions as high priority, leading to disproportionate fines. Such an approach would be aligned to the principle of proportionality envisaged in paragraph 1.8 of the Draft Guidelines.

24. In terms of Annexure F: **Fines Matrix**, there is no guidance provided on the rationale applied to determine the ranges to be applied. It is SAICA's view that it is important for the IRBA to include in the guidelines the decision process followed to establish these monetary guidelines. Reasons should be provided on the 50% approach applied for the moderate and severe transgressions and why a similar approach has not been followed for the minor transgressions. We have noted that the high priority matters starting point for the minor transgressions is higher than the other two categories (moderate and severe). If a similar approach was followed for moderate and severe transgressions, the starting points for the minor transgressions would be as follows:

Type of Disciplinary matter	**Minor Transgressions**
Admission of Guilt – Firm	R400 000 – R4,5 million
Admission of Guilt – Individual	R100 000 – R1,5 million
Disciplinary Hearing – Firm	R600 000 – R7,5 million
Disciplinary Hearing – Individual	R200 000 – R3 million

25. Furthermore, detailed guidance and clarity need to be provided on what constitutes a minor, moderate and severe transgression. This may reinforce our earlier point to explain the linkages between other IRBA Disciplinary and Enforcement documents if these are explained elsewhere. While Annexure G, **Considerations relating to determining the severity of transgressions**, attempts to distinguish between the three categories, it still remains unclear and in our view remains very much overly-subject to the discretion of the Disciplinary/Enforcement committee.

26. The inclusion of minor transgressions within the penalties framework, particularly given the substantial upper limit of fines for such transgressions, raises significant concerns. It is generally anticipated that minor transgressions, by their very nature, could be addressed through alternative measures, such as non-monetary penalties. The primary objective of monetary fines is to safeguard the public interest and ensure accountability among auditors. This underscores the necessity to clearly define what constitutes minor, moderate, and severe transgressions. Imposing substantial fines for minor transgressions, as they are commonly understood, seems excessively punitive.

27. It is also questionable whether a minor transgression would end up at the Disciplinary/Enforcement Committee as the factors listed in Annexure G would need to be assessed prior to bringing the case to the committee. By virtue of the fact that a case has ended up at the Disciplinary/Enforcement Committee, it would be difficult to argue that the matter is not high priority.

28. Annexure G is also clear that if one of the considerations falls in the 'severe transgressions' category then the improper conduct will be deemed as a severe transgression, irrespective of the outcomes from the other considerations. Giving excessive weighting of one consideration over the others does also cause concerns on the application of the principle of proportionality which is one of the intended outcomes as per paragraph 1.8 of the Draft Guidelines. It is our view that the considerations should be weighed in their balance to each other instead of automatically skewing one outcome against the others. This approach would ensure that the Draft Guidelines are principle-based and balanced.

29. In Annexure G, clarity needs to be provided by the IRBA on the following:

    a. Consideration 3 on the duration of the transgression; what would constitute an extended period and whether this would relate to multiple audit engagements?
    b. Furthermore, consideration 4 refers to 'Benefit to the respondent from the transgression.' Clarity needs to be provided on what this entails and whether or not this includes audit fees earned from conducting the audit engagement. Guidance on what is excluded versus included would be useful in this regard.
    c. Consideration 6 refers to 'systemic issues' in an audit firm. Clarity needs to be provided to the profession on the benchmark that would be used to determine whether systematic issues exist or not. E.g. is it the firm's evaluation of its system of quality management over a defined period of time or previous IRBA inspections findings over a certain period of time.

30. While personal and/or financial circumstances of the Respondent have been incorporated in the mitigation submissions in Annexure B, the risk still remains that the imposition of fines for small firms may lead them to bankruptcy. For example, the minimum fine for a minor transgression involving a high priority matter by a firm is R900 000. Such an amount could prove to be excessive for a small firm and lead to joblessness for the employees of that particular firm. In fact, the imposition of the maximum level of monetary fines could create affordability challenges for both firms and registered auditors. There is also the likelihood that these monetary fines may not be covered by Professional Indemnity insurance. It is SAICA's view that such considerations be included in the possible mitigation factors that may be submitted by a firm or registered auditors and that this list should be indicative rather than exhaustive and that it not be limited to only the factors listed in Annexure B. For example, if an auditor demonstrates that significant steps have been taken to rectify the identified issues and prevent future occurrences, such proactive measures should be considered in mitigating the

fine. In this regard, non-monetary sanctions could also serve as potent deterrents without imposing financial burdens that could lead to the bankruptcy of the firms and registered auditors.

Other specific comments

31. In paragraph 2.3, clarity is sought on the date that the transgression was '*first perpetrated*'. The confusion comes in whether this is the date upon which the audit report is signed or when the actual audit procedure that was committed or omitted took place. It is important to distinguish between the two as there could be an impact on the date of the transgression and the monetary penalties that apply. E.g. if the actual procedure that leads to the transgression was conducted in May 2023 but the auditor's report was signed in July 2023.

32. In paragraph 3.3, there is an introduction of capping for maximum cumulative fines for all charges relating to transgressions conducted on or after 15 June 2023 up until 5 June 2024. Our understanding is that this is to account for the amendments that were made to the proposed maximum fines relating to disciplinary hearing matters. For consistency, the capping of the cumulative fines for all charges thus should not apply to the admission of guilt matters. Furthermore, as IRBA takes into account the responses from the consultation process, the definition of what 'per charge' is needs to be clarified. For example, where there are multiple findings in a single engagement that are considered as transgressions, could these result in multiple charges or a single charge?

Conclusion

33. SAICA appreciates the IRBA's efforts in establishing a structured approach to monetary fines and the opportunity to provide comprehensive feedback. We believe that our recommendations will enhance the clarity, fairness, and effectiveness of the Draft Guidelines. We look forward to engaging further with the IRBA on this critical issue and remain available for any clarifications that may be required.

34. Consistent with the other exposure drafts published by the IRBA on Standards consultation projects, we urge that the comment letters submitted by the various commentators on this important topic be publicly made available on the IRBA website. This will enhance the transparency of the consultation process followed by the IRBA in finalising the Guidelines.