Annexure A

Deloitte fully supports regulatory reform in the Auditing Profession. We are in agreement with amendments that are aimed to accelerate and improve the IRBA processes conducive to regulatory reform. Our below comments and concerns on Bill 2 of 2020 ("the Bill") as it pertains to the proposed amendments to the Auditing Profession Act, 2005 ("APA") are articulated to assist the IRBA in its objectives to provide regulatory oversight of the Auditing Profession as one of the valuable role players in the financial reporting eco-system. The following matters of principle inform our detailed responses in Annexure B.

1.1 Balancing of the powers of the IRBA with adequate recourse of the auditor [SLIDE 3]

While we support the strengthening of the powers of the IRBA to conduct effective investigations, we submit that these measures should be balanced by adequate recourse for the auditors subject to the process. The Bill proposes the introduction of among others entry and search and unlimited sanctions, and it is our recommendation that auditors be afforded the right to appeal the decisions of the Disciplinary Committee and the IRBA Board to a court, as is a common feature in other professions (including engineering, medical, veterinary, property practitioners, attorneys,)

1.2 A comprehensive review is needed on the consistency in which the IRBA Board committees structure, processes and composition are legislated [SLIDE 4]

Amendments are proposed to the IRBA Board Committees such as the Disciplinary Committee and Investigating Committee. The Bill goes further in introducing the Enforcement Committee which is presumably the structure currently referred to in the IRBA Rules as the Disciplinary Advisory Committee. The committees, composition, duties, functioning and other items are inconsistently spread throughout the main Act, Regulations, Rules and delegations contained in Board Resolutions. The Enforcement Committee should be treated similarly to the other statutory committees in the Act and its functions should be more clearly articulated. For the sake of regulatory certainty and consistent drafting, all statutory committees should have dedicated sections on the Act setting out their composition and functions, akin to sections 21 and 22 dealing with the Committees for Ethics and Auditing Standards. All procedural aspects must be set out in the Regulations to the Act.

The current amendment process provides an ideal opportunity to ensure consistency and transparency in the way the IRBA governance framework and different enforcement processes are set out. It is our recommendation that a complete review is needed to ensure that Committees are comprehensively dealt with in the Act and that all procedural matters are transparently set out in the Regulations. All

provisions pertaining to the enforcement processes and procedures should be removed from the IRBA Rules and various Board resolutions and rather be set out clearly in the Regulations to the Act.

1.3 Lack of audit professional expertise on the Board of the IRBA [SLIDE 5]

The proposed amendment to Section 11 suggests that only formerly registered auditors may be appointed to the Board of the IRBA. The current proposal is to remove the inclusion of Registered Auditors from the Board composition. This proposal is inconsistent with the approach applies to other professions in South Africa such as the Legal Practices Council, the Health Professions Council and the Engineering Council of South Africa where there is significant representation of professionals in that profession. The Auditing profession is complex and a thorough understandings requires a deep knowledge of auditing standards, coupled with practical application, experience. For the Board of the IRBA to stay abreast of practical and professional developments it is imperative that Registered Auditors are appointed to the Board. Registered Auditors can contribute a wealth of knowledge, skill and experience to the Board of the IRBA and greatly enhance the governance of the IRBA as an organisation as well as oversight of the profession. The appointment of Registered Auditors to the Board of the IRBA shows confidence and encouragement to the IRBA's own constituency. Contrary to the requirements of the Act, the Board of the IRBA currently and has for some time now, lacked Registered Auditors in its composition, which may have potentially exacerbated the challenges facing the Auditing Profession.

1.4 Reduced expertise in the investigations and disciplinary process [SLIDE 6]

The Bill seeks to diminish legal and auditing expertise applied to both the Investigations- and Disciplinary committees. Although the Bill prima facie appears to be an improvement of the IRBA processes, the legal and auditing specialists form a minority in the IRBA Board and committee structures. Whilst we support an improved and expeditious process, a lack of legal and audit expertise may have the opposite result. We propose that the proportion of persons with such expertise on the structures be increased as suggested in the detailed comments below.

We further propose that the requirement for a retired judge or senior advocate as chairperson of the Disciplinary Committee be retained, as the legal expertise is much needed in complicated matters. It is proposed that the chairperson of the Disciplinary Committee should appoint the chair of the panel and

that it should be required that the appointee should be a retired judge or senior legal representative of more than 20 years' experience to ensure that the necessary expertise is available for complex matters.

The rulings made by and decisions of the Disciplinary Committee may have a very serious impact on the career of an auditor (even ending such a career), and as such it is crucial for the process to be legitimate and fair. It is for this reason the we recommend the Act retains the requirement for the presiding officer to have the required expertise

1.5 Unlimited sanctions [SLIDE 7]

The Bill sets no monetary limit for the setting by the Minister of the maximum fine that may be imposed in terms of the proposed section 51B (2). We propose that a maximum be placed on the limit that the Minister may determine. This would be similar to the approach adopted in other pieces of legislation such as section 7(1) of the National Credit Act, 2005 or section 74(1) of the Competition Act, 1998.
We submit that this power to allow unlimited sanctions may serve as a deterrent for entry into the profession, as well as continued service in the audit profession. Smaller firms and individuals auditors may not have the financial means or desire to remain in such a highly regulated profession with unlimited liability and no recourse such as an Appeal process consistent with other professions.

1.6 Delegation of investigations and disciplinary proceedings to Professional Bodies [SLIDE 8]

The amendment of Section 48 provides that the IRBA may refer a non-audit matter brought against a registered auditor to the relevant accredited professional body for investigation and disciplinary proceedings. The South African Institute of Chartered Accountants (SAICA) is currently the accredited body to which the proceedings will be referred. It is arguable whether the IRBA, as an organ of state and subject to the Promotion of the Administrative Justice Act 3 of 2000 (PAJA), has the authority and legal power to "outsource" its powers under the APA to a voluntary membership association such as SAICA. SAICA is not subject to the APA or the PAJA and participants in the proceedings will not be afforded the protections of S 57 of the APA and PAJA.

The amendments do not stipulate what would constitute a "non-audit" matter nor does it stipulate the proceedings that will apply to the accused. We propose that these matters be addressed to ensure a fair and just administrative process is provided for.

1.7 The form and extent of the search and entry provisions as set out in the Bill [SLIDE 9]

Also see Annexure C.

The IRBA has existing powers to obtain information from auditors comparable to the Regulators of other professions such as lawyers, doctors and engineers. Currently section 47 of the APA gives the IRBA, or any person authorised by it, the power to inspect or review the practice of an auditor at any time. IRBA may, for these purposes, inspect and make copies of any information, including but not limited to any working papers, statements, correspondence, books or other documents, in the possession or under the control of an auditor. An auditor may not refuse to produce any information, as prescribed, subject to the provisions of the Promotion of Access to Information Act 2 of 2000, or any other law, requested by the IRBA, even though the registered auditor is of the opinion that the information contains confidential information about a client. The powers to request and inspect information is similar and compares with the provisions of inter alia the Legal Practice Act 28 of 2014, the Engineering Profession Act 46 of 2000 and the Health Professions Act 56 of 1974.

Given the powers to request and obtain information already in the APA, is our contention that the additional entry and search provisions in the Bill are unnecessary. Not all professions that act in the public interest such as the lawyers, engineers and doctors have search and seizure/entry measures in their governing laws.

If it is nevertheless believed that IRBA's powers must be extended, it should be done in a manner that is constitutionally balanced with due regard to sections 3(2) and 57 of the APA and section 34 of the Constitution of South Africa. The introduction of such invasive procedures must and are only legislated in exceptional circumstances.

Parliament recently passed the Property Practitioners Bill ("PPB") in 2019 (now enacted) that clearly and constitutionally sets out in its Explanatory Memorandum the objectives to correct the deficiencies of the old Estate Agency Affairs Act it repeals pertaining to search and entry powers. In the process of promulgating the PPB, Parliament took careful measures to ensure the constitutionality of the search and entry measures and to ensure an equitable balance between the powers of the regulator and the recourse provided to the subject of such powers. Among other measures the Property Practitioners Bill provides for the right to appeal to a court.

The provisions pertaining to search and entry as set out in this Bill are not in line with the search and entry procedures and right to recourse previously adopted by this Parliament. It is our strong

recommendation that this Bill adopts the provision as set out in the Property Practitioners Act to ensure constitutionality.

Annexure B

Our detailed comments in relation to the specific sections of the Bill are set out below:

2.1 Proposed amendment of section 11 of the APA

Proposed amendment:

The proposed wording on the Minister's appointment of members on the Regulatory Board is an improvement to the previous wording contained in the Draft Bill and welcomed. We however submit that the percentage of persons with audit and legal experience in relation to the rest of the Board can still be improved. The provisions do not go far enough. It is still not clear what the specific credentials of the ex-registered auditor must be other than that he or she '*has at least 10 years' experience in auditing.*'

This begs the questions of the level at which that experience must have been (a trainee accountant has experience in auditing). It does not actually state that the person must have been a registered auditor for 10 years.

Comment:

Whilst we recognise that the proposed amendment should be viewed against the prevailing regulatory philosophy, which elevates the principles of independence and 'public interest', and we understand the exclusion of auditors engaged in practice as registered auditors, one should not ignore the potential impact of an insufficient number of experienced auditors and lawyers on the Board. It is untenable that the Regulatory Board of such a complexly regulated profession will be deprived of their valuable insights.

Principles of good governance dictate that any well-functioning Board should bring the qualities of 'challenge', scepticism and 'recommendation' into the Boardroom. Without a sufficient number of experienced auditors and lawyers, none of the members might be able to bring sufficiently robust and current technical challenge and scepticism to the meeting.

Recommendation:

We would prefer to see a stipulation that at least a third of Board members should have previously been registered auditors for at least ten years and a third should be lawyers.

With respect to the qualification of the auditor to serve on the Board or respective committees, we propose the following wording instead: '*a person who is or has been a registered auditor [engaged in public practice and performing the attest function for at least 10 consecutive years] for at least 10 years'*.

The proposed section 11(8) (a) should remove references to '*registered candidate auditors*' as they are not partners and do not have profits to share.

2.2 Proposed amendment of sections 12 and 20 of the APA

Comment:

The terms of office for committee members and that of the chairperson do not align.

Recommendation

A consequential amendment is required to the term of office of the chairperson and vice chairperson (section 14(1) (b)) to align with the term of office of committee members.

2.3 Insertion of section 24B in the APA

Proposed amendment:

The establishment of the Enforcement Committee appears to be the formalisation of what was previously known as the Disciplinary Advisory Committee (DAC).

Comment:

The question arises as to whether the enforcement committee is intentionally being established as a subcommittee of the Board (as is currently the case with the DAC) or whether this has not been considered and simply represents the default position. Presumably, the DAC is currently constituted as a subcommittee of the Board as to accommodate the various references to 'the Board' in the Act in relation to the investigation and disciplinary process (see for example sections 48(7), 48(8), 49(1) and 49(2)). If 'the Board' were to carry out all the functions attributed to it, it would have to meet far more regularly. For this purpose, the DAC 'stood in the place' of 'the Board'. There is no apparent reason for it to remain a subcommittee of the Board. It is uncertain why the amendments do not establish the Enforcement Committee as a regular committee of the Board.

Recommendation:

The Enforcement Committee should be treated similarly to the other statutory committees in the Act and its functions should be more clearly articulated. For the sake of regulatory certainty and consistent drafting, all statutory committees should have clear sections setting out their composition and functions, akin to sections 21 and 22 dealing with the Committees for Ethics and Auditing Standards. All procedural aspects must be in the Regulations. There is no justification for not clearly setting out these requirements in the Act and it is now the opportune time to do so. We furthermore propose that the qualifications of the ex-registered auditor should be amended to align with the proposal made above in relation to section 11 of the APA.

2.4. Insertion of sections 48A to 48B

Refer to Annexure C for a comprehensive discussion on search and entry.

Recommendation:

If it is believed that IRBA's existing powers must be extended to include entry and search powers,

Parliament should follow a consistent approach on the topic as approved in the Property Practitioners Bill in 2019 (now enacted) coupled with the corrective measures to bring constitutional and procedural balance.

2.5. Insertion of section 24D - Disciplinary Committee

Comment:

This is an improvement on the previous draft but the following comments apply:

Recommendation:

- Section 24C (2) and (3) - refer to the comments above regarding the amendment of section 11.
- Section 24C (6) should instead refer to "*at least three members*". It is envisaged that in certain complex cases it may be desirable to have a greater range of expertise on a disciplinary hearing panel.
- Section 24C(7): It is proposed that the chairperson of the Disciplinary Committee should appoint the chair of the panel and that it should be required that the appointee should be a retired judge or senior legal representative of more than 20 years' experience to ensure that the necessary expertise is available for complex matters.

2.6 Amendment of section 37 by the insertion of section 37(1A) in the APA

Comment

The section is not only ambiguous, it is potentially unworkable. Must a person be a member of an accredited professional body (e.g. SAICA) only at the time of registration, or continuously? In other words, do the words '*be registered*' refer to the initial act of registration, or the continuing status of registration? If the former, there is no issue; if the latter, there are quite far reaching implications. Bear in mind that the act of signing an audit report whilst not registered with the IRBA constitutes the offence of 'holding out'.

Consider the following:

- SAICA normally terminates registration for non-payment of fees, although there are other reasons such as disciplinary removal, death or resignation.
- If this amendment proceeds, a registered auditor's registration with the IRBA would lapse *ipso facto* on the date that his registration is cancelled by SAICA, whether the IRBA was aware of it or not. SAICA would obviously need to inform the IRBA of these cancellations and the IRBA would have to retro-date these on its database.
- However, what of the 21-days' notice of termination, as required by section 39(3), on these grounds? How would that affect the process?

- What would happen if a person's registration was re-instated at SAICA, or if they were re-registered with SAICA? Would they need to re-apply to the IRBA or would their registration automatically be re-instated with effect from the date of re-instatement at SAICA?
- This makes it impossible to respond to the simple (and frequent, and important) enquiry regarding someone's registration status at the IRBA.

Of even greater concern is that requiring ongoing membership of an accredited professional body could potentially result in the functions of Regulatory Board relating to the registration (and even discipline) of auditors being usurped by professional bodies.

Recommendation:

The implications of this amendment and of the importance of clarity as to the registration status of a person requires further consideration by the IRBA.

2.7 Amendment of section 45 of the APA

Recommendation:

It is an opportune time to amend current deficiencies in the Act and the IRBA should make use of this opportunity to do so. Section 45 dealing with reportable irregularities proved to be challenging in the past, regarding the practical interpretation of what the term "*fiduciary duty*" encompasses. The IRBA is aware of the challenges. We propose that the ambit of fiduciary duty is extended by the addition of the concept "*duty of care and skill*" (in addition to the fiduciary duty) to section 45. This will ensure that matters will be reported within the scope of "*care and skill*", where there is uncertainty about the meaning of "*fiduciary duty*". The duty of "*care and skill*" will extend the ambit of the reportable irregularity definition to include matters pertaining to non-compliance with laws – something that is excluded by some in their interpretation of "*fiduciary duty*". It is our view that this addition will go a long way to addressing some of the concerns government might have with respect to non-compliance with laws by both the public and private sector.

2.8 Amendment of section 48 of the APA

Proposed amendment:

The inclusion of subsection (1A) envisages that the enforcement committee of the Regulatory Board may refer non-audit matters against a registered auditor to a professional body accredited in terms of section 32(2) of the APA for investigation.

Comment:

The legal basis for the referral is arguable and may in the first instance be ultra vires the powers of the IRBA. The Regulatory Board must currently investigate all allegations of misconduct against a Registered

Auditor (RA) provided they are reasonable and justified. The amendment seeks to allow the Board to refer non-audit matters to an accredited professional body such as SAICA. The following extract from the contents of the '*communiqué*' issued by the Regulatory Board dated 14 December 2017 and headed 'Notification of Changes regarding Sanctions for Improper Conduct' ('the communiqué'), regarding this issue states:

'*In line with global auditor regulator practice, the IRBA is of the view that it should primarily focus its investigations on complaints that involve RAs providing services to public interest entities [as per the definition of public interest entities in the IRBA Code of Professional Conduct in paragraphs 290.25, 290.26 and 290.26(a)]. Section 48 of the APA will therefore, need to be amended to allow the Board at its discretion, to consider alternative processes that will deal with certain non-assurance matters that do not relate to public interest. Implementation details and the necessary general public education regarding this change will still be undertaken*'

It is not clear exactly what type of non-audit matters the Regulatory Board will elect to investigate and what the process would be for the accredited professional body to follow. It is also not clear how this process will be designed to ensure consistency in process and sanctions between the different organisations (i.e. the IRBA process and the process of the professional body). A professional body such as SAICA has no jurisdiction by law over RAs who are not its members. Sanctions imposed by SAICA on a RA will be unenforceable and arguably *ultra vires* in terms of the current regulatory regime.

Is it competent for the IRBA simply to adopt the finding of the professional body? Would IRBA representatives need to attend the professional body's Professional Conduct Committee meetings to appreciate the context of a finding? Alternatively, is this in fact prejudicial to the Respondent? Would the IRBA hold a truncated sanction hearing? Would SAICA's compliance with the processes and procedures determined by the Board [section 21(2A) (b)] be one of the processes that are evaluated during the monitoring process? Can the IRBA over-rule a finding or sanction of the professional body? Is there an appeal back to the IRBA if the RA wants to challenge the finding/sanction of the professional body? Can the IRBA prescribe qualifications/experience of the professional body's investigators/ panel? Clear criteria must be legislated in terms of which the IRBA may delegate to professional bodies.

Recommendation:

The above and many more issues would need to be thoroughly considered and debated, before the requisite agreements and processes can be implemented. We understand from its stance taken on various matters, that the IRBA approves the model followed by the PCAOB. We understand the PCAOB

to be a national regulator, and to investigate and discipline only cases pertaining to audit aspects of listed entities. We understand further that all cases referred come from their equivalent of the Inspections Department. Perhaps this is what the IRBA seeks to emulate by providing for cases to be referred to professional bodies. A fuller airing of what happens in other jurisdictions would place this amendment in context.

We propose that the Regulatory Board consults more widely on the implementation plan for this proposal to enable the public to comment comprehensively on the entire process. It appears as if a Regulatory impact assessment has not been conducted.

2.9 Proposed amendment: Section 50 – disciplinary hearing

This draft is an improvement on the previous one, but the section still raises some questions:

The reference in section 50(1) to section 49 should specifically be to "*section 49(1) (b)*".

Section 50(6)(a) is impractical and may result in subpoenas that have been validly served not being complied with on the simple ground that it has not in fact come to the relevant person's attention. At the very least, it should be made clear that this section applies only to registered auditors, and not to any person in respect of which the Regulatory Board happens to have a record of a "last known address".

2.10 Proposed amendment: Amendment/substitution of section 51 – sanctions in admission of guilt process

Proposed amendment:

The proposed amendments deal with the imposition of sanctions in the admission of guilt process.

Comment:

The reference to a '*any other relevant non-monetary sanction*' is too vague.

Recommendation:

Competent non-monetary sanctions should be stipulated in the Act. Clear criteria for imposing the proposed sanctions should not be left to the discretion or interpretation of the IRBA's enforcement committee. In the absence of such criteria, the IRBA may be found to act outside the scope of its authority. This is especially problematic in the absence of any possibility of an appeal.

2.11 Insertion of section 51B – sanctions in disciplinary hearings

- It would be desirable to insert the word *'qualified*' in section 51B (3) (a) (IV) as follows: "*disqualify the registered auditor from registration as a registered auditor on a temporary,* ***qualified,*** *or permanent basis'.*
- It may prove helpful to set conditions for (re) registration under section 40(2) of the APA. With the new emphasis on corrective non-monetary sanctions, it is a good opportunity to effect these.
- The criteria for the publication of findings and sanctions imposed pursuant should also be clearly articulated.

2.12 Insertion of section 57A

Proposed amendment

The amendments propose the insertion of section 57(A) in terms of which the Regulatory Board must ensure that appropriate measures are taken in respect of personal information in its possession or under its control.

Comment:

It appears that the wording from section 19 of the Protection of Personal Information Act, 2013 (PoPIA) was copied verbatim. Certain words are however omitted. Section 19(1) of PoPIA inter alia states that a *"responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures"*.

Recommendation:

We propose that the complete wording of the section should be incorporated in the APA due to the vast amounts of personal information IRBA as a responsible party has under its control.

Annexure C: Search and Entry

2.4. Insertion of sections 48A to 48B Powers to enter and search

COMMENT:

We submit that the extended requirement for search and entry is not justifiable and proportionate for the following reasons:

The APA as it currently stands together with some of the proposed amendments affords the IRBA sufficient powers to request and obtain documentation. There is no need to increase the powers to the extent proposed.

Section 47 of the APA gives the IRBA, or any person authorised by it, the power to inspect or review the practice of an auditor at any time and may, for these purposes, inspect and make copies of any information, including but not limited to any working papers, statements, correspondence, books or other documents, in the possession or under the control of an auditor. An auditor may not refuse to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents, and, subject to the provisions of the Promotion of Access to Information Act 2 of 2000, or any other law, requested by the IRBA, even though the Registered Auditor is of the opinion that the information contains confidential information about a client. Non-compliance with section 47(3) or obstruction or hindrance of any person in the performance of the functions in that section constitutes an offence in terms of section 54(2) (a) of the APA. The amended section 48(5)(a) allows an investigating committee to require or subpoena the person investigated or any other "*person with specific knowledge of the matter under investigation*" to "*produce any information including working papers, statements, correspondence, books or other documents*". Failure to comply with such a request would entitle the investigating committee to obtain court orders requiring compliance by the person in question under penalty of imprisonment for contempt and, if necessary, orders entitling the sheriff to obtain them.

The consequence of the current proposal is that not only auditors but also any other person may be subject to the search and entry procedure.

We respectfully submit that interested parties and stakeholders have not been sufficiently alerted to the proposed powers in view of the inadequate legislative process as well as the fact that this is not specifically advertised in the explanatory memorandum. The wording in the memorandum conflates the subpoena and search and entry processes, and the investigation and disciplinary committees. The disciplinary committee has always had the power of subpoena. This is not new. The power of the investigating committee to subpoena is indeed a new insertion and not contested. The memorandum

creates the impression that this search and entry process will be confined to registered auditors in circumstances where there is non-co-operation by them. The memorandum states that it seeks '*to address the challenges faced by the IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors*.' That might have been the intention, but the powers as drafted are far wider and goes well beyond the stated objective. We recognise that the memorandum does not form part of the legislation *per se*, but it nevertheless alerts interested parties of what can be expected in the proposed amendments.

RECOMMENDATION

The matter of search and seizure / entry was thoroughly debated in the Parliamentary process in the context of three significant pieces of legislation:

- The Financial Intelligence Centre Act, 2001 Amendments. Two senior Council opinions were considered at the time by Treasury and Parliament;
- The Tax Administration Act, 2011. Comprehensive written feedback was provided by Treasury on comments made;
- The Property Practitioners Bill passed on 28 March 2019.

Not all professions that act in the public interest such as the lawyers, engineers and doctors have search and seizure/entry measures in their governing laws. The introduction of such invasive procedures must and are only legislated in exceptional circumstances. The recently passed Property Practitioners Bill ("PPB") clearly and constitutionally sets out in its Explanatory Memorandum the objectives to correct the deficiencies of the old Estate Agency Affairs Act it repeals. The legislator should be commended for the efforts to correct the constitutional and procedural imbalance. The PPB affords mechanisms to protect property practitioners from unfair invasive regulatory procedures and provides for escalations via appeal. This law should form the blue print for the introduction of search and seizure in the professional environment and one could only hope that the legislator follows suit with other laws such as the Auditing Profession Act ("APA") Amendment Bill.

> *"The Bill seeks to establish a Property Practitioners Regulatory Authority, provide for the appointment of the Board of the Regulatory Authority, and provides for other matters connected therewith. It seeks to put in place better monitoring mechanisms as compared to the current section 32A of the Act, which provide inspectors with wide powers of search and seizure on premises without proper authority. The Bill now requires that inspectors obtain a warrant to enter premises. The issue of section 32A has been a bone of contention and escalated to the Constitutional Court, e.g. the judgment of Auction Alliance vs EAAB…*
>
> *Chapter 5 of the Bill provides for compliance and enforcement measures. It provides for the appointment, powers, and duties of inspectors to ensure compliance. It provides for the issuing of compliance notices by inspectors for non-compliance and fines as compensation. Inspectors are empowered to search premises and seize documents from property practitioners where there is non-compliance with the Act. Inspectors are empowered to issue compliance notices for non-compliance for a property practitioner to comply within a specific time. The Authority may determine a fine to be paid by the property practitioner concerned through a compliance notice. It provides for the procedure of lodging complaints for non-compliance. In compliance with the Constitutional Court judgment in the matter of Auction Alliance vs The Estate Agency Affairs Board, it was found to be unconstitutional for an inspector to seize documents without a search warrant and the provisions concerned have been drafted in alignment with this judgment."*

A search and seizure/entry procedure must be the exceptional remedy of absolute last resort after all other available remedies have been exhausted and the Judge or Magistrate is satisfied that no other recourse is available. Annexure D Par. (1) reveals that the legislation with search and seizure/entry provisions (e.g. the Tax Administration Act 28 of 2011, Financial Intelligence Centre Act 38 of 2001 and Financial Sector Regulation Act 9 of 2017) have mechanisms in place (e.g. a "compliance notice" or "request to produce") as forerunners to the invasive procedure of search and seizure/entry. The exception to the legislation in Par. (1) is the Estate Agency Affairs Board Act 112 of 1976 (EAABA). Section 32A of the EEABA was successfully challenged in the Constitutional Court. The deficiencies in the EEABA were rectified in the PPB that deals with the issue of "compliance notices" comprehensively in section 26.

The official conducting the search and seizure/entry must have sufficient authority, seniority and qualifications and the official's powers must be specified.

The proposed term "IRBA official" has not been defined and its authority and experience have not been considered in the context of search and seizure/entry provisions similar to other pieces of legislation. Annexure D Par. (2) and (3) reveals that the legislation with search and seizure/entry provisions (being the Tax Administration Act 28 of 2011, Financial Intelligence Centre Act 38 of 2001 and Financial Sector Regulation Act 9 of 2017) all include provisions concerning the official conducting the procedure. The exception to the legislation in Annexure D Par. (2) and (3) is the Estate Agency Affairs Board Act 112 of 1976 (EAABA). The PPB rectified the position by way of section 24 that determines:

.....

(2) *When the inspector performs his or her functions in terms of this section, the inspector must— (a) be in possession of a certificate of appointment or an inspector's identification card issued to that inspector in terms of subsection (1)(b); (b) immediately show that certificate or inspector's identification card to any person who— (i) is affected by the inspector's actions in terms of this Act; or (ii) requests to see the certificate or inspector's identification card; and (c)* ***have the powers of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.***

Whether an IRBA employee has sufficient experience in conducting a search and seizure/entry operation is questionable. Search and seizure/entry procedures are normally authorised by the highest authority and requires specialised units or investigative directorates akin to what is required in the National Prosecuting Authority Act 32 of 1998. An amendment to the definitions in section 1 of the APA will be required to reflect the authority, competence and powers of the IRBA official. This amendment is omitted from the current draft.

The PPB sets out the powers of the official in great specificity and it is recommended that this law be considered being the most recent on the topic after its forerunner law (EAABA) was challenged. Section 25 of the PPB states:

Powers of inspectors to enter, inspect, search and seize.

(1) An inspector may, at any reasonable time and without prior notice, conduct an inspection to determine whether the provisions of this Act are being or have been complied with, and for that purpose, may without a search warrant—
(a) enter and inspect any business premises, except a private residence, of a property practitioner;
(b) require the property practitioner, manager, employee or an agent of the property practitioner to—
(i) produce to him or her the fidelity fund certificate of that property practitioner;
(ii) produce to him or her any book, record or other document related to the inspection and in the possession or under the control of that property practitioner, manager, employee or agent; or
(iii) furnish him or her with such information in respect of the fidelity fund certificate, book, record or other document at such a place and in such manner as the inspector may determine; and
(c) examine or make extracts from, or copies of, any such fidelity fund certificate, book, record or other document.

(2) Where a property practitioner conducts his or her business at his or her private residence, the inspector must notify the property practitioner in advance and in writing before conducting the inspection in terms of subsection (1), and set out the details of the inspection.
(3) An inspector may, on authority of a search warrant—
(a) enter and search any premises and any person on those premises if there are reasonable grounds for believing that there is an article or record therein that has a bearing on the inspection;
(b) examine any such article or record that is in those premises;
(c) request any person on the premises to unlock or otherwise provide unhindered access to any safe, storage facility or other receptacle on the premises, or to point out any other person on the premises who can do so;

(d) request information about any article, document or record that has a bearing on the inspection;

(e) take extracts from, or make copies of, any book, computer, document or record that is on or in the premises and that has a bearing on the inspection;

(f) use any computer system on the premises that has a bearing on the inspection, or require assistance of any person on the premises to use that computer system, to— (i) search any data contained in or available on that computer system; or

(ii) reproduce any record from that data;

(g) seize any output from that computer for examination and copying;

(h) attach and if necessary remove from the premises for examination and safekeeping anything that has a bearing on the inspection; and

(i) seize and retain any such fidelity fund certificate, book, record or other document that may afford evidence of sanctionable conduct under this Act: Provided that the person from whom the fidelity fund certificate, book, record or other document was taken shall, at his or her request and at his or her expense, be allowed to make copies thereof or extracts therefrom, under the supervision of the inspector concerned.

(4) The search warrant contemplated in subsection (3) may only be issued by a judge or a magistrate if it appears from the information given by the inspector under oath or affirmation that—

(a) there are reasonable grounds for suspecting that a contravention of the Act has occurred or is occurring;

(b) a search of the premises is likely to yield information pertaining to the alleged contravention; and

(c) the search is reasonably necessary for the purposes of enforcing the Act.

(5) The search warrant must identify the premises that may be entered and searched and specify the parameters within which the inspector may perform an entry, search or seizure.

(6) The search warrant is valid only until—

(a) the warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose of issuing it has lapsed; or

(d) the expiry of one month after the date it was issued, whichever occurs first.

(7) The warrant may be executed only during the hours of 08h00 and 17h00 of a day other than a Saturday, Sunday or public holiday, unless the judge or the magistrate who issued it authorises that it may be executed at any other time that is reasonable in the circumstances.

(8) Immediately before commencing with the execution of a search warrant, the inspector executing that warrant must—

(a) if the owner or person in control of the premises to be searched is present— (i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand exact copies of the warrant and of this section to that person or to the person named in it; or (b) if no person is present, affix an exact copy of the search warrant at the entrance to the premises in a prominent and visible place.

(9) The inspector authorised to conduct search entry and search in terms of a search warrant issued in terms of subsection (3), may be accompanied and assisted by one or more police officers.

(10) The inspector and any police officer accompanying the inspector must, when entering and searching any premises in terms of a search warrant, conduct that entry and search with strict regard to decency and every person's right to dignity, freedom, security and privacy.

(11) During any search, only a female inspector or police officer may search a female person and only a male inspector or police officer may search a male person.

(12) An inspector who removes anything from premises being searched must—

(a) issue a written receipt for it to the owner of or person in control of the premises in sufficient detail to identify each specific thing so removed; and

(b) return it as soon as practicable after achieving the purpose for which it was removed to the person from whose control it was taken, unless it is to be used as evidence in any subsequent proceedings, in which case the inspector must forthwith in writing inform the person from whose control it was taken of that fact.

(13) During a search conducted under a search warrant, a person may refuse to permit the removal of an article, document or record on the grounds that it contains privileged or protected information, but that person may not cause such article, document or record to be amended, altered or destroyed until the inspector has been afforded a reasonable time to act under subsection (14).
(14) If the owner or person in control of an article or document refuses to give the article, document or record to the inspector conducting the search, that inspector may in writing request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article, document or record for safe custody until a court determines whether or not the information is privileged or protected.
(15) A police officer who is assisting the inspector in terms of this section may use as much force as is necessary, including breaking a door or window of the premises, or the breaking of any lock which prevents the search of any safe, storage facility or other receptacle on the premises, to overcome resistance by any person to the entry and search.

Search and seizure/entry procedure should only be applicable in circumstances where a Judge or Magistrate is satisfied that there are reasonable grounds to suspect non-compliance with section 47(3), 50(4), 50(5), 50(11) (c) or 50(12) and that the entry and investigation of the premises are likely to yield information pertaining to such non-compliance.

This approach is consistent with the Tax Administration Act 28 of 2011 and the Financial Intelligence Centre Act 38 of 2001 as indicated in Annexure D Par. (4) and section 25 (4) of the PPB:

(4) The search warrant contemplated in subsection (3) may only be issued by a judge or a magistrate if it appears from the information given by the inspector under oath or affirmation that—
(a) there are reasonable grounds for suspecting that a contravention of the Act has occurred or is occurring;
(b) a search of the premises is likely to yield information pertaining to the alleged contravention; and
(c) the search is reasonably necessary for the purposes of enforcing the Act.

Search and seizure/entry procedure triggered by the investigations process affords unlimited powers to IRBA. The parameters for triggering an investigation are too wide. In its current form, a mere allegation on any matter may trigger such a procedure. See for example section 30 of the APA that states:

***30. Investigations.**—(1) The Minister may at any time request the Regulatory Board to investigate any matter at its own cost or against full or partial payment.*

Although the Financial Sector Regulation Act 9 of 2017 allows an investigation to trigger search and seizure/entry procedure, the parameters are specified and various protections are afforded in a "super-regulatory environment". Refer the relevant sections depicted Annexure D Par. (4).

The issuance of a warrant by a judge or magistrate as contemplated by section 24B should be subject to specific criteria. Similar provisions are contained for example in the section 25 of the

PPB, the Companies Act, section 177 or section 45 of the Financial Intelligence Centre Act, 2001 or the Financial Sector Regulation Act, 2017. Also refer to the Annexure D Par. (5).

The warrant must be specific and deal with inter alia the following matters. Also refer to section 25 of the PPB above that sets out the warrant in great specificity:

- The warrant must be issued in relation to the **premises** where it is reasonably believed that the business of an auditor is being conducted.

- **A receipt** must be provided and full account of information provided for information being removed. Auditors have the information of numerous third parties and are subject to strict confidentiality requirements.

- The **right to question** contemplated in section 24(6)(a)(ii) should be subject to **limitations** similar to those contained in the Companies Act, section 179(3) or section 140 of the Financial Sector Regulation Act, 2017:

> *"A person who enters and searches premises under section […], before questioning anyone-*
> *(a) must advise that person of the right not to answer or to be assisted at the time by an advocate or attorney; and*
> *(b) must advise that person of the right against self-incrimination; and*
> (c) *allow that person to exercise the right contemplated in paragraph (a) and (b)."*

Consensual search and seizure/entry without a warrant is of concern due to the extensive liability that may be incurred where third party information is held and an ignorant respondent had no access to legal advice or representation. Warrantless inspections of businesses and businesspersons suspected of wrongdoing by industry regulators are extensively discussed in two precedent setting Constitutional Court judgments of *Gaertner and Others v Minister of Finance and Others* and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*. In each case, the Court unanimously declared the empowering statutory provisions relied upon by inspectors to be an unconstitutional violation of privacy. Whilst it is recognised **that provision for search and seizure/entry without a warrant exist as portrayed in Annexure D Par. (6)** in the Tax Administration Act 28 of 2011, Financial Intelligence Centre Act 38 of 2001 and Financial Sector Regulation Act 9 of 2017, it should be acknowledged that these laws contain a

comprehensive suite of protective mechanisms to counter abuse of power including a right of Appeal to a Tribunal and/or the High Court. The exception to the legislation in Par. (5) is the Estate Agency Affairs Board Act 112 of 1976 (EAABA) that was successfully challenged in the Constitutional Court and repealed once the PPB is effective.

Search and seizure/entry powers must be balanced with protections and remedies afforded to the subject of the law similar to other laws containing such provisions. Refer to Annexure D Par. (7), (8) and (9) that indicate the shortcomings in the current proposed amendments to the APA compared with other laws. The APA is lacking in protection for auditors in that it makes no provision for a proper sanctions regime indicating the factors that must be considered before any penalties may be imposed.

Importantly, there is no provision for the right to appeal decisions by the IRBA or the disciplinary panel, in stark contrast to all the other laws depicted in Annexure D and the recently passed PPB. It is of concern that other professions such as health, engineering and legal are afforded the right of appeal - even in the absence of search and seizure/entry provisions. The absence of the right of appeal and a clear sanctions regime in combination with the above vast powers of the Regulator unfortunately renders the amendments constitutionally unbalanced.