

AUDITING PROFESSION AMENDMENT BILL [B 2B-2020]

Briefing to Select Committee on Finance, National Council of Provinces

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national treasury

Department:
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CONTENT

1. Background
2. Overview of amendments in Bill
3. Public submissions to National Assembly's Standing Committee on Finance (NA's SCOF) and responses of National Treasury (NT) & Independent Regulatory Board for Auditors (IRBA)

1. BACKGROUND

- Auditing Profession Act of 2005 (the Act)
 - established IRBA as regulator of auditors and candidate auditors
 - regulates registration of auditors and candidate auditors and their education, training and professional development
 - requires IRBA to promote integrity of auditing profession by, among others, investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct
- The Bill before Parliament proposes amendments to the Act to address challenges and limitations that IRBA faces in discharging its regulatory and oversight responsibilities especially in light of recent, and grave, audit failures in both public and private institutions

1. BACKGROUND (cont)

- During processing of Financial Matters Amendment Bill, NA's SCOF, decided on 7 Mar 2019 not to proceed with amendments to Auditing Profession Act since it was not possible to process amendments in view of very limited time available before 5th term of Parliament ends
- When Financial Matters Amendment Bill was before NA's SCOF, NA of 5th Parliament, certain stakeholders in public submissions raised concerns regarding proposed search & seizure provisions
- On NA SCOF's direction, NT started to engage these stakeholders but did not conclude this since amendments to Auditing Profession Act were not proceeded with

1. BACKGROUND (cont)

- Amendments proposed in Bill, tabled in Feb 2020, are the same as those contained in Financial Matters Amendment Bill
- Following public submissions & hearings on this Bill conducted by NA's SCOF
 - NT & IRBA consulted SAICA and audit firms that made submissions on key issues
 - NT & IRBA submitted to SCOF comment matrix containing submissions made and responses and, where applicable, proposed amendments and also technical refinements
 - Some comments proposed to be considered in future review of the Act, e.g. expanding its scope to include accountants and providing for mandatory rotation rule
 - Important that proposed areas of amendment in Bill to be considered as soon as possible to strengthen governance of Board & improve investigating and disciplinary processes
- Bill, with amendments, was adopted, by NA's SCOF on 18 Nov 2020 and passed by NA on 2 Dec 2020

2. OVERVIEW OF AMENDMENTS

- Bill [B 2B – 2020] proposes amendments to Auditing Profession Act to
 - strengthen the governance of IRBA
 - strengthen the investigating and disciplinary processes
 - provide for the power to enter and search premises and to subpoena persons with information required for an investigation process
 - provide the Minister with the power to determine the maximum monetary fines
 - provide for offences relating to investigation and disciplinary process
 - provide for the protection and sharing of information

2.1 Strengthening governance of Board

- To ensure that IRBA performs its functions within a defined strategy, IRBA to determine, with ministerial approval, a regulatory strategy, to be made public **(clause 2)**
- To strengthen IRBA's independence and address conflict of interest of board members
 - exclude registered auditors & candidate auditors from appointment as board members but provide for audit expertise, through two formerly registered auditors
 - provide for two legally qualified persons
 - prohibit board members from
 - ✓ sharing directly/indirectly in profits or interest of registered auditors or person related to registered auditor
 - ✓ receiving payments, excluding pension benefits, from registered auditor **(clause 3)**
- Term of board members proposed to be increased from two to three years **(clauses 4 & 5)**

2.2 Strengthening of Investigating committee (cl 8)

- Bill provides that committee investigating conduct by registered auditors and candidate auditors to be independent of auditing profession
 - Committee to include two formerly registered auditors and an advocate or attorney
- Disqualification for members of board regarding sharing in profits/interests of, receiving payments from, registered auditors, also proposed for members of investigating committee

2.3 Disciplinary & Enforcement Committees (cl 9)

- Currently disciplinary committee is overburdened by number of disciplinary cases
- To alleviate burden of committee, propose to enable IRBA to appoint as many members of disciplinary committee as it considers appropriate and from these members appoint a panel for every disciplinary hearing
- Disciplinary committee to be chaired by retired judge or senior counsel
- A panel to include at least three persons, the chair being an advocate/attorney and one member being formerly registered auditor (new s24B)

2.3 Disciplinary & Enforcement Committees (cl 9)

- Disqualification for members of board and investigating committee regarding sharing in profits of, receiving payments from, registered auditors, also apply to members of disciplinary committee
- Also prohibition on using his/her position to improperly benefit him/herself or someone else or to impede committee's work (new s24A)
- To further alleviate burden on disciplinary committee, Bill provides for establishment of enforcement committee with powers to deal with recommendations made by investigating committee (new s24B)

2.4 Registration requirements for auditors (cl 11)

- Propose amendment that membership of accredited professional body is prerequisite for registration as auditor/candidate auditor

2.5 Reporting of irregularities (cl 14)

- Given responsibility of auditors to report irregularities to IRBA, risk of removing relevant auditor exists, Bill proposes
 - prohibition on removal of registered auditor before auditor completes process of reporting irregularities to IRBA
 - that where individual registered auditor has reported irregularity and resigns from the firm before complying with relevant section, that auditor must do necessary handover to incoming auditor regardless of when resignation takes effect

2.6 Referral of non-audit matters (cl 15)

- Enabling enforcement committee to refer non-audit matter brought against registered auditor to relevant professional body for investigation and disciplinary proceedings
 - Non-audit matter must fall within constitution and rules of professional body

2.7 Enhancing investigating processes (cl 15)

- For investigation into alleged improper conduct by auditors to be thorough and effective, important to expand powers of investigating committee
- Power to subpoena documents is important and necessary mechanism required to obtain evidence
- Amendment proposed to empower investigating committee to subpoena auditor or any other person to submit to committee documents concerning the investigation

2.7 Enhancing investigating processes (cont)

(cl 16)

- For purposes of conducting thorough investigation into alleged improper conduct by auditor, in some instances it may be necessary that investigator gains access to premises
 - Entry and search only allowed with consent or a warrant issued by a judge/magistrate
 - Powers to be exercised with strict regard to constitutional rights as well as decency and good order (new s48A & s48B)

2.8 Enhancing disciplinary processes (cl 17)

- Once investigation into alleged improper conduct has been completed, different processes are proposed to expedite disciplinary process
- Bill proposes that if investigation indicates sufficient grounds that auditor be charged for improper conduct by
 - following admission of guilt process by enforcement committee **or**
 - referring matter to disciplinary committee for hearing
- Where matter is referred to disciplinary committee, a panel will be appointed for each case, instead of disciplinary committee having to deal with all cases

2.9 Sanctions following guilty findings (cls 17 & 19)

- Act currently empowers disciplinary committee to impose fine not exceeding amount calculated according to ratio for 5 year's imprisonment, prescribed in Adjustment of Fines Act, 1991, on registered auditor found guilty following disciplinary hearing. Fines which have been so determined, are too low and do serve as adequate deterrent
- Where admission of guilt process is followed, Bill proposes sanctions which may be imposed by enforcement committee, e.g.
 - caution or reprimand
 - imposition of fine not exceeding amount determined by Minister on recommendation of IRBA
 - training
- Sanctions to be imposed following disciplinary hearing, include same sanctions that enforcement committee may impose
 - In addition, also cancellation of registration or disqualification from registration on temporary or permanent basis

2.10 Offences & protection of information (cls 20 & 21)

- To demonstrate that improper conduct by auditor is not to be tolerated, Bill proposes amendments which make it an offence to fail to comply with subpoena or to interfere with or hinder conduct of investigation
 - A person found guilty of this offence may be liable on conviction to fine or imprisonment for period not exceeding five years or to both such fine and imprisonment
- To safeguard information obtained during performance of functions in terms of the Act, Bill proposes
 - prohibition on disclosing information, except where, among others
 - ✓ so required by other legislation;
 - ✓ it is for purposes of referring non-audit matter

3. KEY ISSUES RAISED IN PUBLIC SUBMISSIONS TO SCOF, NA

- Governance matters
- Disciplinary committee and panels
- Referral of non-audit matters to professional bodies
- Search and seizure powers
- Sanctions - determination of maximum fine
- Reconsideration of disciplinary decisions
- Protection & disclosure of information

Key issue 1 – Governance matters

Composition

- **Stakeholder comment:** include currently registered auditors on Board and increase legal representation
- **Response:** include currently registered auditors on Board may impede IRBA's independence and also result in IRBA's membership with IFRA withdrawn
- **Proposed amendment:** increase number of formerly registered auditors and legally qualified persons from one to two

Key issue 1 – Governance matters

Related persons

- **Stakeholder comment:** non sharing of profits or interest with a registered auditor or any person related to registered auditor
- **Response:** supported
- **Proposed amendment:**
 - (8) No member may—
 - (a) share, directly or indirectly, in any of the profits or interests of a registered auditor or any person related to a registered auditor; or
 - (b) receive payments, excluding pension benefits, from a registered auditor.
 - (9) For purposes of subsection (8)(a) ‘related’ means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of 2008).

Key issue 1 – Governance matters

Stakeholder comment:

- Currently Bill provides for IRBA to determine policy framework for performing its functions in terms of section 4(1), with Ministerial approval
- This means that IRBA requires Ministerial approval to proceed with policy framework and time frame is proposed

Response – propose following amendments:

“(3)(a) The Regulatory Board must [**with the approval of the Minister,**] determine a **[policy framework]** regulatory strategy for performing its functions in terms of subsection (1).

(b) The Regulatory Board must submit the regulatory strategy to the Minister for approval within three months after the date that the Auditing Profession Amendment Act, 2020, takes effect.

(c) The Minister-

(i) may, after consulting the Regulatory Board, make amendments to the strategy referred to in paragraph (b); and

(ii) must publish in the *Gazette* the approved regulatory strategy within six months after the date that the Auditing Profession Amendment Act, 2020, takes effect.

(d) The Minister or the Regulatory Board may request an amendment to the regulatory strategy published in terms of paragraph (c) or a new regulatory strategy be determined in accordance with paragraph (c).

Key issue 1 – Governance matters

Number of meetings of committees

- **Stakeholder comment:** keep number of meetings at minimum of four per year
- **Response:** supported

Key issue 2 - Disciplinary committee & panels

Composition of committee and panel

Stakeholder comment:

- Clarity regarding composition of disciplinary committee in addition to auditors and legally qualified persons
- Number of panel members to be at least three

Response:

- Proposal to clarify that other one-third of disciplinary committee to be other suitably qualified persons of disciplinary committee
- Proposal for minimum of three panel members supported

Key issue 2 - Disciplinary committee & panels (cont)

Chairperson of committee and panel

Stakeholder comment:

- Seniority of chairperson of disciplinary committee
- Chairperson of disciplinary panel to be retired judge or senior legal person with more than 20 years' experience

Response:

- Propose that disciplinary committee be chaired by retired judge or senior counsel
- Propose that chairperson of disciplinary panel be its legally qualified member

Key issue 3 - Referral of non-audit matters to professional bodies

- **Stakeholder comment:** require clarity regarding referral of non-audit matters to professional bodies
- **Response:** No need to define non-audit since ‘audit’ is defined in section 1 of Act
- **Proposed amendment:** Amendment for details of referral of non-audit matters to be dealt with in IRBA’s rules and that referral must fall within constitution and rules of professional body

Key issue 4 - Search & seizure powers

Stakeholder comment:

- Constitutional concerns regarding search and seizure

Response:

- Submit that provisions are constitutionally sound
- However, stakeholders identified areas for refinement some of which have been included in proposed amendments, e.g.
 - ✓ qualification and certificate for person authorised to conduct search & seizure
 - ✓ enhanced protection (non use of answers in criminal proceedings)
 - ✓ clarity on criteria for warrant

Key issue 5 - Reconsideration of disciplinary decisions

Stakeholder comment: provide for right to either internal or external appeal against disciplinary decisions

Response:

- Although Bill does not provide for *internal appeal*, or *appeal* to courts, against decisions, right to take these decisions to court for review remains available
- Grounds for *review* by court in terms of Promotion of Administrative Justice Act, 2000 (“PAJA”) are sufficiently extensive to offer protection to persons affected by such decisions, e.g. bias, procedurally unfair, materially influenced by error of law, ulterior purpose, irrelevant considerations, bad faith, arbitrary or capricious, action not rationally connected to purpose or information before decision-maker, action otherwise unconstitutional or unlawful

Key issue 6 – Sanctions

Stakeholder comment:

- Determination of maximum fine by Minister in Act
- Inclusion of factors to be considered before imposing sanctions

Response:

- To allow for flexibility it is not desirable to determine amount in Act
 - ✓ However, it is proposed that Minister determines maximum fine on recommendation of Board and also publish proposed maximum fine for public comment
- Mitigating factors may be submitted for consideration in determining sanction

Key issue 7 – Protection and disclosure of information

Stakeholder comment:

- Provide for disclosure of information if in public interest to combat unlawful or unethical conduct
- Ensure appropriate protection of personal information
- Allow for sharing of information with professional bodies in respect of referral of non-audit matters

Response:

- IRBA publishes names of persons found guilty of improper conduct if entity audited was public interest entity and/or if respondent is repeat offender – refer to IRBA Policy on Sanctions (Dec 2016)
- IRBA is bound by Protection of Personal Information Act and has to implement Act. This requirement is reiterated in proposed section 57A
- Proposal is made for sharing of information with professional bodies in respect of referral of non-audit matters

***Ro livhuwa/ Thank you/Re a
leboga/ Dankie***