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Attachment 3 – SAICA submission on publication of the Draft Proposed Property Practitioners Bill, 2016

Definitions

1. In this Act, unless the context otherwise indicates—

“accounting records” means information in written or electronic form concerning the property practitioner’s trust accounts as required in terms of this Act, including but not limited to records of all transactions involving trust monies, general and subsidiary ledgers and other documents and books used in the administration of the trust accounts, and, in relation to the property practitioner’s business as such, information in written or electronic form concerning the financial affairs of the business as required in terms of this Act, as well as in terms of any other Act that may be applicable to the form of entity of the property practitioner’s business, including but not limited to, records of assets, liabilities, income and expenses, general and subsidiary ledgers and other documents and books used in the preparation of financial statements of the business.

“audit” has the meaning set out in the Auditing Profession Act 26 of 2005 (APA). **“auditor”** means an individual or firm registered in terms of section 37 or 38 of the Auditing Profession Act, 2005 (Act No. 26 of 2005);

“recognised financial reporting framework” means International Financial Reporting Standards or the International Financial Reporting Standard for Small and Medium-sized Entities;

“trust money” means money held by the property practitioner on behalf of a client in a trust account for services to be rendered by the property practitioner.

Trust account

53. (1) Every property practitioner—

(a) must open and keep one or more separate trust accounts, which must contain a reference to this section, with a bank registered in terms of the Banks Act, 1990, (Act No. 94 of 1990);

(b) must immediately after opening a trust account contemplated in paragraph (a) appoint an auditor as prescribed;

(c) must immediately after opening a trust account as contemplated in paragraph (a) and appointing an auditor as contemplated in paragraph (b), provide the Authority as prescribed with all information in respect of such account or accounts and such auditor; and

(d) or his, her or its responsible or designated employee, as the case may be, must immediately deposit all trust money held or received by or on behalf of that property practitioner in the relevant trust account.

(2) Despite subsection (1), any property practitioner may invest in a separate savings or other interest-bearing account opened by him, her or it with any bank any monies deposited in his, her or its trust account which are not immediately required for any particular purpose, provided that—

(a) savings or other interest-bearing accounts must contain a reference to this subsection; and

(b) property practitioner must as prescribed provide the Authority with all information in respect of such account.

(2A) The prescribed portion of interest on moneys deposited in a trust account referred to in subsection (1)(a), and on moneys invested in terms of paragraph (2), shall, subject to the express terms of a written mandate, be paid to the fund, without deducting bank charges, by the property practitioner concerned. Any terms in a written mandate that makes the property practitioner the beneficiary of the full amount of interest shall be void.

Comment [TP1]: Detailed regulations should be issued to describe how the property practitioner should administer and maintain the trust accounting records. See additional information in the appendix. There may be additional matters that the EAAB would like to add and this should be discussed.

Comment [TP2]: The Bill does not state anything in terms of paying over interest earned on the trust account or investment account. Without such a requirement how will the fidelity fund be funded?

Comment [TP3]: It is current practice that the estate agent pays over 50%.

Comment [TP4]: There has been many questions on whether bank charges can be deducted before the 50% is calculated.

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(3) A property practitioner must retain all trust money deposited in terms of subsection (1) or invested in terms of subsection (2), until he, she or it—

(a) is lawfully entitled to such money; or

(b) is lawfully instructed in writing to make payment therefrom to any person.

(4) Any bank which manages trust accounts for purposes of this Act must, from time to time as prescribed, submit a certificate to the Authority declaring interest in respect of that account.

(5) Every property practitioner must—

(a) keep separate accounting records of all monies deposited by him, her or it in his, her or its trust account and of all monies invested by him, her or it in any savings or other interest-bearing accounts contemplated in subsection (2);

(b) balance his, her or its books and records relating to any account contemplated in paragraph (a) at intervals of not more than one month, **[and cause them as well as all his, her or its business accounts or any other account into which monies are deposited in connection with any property transaction to be audited by the same auditor contemplated in subsection (1)(b), within six months after the final date of the financial year of the property practitioner concerned; and]**

(c) administer the accounts referred to in subsections (1) and (2) in the prescribed manner; and

(d) cause his, her or its accounting records as contemplated in sections 53(1)(a) and 53(2) to be audited by an auditor, to enable the auditor to express an assurance conclusion on whether the trust accounts of the property practitioner for the financial year under consideration were maintained, in all material respects, in accordance with sections 53(1)(a), 53(1)(b), 53(1)(c), 53(1)(d), 53(2), 53(3), 53(5)(a), 53(5)(b), 53(5)(c), 53(10), 53(11), 53(15), 54(1), 54(2), within six months after the final date of the financial year of the property practitioner concerned.

(e) in complying with (d) above the auditor shall comply with the auditing pronouncements in terms of the Auditing Profession Act (Act No. 26 of 2005).

(6) A property practitioner must, forthwith after receipt of an the auditor's report contemplated in subsection (5) **[b]d**, submit that report to the Authority, but a property practitioner who submits that report later, may upon payment of a prescribed penalty make a late submission of that report.

(7) Despite subsection (5), the Authority may on good cause at any time order a property practitioner by notice in writing to cause the accounting records contemplated in subsection (5)(a) to be audited as contemplated in subsection 5(d) and submit the auditor's report to the Authority within a period stated in such notice, but not less than 30 days, **[an audited statement prepared by an auditor fully setting out the state of affairs in respect of the matters referred to in subsection (5)(b).]**

(8) The Minister may prescribe circumstances under which a property practitioner may be exempted from opening and keeping a trust account. Under such circumstances the Minister will also prescribe the requirements regarding appointment of an auditor and the audit of the property practitioner's financial statements where there are no other laws or regulations that would otherwise require and audit of the financial statements based on the type of business through which the property practitioner practices.

(9) A court may on good cause, upon application by the Authority or any other competent person, prohibit any property practitioner from operating in any way his, her or its trust, savings or other interest-bearing accounts contemplated in subsection (2) and may appoint a curator bonis to control and administer such trust, savings or other interest-bearing accounts, with the rights, duties and powers that the court deems fit.

Comment [TP5]: We believe that lawfully entitled should be defined – we do not have appropriate wording for this.

Comment [TP6]: We believe that lawfully instructed should be defined – we do not have appropriate wording for this.

Comment [TP7]: Refer to my insertion of sub-section (d) below to describe an assurance engagement in terms of ISAE 3000.

Comment [TP8]: Such a requirement will cover both a compliance engagement under ISAE 3000(Revised) on the trust accounts as well as an ISA 700 audit on the business accounts

Comment [TP9]: This section allows for a Property Practitioner to be exempted from keeping trust accounts under certain circumstances, as prescribed by the Minister. We welcome this requirement, since it caters for certain practical circumstances which may occur in practice. However, the following question arises, that requires consideration:

- If a property practitioner is exempted from keeping trust accounts there would also not be a need to appoint an auditor to audit such accounts.
- However, will there still be a requirement to appoint an auditor to audit the property practitioner's business accounts?

This requirement should be clarified and if a property practitioner is exempted from keeping a trust account then the appointment of the auditor needs to be waived. The decision needs to be taken if this property practitioner still would require there business accounts (financial statements) to be audited.

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(10) If—

(a) the Authority refuses under the provisions of this Act to issue a Fidelity Fund certificate to any property practitioner who applied for a Fidelity Fund certificate;

(b) a Fidelity Fund certificate issued to any property practitioner has been withdrawn or lapsed without being renewed;

(c) any property practitioner ceases to act as such; or

(d) any property practitioner becomes subject to any disqualification contemplated in section 49, the property practitioner concerned must immediately wind up his, her or its trust account, savings account or other interest-bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the persons entitled to it.

(11) Any property practitioner who winds up an account as contemplated in subsection (10) which contains unclaimed or unidentifiable money, or who has held monies in his, her or its trust account of which the owner or beneficiary could for longer than three years not be identified, must pay that money into the Fund to be held in trust, but the Fund must, upon application in the prescribed manner by the owner or beneficiary of such money and with the provision of sufficient proof, pay that money to that owner or beneficiary.

(12) Any money paid into the Fund in accordance with subsection (11) which has remained unclaimed by the person entitled thereto for a period of 30 years as from the date upon which such person became entitled to claim that money, is forfeited to the Fund.

(13) Despite any other law, the amount standing to the credit of the trust, savings or other interest-bearing account contemplated in subsections (1) and (2) of a property practitioner, does not under any circumstances form part of the assets of such property practitioner or, if he or she was a natural person and has died or has become insolvent, of his or her deceased or insolvent estate.

(14) Despite any other law, no trust money which may have been paid into any account other than an account contemplated in subsection (1) or (2), whether erroneously or not, under any circumstances becomes part of any such account, and does not lose its nature or characteristics as a result of being paid into such other account.

(14A) A property practitioner must annually confirm or update the details of his, her or its bank accounts contemplated in 53(1)(a) and 53(2).

(15) A property practitioner must annually confirm or update the details of his, her or its auditor **as prescribed**.

Comment [TP10]: Included this as it may change in a similar way as subsection (15).

Duty of property practitioner to keep accounting records and other documents

54. (1) Despite any other law, a property practitioner must for a period of 10 years in respect of—

(a) all documents exchanged with the Authority;

(b) if applicable, correspondence with his, her or its employer or franchisor;

(c) any agreement incidental to his, her or its carrying on the business of a property practitioner;

(d) any agreement, mandate, mandatory disclosure form or other document relating to the financing, sale, purchase or lease of a property;

(e) any advertising or marketing material related to his, her or its carrying on the business of a property practitioner; and

(f) any other document prescribed by the Minister, from the date of the document or the probable date of the document retain that document and must upon request forthwith provide the Authority with a legible certified copy of that document.

(2) The documents contemplated in subsection (1) may be stored electronically if such storage meets the requirements of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

(3) A property practitioner who contravenes subsection (1) is guilty of an offence.

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(4) In addition to the duties contemplated in section 53~~54~~, a property practitioner must in respect of his, her or its activities as such—

(a) keep in one of the official languages at an address in the Republic the accounting records **[that are necessary to fairly reflect and explain the state of affairs]**—

(i) of all monies received or expended by him, her or it, **[including monies deposited to a trust account referred to in section 53(1) or invested in a savings or other interest-bearing account referred to in section 53(2);]**

(ii) of all his, her or its assets and liabilities; and

(iii) of all his, her or its financial transactions and the financial position of his, her or its business; and

(b) prepare financial statements and cause [the accounting records contemplated in paragraph (a)] them to be audited by an auditor within six months after the final date of the financial year of the property practitioner, which final date may not be altered by him, her or it without the prior written approval of the Authority.

(c) the financial statements must either be prepared in accordance with a recognised financial reporting framework or a basis of accounting as determined by the property practitioner taking cognisance of other applicable laws and regulations which may prescribe the financial reporting framework to be applied in the preparation of the financial statements based on the type of business through which the property practitioner practices.

Comment [TP11]: Should this not be section 53?

Comment [TP12]: Subsection (a)(ii), read together with the introduction sentence, is not clear in terms of the assets and liabilities that are referred to. It should be clarified that the accounting records refer to the “business of being a property practitioner” as it could in the case of a sole practitioner be interpreted as including the person’s own/ personal assets and liabilities. For example, the phrase “as such” could be added to the end of the introduction sentence of section 54(4).

Comment [TP13]: This is already in 53 and will be audited in terms of 53(5)(d). This is also to keep the requirement to prepare financial statements and have them audited separate from the audit of the trust accounts.

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Appendix A – Suggested regulations for sections 53(4); 53(5)(a) - (c); and 53(10)

53(5)(a) keep separate accounting records of all monies deposited by him, her or it in his, her or its trust account and of all monies invested by him, her or it in any savings or other interest-bearing accounts contemplated in subsection (2)

1. The accounting records shall distinguish, in readily discernable form, between business account transactions and trust account transactions
2. Trust money shall in no circumstances be deposited in or credited to a business banking account. Trust money found in a business banking account at any time shall be transferred to a trust banking account without undue delay. A property practitioner shall be deemed to have complied sufficiently with this regulation if it makes the transfer from its business banking account to its trust banking account at the earliest working day.
3. Money other than trust money found in a trust banking account at any time shall be transferred to a business banking account without undue delay. A property practitioner shall be deemed to have complied sufficiently with this regulation if it makes transfers from its trust banking account to its business banking account at least once a month.

53(5)(b) balance his, her or its books and records relating to any account contemplated in paragraph (a) at intervals of not more than one month

1. The property practitioner shall write up his, her or its accounting records and balance them at intervals of not more than one month. The property practitioner shall be deemed to comply with this regulation if its accounting records have been written up and balanced by the last day of the following month.

53(5)(c) administer the accounts referred to in subsections (1) and (2)

1. The property practitioner shall report to the Authority forthwith in writing any loss, theft or destruction of any accounting records.
2. The property practitioner shall, in the case of accounting records being computerised, make monthly backups which shall be kept in a safe, fireproof place remote from the property practitioner's premises or, in the case of accounting records that are in the form of manual books of account, shall ensure that, outside normal business hours, such records are kept in a safe place.
3. If the firm keeps any of its accounting records in electronic form, the firm shall:
 - 3.1 Provide adequate precautions against loss of the records as a result of damage to or failure of the media in which the records are maintained; and
 - 3.2 Ensure that the records are at all times capable of being retrieved to a readable and printable form, including by converting the records from legacy to later systems or software from time to time.
4. The property practitioner shall, where he, she or it utilises electronic banking in respect of payments from the trust account, keep a proper audit trail, which shall include verification of the payee's banking account details.
5. The property practitioner's accounting records shall not, save with the prior written consent of the Authority, and except for electronic records in terms of regulation 3 and backups of computerised records, be maintained at any place other than its main office

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or branch office, but in the latter instance, only insofar as they relate to any part of its practice conducted at that branch.

6. When making a transfer from its trust banking account to its business banking account, the property practitioner shall ensure that:
 - 6.1 The amount transferred is identifiable with and does not exceed the amount due to it;
 - 6.2 The trust creditor from whose account the transfer is made is identified; and
 - 6.3 The balance of any amount due to it remaining in its trust banking account is capable of identification, with corresponding entries appearing in its trust ledger.
7. The property practitioner shall, within a reasonable time after the performance or earlier termination of any mandate, account to its client in writing and retain a copy of each such account for not less than ten years; each account shall contain details of:
 - 7.1 All amounts received by it in connection with the matter concerned, appropriately explained;
 - 7.2 All disbursements and other payments made by it in connection with the matter;
 - 7.3 All fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed;
 - 7.4 The amount owing to or by the client.
8. The property practitioner shall ensure that all money received by it on account of any person is deposited intact into its trust banking account on the date of its receipt or the first banking day following its receipt on which it might reasonably be expected that it would be banked.
9. The property practitioner shall ensure that any amount withdrawn by it from an investment account is deposited promptly by it into its trust banking account.
10. The property practitioner shall ensure that the total amount of money in its trust banking account, trust investment account and trust cash at any date shall not be less than the total amount of the credit balances of the trust creditors shown in its accounting records.
11. The property practitioner shall ensure that no account of any trust creditor is in debit.
12. The property practitioner shall employ and maintain a system to ensure that the requirements of these regulations are not infringed when amounts are transferred from its trust banking account to its business banking account.
13. The property practitioner shall immediately report in writing to the Authority should the total amount of money in its trust bank account be less than the total amount of credit balances of the trust creditors shown in its accounting records, together with a written explanation of the reason for the debit and proof of rectification.
14. The property practitioner shall immediately report in writing to the Authority should an account of any trust creditor be in debit, together with a written explanation of the reason for the debit and proof of rectification.
15. Withdrawals from the property practitioner's trust banking account shall be made only:
 - 15.1 To or for a trust creditor, or
 - 15.2 As transfers to the practitioner's business banking account, provided that such transfers shall be made in respect of money due to the property practitioner; and

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provided that no transfer from its trust banking account to its business banking account is made in respect of any disbursement unless:

- 15.2.1 The disbursements have actually been made and debited by the property practitioner; or
- 15.2.2 A contractual obligation has arisen on the part of the property practitioner to pay the disbursement; or
- 15.2.3 Fees and disbursements have been correctly debited in its accounting records.

- 16. Any cheque drawn on the practitioner's trust banking account shall be made payable to or to the order of a payee specifically designated.
- 17. Payments from the trust banking account of the property practitioner shall only be by cheque or electronic transfer.
- 18. No withdrawals from the trust banking account of the property practitioner may be made by way of cellular and telephone transacting (telebanking).
- 19. The property practitioner shall extract at intervals of not more than three calendar months, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such moneys standing to the credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the property practitioner's trust banking account, investment account.
 - 19.1 The balance listed in respect of each such account shall also be noted in some permanent, prominent and clear manner in the ledger account from which that balances was extracted.
 - 19.2 Each such list shall be part of the accounting records of the property practitioner to be retained for the ten-year period referred to in section ... of the Act.
- 20. The property practitioner shall:
 - 20.1 Immediately notify the Authority in writing of the name and address of the bank or banks at which its trust banking account or accounts are kept and shall thereafter notify the Authority immediately of any change in the name and address of such bank or banks;
 - 20.2 Whenever so required by the Authority, furnish the property practitioner within ten days, or such longer period as the Authority may stipulate, a signed statement issued by the bank or banks with which it keeps its trust banking account or accounts and a signed statement issued by the bank with which the property practitioner keeps any investment account, certifying the amount of the balance of such trust banking account or accounts or investment account at such date or dates as may be specified by the Authority.
- 21. The property practitioner shall, unless otherwise instructed, pay any amount due to a client within a reasonable time.