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Ms V Sewlal

Office of the Information Regulator

Email: VarSewlal@justice.gov.za

Dear Ms Sewlal,

SAICA SUBMISSION ON THE AMENDED GUIDELINES TO DEVELOP CODES OF CONDUCT IN TERMS OF CHAPTER 7 OF THE PROTECTION OF PERSONAL INFORMATION ACT OF 2013 ("POPIA")

In response to your request for comments on the Amended Guidelines to develop Codes of Conduct in terms of the Protection of Personal Information Act please find comments prepared by The South African Institute of Chartered Accountants (SAICA).

We thank you for the opportunity to provide comments on this document and we would like to invite the department to engage with us, should you wish to discuss the comments.

Yours sincerely,

Juanita Steenekamp
Project Director: Governance and Non-IFRS Reporting

General discussions

The guidelines appear to be ultra vires sections 60(2) and 60(4) and deals with matters beyond the scope of the authority of the sections. It is proposed that the guidelines address the following as per the provisions:

> *"(2) A code of conduct must—*
> *(a) incorporate all the conditions for the lawful processing of personal information or set out obligations that provide a functional equivalent of all the obligations set out in those conditions; and*
> *(b) prescribe how the conditions for the lawful processing of personal information are to be applied, or are to be complied with, given the particular features of the sector or sectors of society in which the relevant responsible parties are operating.*
>
> *(4) A code of conduct must also—*
> *(a) specify appropriate measures—*
> *(i) for information matching programmes if such programmes are used within a specific sector; or*
> *(ii) for protecting the legitimate interests of data subjects insofar as automated decision making, as referred to in section 71, is concerned;*
> *(b) provide for the review of the code by the Regulator; and*
> *(c) provide for the expiry of the code."*

The Draft Guidelines refer to "body" as a public or private body as defined in POPIA. Clarity is sought on the implications where certain bodies in an industry draft a code of conduct, but the remaining bodies in the industry elect not to participate, for example where these bodies are not completely of similar class or grouping. Sections 27 and 28 also deals with the bodies bound by the Code and it is not clear if certain bodies in an industry can subscribe to the code and others not.

Section 15.1 and 18 allows for a code to provide for exemptions under POPIA. Section 18.2 then also states that POPIA will apply in instances where no exemptions are provided for. This seems in contrast with the Act as the Act does not allow for exemptions except as set out in sections 6 and 7. The code could provide for exemptions to the code but not the Act.

Section 26 refers to the fact that the Act does not refer to how codes should be administered and that the Regulator will consider this when codes are submitted. This seems very vague and does not assist the bodies when drafting the codes. Bodies should be allowed to propose their own governance requirements.

Section 29 states that all industry bodies must have practices or procedures in place to deal with complaints. The Act states in section 63(1) that a code of conduct may prescribe procedures to deal with complaints but such provisions may not limit or restrict any provision of Chapter 10 of the Act. It further states if the code includes any procedures for making and dealing with complaints then the additional requirements as set out in section 63(2) of the Act must be satisfied. The Regulator cannot prescribe more onerous requirements than what is allowed in the Act.

The guidelines in section 30 refer to reporting on compliance with a code in an annual report and that this report could include feedback from audits or investigations. The Act does not require any annual reports or audits to be performed. The Act and guidelines also does not define what an audit is and the guideline is seemingly more onerous than the Act and could be interpreted as ultra vires.

The term "audit" is also defined in section 1 of the Auditing Profession Act (Act No. 26 of 2005), and states that an "audit" includes an audit of financial statements carried out with the objective of expressing an opinion as to their fairness or compliance with an identified financial reporting framework and any applicable statutory requirements, and the registered auditor must, comply with those standards issued by the IRBA. The registered auditor can only accept an engagement if the preconditions for an audit or an assurance engagement are met.
Two of the preconditions are:

- that the underlying subject matter is appropriate; i.e. it is identifiable and capable of consistent measurement or evaluation against applicable criteria such that the resulting subject matter information can be subjected to procedures for obtaining sufficient appropriate evidence to support the auditor's opinion or conclusion;
- that the criteria that the auditor expects to be applied in the preparation of the subject matter information exhibit all the characteristics of *suitable criteria.*

Therefore when the term audit is used in the Guidelines, it would need to meet the requirements as set out in the Auditing Profession Act.

Section 36 of the Guidelines deals with the fact that the Regulator can approve a variation of an approved code and that the Regulator may undertake consultation on this variation. In our view the bodies to which the code applies should be involved and able to comment on the proposed variation, and any bodies that no longer wishes to subscribe to this code should be provided the option. The guidelines for imposing a code and the variation thereof is not comprehensive enough and may lead to unfair administrative procedure.

We commend the Regulator for drafting the proposed guidelines. The Regulator should however caution that these Guidelines do not impose more onerous requirements than allowed for in the Act.