16 January 2023

Final Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2022 Draft Taxation Laws Amendment Bill and 2022 Draft Tax Administration Laws Amendment Bill.

(Based on hearings by the Standing Committee on Finance in Parliament)

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1. BACKGROUND

1.1. PROCESS AND PUBLIC COMMENTS

The 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill) was first published on the same day as the Budget (23 February 2022) and gives effect to changes in rates and monetary thresholds to the personal income tax tables and increases of excise duties on alcohol and tobacco. It also contains changes tabled by the Minister in Parliament on 31 March 2022 and 31 May 2022 regarding temporary relief on the fuel levy as well as the postponement of the effective date of an increase in the health promotion levy. The 2022 Draft Rates Bill was published for the second time on 29 July 2022 to solicit public comments.

The 2022 Draft Taxation Laws Amendment Bill (TLAB) and 2022 Draft Tax Administration Laws Amendment Bill (TALAB) contain the remainder of the tax announcements made in Chapter 4 and Annexure C of the 2022 Budget Review, which are more complex, technical and administrative in nature. Due to the complex nature of these draft bills, greater consultation with the public is required on their content. The 2022 Draft TLAB and TALAB were published for public comments on 29 July 2022.

For legal reasons, the draft tax amendments continue to be split into two separate bills, namely, a money bill in terms of section 77 of the Constitution, dealing with money bill issues, for example, 2022 Draft Rates Bill, 2022 Draft TLAB and an ordinary bill in terms of section 75 of the Constitution, dealing with tax administration issues, for example 2022 Draft TALAB.

The closing date for all public comments on the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB was 29 August 2022. National Treasury and SARS received written comments from 104 organisations and 30 individuals (list of commentators attached as Annexure A).

The National Treasury and SARS briefed the Standing Committee on Finance (SCoF) on the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB on 23 August 2022. Workshops with stakeholders to discuss their written comments on the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB were held on 8 and 9 September 2022 respectively. Subsequently, oral presentations by taxpayers and tax advisors on the 2022 Draft Rates Bill were made at hearings held by the SCoF on 13 September 2022 and oral presentations by taxpayers and tax advisors on the 2022 Draft TLAB and 2022 Draft TALAB were made at hearings held by the SCoF on 14 September 2022.

On 20 September 2022, National Treasury and SARS presented to the SCoF the Draft Response Document on the 2022 Draft Rates Bill and on 21 September 2022, National Treasury and SARS presented to the SCoF the Draft Response Document on the 2022 Draft TLAB and 2022 Draft TALAB. The 2022 Draft Response Document contains a summary of draft responses from National Treasury and SARS officials to the public

comments received and proposed steps to be taken in addressing the key issues raised during the consultation process.

Once the responses are considered by SCoF, they will be presented to the Minister for approval, including to approve consequential amendments to the 2022 Draft tax bills prior to the formal introduction/tabling by the Minister in Parliament.

1.2. POLICY ISSUES AND RESPONSES

Provided below are the responses to the key issues raised by the public in respect of the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB in the form of written submissions as well as during the public hearings. These comments have been taken into account in finalising the 2022 Tax Bills tabled by the Minister in Parliament. Comments that are outside the scope of the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB are not considered for purposes of this response document.

1.3. SUMMARY

This response document includes a summary of all the written comments received on the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB published for public comment by 29 August 2022, as well as a summary of all the written and oral presentations made during public hearings on the 2022 Draft Rates Bill, 2022 Draft TLAB and 2022 Draft TALAB held by the SCoF on 13 and 14 September 2022.

2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill

2. CUSTOMS AND EXCISE: INCREASE IN THE EXCISE DUTY ON ALCOHOL AND TOBACCO

2.1. General increase in the excise duty on alcohol and tobacco by between 4.5 and 6.5 per cent

(Main reference: Schedule No. 1 to Customs and Excise Act, 1964: Clause 5 of the Draft Rates Bill)

Government has a guideline to direct excise duty policy where duty should be 11, 23 and 36 per cent of weighted average retail price for wine, beer and spirits and 40 per cent of the price of most popular brand for cigarettes. In 2022, Government proposes excise duty changes of between 4.5 per cent (inflation) and 6.5 per cent.

Comment: During the 2021 Budget, the Minister of Finance announced a review of the excise alcohol policy. This year, it was confirmed that the "review papers on the alcohol and tobacco excise duties policy framework will be released shortly for comment". The industry has to date not received any feedback from National Treasury on the status of the review or when the discussion document will be released for public comment. We are concerned that we are 6 months into the 2022/23 excise cycle and policy discussions by their very nature could have long term implications for our sector and for the consultations with industry to be meaningful we would require a transparent process with clear timelines.

> *Response:* Noted. National Treasury is busy finalising the alcohol review paper and once completed, all the stakeholders will be informed and a consultative process initiated. There has been a number of developments in the alcohol industry, the regulatory framework and the excise policy framework need to keep up with all these developments. Any structural changes to the excise policy framework will first be consulted with all stakeholders before implementation.

Comment: There are many reasons why people drink alcohol and none of the consumption reasons relate to the cost or affordability of alcohol. Thus, leveraging pricing policies is unlikely to address irresponsible drinking as it is not addressing the underlying drivers alcohol consumption. Targeted policies or interventions that address the specific drivers are more likely to have a lasting impact than disproportionate polices that erode overall value to society.

> *Response:* Partially accepted. The problems related to alcohol consumption and abuse require a comprehensive package of tax and non-tax measures to address them effectively. However, excise policy is a cost effective, key component of these package of measures as consumers do change their spending behaviour based on prices. But, a lot more still needs to be done on non-tax measures to address the problem of excessive alcohol consumption. The World Health Organisation (WHO) has identified some of the alcohol policy "best-buys", which include increasing alcohol beverage

excise taxes, enacting and enforcing bans or comprehensive restrictions on exposure to alcohol advertising (across multiple types of media), and enacting and enforcing restrictions on the physical availability of retailed alcohol (via reduced hours of sale), amongst others.

Comment: A reflection on the tax incidence over the past six years and its compounding impact has shown a cumulative deviation of 17,03% (marginally down from 2021). This is a deviation from the Governments Tax Policy. There are significant impacts of excise duty increases on the value chain which is ultimately absorbed by the consumer at nearly double the intended excise duty rate. Given the relevant considerations, a rise in excise duties should ideally be in line with or below the inflation rate.

Response: Noted. The alcohol tax regime applies a specific excise duty rate which is the same throughout the supply chain. The application of Duty at Source (DAS) is cost effective for the administration of the excise duty regime. Unfortunately, SARS (or National Treasury) cannot prescribe how the pricing mechanisms should work in the industry supply chain. The implementation of excise duties on alcoholic products is done with consumers in mind – only price increases that are felt by the consumer will reduce consumption.

Comment: A commitment by Government to maintain a stable excise policy over the following five years would be complimentary to the intent by Government and a clear indication to investors of Government's deliberate intent to attract FDI. Creating certainty in the excise tax system by changing the excise adjustment approach to a fixed excise rate, in-line with (forecasted) inflation for three years in the medium-term budget, will allow businesses to plan and invest better.

Response: Not accepted. There is an excise tax policy in place to increase the excise rates by at least inflation or targeted incidence, whichever is higher, on an annual basis. The Government cannot commit to fixing annual excise rate increases for a three or five year period as suggested.

Comment: When considering the results of Budget 2022, we were pleased with the near inflation related excise adjustment and the diversified approach to adjustment across the alcohol categories. Disappointingly however, in contrast to beer and spirits, the wine industry was given a reduced excise adjustment rate. The crux of our contribution is therefore to fundamentally address the inconsistencies in the excise framework, that shows itself in the way the excise adjustment has been applied across the alcohol categories in Budget 2022.

Response: Noted. Some of the policy issues will be addressed in the policy review process underway. However, it should be noted that beer is the preferred alcoholic beverage and dominates the alcoholic beverage market. It accounts[1] for approximately 75 per cent of total alcoholic beverage consumption by volume, with alcoholic fruit beverages & spirit coolers at 12 per cent, wine at 10 per cent, and spirits at 3 per cent. Industry data[2] further estimates that beer represents about 51.4 per cent of the market based on absolute alcohol content and about 65.75 litres per capita consumption for individuals 15 years and older compared to wine estimates of 16 per cent and 8.61 litres in 2021.

[1] WESGRO (2021). South African Wine: Trends and Opportunities for Trade in Africa. https://www.wesgro.co.za/uploads/files/Research/South-African-Wine-Trends-and-Opportunities-in-Africa_Wesgro-IQ_20210518.pdf
[2] SAWIS (2021). SA Wine Industry 2021 Statistics Nr 46. Accessible at https://www.sawis.co.za/info/download/Book_2021.pdf

Comment: We have recommended that the distortionary effect of the preferential treatment afforded to the wine industry be removed and simultaneously an alcohol-by-volume (ABV) or an alcohol content-based calculation system be applied to all alcohol categories, similar to that which currently applies to beer and spirits. This staggered excise system where higher excise taxes are paid by beverages with higher alcohol content would remove the current distortions in the excise system in which beverages with higher alcohol content are paying lower excise rates. There is a need for excise tax reform and the application of a consistent approach through alcohol-by-volume ('ABV') taxation for all alcohol products.

> *Response:* Noted. In theory, the taxation of alcoholic beverages based on alcohol content would be ideal for public health purposes. However, in reality the excise policy structures implemented globally are such that the other factors are considered. The application of low excise duties on a per litre basis on wine is not unique to South Africa. This is prevalent mostly in wine producing countries. Also, as an example, the European Union Directive 92/84/EEC set the minimum rate at €0 for wine (still and sparkling) per hectolitre of product, for beer at €1.87 per hectolitre per degree alcohol, €45 for intermediate products (e.g. port, sherry) per hectolitre of product, and €550 for spirits per hectolitre of pure alcohol. This framework sets a differentiated tax structure which provides for different treatment of categories of alcoholic products (i.e. wine taxed per product volume, whereas beer and spirit based on alcohol content) and special rates for small producers.

Comment: The industry also impresses on National Treasury and SARS that the current regime of varying excise duty payment terms is inequitable. The Rules to the Customs and Excise Act set out varying payment terms for the various alcoholic products ranging from 30 days in the case of beer to 130 days in the case of spirituous beverages. It is further proposed that the payment terms for the collection of excise duties should be uniformly applied across all alcoholic products.

> *Response:* Noted. The current differential excise duty payment terms for the respective alcoholic beverage product categories reflect the unique product-specific characteristics. Excise duties are collected at a manufacturing level under the duty-at-source administration, but are consumption taxes for which the tax costs are recovered by industry from consumers. The lengthy maturation periods of wine and spirits mean that these industries typically have to bear the costs of excise duties on their products for several years before it can be recovered from consumers, while the beer industry is in the favourable position to market its products and recover excise duty paid by it much sooner. The impact of these factors on the cash flow of the respective industries are reflected in the differential historical payment terms. Nonetheless, SARS in its 2019 discussion document expressed its intention to review and explore uniform payment terms during the process to rewrite the excise legislation.

Comment: A study of Part 2A of Schedule No. 1 to the Customs and Excise Act reveals that alcoholic products are divided into no less than sixteen (16) groupings with approximately ten (10) different excise duty rates applied. Within each product grouping further subdivisions exist based on factors such as packaging, feedstock material, fermentation and mixing. This has made the excise duty tax regime difficult for producers to administer and has inhibited innovation in the beer industry.

Response: Not accepted. The contention by the industry that the taxation of all alcoholic beverage product categories by absolute alcohol content would significantly reduce the number of tariff headings and tariff items for tariff classification purposes is not accepted. The present tariff classification of the current excise product categories is based on the internationally Harmonised System classification of the World Customs Organisation and are also harmonised with the Liquor Products Act, 1989, of the Department of Agriculture, Land Reform and Rural Development (DALRRD) for the regulation of the alcoholic beverage industries. Even though taxation per absolute alcohol content would simplify the excise administration, it would not affect the need for tariff classifications of the respective product categories for such harmonisation and which forms the foundation for the customs and excise treatment of all tradeable goods. Nor would it remove the need for all the alcoholic beverage industries to obtain compulsory tariff determinations from SARS for each of their respective products as required in terms of section 47(9) of the Customs and Excise Act for the application of harmonised tariff classification principles.

Comment: We would like to commend National Treasury for taking a far more balanced approach in respect of the current 2022/2023 excise increase than that which was seen in the 2021/2022 fiscal year. As was previously pointed out to National Treasury, the approach taken in the 2021/2022 fiscal year (i.e. an 8% excise increase) if continued, would be unsustainable for the legal tobacco industry.

Response: Noted.

Comment: The Draft Rates Bill proposes to increase the excise rate on cigarettes by 5.5% in the context of the 2021 inflation rate (CPI) of 4.5%. This excise hike has placed the excise incidence on cigarette's Most Popular Price Category ("MPPC") at 45% compared to a targeted incidence of 40% as per the National Treasury's excise policy. The total tax incidence on the MPPC currently sits at 58.1% against the background of falling consumer affordability and unprecedented levels of illicit trade.

Response: Noted. Though the proposed increases keep the tax incidence above the 40 per cent policy guideline, the industry has continued to absorb a portion of the excise increases as opposed to passing them through to consumers, which leads to an overestimated tax incidence. The adjustments correct for any price movements that tend to undermine Government's policy intention to reduce consumption and improve public health. The excise increases also seek to ensure that tobacco products do not become affordable over time as this will increase consumption of tobacco products, which goes against public health policy objectives. The excise policy framework for tobacco products is currently under review and once completed, all the stakeholders will be informed and a consultative process initiated.

Comment: Recommend that National Treasury revise the base on which the current excise increase is determined, Using Peter Stuyvesant as the MPPC is no longer relevant in the current market. In line with global best practice, South African fiscal policy in respect of cigarettes should be determined on Weighted Average Price ("WAP") in the market.

Response: Not accepted. A revision of the Most Popular Price Category ("MPPC") to the Weighted Average Price ("WAP") will be a fundamental or substantive policy

change with significant ramifications for tobacco control policy in South Africa. The current benchmarking using MPPC already has differential impacts on cigarette products in terms of excise burdens, so National Treasury does not envisage a situation where there is a reversal on the current levels of excise duty rates. However, the excise policy framework for tobacco products is currently under review and some of these issues will be considered and inputs from all stakeholders will also be considered.

2.2. Illicit trade of tobacco products and alcohol products

Comment: The macro-economic environment in South Africa is worsening and consumers are being further stretched. Duty Paid ("DP") cigarettes are becoming less affordable to consumers, who are moving at a rapid rate to the Duty Not Paid ("DNP") cigarette market. A consequence of the above is that South Africa now has one of the highest illicit cigarette trade levels in the world at approximately 62% of consumption. The vast majority of all consumption (illicit and licit), approximately 80%, takes place in the informal trade. The informal trade is dominated by single stick sales, and given the DNP price points, the legal market can simply not compete.

Response: Noted. National Treasury acknowledges that the problem of illicit trade undermines the health and excise policy objectives. However, the problem of illicit trade is also an act of criminality and cannot be dealt with through excise rate adjustments but needs to be effectively addressed through robust compliance and law enforcement mechanisms. SARS has been investigating and clamping down on the illicit economy focusing on the tobacco, gold and fuel industries, and this has resulted in many enforcement actions taken. SARS is harnessing its capabilities to make non-compliance with legal tax obligations hard and costly to those who are engaged in these criminal pursuits.

Comment: The current cigarette excise increase (which took effect in February 2022) has helped close the gap between the lowest priced products at the bottom of the legal market (selling at R32 per 20) and illicit products being sold as low as R7 per pack of 20. Recommend introducing into the Act, through a primary legislation change, a Minimum Retail Price point of R32 per pack of 20 to achieve effective enforcement and to address retail tax compliance. A primary legislation change will allow all manufacturers to provide support (through public consultation) to National Treasury as to why the R32 is too high or too low.

Response: Noted. The issue of Minimum Retail Sales Price is a new proposal in terms of the current policy regime. The excise policy framework for tobacco products is currently under review. Inputs from all stakeholders such as this will be considered.

Comment: Given the Southern African Customs Union ("SACU") Agreement, and the Duty at Source ("DAS") system, a track-and-trace system aligned to that currently being introduced in Botswana should also be implemented in South Africa. This will allow for interoperability within SACU, strengthening the ability of the Authorities to enforce and ultimately clamp down on illicit trade.

Response: Noted. The National Department of Health is leading Government on the matter of ratifying the World Health Organisation's Protocol to Eliminate Illicit Trade in Tobacco Products. As part of the Protocol, South Africa would be required to consider,

as appropriate developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.

Comment: Continue to increase excise in a balanced manner which fully appreciates the extent of the illicit trade problem in South Africa, the effect that this has had on the MPPC concept and the affordability issues currently being faced by the majority of South Africans. This will prevent further volume being lost to illicit trade and will ultimately translate into a positive net effect for the fiscus.

Response: Noted.

Comment: Illicit alcohol trade is not only a problem linked to a lack of enforcement, but very much influenced by decisions made at policy level. This is not merely a challenge to be solved by SAPS and SARS but also the responsibility of National Treasury, DAFF and DTIC as policy and regulatory bodies. The Industry requests that government does not exacerbate an already precarious position between the licit and illicit alcohol market by increasing pricing of legal alcohol further and widening the price gap between the two, especially in an economy which is increasingly under strain.

Response: Noted. The problem of illicit trade is a concern for government and requires a concerted effort from all the role-players to address effectively. All law enforcement agencies can play an important role in curbing the scourge of illicit trade and efforts are made to address this problem.

3. CUSTOMS AND EXCISE: HEALTH PROMOTION LEVY

3.1. Delaying the increase to the health promotion levy for a year

(Main reference: Section 58 of Customs and Excise Act, 1964: Clause 5 of the Draft Rates Bill)

The 2022 Budget sated that the health promotion levy would be increased by 4.5 per cent to 2.31 cents per gram from 1 April 2022. Further announcements were made in the 2022 Budget to start consultations on lowering the 4g of sugar per 100ml threshold and to extend the levy to fruit juices. On 1 April 2022, after consultation with the Minister of Agriculture, Land Reform and Rural Development and the Minister of Trade, Industry and Competition, the Minister of Finance released a media statement to delay the implementation of the increase in the health promotion levy to 1 April 2023 to allow for further consultations. Consultations will begin after the release of a discussion paper on extending the levy to 100% fruit juices and lowering the 4g per 100ml threshold.

Comments: To our disappointment, the National Treasury postponed the increase to April 2023 to allow for broader consultations on the expansion of the HPL to include fruit juices and lower the 4g threshold of the levy. The National Treasury did not give any explanations on why this postponement was necessary for consultations nor how the decision was made. This lack of transparency and accountability is worrying especially with regard to a food policy that helps prevent unhealthy consumption of SSBs and protects the public against obesity and other life-threatening non-communicable diseases (NCDs).

Response: Noted. The Minister proposed that the effective date of the increase be postponed to 1 April 2023 to allow for the consultation process lowering the 4 grams threshold and extending the levy to fruit juices.

Comments: The National Treasury must include efforts to raise the HPL to the intended 20% rate and sincerely begin the process of expansion to fruit juices and lowering the 4g threshold. Growing evidence shows that health taxes are the most cost-effective tool in controlling consumption of unhealthy foods. This is why increasing the HPL regularly while accounting for inflation is vital.

Response: Noted.

Comments: We welcome the National Treasury's decision to begin public consultations to include fruit juices into the HPL, as this can strengthen the long-term health-promoting intent of the policy. The exemption of 100% fruit juices from the HPL can be confusing for the public as it creates the impression that fruit juices are "healthier" than other sugar-sweetened beverages, however the amount and type of sugar in fruit juices is harmful to health.

Response: Noted.

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4. CUSTOMS AND EXCISE: ELECTRONIC NICOTINE AND NON NOCOTINE DELIVERY SYSTEM

4.1. Taxation of electronic nicotine and non-nicotine delivery system

(Main reference: Part 2A of Schedule No. 1 to Customs and Excise Act, 1964: Clause 25 of the Draft TLAB)

The Government intention to tax electronic nicotine and non-nicotine delivery systems (ENDS / ENNDS) was made in budget 2019 and subsequently in budget 2020 due the growing evidence to demonstrate that these products are not harmless. The WHO has urged countries to ensure that tobacco control laws and regulations are comprehensive enough to regulate all forms of novel and emerging nicotine and tobacco products. Since then, National Treasury published and consulted on a draft Discussion Paper which proposed a specific excise tax on both the volume and nicotine concentration of the solution. After considering comments received, in the 2022 Budget, a proposal was made to apply a flat excise duty rate of R2.90 per millilitre regardless of the nicotine content of the solutions with implementation effective from January 2023. After further consultation with SARS, the effective date has been postponed to June 2023 to allow for the administration systems to be put in place. As such, proposed amendments are made in Part 2 of Schedule 1 to the Customs and Excise Act in this regard.

Currently, several countries are already regulating the use of ENDS/ENNDS in one way or the other. According to Global Centre for Good Governance in Tobacco Control[3], as of February 2021, there were about 37 countries that banned the selling of e-cigarettes, whereas 73 countries allowed the selling of e-cigarettes with sales restriction or regulations such as cross-border sale restrictions/regulations, restrictions in venues where they can be sold, access restrictions, or other restrictions Further, at least 36 are known to regulate the amount (concentration/volume) of nicotine in e-liquids.

Comments on application of excise duty

Comment: The proposed excessive tax will potentially affect the trade of all legitimate and tax paying vendors, which has the potential to lead to a reduction in income tax generation, VAT and possibly lead to further job losses. We are further concerned that the tax will make it difficult for smokers and vapers to access less harmful alternatives. As a result of the tax,

[3] GGTC (2021). Accessed at https://ggtc.world/knowledge/who-fctc-article-53/e-cigarette-ban-regulation-global-status-as-of-february-2021

vapers are more likely to return to combustible tobacco products or even un-regulated black-market products.

Response: Partially accepted. The proposed tax on ENDS / ENNDS is a legitimate fiscal instrument that contributes to closing a regulatory loophole in the system that has placed the South African population (especially the youth) in a vulnerable position. Leaving ENDS / ENNDS unregulated or untaxed undermines government's commitment to not only prevent / reduce tobacco consumption but also nicotine addiction. As noted in Article 5.2 of the WHO Framework Convention on Tobacco Control, "…each Party shall, in accordance with its capabilities, adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke."

Comment: The proposed excise duty will be ineffective in achieving its intended purposes because Treasury has not demonstrated how the proposed tax will benefit public health. Treasury should conduct further assessment of the sector in order, firstly, to arrive at a scientific and balanced view of what ENNDS represents for public health, and secondly, to solidly anchor its excise proposal on an empirical understanding of the vaping sector in South Africa.

Response: Not accepted. There is consensus that even though these products are marketed as less harmful compared to cigarettes or traditional tobacco products, they are not without risk. The long-term health effects of e-cigarette use are unknown at this stage, primarily because e-cigarettes have not been in the market for a long time. Therefore, a cautionary approach is taken Suggestions that National Treasury should further delay the implementation of a tax on ENDS / ENNDS are ill-intentioned and do not benefit society especially, vulnerable groups such as the youth.

Comment: View vaping as a smoking cessation tool for adult smokers wishing to quit the habit. Vaping is not smoking, it is combustion free and tobacco free, even if there may be tobacco flavoured variants of vaping liquid; and vaping has been scientifically proven to be at least 95% less harmful than smoking.

Response: Not accepted. ENDS/ENNDS are not recognised or approved, in terms of the Medicines and Related Substances Act, 1965 as cessation products unlike other nicotine replacement products such as nicotine gum, patches, metered sprays etc. These products have gone through a testing process and have limitations on the amount of nicotine they should contain (i.e., appropriate dosage). The WHO[4] recommends that governments scale up policies and tried and tested interventions, such as brief advice from health professionals, national toll-free quit lines and cessation interventions delivered via mobile text messaging. And where economically feasible, should also consider promoting nicotine replacement therapies and non-nicotine pharmacotherapies for cessation. Even in the United States, as indicated by the US Food and Drug Administration (FDA)[5], no e-cigarette has been approved as a

[4] Accessed at https://www.who.int/news-room/questions-and-answers/item/tobacco-e-cigarettes
[5] accessed at https://www.fda.gov/tobacco-products/products-ingredients-components/e-cigarettes-vapes-and-other-electronic-nicotine-delivery-systems-ends

cessation device or authorized to make a modified risk claim. It further indicates that there is not yet enough evidence to support claims that e-cigarettes and other ENDS are effective tools for quitting smoking. The United States Surgeon General's 2020 Report[6] indicates that smoking cessation medications approved by the U.S. FDA and behavioural counselling are cost-effective cessation strategies and increase the likelihood of successfully quitting smoking, particularly when used in combination. Using combinations of nicotine replacement therapies can further increase the likelihood of quitting. Further conclusions were that there is presently inadequate evidence to conclude that e-cigarettes, in general, increase smoking cessation due to a continually changing and heterogeneous group of products which are used in a variety of ways.

Comments on excise structure and duty rate

Comment: Recommend an imposition of a flat tax of at least R5/mil of e-liquids regardless of nicotine concentration. This is calling for an increase from the R2.90/mil recommended by Treasury. We believe our recommended amount would have more impact in making these products less affordable to adolescents who are more at risks of the underdevelopment of their brains should they use these products. Because even a R5/mil tax would only make little impact on the price of these products to deter adolescents from purchasing them. We also recommend a base tax of R50 per unit. This means that where the tax amount becomes less than R50, R50 should be the tax for these products.

Response: Noted. The current proposed rate is an introductory rate that may be adjusted in the short to medium term during the budget process. However, it is the Minister of Finance that makes the decisions about the excise rates and adjustments.

Comment: Oppose the currently proposed excise duty on Electronic Nicotine and Non-Nicotine Delivery Systems. The currently proposed rate of R2.90/ml will make it difficult for legitimate businesses such as ours to compete against the growing black market.

Response: Noted. The proposed excise rate is comparable to other rates applied in other jurisdictions that have implemented excise duties on ENDS/ENNDS. The Minister of Finance makes the decisions about the excise rates and adjustments.

Examples are shown below:

Examples of excise duties implemented elsewhere:	
Countries	**Excise duty rates & base**
Cyprus	€0.12 ($0.14 US) per ml tax on all e-liquid **(equivalent to R2.11 per ml)**
Denmark	the Danish parliament has passed a DKK 2.00 ($0.30 US) per ml tax, which is scheduled to take effect July 1, 2022 **(equivalent to R 4.52 per ml)**
Finland	a €0.30 ($0.34 US) per ml tax on all e-liquid **(equivalent to R 5.12 per ml)**
Georgia	a tax of 0.2 Georgian Lari ($0.066 US) on all e-liquid **(equivalent to R0.99 per ml)**
Germany	will impose a €0.16 ($0.19 US) per ml tax on all e-liquid beginning July 1, 2022 **(equivalent to R2.86 per ml)**
Greece	a €0.10 ($0.11 US) per ml tax on all e-liquid **(equivalent to R 1.66 per ml)**

[6] U.S. Department of Health and Human Services. Smoking Cessation: A Report of the Surgeon General—Executive Summary. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2020.

Hungary	a HUF 20 ($0.07 US) per ml tax on all e-liquid **(equivalent to R1.06 per ml)**
Poland	a 0.55 Polish Zloty (PLN) ($0.14 US) per ml tax on all e-liquid liquid **(equivalent to R2.11 per ml)**
Portugal	a €0.32 ($0.37 US) per ml tax on nicotine-containing e-liquid **(equivalent to R5.58 per ml)**
Russia	nicotine-containing e-liquid is taxed at 13 rubles ($0.21 US) per ml **(equivalent to R3.17 per ml)**
Serbia	a 4.32 Serbian Dinar ($0.044 US) per ml tax on all e-liquid **(equivalent to R0.66 per ml)**
Slovenia	a €0.18 ($0.20 US) per ml tax on nicotine-containing e-liquid **(equivalent to R3.01 per ml)**

Source : https://vaping360.com/learn/tax-rates-on-vaping-products/

Comment: To prevent fiscal evasion through manufacturers/importers entering, for example, 1.6ml for home consumption but rounding down to 1.0ml. It is proposed that the excise instrument be set at flat rate of R1.40 for any ml measurement under 2ml of e-liquid per single product and an additional R0.70 per ml over 2ml, or flat rate of R0.92 for any ml measurement under 2ml of e-liquid per single product and an additional R0.46 per ml over 2ml. Taking a more holistic view of the findings highlighted in the Exford Economics report, it is clear that when simply considering e-liquid excise rates from an international perspective, a rate of R1.45/ml should be seen as an upper limit in South Africa's case. However, when also considering the implications of excise duties on product prices and affordability, an excise rate closer to the lower quartile of R0.70/ml seems more appropriate.

> *Response:* Noted. Issues of tax evasion / illicit trade cannot be dealt with by complicating the excise tax structure. There is some consensus (even with SARS) that from the initial round of consultations that National Treasury should adopt a more simplified excise tax structure for ENDS / ENNDS. Further, our assessment of the proposed excise rate on ENDS / ENNDS indicate that the rate (particularly, the minimum / average tax incidence) is comparable with current practise globally. The intention is for ENDS / ENNDS like other excisable products, to become unaffordable, especially for more vulnerable groups such as the youth. However, it is the Minister of Finance that makes the decisions about the excise rates and adjustments.

Comment: The new proposed excise rate is based purely on volume is not only disappointing from the view that none of the points raised against an excise were taken into consideration but effectively will make many of these products unaffordable to many South African citizens that have used these products to successfully quit combustible tobacco.

> *Response:* Not Accepted. The original proposal in the published discussion paper considered applying a tax based on both nicotine content per milligram and the volume of the solution per millilitre. However, following public comments submitted to National Treasury, it became apparent that the system will be administratively complex for both the taxpayers and SARS to implement. Therefore, a revised proposal of a flat excise duty rate was announced in the 2022 Budget as an administratively feasible option. Further, ENDS/ENNDS are not recognised or approved, in terms of the Medicines and Related Substances Act, 1965 as cessation products unlike other nicotine replacement products such as nicotine gum, patches, metered sprays etc. These products have

gone through a testing process and have limitations on the amount of nicotine they should contain (i.e., appropriate dosage).

Comments on administration

Comment: As the vaping market is extremely fragmented and complex to administer, the introduction of a robust administrative framework is essential to mitigate not only the risk of fiscal evasion but also to ensure the appropriate product compliance and standards are adhered to in the market.

Response: Noted. SARS as the implementing agency will ensure that all the necessary measures for licencing and registration of taxpayers is done for effective enforcement of the legislation. SARS has committed itself to detect taxpayers and traders who do not comply with their tax obligations and make non-compliance hard and costly on them.

Comment: As with any excisable products framework, the ENDS/ENNDS excise framework would need to be supported by a robust anti illicit trade framework, which includes, amongst other things, licensing of importers and manufacturers of nicotine, security and customs presence at manufacturing sites and bonded warehouses, auditing, and traceability of products.

Response: Noted. SARS as the implementing agency will ensure that all the necessary measures for licencing and registration of taxpayers is done for effective implementation and the enforcement of the legislation.

Comment: If an excise on vaping is introduced, the Authorities must be able to have total visibility of the products entering and moving through the market to mitigate any potential for fiscal evasion. Therefore, we recommended that an electronic track-and-trace system with a Unique Identity Code per individual product be introduced from the outset not only to track the product throughout the supply chain, but also be utilised as a guaranteed and robust electronic excise collection system.

Response: Noted. The National Department of Health is leading Government on the matter of ratifying the WHO's Protocol to Eliminate Illicit Trade in Tobacco Products. As part of the Protocol, South Africa would be required to consider, as appropriate developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade. The implementation of a track and trace system would be beneficial for the administration of all excisable products as it would equally apply.

Comment: We have noted that the vaping market is “puff” focused as opposed to “ml” focused. As a result, advertising and product packaging generally refer to “puffs per product” and not “ml of e-liquid”. In order to alleviate the administrative burden placed on tax authorities (both audit and enforcement) it is recommended that mandatory ml labelling requirements on outer packaging be introduced.

Response: Noted. The National Department of Health is revising legislation to include the regulation of ENDS/ENNDS which will empower the Minister of Health to make regulations on a number of issues related to the regulation of these products.

Comment: Further public consultations on the proposed excise are required and therefore we propose that the implementation date for the new excise be extended to 1 January 2024.

Response: Noted. The initial proposal as announced in the 2022 Budget was to implement the excise duty from 1 January 2023. However, in the 2022 draft TLAB a decision was made to have a later implementation date of 01 June 2023 to provide SARS and taxpayers sufficient time for the administration of the system. SARS will develop the administration rules and conduct stakeholder/taxpayer engagements.

4.2. Concerns about illicit trade of vaping products

Comment: The proposed excise duty will make vaping expensive, have a destructive economic impact on the vaping industry and could have the unintended consequence of emboldening the black market in counterfeit/illegitimate vaping products and "self-mix" e-liquids in South Africa. Self-mixed e-liquids can result in increased vaping at elevated nicotine concentration levels, to the detriment of public health outcomes.

Response: Noted. Illicit trade is a concern for Government, both in terms of undermining public health and revenue collections. Therefore, efforts will be made to ensure that administration of the system is strengthened to address the problem as and when it occurs. However, there can never be a full proof system since some of the illicit trade is influenced by acts of criminality.

5. CARBON TAX

5.1. Carbon tax rate trajectory-proposals from 2023 to 2030

(Main reference: Section 5(2) of the Carbon Tax Act: Clause 38 of the Draft TLAB)

The 2022 Budget proposed increases in the carbon tax rate for the 2023 to 2025 tax periods by a minimum of US$ 1; and increasing to US$20 in 2026 and at least US$30/t$CO_2$e in 2030.

To give effect to the carbon tax rate announcements made in Budget 2022, the following amendments are proposed in the 2022 draft TLAB:

- 2023 to 2025**:** It is proposed that amendments are made to Section 5(2) of the Carbon Tax Act to provide for the carbon tax rate adjustment by US$1, US$2 and US$ 3/tCO_2e for the 2023, 2024, and 2025 tax periods ending on 31 December, respectively.
- 2026 and 2030: It is proposed that amendments are made to Section 5(2) of the Carbon Tax Act to provide for that the carbon tax rate increases to US$20/t$CO_2$e rand equivalent in 2026 and US$30 in 2030.

- 2027 to 2029**:** It is proposed that amendments are made to Section 5(2) of the Carbon Tax Act to provide for the carbon tax rate adjustment by US$2, 5 /t$CO_2$e per year for the 2027 to 2029 tax periods.

The proposals aim to provide longer term policy and investor certainty necessary to drive low carbon investments and meet South Africa's NDC and 2050 net zero emission commitments.

Comment: Stakeholders broadly support the carbon tax and recognise the importance of the carbon tax for the country's transition. Some stakeholders do not support the carbon tax rate of US$20/t$CO_2$e in 2026 and US$30/tCO_2e in 2030 as they are of the view that it is too soon and too high and will inhibit investment in decarbonisation technologies and growth of new low-carbon growth sectors. The timing of the rate adjustments and potential removal of the tax-free allowances will result in very high costs within a short timeframe for business to absorb and mobilise the capital needed to transition to low-carbon operations which could result in a premature shut-down of companies. These stakeholders are of the view that the annual carbon tax rate should be increased by inflation plus 2 percentage points until at least 2030 to allow for reviewing and aligning of different policies, and the higher carbon price should be considered post 2035, on a date to be informed by detailed analysis of viable mitigation and socioeconomic considerations. Other stakeholders are of the view that the implementation of an effective carbon price is a powerful tool to change behaviour by altering economic incentives and is a crucial mechanism to mitigating South Africa's emissions and meet its commitments to limit global temperature increases under the Paris Agreement. Pricing carbon correctly to reflect the actual costs of emissions to society would be transformative in limiting the worst impacts of the climate crisis.

Comment: South Africa faces severe and growing climate risks including extreme weather events such as storms, flooding and droughts, which will have major implications for the SA economy. The need for deep and urgent emissions reductions is crucial, and the implementation of a carbon tax that is meaningful, avoids double incentives and underpins South Africa's NDC commitments is recommended. The proposed increases to the carbon tax are well below what experts recommend as necessary to meet the goals of the Paris Agreement i.e. US$50 to 100/t$CO_2$e and effective carbon prices reaching US$75 combined with a phaseout of fossil fuel subsidies of the High-Level Commission on Carbon Prices, effective carbon price increasing to US$50 proposed by the IMF and the National Business Initiative analysis which recommended carbon pricing of US$56 by 2030. The social costs of carbon are estimated to range from $150 to $350/t$CO_2$e in 2020. It is recommended that the proposed amendments including those beyond 2030 should prescribe a carbon tax rate related to GHG emissions reductions commensurate with the best available climate science. Stakeholders are of the view that clause 38(1)(e) of the 2022 draft TLAB should indicate the progressive increase in the carbon tax necessary to ensure long term mitigation by towards net zero emissions by 2050. It is recommended that increases to the carbon tax rate post 2030 in clause 38(1)(e) of the 2022 draft TLAB should be commensurate with the best available science related to effective GHG emission reduction and in accordance with South Africa's Nationally Determined Contribution in force at the time.

Comment: Some stakeholders are of the view that it is important for South Africa's international competitiveness to have a domestic carbon price that is aligned with the

international carbon price but at the same time also considers South Africa's unique socio-economic circumstances. They are of the view that a domestic price higher than the international price will put an undue cost burden on the South African industry.

Comment: There is broad agreement on the other hand that a domestic price lower than the international price could potentially impact negatively on demand for South African goods and may have cost implications in systems like the proposed European Union Carbon Border Adjustment Mechanism. Providing clarity of the pathway is essential both for incentivising investments into carbon emissions mitigation by the private sector, and for ensuring alignment with the international standards set by trading partners. It is further noted that the EU's Carbon Border Adjustment Mechanism (CBAM) will effectively price high-carbon South African products out of the market, especially if this is replicated by other jurisdictions. The imposition of the EU Carbon Border Adjustment Mechanism (CBAM) from 2027 will make access to international markets more challenging for South African carbon intensive products. Any allocated product (iron & steel, fertilisers, cement, and aluminium at present) will be subject to the EU's rate from a purchaser perspective – a steel purchaser will effectively pay the difference between SA's carbon price and the EU price to the EU.

Comment: It is argued that pegging the price at the same level as the EU means that there is no difference, and that the SA fiscus will capture the total benefit of the tax. Imposition of a corresponding carbon price in the South African context therefore provides stronger local incentive for decarbonisation, increases the revenue for the fiscus that can better fund positive decarbonisation incentives, and will more rapidly drive decarbonisation and improve the competitiveness of South African products on an internationally priced market.

> *Response:* Not Accepted. The proposed rate increases by inflation plus 2 percentage points until 2030, with higher prices only considered after 2035 is not accepted. South Africa has made ambitious commitments in the Nationally Determined Contribution Commitments (NDCs) under the Paris Agreement for a peaking of emissions in 2025, and a rapid decline in emissions in 2030. Emissions will decline in the range of 350 to 420 million tonnes and for the first time, the climate targets are compatible with the 1,5c temperature goal. A credible price on greenhouse gas (GHG) emissions is crucial and can go a long way towards building up a cost-effective climate policy framework. The 2022 carbon tax rate proposals aim to provide policy certainty on the rate trajectory and a credible price signal to help achieve the NDC commitments approved by Cabinet. The proposed rate increases of inflation plus 2 percentage points until 2030 with higher prices implemented after 2035 does not sufficiently reflect the polluter pays principle and the anticipated growing climate risks. It is also not in line with the carbon prices required to meet the 2deg temperature goal under the Paris Agreement in a cost-effective manner. The High-Level Commission on Carbon Prices, IMF, and the National Business Initiative analysis and assessment of the carbon prices recommend minimum effective carbon prices of at least US$25 by 2025 and US$40 with no tax-free allowances by 2030 to adequately internalize the externality costs of climate change. For the headline carbon tax rates proposed in the draft TLAB, the effective carbon tax rates assuming average tax-free allowances of 80 to 85 per cent would be about R46 to R62/tCO_2e (~US$3 to US$4) in 2026 and R69 to 99/tCO_2e (~US$6) in 2030. The effective tax rate will be much lower if the other deductions such as the carbon tax deductibility for income tax purposes, carbon sequestration deduction and the cost recovery mechanism for the liquid fuel sector are considered. Although the proposed 2022 draft TLAB rates are below the carbon prices

required to fully internalise the externality costs of climate change, they would start to align with the average effective carbon tax rates implemented globally. It would not impose a significant tax burden on companies, but it would send an important price signal to drive future investment decisions and companies that invest in low carbon technologies and energy efficiency measures will have a lower carbon tax liability. Globally, a shift toward low-carbon production is inevitable. The sooner local companies can begin the transition, the more competitive they will be and avoid the imposition of carbon border adjustments.

Response: Accepted. It is recommended that increases to the carbon tax rate post 2030 in clause 38(1)(e) of the 2022 draft TLAB should be commensurate with the best available science related to effective GHG emission reduction and in accordance with South Africa's Nationally Determined Contribution in force at the time. It must be noted that every tonne of greenhouse gas emitted has far reaching consequences that should be accounted for in applying the polluter pays principle. If efforts to reduce emissions are not taken urgently, the repercussions of high emissions will be suffered by the future generations, which would not be in line with the principle of intergenerational equity.

Comments on tax free allowances and incentives

Comment: Stakeholders requested guidance on the phasing out of allowances and the exclusion of the proposed percentage reductions of the basic tax-free allowances from 2026 from the TLAB. This could create policy uncertainty and be interpreted as them being either totally removed or significantly smaller by 2030. The allowances have been instrumental in assisting business sectors such as mining, petrochemicals, and hard to abate sectors such as iron and steel and cement.

Comment: It is proposed that allowances are expanded and retained and, where a phase out is planned, that this be clearly articulated. It is noted that other governments assist taxpayers in transitioning to greener technologies by providing various incentives or forms of financial aid such as free allocations, indirect compensation, subsidies, ringfencing of carbon tax revenues, and funding support for innovation, technology, research and development. It is proposed that supporting policies and measures to encourage decarbonisation and growth of low carbon sectors are explored and introduced.

Comment: Some stakeholders suggest that for hard to abate sectors, consideration should be given to carbon border adjustments similar to proposals from other jurisdictions to address competitiveness concerns. Others are of the view that the basic, trade exposure and carbon budget allowances should be removed, as they undermine the carbon tax.

Comment: Some stakeholders are of the view that companies have had at least a decade to prepare for the carbon tax, and with the extension of the first phase by a further three years, have even more time to take the necessary steps to transition in alignment with climate science. Once the tax-free allowances are taken into account, the effective carbon tax rate is about US$2 per tCO_2e and could be as little as R6 ($0.4) The intention of the tax is to disincentivise companies from emitting carbon because it is too expensive to do so. If the tax is too low, companies will simply absorb this cost and continue with business as usual, rendering the carbon tax superfluous. Despite this, there are still vociferous objections to the

carbon tax, and to the allowances being removed. The more notice and information that can be provided about the allowances falling away, the better and this should be published for comment as soon as possible.

Response: Noted**.** In Budget 2022, the following announcements were made on the tax-free allowances under the carbon tax*: "The basic tax-free allowance will also be gradually reduced to strengthen the price signals under the carbon tax from 1 January 2026 to 31 December 2030. To encourage investments in carbon offset projects, government intends to increase the carbon offset allowance by 5 per cent from 1 January 2026. These and other proposals will form part of a review for the second phase, to inform future budget announcements"*. It should be noted that neither in the Ministers Budget speech nor the Budget review is it stated that all the tax-free allowances will be phased out or removed by 2030. In light of the extended phase 1 and to provide policy certainty, a paper will be published in 2023 on possible design options for the tax-free allowances under the carbon tax for public comment and further stakeholder consultation. This will take into account the comments received on the 2022 draft TLAB and the best trajectory to keep South Africa in line with its mitigation ambitions that are outlined in the country's NDC and net zero commitments.

Response: Noted**.** The carbon tax is intended to help reduce the price differential between the low and high carbon emitting technologies. In addition, the current design of the carbon tax provides significant tax-free allowances and revenue recycling measures to support industries transition and to minimise potential adverse impacts on industries and poor and low-income households. Indirect compensation provided under the EU ETS caters for the indirect electricity costs incurred by emitting companies and trade exposed sectors, subject to certain thresholds and intensity benchmarks. This is very similar to the current design of the carbon tax which includes the electricity price neutrality commitment, the trade exposure allowance, and the special process emissions allowance for hard to abate sectors, such as iron and steel, cement and chemicals. Future adjustments of the tax-free allowances for the hard to abate sectors will take into account the availability of mitigation technologies and the pace and scale of the transition over the next decade while seeking to ensure that the dynamic incentives are maintained on the margin for research, development and technology innovation. This will also consider the work underway by the Department of Forestry, Fisheries and the Environment on the Mitigation Potential Analysis, sector emissions targets and carbon budgets. Tax incentives for capital investments in research and development and renewable energy production are already provided under the Income Tax Act.

Response: Not Accepted. The Carbon Tax Act does not include a sunset date on the transition allowances i.e. the basic of 60 percent, process and fugitive of 10 percent, trade exposure up to a max of 10 percent, performance of 5 percent and carbon offsets allowances from 5 to 10 percent. A provision for the retention of the allowances is therefore not required.

Comments on detailed bottom-up analysis and socio-economic impact assessment

*Comment***:** The socio-economic modelling that underpins the 2019 Carbon Tax Act and now the Taxation Laws Amendment Bill is based on a view of the economy and macro forecasts from 2015. This analysis must be updated to reflect the current post-COVID economy, real capital, and labour market rigidities. Stakeholders are of the view that detailed analysis is required to understand the consequences and benefits of mitigation and fiscal instruments. Initial analysis shows that different sectors have different switching prices and will require varying lengths of time to transition. Without detailed analysis at the sector and facility level, a uniform application of an economy-wide carbon tax will not be effective. It is proposed that detailed bottom-up analysis is conducted for hard-to-abate and trade vulnerable sectors to inform the carbon tax levels for these sectors and also consider border carbon tax adjustments. Stakeholders will study viable mitigation and socio-economic implications to determine the right time to engage with the National Treasury to understand the tax's impact on different sectors of the economy.

Response: Not Accepted**.** Several carbon tax modelling studies have been undertaken to date, by the National Treasury, local academics and international institutions such as the World Bank. The broad findings from these Computable General Equilibrium models show that a carbon tax will make a significant contribution to the reduction of GHG emissions and that the economic impact of the carbon tax will depend on how the revenues are used, i.e., the revenue recycling measures. These modelling studies were presented, explained and debated at a public workshop in November 2016 and the report entitled: *"Modelling the Impact on South Africa's Economy of Introducing a Carbon Tax"* is publicly available. The results of these studies provide a reasonable understanding of environmental and economic impacts of a carbon tax and helped with the decision-making process**.** Overall, the economic modelling conducted shows that the carbon tax will have a significant impact on reducing South Africa's GHG emissions and would lead to an estimated decrease in emissions of 13 to 14.5 per cent by 2025 and 26 to 33 per cent by 2035 compared with business-as-usual with a marginal impact on the economy's average annual growth rate. The carbon tax would make an important contribution towards reaching South Africa's NDC commitments.

Response: Noted. In 2020, the Department of Forestry, Fisheries and the Environment embarked on a project to update the 2014 Mitigation Potential Analysis (MPA) to help inform the NDCs, sector targets and the carbon budgeting, and to assist industries to develop greenhouse gas mitigation plans required under the soon to be enacted Climate Change Bill. Various industry sector updates were done including:

- Historic activity emissions and other data updated to 2020
- Growth rates updated in the aluminium, cement, chemicals, glass, iron and steel and mining and quarrying sector
- New mitigation measures included for Ferroalloys (renewable energy, waste heat recovery and fuel switch and Mining (electric vehicles)
- Mitigation measures updated across most sectors including the timing for implementation, uptake and potential.

The study shows that there is potential for electricity intensity reductions across the different sectors including ferroalloys, aluminium, cement, mining, chemicals, lime and iron steel up to 2050 relative to 2020 baseline. This also applies for process emissions.

Additional sector-based bottom-up analysis was also conducted by the National Business Initiative (NBI), BUSA and other entities to assist sectors identify mitigation potential and fuel switching prices for the cement, iron and steel and electricity sectors.

Building on the technical analysis of the NBI and the MPA 2020 update of the DFFE, BUSA is encouraged to undertake further bottom-up analysis to identify mitigation potential and opportunities across the key emitting sectors and also consider further opportunities for research and development to support technology innovation.

Comments on US dollar-based carbon tax rates

Comment: Stakeholders are of the view that the formulation of the carbon tax rate in US$ will result in uncertainty and instability for South African taxpayers due to fluctuations in the exchange rate between the Rand and the US Dollar. The Rand is currently trading between R16 and R17 to the dollar. It is suggested that the Rand based rate is reinstated. It is suggested that the average exchange rate is defined and the time period for the exchange rate/ data is aligned with the tax period of the carbon tax that is, January to December.

Response: Accepted. Changes will be made in the 2022 Draft TLAB to convert the US$ based carbon tax rates to the Rand equivalent using the average exchange rates published by the South African Reserve Bank. The latest data available for a 12-month period is August 2021 to end of July 2022. It is proposed that the average exchange for this period of R15,40 to the dollar is used for the conversion of the carbon tax rates to the Rand equivalent and the rate increases are replaced with the specific tax rate. The new proposed rates in Rands are outlined as follows. Further changes will be made in the 2022 Draft TLAB to provide for the future periodic adjustments of the carbon tax rates every 3 years to take into account the impact of exchange rate movements on the comparability of the rates to global carbon pricing.

Year	**Carbon Tax Rate (R/tCO_2e)**
2023	159
2024	190
2025	236
2026	308
2027	347
2028	385

2029	424
2030	462

Comments on carbon budget/tax alignment

Comment: Some stakeholders are of the view that a meaningful carbon tax can be implemented while the carbon budgets and sector emission targets are being determined and there is no need for a delay in the implementation of the carbon tax amendments. A 2018 version of the Climate Change Bill provided that it would be a criminal offence to exceed a carbon budget. There are however concerns that the current version of the Climate Change Bill does not make exceedance of a carbon budget an offence or refer to a higher carbon tax rate as a penalty**.** Further clarity is requested on implementation of the higher tax rates on emissions exceeding the carbon budget.

> *Response*: Accepted**.** The Carbon Tax Act (through the Tax Laws Amendment Bill) will be amended once the Climate Change Bill is enacted to provide for the higher tax rate on emissions exceeding the budget. This will be aligned with the gazetting of the Carbon Budget Regulations. As announced in Budget 2022, to address concerns about double penalties for companies under the carbon tax and carbon budgets, it is proposed that a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted. Consideration can be made for such changes to apply retrospectively to coincide with the effective date of the changes included in the Climate Change Bill. The mandatory carbon budgeting system is expected to come into effect on 1 January 2023, at which time the carbon budget allowance of 5 per cent will fall away.

Comment: Clarity is requested on whether the penalty tax rate will be applicable over a five-year period. There is a view that it would be unfair to penalize a company for a transgression in one year if that company remains within its budget over the five-year period.

> *Response:* Noted**.** An annual accounting period is preferred to align with the carbon tax period and to avoid a situation where a company would face a significant tax liability at the end of the 5-year period. Finalisation of the design will be done after further consultations with stakeholders.

Comment: It is suggested that should the Climate Change Bill and the mandatory carbon budgeting process be implemented at a later date (which will be after 1 January 2023), then the current carbon budget allowance should be extended, as it expires at the end of 2022.

> *Response***:** Noted**.** The filing of the carbon tax returns, and payment of the tax liability occurs 6-months after the end of the tax period. The 2023 tax filing will be done in July 2024, and this should provide sufficient time for the enactment of the Climate Change

Bill and implementation of the mandatory carbon budgets. The extension of the carbon budget allowance may not be required.

5.2. Electricity price neutrality extension

(Main reference: Section 6(2) of the Carbon Tax Act: Clause 39 of the Draft TLAB)

In the 2022 Budget, it was proposed that the first phase of carbon tax and the commitment to electricity price neutrality would be extended for 3 years from 31 December 2022 to December 2025. i.e., credit for electricity generation levy and renewable energy purchases extended to Dec 2025

Comment: The proposed extension of the electricity price neutrality commitment to 2025 is welcomed and supported by stakeholders. Business is of the view that the neutrality of electricity producers remains in place in perpetuity, or at least until the electricity production industry has been decarbonised. To help address electricity supply constraints and contribute towards achieving South Africa's emissions commitments the renewable energy premium deduction should remain in place at least until 2030. It was also suggested that further analysis is done on the impacts on sectors of removing the electricity price neutrality concession from 2026. There is a concern that there are double benefits provided to large emitters through a double reduction of their tax liability for the renewable energy investments under the carbon tax, i.e. electricity price neutrality as the carbon tax already provides the primary incentive to shift to lower carbon electricity. There was a view that electricity generators should also absorb some of the costs to give effect to the polluter pays principle and incentivise generation and dispatch decisions. A full or partial cost pass-through of the carbon tax in the electricity prices by NERSA would undermine the polluter pays principle. There is a view that there should be a policy commitment by government to not only increase the amount of renewable energy on the grid but also by a reduction in the overall carbon intensity of the electricity mix in line with the decarbonisation trajectory.

Response: Noted. In light of the extension of the electricity price neutrality commitment by 3 years until 2025, further work will be undertaken to assess the impacts of removing this concession on different sectors. Further consideration will be given to extending this deduction for an additional 3-5 years and refining the design of the incentive to remove any double benefits.

Comment: Electricity generators including state-owned entities claim the renewable energy premium deduction in respect of renewable energy purchased in terms of the power purchase agreements concluded as part of the Renewable Energy Independent Power Producers Procurement Programme. Due to the restructuring of the electricity sector and separation of the generation, transmission and distribution functions, it is envisaged that the power purchase agreements concluded as part of the Renewable Energy Independent Power Producers Procurement Programme, will be transferred to National Transmission Company of South Africa (NTCSA) when it commences operations. However, the carbon tax liability arising from greenhouse gas emissions in category 1A1a will remain with the generation function of the state-owned entity. Stakeholders are of the view that the TLAB should include a transitional

provision allowing electricity generators to continue to claim renewable energy premium deduction in respect of power purchase agreements ceded to NTCSA.

Response: Accepted. It is proposed that an announcement should be made in the Budget for changes to be made in the tax legislation once the new National Transmission Company of South Africa (NTCSA) has started operating.

Comment: Stakeholders are also of the view that the electricity price neutrality deduction should be extended to include 1A4 activities: Other Sectors (including heat and electricity recovery from Waste) i.e. commercial and agriculture, forestry, fishing.

Response: Accepted. Changes will be made in the 2022 draft TLAB to include the 1A4 category to align the tax treatment of similar activities.

5.3. Energy efficiency savings tax incentive extension

(Main reference: Section 12L of the Income Tax Act: Clause 9 of the Draft TLAB)

In the 2022 Budget, it was proposed that the first phase of carbon tax and the energy efficiency savings tax incentive would be extended for 3 years from 31 December 2022 to December 2025.

Comment: The extension of the 12L Energy Efficiency Savings tax incentive is welcomed by stakeholders. Some stakeholders are of the view that the section 12L energy efficiency rate should be increased to at least R1.55/kWh by 2022 to align with the rising electricity price. It is also proposed that the section 12L tax extension be aligned with the increase in the carbon tax rates. Some concerns raised on improving access to the incentive and streamlining the process for small and medium sized firms.

Response: Noted. Energy efficiency improvements and investments are the low hanging fruit which business should be doing in any case. With the increase in the carbon tax rate and the higher electricity prices, a case for extending the 12L incentive beyond 2025 is quite weak and difficult to justify the continuation of the incentive. Some support for SMMEs could however be considered. Work is underway by the South African National Energy Development Institute to streamline and simplify the process for small and medium sized enterprises to access the tax incentive.

5.4. Limiting carbon sequestration deduction to activities within operational control of the taxpayer

(Main reference: Section 6(4) of the Carbon Tax Act: Clause 39 of the Draft TLAB)

In the 2022 Budget, it was proposed that changes be made to section 6(4) of the Carbon Tax Act to limit eligible sequestration activities within the operational control of the taxpayer conducting activities in terms of IPCC code 1A2D for pulp, paper and print.

Comment: Some stakeholders were of the view that the definition of operational control should be included in the Carbon Tax Act as it may have a different meaning for tax purposes under

the Customs and Excise Act and reporting of greenhouse gas emissions under the National Greenhouse Gas Reporting Regulations. Operational control is defined in the National Greenhouse Reporting Regulations as “a data provider has operational control or another company if it, or one of its subsidiaries, has the full authority to introduce and implement its operating policies at the company.” Industry was of the view that in accepting third-party timber, a mill can extend its operating policies regarding sustainable management of plantations and reporting emissions through contractual agreements. Paper manufacturers have implemented a pilot project with members and third-party timber growers to test a methodology to register, report and verify emissions, as well as governance structures to ensure chain of custody and sustainable management. The methodology aims to report on verified emissions and mitigate double counting and potential abuse whilst upholding the principles of sustainable management, additionality, and permanence principles.

> *Response:* Not Accepted. The concept of operational control is common in the Customs and Excise Act, for example the registration and licensing requirements for customs and excise purposes are applied to those persons who are in charge of the operations that are regulated by that Act. Similarly, the carbon tax rules in that Act define the emissions facilities which a taxpayer must license for carbon tax purposes as those premises where a taxable activity occurs over which the taxpayer has operational control. For purposes of that Act, operational control has the normal everyday language meaning of the term and a definition thereof is not considered necessary or warranted.

> *Response:* Noted. The pilot project for developing the MRV protocol for third party timber growers is welcomed and will ensure a proper monitoring and verification system for third party timber production and prevent potential abuse and double claims of the sequestration deduction.

Comments on extension of carbon sequestration deduction to 1A2J sawmilling activities

Comment: Some stakeholders are of the view that the proposed amendments will exclude other taxpayers who fall outside the pulp, paper and print industry such as the sawmills and other wood-based companies. It is requested that consideration be given to the extension of carbon sequestration deductions to include emissions sequestered in harvested wood products for sawmilling activities under IPCC code 1A2J. The methodology for monitoring, reporting, and verifying sequestered emissions from sawmills has been included in the Department of Forestry, Fisheries and Environment’s Draft Methodological Guidelines for Quantification of Greenhouse Gas Emissions – Carbon Sequestration in the Forestry Industry to Support the Implementation of the Greenhouse Gas Emission Reporting Regulations, 2016. The methodological guidelines allow for sequestration in harvested wood products from sawmills and other wood-based product manufacturing facilities. The process developed to register, report, and verify emissions at pulp and paper mills can be extended to include sawmills. Stakeholders were also of the view that the sequestration deduction should be extended to other sectors with no limitations.

> *Response:* Accepted. The 1A2J sawmilling activity is similar to the paper and pulp activities and includes carbon sequestration in harvested wood products in the-

production value chain. The extension of the deduction to include sawmilling activities will ensure that similar activities are treated in similar way for tax purposes.

Response: Noted. Consultations were held with industry on the possible extension of the sequestration deduction to other sectors. This could be considered on a case-by-case basis. Further work will be undertaken by industry to develop the case for the extension of the deduction and appropriate methodologies to estimate the emissions sequestered. This will take into account the current regulatory requirements, and monitoring and verification systems necessary to limit potential for tax avoidance and ensure the environmental integrity of the carbon tax, additionality and permanence of sequestered emissions. Some stakeholders may be able to claim the carbon offset allowance for forestry related projects.

6. INCOME TAX: INDIVIDUALS, SAVINGS AND EMPLOYMENT

6.1. Reviewing the timing of accrual and incurral of variable remuneration

(Main reference: Section 7B of the Income Tax Act: Clause 2 of the Draft TLAB)

The Act makes special dispensation for variable remuneration and makes provision for the deferral of the taxation of variable remuneration to the date when the amount is received by the employee as opposed to when it accrues to the employee. Currently, variable remuneration is defined in the tax legislation to include the following amounts: (i) overtime pay, bonuses or commission as contemplated in the "remuneration" definition contained in paragraph 1 of the Fourth Schedule to the Act; (ii) an allowance or advance paid in respect of transport expenses as contemplated in section 8(1)(b)(ii); (iii) an amount which the employee becomes entitled to as a result of unutilised leave; (iv) any night shift or standby allowance; or (v) any amount paid or granted for a reimbursement as contemplated in section 8(1)(a)(ii) of the Act. Government is cognisant of the fact that the above-mentioned list of amounts that fall within the definition of variable remuneration may not fully cater for all types of variable remuneration. Although "commission" is included in the current list of variable remuneration, such commission only caters for performance-based payments that form part of the employee's salary, it does not cater for instances where such payments are for example calculated based on units produced. This is due to the fact that the common meaning of "commission" refers to a percentage-based payment as opposed to an amount determined based on units produced. Further to the above, the current provisions of section 7B of the Act need to be clarified to cater for instances where any type of variable remuneration accrues to the employee and the employee dies before the date of payment of the variable remuneration.

Comment: The proposed amendment in the proviso may create problems in instances where an employee is entitled to a bonus but dies before date of payment thereof. It may therefore be beneficial to deem the accrual date in such instances as the day prior to date of death.

Response: Accepted. Changes will be made in the 2022 draft TLAB to clarify that where the employee is deceased before the date of payment, the amount of variable remuneration is deemed to accrue to the employee on the day prior to the date of employee's death.

Comment: The reference to "units produced" in the proposed amendment creates confusion and may need to be clarified or defined in legislation. Further to the above, given that the proposed amendment is motivated by occurrences in the informal sector, it is unclear why the legislation does not specifically reference the informal sector.

Response: Partially Accepted. While the amendment is based on occurrences within the informal sector, Government is cognisant of the fact that this issue may not necessarily be limited to the informal sector. The proposed amendment is essentially intended to cater for instances where a performance-based payment, over and above the employee's wages, is dependent on the fulfilment of a suspensive condition by the employee. That said, changes will be made in the 2022 Draft TLAB to remove the reference to the term "units produced".

Comment: Consideration should be given to including amendments that cater for instances where a variable payment is determined with reference to an equity instrument as contemplated in section 8C of the Income Tax Act.

Response: Not Accepted. It should be noted that these requests were not part of the 2022 Budget proposals and are therefore not part of the 2022 legislative cycle. The intention behind the proposed amendment to section 7B in the 2022 draft TLAB was in no way connected to equity instruments or payments derived with reference to equity instruments as contemplated in section 8C of the Income Tax Act.

6.2. Apportioning the interest exemption and limiting capital gains tax annual exclusion when an individual ceases to be tax resident

(Main reference: Section 10(1)(i) of the Income Tax Act and paragraph 5(1) of the Eighth Schedule to the Income Tax Act: Clauses 22 and 55 of the Draft TLAB)

In 2012, clarification was made in the Act to provide that when an individual ceases to be a South African tax resident, that individual's year of assessment is deemed to have ended on the date immediately before the day he or /she ceased tax residency. This section further provides that the individual's next succeeding year of assessment is deemed to commence on the day on which tax residency is ceased. The above deeming provisions result in the individual having two years of assessment during a twelve-month period, and that makes it possible for the individual to double-up on certain exemptions or exclusions that are allowable per year of assessment. This goes against the policy rationale of the provisions of the Act. In order to address this anomaly, it is proposed that changes be made in the following provisions of the Act, section 10 of the Act and paragraph 5 of the Eighth Schedule to the Act, to apportion the interest exemption and capital gains annual exclusion in the above-mentioned instances.

Comment: The current SARS systems do not cater for instances where taxpayers have two years of assessment, system changes would therefore be required to cater for this proposed amendment.

Response: Accepted. SARS is aware of this and has already commenced the process of ensuring that systems are updated in time to cater for the proposed amendment.

Comment: Apportioning the capital gains tax annual exclusion on a 'number of days' basis may be prejudicial to taxpayers as it is likely that the bulk of their capital gains tax charges will arise in the year of assessment when they are tax resident.

Response: Accepted. Changes will be made in the 2022 draft TLAB to allow taxpayers to utilise the annual exclusion as best suites them, provided that the cumulative exclusions utilised during the two years of assessment does not exceed the annual exclusion allowable.

Comment: The proposed amendment is likely to have unintended consequences in instances where a taxpayer dies during a year of assessment. As a result, individuals who die during a tax year need to be specifically excluded from this proposal.

Response: Not Accepted. Persons who die have a higher capital gains exclusion that is not affected by the proposal.

Comment: The capital gains tax annual exclusion and interest exemption are not the only amounts impacted by the above stated 12-month period. Consideration should be given to extending this concession to the section 11F allowable retirement deduction and section 12T Tax-Free Saving Accounts provisions.

Response: Not Accepted. It should be noted that these requests were not part of the 2022 Budget proposals and are therefore not part of the 2022 legislative cycle. The intention behind the proposed amendment in the 2022 draft TLAB was to prevent taxpayers from being able to 'double-up' on the capital gains tax annual exclusion and interest exemption.

6.3. Reviewing the transfer of total interest in a retirement annuity fund

(Main reference: Definition of "Retirement Annuity Fund" in section 1 of the Income Tax Act: Clause 1 of the Draft TLAB)

The Act makes provision for members of retirement funds to transfer their retirement interest from one retirement fund to another. These transfers are subject to certain conditions, for example, if the individual is transferring to a similar type of retirement fund, or from a less restrictive to a more restrictive retirement fund; and in the case of retirement annuity funds, if the total interest in the transferor fund is transferred. These conditions result in retirement annuity fund members with more than one contract in a particular retirement annuity fund being restricted from transferring one or more

contracts from one retirement annuity fund to another. An anomaly however arises as members of a preservation fund are not restricted regarding the proportion of their retirement interest that can be transferred into another fund. To address this anomaly, it is proposed that changes be made in the legislation to allow retirement annuity fund members to transfer one or more contracts in a particular retirement annuity fund, subject to certain conditions aimed at ensuring that the current de-minimis thresholds are not contravened, to another retirement annuity fund.

Comment: The proposed de-minimis of R495 000 seems a little excessive, consideration should be given to reducing this – could potentially reduce it to the current R245 500 commutation de-minimis.

Response: Partially Accepted. Changes will be made in the 2022 Draft TLAB to reduce the current *de-minimis* from R495 000 to R371 250.

Comment: The current wording makes it impossible for members with a retirement interest balance of less than R495 000 to effect a transfer of their total interest.

Response: Accepted. Changes will be made in the 2022 draft TLAB so that the de-minimis applicable to per contract transfer does not apply in instances where the transfer is of 100% of the individual's retirement interest.

6.4. Clarifying the compulsory annuitisation and protection of vested rights when transferring to a public sector fund

(Main reference: Definitions of "Pension Fund" and "Provident Fund" in section 1 of the Income Tax Act: Clause 1 of the Draft TLAB)

In 2013 the retirement fund reform amendments were effected to the Act regarding the annuitisation requirements for provident funds and provident preservation funds. However, these amendments only came into effect on 1 March 2021 and were subject to the protection of vested rights. As a result, historic vested rights (those that arose prior to 1 March 2021) were segregated from new rights (those arising after 1 March 2021). The protection of vested rights therefore applies as follows:

- Any member of a provident or provident preservation fund as at 1 March 2021 will not be required to annuitise any historic vested rights;
- New vested rights in relation to members 55 years or older as at 1 March 2021 will remain protected provided the member remains in that same fund;
- Historic vested rights may be transferred into another retirement fund without forfeiting their vested rights protection (irrespective of the number of transfers effected).

It has come to Government's attention that the tax legislation would result in the protection of historic vested rights being forfeited if a transfer is effected into a public sector fund. This is due to the fact that the pension fund and provident fund definitions do not make any reference to the protection of vested rights for individuals who were members of a provident or provident preservation fund as at 1 March 2021. To address this anomaly, Government proposes amending the pension and provident fund

definitions in section 1 of the Act to ensure that historic vested rights remain protected even if transferred to a public sector fund.

Comment: There is uncertainty with regards to why the draft legislation refers to the Commissioner recognising a fund, clarity in this regard is therefore sought.

Response: Noted. This reference is in place to cater for public sector funds that are, for whatever their respective reasons may be, willing to comply with the Pension Funds Act but not willing to comply with the Income Tax Act in instances where the Act deviates from the Pension Funds Act.

6.5. Clarifying paragraph (eA) of the definition of gross income regarding public sector funds

(Main reference: Definition of "Gross Income" in section 1 of the Income Tax Act: Clause 1 of the Draft TLAB)

In 2021, the retirement reform amendments that require mandatory annuitisation for provident funds came into effect. These reforms included amendments that cater for public sector pension funds that operate like provident funds. As such, with effect from 1 March 2021, members of provident funds (including public sector pension funds that operate like provident funds) are required to annuitise their benefits upon retirement. At issue is the fact that despite the above-mentioned changes regarding the annuitisation of public sector funds, paragraph (eA) of the definition of gross income in section 1 is silent on public sector funds that fall within paragraph (a) of the definition of provident fund. To address this and confirm the policy intent that annuities received from public sector pension funds should be included in gross income, it is proposed that clarification be made in paragraph (eA) of gross income to include these public sector funds.

Comment: The proposed amendment to the definition of "gross income" is in insufficient to cater for the annuitisation of public sector funds, additional amendments are therefore required.

Response: Comment Misplaced. The proposed amendment in the 2022 draft TLAB inserts the reference to public sector provident funds. This was done to ensure that paragraph (eA) of the definition of "gross income" in section 1(1) of the Income Tax Act refers to all public sector funds.

Comment: In order for fully cater for the proposal, section 10C would also need to be amended.

Response: Not Accepted. The primary intention of the proposed amendment in the 2022 draft TLAB was to correct cross-referencing in the Income Tax Act so as to ensure that annuities from public sector funds fall within the ambit of the gross income definition in section 1(1) of the Income Tax Act.

6.6. Technical correction to the definition of “living annuity” in section 1 of the Income Tax Act

(Main reference: Definition of “Living Annuity” in section 1 of the Income Tax Act: Clause 1 of the Draft TLAB)

Members of retirement funds who have reached retirement age and opted to retire can elect to receive a living annuity from their respective retirement fund. It has come to Government’s attention that the current definition of “living annuity” creates an anomaly which may result in taxpayers interpreting the legislation as prohibiting a member in receipt of a living annuity from one fund to transfer to another fund and continue receiving their living annuity from the transferee fund. To address this anomaly, it is therefore proposed that the definition of “living annuity” is amended to clarify that a living annuity can still be provided in instances where the fund providing the living annuity is not the same fund the individual was a member of on date of retirement.

Comment: The proposed amendment does not fully cater for transfers of in-fund living annuities. Transfers undertaken in terms of section 14 of the Pension Funds Act where in-fund living annuities are transferred to an umbrella fund are not catered for as the current wording does not give the member flexibility to elect which fund, they wish to receive the living annuity from. It is therefore requested that the scope of the amendment is widened to enable transfers of in-fund living annuities to occupational funds.

Response: <u>Not Accepted.</u> It should be noted that this request was not part of the 2022 Budget proposals and is therefore not part of the 2022 legislative cycle. The intention behind the proposed amendment in the 2022 draft TLAB was to clarify that a living annuity can still be provided in instances where the fund providing the living annuity is not the same fund that the individual was a member of on date of retirement.

6.7. Technical correction to the definitions of “pension preservation fund” and ‘provident preservation fund” in section 1 of the Income Tax Act

(Main reference: Definition of “Pension Preservation Fund” and ‘Provident Preservation Fund” in section 1 of the Income Tax Act: Clause 1 of the Draft TLAB)

In accordance with section 37C of the Pension Funds Act, upon the death of a member of a retirement fund, the trustees of said fund are responsible for distributing the arising death benefits to the elected nominees or beneficiaries of said fund. In instances where no nominees or beneficiaries have been selected by the member, the Pension Funds Act allows the trustees to transfer said benefits to an unclaimed benefit fund. It has come to Government’s attention that the current definitions of “pension preservation fund” and “provident preservation fund” in the Income Tax Act create anomalies as they do not make specific references to section 37C of the Pension Funds Act, but only makes references to the Pension Funds Act. To address these anomalies, it is proposed that the current definitions of “pension preservation pund” and “provident preservation fund” be amended to make specific references to section 37C of the Pension Funds Act.

Comment: The proposed amendments dos not fully achieve the desired objective. This due to the fact that the definition of “pension preservation fund” and “provident preservation fund” as contained in the Income Tax Act make specific reference specific to nominees or dependents while section 37C of the Pension Funds Act does not. Furthermore, the Income Tax Act definitions of “pension preservation fund’ and “provident preservation fund” only make mention of former members of occupational funds or preservation funds and fail to make mention of former members of a beneficiary fund. Based on the above, further amendments to the definitions of ‘pension preservation fund” and “provident preservation fund” will be required.

Response: Not Accepted. The intention behind making technical corrections of including the specific reference to section 37C(1)(c) of the Pension Funds Act in the definitions of ‘pension preservation fund” and “provident preservation fund” was to provide clarity. It is Government’s view that the current definitions of ‘pension preservation fund” and “provident preservation fund” cater for the transfer of unclaimed death benefits where the beneficiary, dependant or nominees are known but not paid within 24 months. This is due to the fact that the above-mentioned definitions make reference to the definition of “unclaimed benefit” as contemplated in the Pension Funds Act.

7. INCOME TAX: GENERAL BUSINESS TAX

7.1. Clarifying the definition of “Contributed tax capital”

(Main reference: Section 1 of the Income Tax Act: Clause 41 of the Draft TLAB)

In the 2021 Budget Review, Government announced proposed changes to the definition of the CTC aimed at limiting possible exploitation of the provisions dealing with Contributed Tax Capital (CTC). As such, amendments were proposed in the 2021 draft TLAB to address these tax avoidance concerns and clarify the definition of contributed tax capital. The amendments also proposed to exclude the general repurchase of listed shares (share buy backs) by companies listed on the JSE or other South African Exchanges from the proposed anti-avoidance measure. The initial effective date for the proposed amendments was 1 January 2022. After reviewing the public comments on the 2021 draft TLAB, Government decided to postpone the effective for these amendments to 1 January 2023, to give both National Treasury and affected stakeholders more time to take account of the impact of the proposed amendment, and to review the impact of the 2021 amendments in the 2022 legislative cycle. As such, in the 2022 draft TLAB, it is proposed that changes be made in the proviso to the definition of “contributed tax capital” in section 1 of the Act to allow for targeted transactions to certain holders of shares within the same class of shares to which the transfer is actually made instead of a specific list of corporate actions that are exempt from the proposed provisions. Also, proposed changes will be made in the legislation to include an anti-avoidance measure that will require a company to test whether “contributed tax capital” had equally been allocated to all shareholders of that class of shares, proportionality to their shareholding, for a running

91-day period before and after each and every transfer made within that class of shares for that period. Consequently, should any previous or any future distribution within that 91-day period before and after a distribution not have been allocated "contributed tax capital" within that class of shares then none of those transfers made during that period will be able to be allocated "contributed tax capital".

Comment: The proposed amendment essentially seeks to clarify the principle that shareholders within the same class of shares should equally, in relation to their shareholding, share in the allocation of an CTC distribution. However, the new 2022 proposed wording still has a potentially restrictive impact on legitimate corporate actions, especially on the redemption of preference shares. Redeemable preference shares, whilst in the same class, may be subject to different terms and conditions, which could result in a preference share's contractual dividends being paid quarterly (i.e. every 91-days) whilst also being subject to an earlier voluntary redemption. Based on the 2022 proposed legislation this voluntary redemption is potentially prohibited as the redemption of that a preference shares can only be made after all accrued distributions on that preference share have been made meaning that the preference share will always fall foul of the proposed combined running 182-day test.

Comment: It is important to note that the targeted mischief is not within the redemption, disposal or withdrawal of an issued class of shares or preference shares and as such the proposed 2022 amendments to the definition of CTC don't necessarily achieve the desired outcome of ensuring an equal and proportionate distribution of CTC to all shareholders within a class of shares. Based on the current proposed 2022 wording, certain unintended loopholes within that wording and possible corporate dividend policies, it merely becomes an exercise of structured timing or distributions to still achieve the same targeted mischief. As such, it is suggested that the legislation rather reverts to the wording of the Taxation Laws Amendment Act, 20 of 2021 (TLAA 2021) wording with specific exemptions for specific share buy-backs and a redemption of preference shares

Comment: The proposed further proviso's combined running 182-day anti-avoidance measure potentially could reclassify a distribution of CTC as a 'dividend' during that 182-day period which in itself would subject that now, deemed dividend, to the submission of a relevant return to SARS and resultant dividends tax. It is requested that clarity be provided through additional supportive legislation as to when the deemed dividend would actually become due and payable in terms of section 64E of the Act.

> *Response*: Accepted. Changes will be made in the 2022 Draft TLAB to ensure an equal and proportionate distribution of CTC per share whilst not impacting on legitimate corporate actions.

Comment: The proposed legislation from the TLAA 2021 stipulated an effective date of 1 January 2023 whilst the proposed amendment on the draft TLAB 2022 provided for an effective date of 19 January 2022 which would retrospectively catch valid transactions based on current legislation between the periods of 19 January 2022 and 29 July 2022 when the draft TLAB 2022 was first published for comment.

Response: Not Accepted. This is a drafting technicality when making an amendment to an amendment act, however, that amendment has a different effective date than the promulgation of the amendment act. The proposed amendment in draft TLAB 2022 technically seeks to amend the original amendment (which has a future effective date of 1 January 2023) contained in section 41 of the 2021 TLAA 2021 which was promulgated on 19 January 2022. The effective date of the proposed amendment to the definition of CTC is still 1 January 2023.

Comment: The current proviso to the definition of CTC states that "*the amount transferred by a company…must not exceed an amount that bears to the total amount of contributed tax capital to that class of shares immediately before the transfer the same ratio as the number of shares of that class held by that person bears to the total number of shares of that class*". This wording creates unintended tax consequences for a shareholder that makes a large capital contribution to a company, but by virtue of the wording of this proviso, may only be able to receive a portion of a distribution by that company as CTC, proportionate to its diluted shareholding and not its shareholding in the company because of its actual capital contribution.

Response: Not Accepted. It should be noted that this request is in respect of the first proviso to the definition and was not part of the 2022 Budget proposals and is therefore not part of the 2022 legislative cycle.

7.2. Refining the reversal of the nil base cost rules applicable to intra group transaction

(Main reference: Section 45 of the Income Tax Act: Clause 16 of the Draft TLAB)

In 2021, amendments were made to the intra group transactions rules in the corporate reorganisation provisions to clarify the application of the reversal of the nil base cost rules in instances that a group company acquires an asset in terms of a tax deferred intra-group transaction and within 18 months the acquirer of an asset disposes of that asset that triggers the tax deferral benefit in respect of the asset disposed of. Amendments were also made to allow for a reversal of the nil base cost rules when a de-grouping is triggered as a result of a transferee company ceasing to form part of the same group of companies as a transferor company. It has come to Government's attention that there are further instances that warrant the reversal of the nil base cost rules that have not been taken into account in the 2021 amendments, for example, when an asset is disposed of beyond 18 months outside of the corporate reorganisation rules and where de-grouping is triggered as a result of a transferee company ceasing to form part of the same group of companies as a controlling company in relation to a transferor company. It is proposed that further refinements be made in the 2022 draft TLAB to take into account the above-mentioned instances, and that that the proposed amendments should come into operation on 1 January 2023 and apply in respect of years of assessment ending on or after that date.

Comment These amendments are welcomed. It is, however, recommended that Government considers a retrospective amendment given that the amendments stem from amendments made in 2021.

Response: Accepted. Changes will be made in the 2022 draft TLAB so that the effective date is in line with the effective date of the 2021 amendments.

Comment: As a result of the amendments contained in the 2022 draft TLAB, nil base cost reversal will be available in respect of assets disposed of subsequent to their acquisition in terms of an intra group transaction in the instance that they are disposed of outside of the corporate reorganisation rules earlier than 18 months and subjected to the deferral benefit claw back set out under section 45(5) as well as in the instance that such assets are disposed of outside the corporate reorganisation rules after the 18 months lock in period. The drafting of the reversal rule could be simplified by making reference to asset disposals outside the corporate reorganisation rules.

Response: Accepted. Changes will be made in the 2022 draft TLAB to simplify the provisions governing the nil base cost rules by providing that nil base cost reversal is available in instance where assets previously acquired through debt or share funding and subsequent disposed of outside of the reorganisation rules, without regard to whether such disposal occurred within 18 months or not.

Comment: The provisions of the reversal of nil base cost rules do not explicitly require that asset to have been funded by the debt or shares in question. This should be made clear.

Response: Accepted. Changes will be made in the 2022 draft TLAB to explicitly provide for this requirement to remove any uncertainty in this regard.

7.3. Clarifying the rule that triggers recoupment under the debt forgiveness rules

(Main reference: Section 19 of the Income Tax Act: Clause 10 of the Draft TLAB)

The debt forgiveness rules make provision for the trigger of an additional recoupment in the instance that an asset is disposed of during a year of assessment and the debt that was used to fund the acquisition of that asset is forgiven in a subsequent year of assessment. It is proposed that clarification be made in the legislation that this provision is also intended to apply to trigger a recoupment in a subsequent year of assessment if the disposal of the asset in a prior year of assessment resulted in a scrapping allowance or capital loss. In this regard, changes are proposed to clarify that a debt benefit arising in respect of a debt that funded any allowance asset that was disposed of in a prior year of assessment, must be treated as an amount recovered or recouped and only reduced by so much amount that was previously recovered or recouped (if any) on the prior disposal of that allowance asset. As a result, where a capital loss arose or scrapping allowance was claimed, the total amount of the debt benefit arising in a latter year of assessment will be treated as an amount recovered or recouped.

Comment: The manner in which the proposed amendment is drafted can be read to mean that the full amount of a debt benefit is the recoupment that a taxpayer must include in income.

Response: Accepted. Changes will be made in the 2022 draft TLAB to include a limitation indicating that any recoupment should be limited to previous deductions claimed in

respect of any asset funded by debt that the debt benefit relates to. In addition, in determining a recoupment only so much of the debt benefit arising that was not taken into account in reducing the base cost of the asset as provided for under paragraph 12A of the Eighth Schedule should be considered.

Comment: A similar formulation is not made under paragraph 12A(4) of the Eight Schedule. In addition, the interaction between this paragraph 12A(4) may be made clearer.

Response: Not Accepted. The intension with the 2022 draft TLAB amendments on debt forgiveness is to clarify the instances where a recoupment should be made. The provisions under the Eighth Schedule do not concern themselves with recoupment and therefore amendment thereto to align style cannot be prioritised and may result in some taxpayers unnecessarily ascribing new interpretations to any new wording. Lastly, the interaction of the revenue and capital rules are made clear by the exclusion under the revenue rules of any debt benefit that has been accounted for under the capital set of rules in paragraph 12A of the Eighth Schedule.

7.4. Reviewing the debtor's allowance provisions to limit the impact on lay by arrangements

(Main reference: Section 24 of the Income Tax Act: Clause 13 of the Draft TLAB)

The Act makes provision for the debtor's allowance to be claimed as a deduction against income of taxpayer in respect of an agreement entered into by a taxpayer with any other person in respect of any property of which ownership or transfer is passed from the taxpayer to that other person after the receipt by the taxpayer of the whole or a certain portion of the amount payable in terms of the agreement, provided that the agreement has a duration of at least 12 months and in terms of which at least 25 per cent of the amount due to the taxpayer is only payable in a subsequent year of assessment. In terms of this provision, the whole of the amount due in terms of the agreement is deemed to have accrued to the taxpayer on the day on which the agreement was entered into and included in the taxpayer's income upfront. It has come to Government's attention that lay-by arrangements do not benefit from the above-mentioned debtors allowance rules because lay-by arrangements last for periods shorter than 12 months. In order to mitigate against the adverse effect of a upfront inclusion of proceeds from lay by arrangements, it is proposed that a new provision be added to section 24 of the Income Tax Act to make provision for a taxpayer to claim as an allowance against income, all proceeds from lay by arrangements, to the extent that such amount was not claimed by the taxpayer as an allowance in terms of the other provisions of the Act and subject to a condition that any proceeds from lay by arrangements claimed as allowance must be included in the taxpayer's income in the following year of assessment. The proposed amendments will come into operation on 1 January 2023 and apply in respect of years of assessment commencing on or after that date.

Comment: The relief for retailers in respect of lay-by arrangements is welcomed. However, an earlier effective date should be considered considering the burden already shouldered by the retailers.

Response: Accepted. Changes will be made in the 2022 draft TLAB to change the effective date so that the relief comes into effect a year of assessment earlier than initially proposed and the amendments will come into effect on 1 January 2023 and apply in respect of years of assessment ending on or after that date.

Comment: With the addition of the debtors' allowance in respect of lay-by arrangements, a retailer may double dip in the instance that their lay-by arrangement meets the requirements of the already existing debtors' allowance and the debtors' allowance specifically provided for in respect of lay-by arrangements as proposed in the draft 2022 draft TLAB.

Response: Accepted. Changes will be made in the 2022 draft TLAB to clarify the current general debtors' allowance may not be claimed for lay-bye arrangements.

Comment: The reference to section 11(*j*) doubtful debt allowance under the proposed debtors' allowance for lay-by arrangements is misplaced and should be removed.

Response: Accepted. Changes will be made in the 2022 draft TLAB to remove the reference to section11(*j*) doubtful debt as in the context of lay-by arrangements, there is no debt that can be considered as being doubtful.

8. INCOME TAX: TAXATION OF FINANCIAL INSTITUTIONS AND PRODUCTS

8.1. Impact of IFRS17 insurance contracts on the taxation of short term and long-term insurers

(Main reference: Sections 28 &29A of the Income Tax Act: Clauses 14 &15 of the Draft TLAB)

In 2015, 2016 and 2017 amendments were made to both section 28 and section 29A of the Act, dealing with the tax treatment of short-term and long-term insurers respectively to take into account changes introduced by the then Financial Service Board (now Financial Sector Conduct Authority) to replace the regulatory regime applicable to insurers with the Solvency Assessment and Management (SAM) Framework and rather follow the IFRS 4 Phase II standard of insurance methodology for tax purposes. In May 2017, the International Accounting Standards Board issued a new accounting standard for insurers, called IFRS17 Insurance Contracts, that is to be applied to all insurance contracts for all accounting periods commencing on or after 1 January 2023. The implementation of IFRS 17 may have a material impact on the taxation of insurers. Based on the consultation with the affected stakeholders, the impact on short term insurers is minimal, in some instances nil. On the other hand, the impact on long term insurers may be sizeable. As such, it is proposed that the following changes be made in the Act, namely, aligning the current definitions and terminology of IFRS 4 to IFRS 17 and introducing transitional tax measures, such as the phasing in period and the phasing in amount

With regard to short term insurers, the following is proposed:

- A phasing in period of 3 years
- The phasing in amount will be the difference between the amount that is deductible from income of a short term insurer in terms of the current provisions of section 28(3) or 28(3A) of the Act at the end of the year of assessment commencing on or after 1 January 2022 but before 1 January 2023 and the amount of the deduction under that section for the measuring year had IFRS17 been applied at the end of the measuring year.
- An alternative calculation is also proposed where the application of IFRS17 results in an increased deduction under section 28(3) or 28(3A) of the Act.

With regard to long term insurers, the following is proposed:

- A phasing in period of 6 years
- The phasing in amount will be the difference between the adjusted IFRS amount determined under the current rules with reference to IFRS4 at the end of the year of assessment commencing on or after 1 January 2022 but before 1 January 2023 (measuring year) and the "adjusted IFRS value" amount had IFRS17 and the definition of "adjusted IFRS value" as amended by the 2022 TLAB, been applied at the end of that year of assessment.
- An alternative calculation is also proposed where the application of IFRS17 results in an increased adjusted IFRS17 amount.

Comments on short term insurance

Comment: While the proposed phase-in measures will provide the relief from the tax impact of transitioning to IFRS 17, terminology in section 28 of the Act still needs to be updated to that of IFRS 17 to create certainty of the amounts to be used in the calculation of taxable income for short-term insurers as well as appropriate cross referencing of the proposed new section 28(3C).

> *Response*: Accepted. Further refinements will be made in the 2022 draft TLAB to update the terminology in section 28 of the Income Tax Act in line with IFRS 17 and to update cross referencing of the proposed new sections.

Comment: Section 28(2)(a) of the Act requires for the inclusion of premium received by or accrued to the short-term insurer for a risk cover under a policy on its commencement date. This amount was previously disclosed in the IFRS 4 statement of comprehensive income as gross written premium ("GWP"). In addition, section 28(3)(a) of the Act allows for a tax deduction of unearned premium reserve ("UPR") which is recognised as a provision for purposes of IFRS 4. However, GWP will be replaced with an amount which is disclosed as "insurance revenue" under IFRS 17 which is equal to GWP less movements in the UPR. Therefore, section 28(2)(a) of the Act should refer to "insurance revenue" determined in accordance with IFRS 17 and the deduction currently allowed under in terms of section 28(3)(a) should be deleted.

> *Response*: Accepted. Changes will be made in the 2022 draft TLAB so that section 28(2)(a) refers to "insurance revenue" which is determined in accordance with IFRS as reported by the insurer to shareholders in the annual financial statements and section 28(3)(a) will be deleted as it will no longer be required.

Comment: There may be instances where a cell arrangement is accounted for as either an investment contract recognised under IFRS 9 or a reinsurance arrangement for purposes of IFRS 17. In these circumstances, the relevant insurance profits will not be fully disclosed in the statement of comprehensive income of the short-term insurer. In order to address cell captive arrangements and other arrangements where premium income is not specifically included in 'insurance revenue', earned premiums in relation to such contracts should be specifically included in taxable income.

> *Response*: Accepted. Changes will be made in the 2022 draft TLAB so that premiums received or accrued specifically include premium income earned in relation to an investment contract entered into by a "cell captive insurer" as defined in section 1 of the Insurance Act in respect of "first party risks" as defined in that section of that Act.

Comment: Given that the liabilities relating to claims are specifically referred to as liabilities for incurred claims ('LIC') under IFRS 17, we request that that section 28(3)(b) of the Act be amended to refer to LIC under IFRS 17.

> *Response*: Accepted. Changes will be made in the 2022 draft TLAB so that section 28(3) of the Act specifically refers to liabilities for incurred claims in respect of the policies of the insurer, net of amounts recognised in reinsurance contracts for liabilities for incurred claims, which are determined in accordance with IFRS as reported by the insurer to shareholders in the audited financial statements.

Comment: An additional change is required to the definition of the proposed "phasing-in amount" in the draft TLAB to exclude from this amount the impact of insurance and reinsurance receivables and payables other than those forming part of the liability for incurred claims. At issue is that premium debtor balances are specifically set off against the insurance liabilities relating to unearned premiums.

> *Response*: Accepted. The disclosure requirement under IFRS 17 that sets off certain asset balances, which were disclosed as separate asset balances under IFRS 4, against insurance contract liabilities relating to liability for remaining coverage should not create a tax liability. A specific deduction will be proposed in the first year of assessment commencing on or after 1 January 2023 for the net amounts of insurance premium or reinsurance premium debtors, and amounts of reinsurance premium payable taken into account in determining the liabilities for remaining coverage at the end of the last year of assessment commencing on or after 1 January 2022 but before 1 January 2023, had IFRS 17 been applied at the end of the year of assessment. Furthermore, the phasing-in amount will be reduced by the amount of insurance premium and reinsurance premium debtors less the amount of reinsurance premiums payable, at the end of the latest year of assessment commencing on or after 1 January 2022 but before 1 January 2023, had IFRS 17 been applied, other than amounts forming part of the liability for incurred claims.

Comment: In future, under IFRS 17, there will be a substantial degree of difficulty in separating the 'salvages/third-party recoveries' receivable and the actual receipt thereof. As such, it will not be practically possible to tax these amounts on receipt in terms of section 28(2)(e) of the Act. Since the 'salvages/ third-party recoveries' receivable immediately before transition would not have been taxed, these amounts would need to be included in the taxable income of the short-term insurer in the year of transition, regardless of whether the amounts have been received or not.

> *Response*: Accepted. Currently salvages / third-party recoveries are taxable on receipt. As a result, changes will be made in the 2022 draft TLAB for an inclusion in income in the first year of assessment commencing on or after 1 January 2023 of an amount equal to the difference between amounts recoverable by that short-term insurer in respect of claims incurred under a short-term policy issued by that short-term insurer at the end of the last year of assessment commencing on or after 1 January 2022, but before 1 January 2023 that has not been received by that short-term insurer by the end of that year of assessment.. In addition, the phasing-in amount will be increased by the amount of the inclusion described above.

Comment: We request an alternative to IFRS for branches of foreign reinsurers to be allowed by using the figures determined for annual audited regulatory returns as a basis of determining the allowed deduction in terms of section 28(3A) of the Act.

> *Response*: Not Accepted. The Income Tax Act should not cater for two different accounting standards in respect of the taxation of similar taxpayers.

Comments on long term insurance

Comment: The proposed 6-year phasing-in period in the draft TLAB is not adequate especially considering the contract durations of a long-term insurer. Possibly, a phasing-in period of 10 years will be sufficient to manage any potential systemic risk associated with unknown solvency and liquidity positions. In addition, a longer phasing-in period will also protect the fiscus from an uneven income tax contribution from the industry over time.

> *Response*: Noted. The proposed phase-in period of 6 years in the 2022 daft TLAB will be maintained mostly because of (i) the financial impact figures that were submitted by the individual insurers reflecting the potential impact of transitioning to IFRS 17, (ii) ensuring consistency and practising fairness to those companies that were given allowed a 6-year phasing from 2018, when the Income Tax Act introduced the adjusted IFRS basis to value long-term insurers' liabilities. However, Government will monitor issues raised by the industry after the commencement and implementation of IFRS 17.

Comment: During the previous amendments to address the transition to the 'adjusted IFRS value' tax basis instead of the SAM basis of valuation of liabilities, the phasing-in mechanism was achieved by adjusting the liability value per policyholder fund over a 6-year period. All ASISA members except for one propose that National Treasury revert to the phasing-in methodology that applied for the transition.

Response: Accepted. The intention for the proposal in the 2022 draft TLAB for an adjustment to be made in the determination of taxable income of the corporate fund was to provide a greater alignment between tax and accounting. In order to cater for the preference of most long-term insurers, changes will be made to the 2022 Draft TLAB in the phasing -in mechanism by adjusting the value of liabilities per policyholder fund.

Comment: The current proposal in the Draft TLAB does not consider capital gains and liquidity implications because the restatement of insurance liabilities will result in assets being transferred between tax funds in the year of transition (commencing on or after 1 January 2023) or within three months after the end of the year of transition. The impact may be very large where the quantum of the difference between the original and restated insurance liabilities is very large.

Response: Accepted. This aspect will be addressed by changing the phasing in amount with reference to the value of liabilities.

Comment: The reference in the phasing-in amount in the draft TLAB must refer to "value of liabilities" as opposed to "adjusted IFRS value". "Value of liabilities" is the amount used to calculate transfers to/from the corporate fund as contemplated in terms of section 29A (7) read with the ITR14L. It is used as the opening balance and closing balance on Form 1 of the ITR14L income tax return for long-term insurers and should therefore be the amount referenced in the phasing-in calculation. In addition, since certain items previously disclosed under current liabilities like liability for incurred claims are now disclosed as part of the "adjusted IFRS value" under IFRS 17, the phasing-in amount should refer to "value of liabilities".

Response: Accepted. To ensure that the correct comparison is being made, that is, "adjusted IFRS value" determined before and after the implementation of IFRS 17 and that there is consistency among insurers, changes will be made in the 2022 draft TLAB so that the "value of liabilities" definition is utilised to determine the phasing in amount.

Comment: Premium debtors and policy loans were previously disclosed as assets under IFRS 4. However, under IFRS 17, insurance contract liabilities will be determined and presented net of premium debtors and policy loans. On transition, to IFRS 17, due to the change in disclosure, premium debtors and policy loans should be excluded from the determination of the phasing-in amount. If premium debtors and policy loans are not adjusted in the phasing-in calculation it will lead to an unintended excess that result in double taxation of the same amount.

Response: Accepted. The proposed "phasing-in amount" in the 2022 Draft TLAB will be changed by deducting amounts for premium debtors and policy loans determined in accordance with IFRS as reported by the insurer to shareholders in the audited annual financial statements at the end of the latest year of assessment commencing on or after 1 January 2022 but before 1 January 2023.

Comment: In cases where a policyholder fund is in a deficit position (market value of assets are less than the value of liabilities) and an amount is required to be transferred to the fund from the corporate fund, this does not give rise to an actual deduction in the corporate fund. The transfer is instead ring-fenced for offset against future profit transfers reducing the extent to which the future profit transfers are taxed. Therefore, any deficit created on transition to IFRS 17 should follow a similar approach.

> *Response*: Accepted. This aspect will be addressed by changing the phasing in amount with reference to the value of liabilities.

9. INCOME TAX: BUSINESS INCENTIVES

9.1. Interaction between the application of the assessed loss restriction rules and capital expenditure regime for mining operations

(Main reference: Section 20(1) of the Income Tax Act: Clause 42 of the Draft TLAB)

In 2021 changes were made in section 20 of the Act to restrict the use of assessed losses carried forward as part of the corporate income tax package to broaden the tax base and reduce the corporate income tax rate. It has come to Government's attention that there is an anomaly in the interaction between the application of the new assessed loss restriction rules in section 20 of the Act and the current capital expenditure regime applicable to mining operations in terms of section 36 of the Act. To address this anomaly, it was proposed that clarification be made in section 20 of the Act, dealing with restriction of assessed losses, by inserting an ordering rule stating that the calculation of the assessed loss restriction in terms of section 20 should be determined before taking into account the capital expenditure deduction for mining operations in terms of section 36 of the Act.

Comment: Taxpayers requested clarity on the application of the assessed loss restriction rules in relation to different mines' ring-fencing and non-mining income as the example included in the explanatory memorandum was not clear.

> *Response:* Accepted. The anomalies in the example have been rectified and a revised version showing the policy intent with respect to ordering is included below. Current-year taxable income before applying section 20 and section 15(a) in conjunction with section 36 of the Act consists of R2,000 in non-mining income and R3,000 in mining income. Collectively, the total income is R5,000 and the company has an assessed loss balance brought forward of R8,000, which exceeds 80 per cent of taxable income at this point. The company may deduct R4000 (80 per cent of R5000), leaving taxable income of R1000. Please note that the *de minimis* rule has not been applied here – the low numbers are for the purposes of simplicity.The numbers in italics are recorded on a per-mine basis and to distinguish mining from non-mining income given that the per-mine ring-fencing provision in section 36(7F) of the Act needs to be applied to determine how much capital expenditure can be redeemed. Mine 1 and Mine 3 each have a balance of capital expenditure to

redeem. For Mine 1, this must be restricted to the lower of this mine's taxable income following the application of section 20 (i.e. R300) and total mining income (i.e. R600). Hence, R300 is redeemed. For Mine 3, no capital expenditure can be redeemed as the lower amount is zero in respect of Mine 3's taxable income. In total, R300 is redeemed and the company has a taxable income of R700.

		Non-mining	Mine 1	Mine 2	Mine 3	Total (mining)	Total
	Taxable income before assessed loss provisions (s20) and capex (s36)	**2 000**	**3 000**	**3 000**	**(3 000)**	**3 000**	**5 000**
	Current year loss		(1 500)	(1 500)	3 000	0	0
	Taxable income after current year loss	2 000	1 500	1 500	0	3 000	5 000
s20	Assessed loss b/f	(2 000)	(2 000)	(2 000)	(2 000)	(6 000)	(8 000)
s20	restricted to 80% of taxable income	*(1 600)*	*(1 200)*	*(1 200)*	*0*	*(2 400)*	(4 000)
	Taxable income following s20 application	*400*	*300*	*300*	*0*	*600*	**1 000**
	Balance of assessed loss c/f	*(400)*	*(800)*	*(800)*	*(2 000)*		*(4 000)*
	Capex balance		(4 000)	0	(2 000)	(6 000)	(6 000)
s36	Redemption of capex (mining & per-mine ring-fencing to apply)		(300)	0	0	(300)	(300)
	Taxable income / (loss) for the year	***400***	***0***	***300***	***0***		**700**
	Capex balance c/f		*(3 700)*	*0*	*(2 000)*		*(5 700)*

Comment: the amendment considers sections 36(7E), (7F) and (7G) of the Act. While these are the section 36 ring-fencing provisions, they are not the provisions in terms of which the actual deduction of capital expenditure is made. The actual deduction is made in terms of section 15(a) read with s36(7C). It was recommended that the provision in section 20 should reference s15(a).

Response: Partially Accepted. Changes will be made in the 2022 draft TLAB in this regard.

9.2. Interaction between the application of interest limitation rules and capital expenditure regime for mining operations

(Main reference: Section 23M of the Income Tax Act: Clause 12 of the Draft TLAB)

In 2021 changes were made in section 23M of the Act to strengthen the rules dealing with the limitation of interest deductions in respect of debts owed to persons not subject to tax (as part of the corporate income tax package to broaden the tax base and reduce the corporate income tax rate). It has come to Government's attention that there is an anomaly in the interaction between the application of the interest limitation rules in section 23M of the Act and the current capital expenditure regime applicable to mining operations in terms of section 36 of the Act. At issue is the application of the provisions of section 23M to the interest expense on non-

producing mining operations that forms part of capital expenditure of such mining operations. To address this anomaly, it is proposed that clarification be made in section 23M of the Act, by inserting a provision stating that the interest limitation rules will not be applied to limit the interest expense of non-producing mining operations that forms part of capital expenditure of such mining operations in terms of section 36 of the Act.

Comment: Clarity is sought on whether “interest incurred” in the proposed subsection (6A) refers to the section 23M or 36(11)(b) definition of interest.

> *Response:* Noted. The reference to interest incurred is aligned with the limitation of interest incurred under section 23M of the Act. Although section 36(1) of the Act refers to interest payable, the practical application does not create an inconsistency.

Comment: Clarity is sought on whether the carve-out in the proposed subsection (6A) extends to interest on loans prior to commencing production.

> *Response:* Accepted*.* Changes will be made in the 2022 draft TLAB to clarify that this extends to interest on loans prior to commencing production too.

Comment: Taxpayers welcomed this amendment, but there were some requests for further clarity. It was pointed out that the amendment applies to the entire section 23M of the Act, rather than to just the limitation in section 23M(2) of the Act.

> *Response:* Noted*.* It was intended that the exclusion apply to the entire section. If it is not practical to track interest that has been capitalised during periods of non-production for the limitation, it will be equally impractical to so do in the calculation of adjusted taxable income. Hence, all interest incurred (as defined in section 23M of the Act) in the mining context during periods prior to the commencement of production and periods of non-production should not be taken into account for the purposes of section 23M of the Act.

9.3. Tax treatment of an asset acquired as a government grant in kind

(Main reference: Section 11(*e*) of the Income Tax Act: Clause 8 of the Draft TLAB)

The Act provides tax exemption for any government grant received or accrued under a scheme listed in terms of the Eleventh Schedule or approved under the national annual budget process and gazetted by the Minister of Finance. In addition, any expenditure funded by a government grant that has been received or accrued, other than a government grant in kind, must be reduced for purposes of claiming allowances in respect of trading stock and allowance assets. This reduction is required because a taxpayer receiving a government grant does not incur the expenditure it is funded by that government grant. It has come to Government’s attention that when an asset is acquired for no consideration, for example a government grant in kind, the provisions for wear and tear allowances in terms of section 11(*e*) are applicable because they apply to the value of the asset and not the expenditure or cost incurred by the taxpayer. This creates an anomaly in the system as, similar with a cash government grant, the receipt of a government grant in kind is exempt from tax but the assets received should not qualify for wear and tear allowances. To address this anomaly, it is proposed that a new subparagraph (*e*)(ix) be introduced in section 11 of the Act aimed at aligning the tax treatment of an asset

acquired as a government grant in kind with the tax treatment of assets acquired using a cash government grant. It is proposed that these changes should be deemed to have come into effect on the date that the 2022 draft TLAB was published for public comment, i.e, 29 July 2022 and apply in respect of years of assessment ending on or after that date.

Comment: The proposed amendment seems to target all government grants in kind (including government grants that are not exempt from tax). For a government grant to be exempt from normal tax, it must meet the requirements set out in section 12P. Not all government grants meet these requirements to be exempt from normal tax and taxpayers in such situations are liable to pay tax on these government grants received.

Response: Not Accepted. When the government grant regime was introduced in 2012, it was with the intention that there should be a unified tax treatment of all government grants. In this respect government grants must be listed in the Eleventh Schedule of the Act to qualify for exempt treatment under section 12P. The introduction of government grant can stem from any of the three spheres of government leading to some delays between their introduction and request for inclusion in the eleventh Schedule. However, any grant that is included in the Eleventh Schedule, is so included from its date of introduction, and will always qualify for exemption from its introduction. It is therefore unnecessary and contrary to the intention to have a unified regime to cater for non-exempt grants.

10. INTERNATIONAL TAX

10.1. Clarifying the treatment under CFC rules of amounts from hybrid equity instruments deemed to be income

(Main reference: Section 9D(9)(fA) of the Income Tax Act: Clause 4 of the Draft TLAB)

The CFC rules contain an exclusion applicable to a payor and payee for intra-CFC interest, royalties, rental income, insurance premium or income of a similar nature, provided both the payor and payee are part of the same group of companies. In terms of hybrid equity instrument rules, certain dividends in relation to the recipient are deemed to be income. To ensure neutral tax treatment, it is proposed that provision be made for the exclusion of the potential deemed income by the payee company for hybrid equity instruments between the CFCs.

Comment: The same exclusion for dividends in respect of section 8E hybrid equity instruments should be extended to dividends from third party-backed instruments in terms of section 8EA of the Act.

Response: Accepted. Changes will be made in the 2022 Draft TLAB to extend the proposed amendment to dividends from third party-backed shares in terms of section 8EA of the Act.

Comment: Clarity should also be provided on what is meant by "any similar amount adjusted in terms of section 31".

Response: Noted. In order to achieve consistency with the treatment of interest, royalties, rental, insurance premiums or income of a similar nature in section 9D(9)*(f)* the words: "any similar amount adjusted in terms of section 31" will be retained.

10.2. Clarifying the exclusion of participatory interest in investment schemes from the definition of foreign dividend

(Main reference: Definition of "foreign dividend" in section 1(1) of the Income Tax Act: Clause 1 of the Draft TLAB)

In general, a "foreign dividend" is defined in the Act as an amount paid by a foreign company in respect of a share in that foreign company. Specifically excluded from the definition of "foreign dividend" is any amount paid or payable that constitutes a redemption of a participatory interest in an arrangement or scheme contemplated in paragraph (*e*)(ii) of the definition of "company". It has come to Government's attention that in certain instances foreign law does not only deal with redemptions but also the sale of units, shares or interest to the arrangement, scheme or foreign management company of the scheme. It is therefore proposed that the words "or other disposal" and "to that scheme or arrangement or to the management company of that scheme or arrangement" be added to the exclusion to cater for amounts from those disposals.

Comment: Clarification is required on whether the proposed amendment expands the exclusion in order to cater for "other disposals" in foreign CISs or whether it has been expanded to include disposals of interests held in foreign management companies.

Response: Noted. The clarification is intended to cater for various permutations that may exist, for example, disposal to the scheme or arrangement or management company of that scheme.

Comment: Given that the proposed amendment in the Draft TLAB is aimed at clarifying the existing legislation, it is submitted that there should be no defined effective date and the proposed clarification should come into effect on the date of promulgation of the Taxation Laws Amendment Act, 2022.

Response: Accepted. Changes will be made in the 2022 draft TLAB to change the effective date to the date of promulgation of the Taxation Laws Amendment Act, 2022 as the general practice is that if the amendment is merely clarifying the existing legislation, the effective is the date of promulgation of the Taxation Laws Amendment Act.

11. VALUE-ADDED TAX

11.1. General comments on the proposed amendments as a result of the 2019 amendments to section 72

(Main reference: Sections 1(1), 20, 23 and 52 of the VAT Act: Clauses 27,31,32 and 33 of the Draft TLAB)

In 2019 changes were made to section 72 of the VAT Act, which provides the Commissioner with the discretionary powers to make arrangements or decisions as to the manner in which the provisions of the VAT Act or the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax provided for in terms of the VAT Act, shall be applied, provided that the Commissioner is satisfied that as a consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise with regard to the application of the VAT Act. These changes have an impact on the arrangements or decisions made in terms of this section before 21 July 2019. In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all the arrangements or decisions issued by the Commissioner before 21 July 2019 were no longer valid after 31 December 2021, at issue is whether changes could be made in the VAT Act to accommodate these arrangements or decisions.

Comment: The proposed effective date of the amendments in lieu of the section 72 rulings is currently 1 January 2023. Existing section 72 rulings ended with effect from 1 January 2022. This leaves a one-year gap where the VAT position of a vendor and non-vendors are unclear. Further, in certain instances, the end of the rulings implied that taxpayers had to register for VAT. Some have not as yet done so. Further, the new proposed amendments imply that such suppliers, if registered for VAT, would have to deregister. This would leave them exposed to the exit VAT provisions contained in section 8(2). It is recommended that the proposed amendment either be backdated to 1 January 2022 or that transitional arrangements be introduced.

Response: Not Accepted. VAT is a transactional tax, and it is difficult to consider retrospective amendments in this regard. Also, during public workshops and public hearings on the 2022 Draft TLAB, some taxpayers have indicated that they were VAT compliant with the legislation when changes were made and will comply again when the proposed amendments become effective. As such, the request to apply these amendments retrospectively may seem to be condoning the unlawful actions of those taxpayers that were non-compliant.

Comment: Consideration should be given to whether the 2019 amendment needs to be relooked at and possibly reinstating the Commissioner's discretionary powers to issue rulings as opposed to making actual amendments to the VAT Act to cater for the needs of specific taxpayers or industries.

Response: Not Accepted. The policy rationale for making the 2019 amendments was stated in Annexure C of the 2019 Budget Review (Page 135).

11.2. Reviewing the section 72 decision with regard to cross-border leases of foreign owned ships, foreign owned aircraft, and foreign owned rolling stock for use in South Africa

(Main reference: Definition of “enterprise” in section 1(1) of the VAT Act: Clause 27 of the Draft TLAB)

In 2020, changes were made to the definition of “enterprise” in section 1(1) of the VAT Act by introducing a new proviso (xiii) to the definition, aimed at excluding such a lessor from the definition of “enterprise” in instances where the lessee imports the following goods, namely, ships, aircraft and rolling stock for use in or partly in South Africa and the lessor of the above-mentioned goods is not a resident of South Africa and is not a registered vendor in terms of the South African VAT Act, subject to the lessee declaring the VAT on the importation of the above-mentioned goods. It has come to Government’s attention that the new proviso does not apply in instances where the foreign lessor enters into a separate agreement with the South African resident lessee for purposes of leasing any foreign owned parts relating to such foreign owned ships, foreign owned aircraft or foreign owned rolling stock, for example, aircraft engines. It is proposed that changes be made to the above-mentioned proviso of the definition of “enterprise” of the VAT Act by extending the scope to include any lease agreement entered into between a foreign resident lessor and a South African resident lessee with regard to the leasing of any foreign owned parts relating to the foreign owned ships, foreign owned aircraft or foreign owned rolling stock, if all the current requirements of the proviso (xiii) to the definition of “enterprise” in section 1(1) of the VAT Act are met.

Comment: The wording used in the proposed amendment does not clarify whether this amendment will apply only in instances where the leasing agreement for the parts is directly linked to the leasing agreement for the foreign owned ships, foreign owned aircraft or foreign owned rolling stock.

> *Response:* Accepted. Changes will be made in the 2022 draft TLAB to clarify that the contracts do not need to be related in this regard.

11.3. Reviewing the section 72 decision with regard to “flash title sales”

(Main reference: Definition of “enterprise” in section 1(1) of the VAT Act: Clause 27 of the Draft TLAB)

Other arrangements made in terms of section 72 of the VAT Act before 21 July 2019, which are impacted by these changes refer to the VAT treatment of flash title sales. Flash title sales is defined in the Export Regulations as a supply of movable goods by a vendor to a non-resident qualifying purchaser (QP1), which QP1 subsequently supplies the movable goods to non -resident QP2 for export purposes. At issue is the fact that flash title sales may be caught under the current definition of “enterprise” and such QP1 may be required to register for VAT in South Africa. In order to address the administrative burden, the Commissioner had, before 21 July 2019, issued rulings in terms of section 72

of the VAT Act to the effect that foreign suppliers and acquirers of goods on a flash-title basis do not have to register for VAT in South Africa. In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all arrangements or decisions issued by the Commissioner before 21 July 2019 will no longer be valid after 31 December 2021, it is proposed that the definition of "enterprise" in the VAT Act be amended by introducing a new proviso aimed at excluding from the definition of "enterprise" a "Qualifying Purchaser", as defined in the Export Regulations (QP1), who is a non-resident non-vendor, who merely takes flash-title ownership of goods in South Africa.

Comment: The new proviso provides for QP1 only and does not provide for subsequent QP's who also supply the goods on a flash title basis whilst the goods are still at the port in South Africa.

Response: Not Accepted. Only QP1s are covered by the Regulations and were subject to the previous section 72 arrangements or decisions. SARS have no sight of documentation between QP1 and QP2. This is not regarded as another export for Customs purposes.

Comment: Consideration should be given to introducing an election in the definition of "enterprise" so QP1 could choose to register in order to claim input tax credits. This relates to instances where the other requirements are still being met – i.e. QP1 makes no other "supplies" in South Africa.

Response: Accepted. Changes will be made in the 2022 draft TLAB to cater for this.

11.4. Reviewing the section 72 decision with regard to the VAT treatment of the registration of certain foreign suppliers

(Main reference: New section 23(2A) of the VAT Act: Clause 32 of the Draft TLAB)

Other arrangements made in terms of section 72 of the VAT Act before 21 July 2019, which were impacted by the 2019 changes refer to the VAT treatment of the registration of certain foreign suppliers. The definition of "enterprise" in section 1(1) of the VAT Act, read together with the provisions of section 23 of the VAT Act, makes provision for every person who is conducting an enterprise and whose taxable supplies have exceeded the registration threshold or are expected to exceed same, to have a legal requirement to register for VAT in South Africa. This applies regardless of whether or not such a "vendor" as defined, has a physical presence in South Africa. Consequently, section 23(2) of the VAT Act, makes provision for foreign entities who are required to register for VAT in South Africa in terms of section 23(1) to appoint a representative vendor and to open a banking account with any bank, mutual bank or other similar institution, registered in terms of the Banks Act 94 of 1990, for the purposes of the enterprise carried on in South Africa. At issue is the administrative compliance challenges encountered by foreign entities with no physical presence in South Africa with the provisions of section 23(2) of the VAT Act. These difficulties include for example, the appointment of the representative vendor in South Africa who is capable of administering the VAT registrations and compliance requirements of multiple entities that form part of the same group of companies and the opening of a South African bank account. The proposed amendment seeks to introduce a new subsection (2A) aimed at allowing the resident

registered vendor to register a single branch registration in respect of all the non-resident holding companies and subsidiaries that form part of the same group of companies, as defined in section 1(1) of the Income Tax Act, as the registered vendor, subject to certain conditions.

Comment: Deeming the non-resident entity to be a branch of the South African vendor group company should be optional and not mandatory. Clarity is required on which vendor needs to make the application. Clarity is also required on the VAT situation where there is no group company registered for VAT in South Africa. Provision needs to be made for a continuation of the VAT registration number of the branch when the main entity deregisters. The branch should not be deemed to be a separate "enterprise" but rather a separate "person". Clarity is required on the VAT implication of South African supplies made between non-resident entities within the same branch registration.

> *Response:* Partially Accepted. Changes will be made in the 2022 Draft TLAB to provide further clarity where necessary. In other instances, the normal provisions of the VAT Act will apply.

11.5. Reviewing the section 72 decision with regard to the VAT treatment of pooling arrangements

(Main reference: New section 52(3) of the VAT Act: Clause 33 of the Draft TLAB)

Further arrangements made in terms of section 72 of the VAT Act before 21 July 2019, that were impacted by the 2019 changes relate to the VAT treatment of pooling arrangements. Section 52 of the VAT Act makes provisions for the VAT treatment of pooling arrangements in respect of pools contemplated in section 17 of the Marketing of Agricultural Products Act 47 of 1996, any rental pool scheme operated and managed by any person for the benefit of the owners of time sharing interests in a property time sharing scheme as defined in section 1 of the Property Time-sharing Control Act 75 of 1983, the owners of sectional title interests in a sectional title scheme as defined in section 1 of the Sectional Title Act 95 of 1986 and the shareholders in a Shareblock Company as defined in section 1 of the Shareblocks Control Act 59 of 1980, subject to certain conditions stipulated in that provision. However, there are other pooling arrangements, for example pooling arrangements for incorporated medical practices and pooling arrangements for the medical practitioners that are subject to the policies of the Health Professions Council of South Africa ("HPCSA"). These policies or regulations impact the manner in which these practises and practitioners conduct business and lead to enormous complexities, administrative challenges and additional costs. The section 72 arrangements or decisions that the Commissioner had issued previously had the effect that each pool was separately registered as a VAT vendor and not each individual practice or practitioner. It is proposed that changes be made to section 52 by introducing a new subsection (3) dealing with the VAT treatment of pooling arrangements established in order to comply with the provisions of legislation, regulations or rules of a professional body and applied by taxpayers that are subject to such legislation, regulations or rules of such professional body, subject to certain conditions.

Comment: Section 51 already caters for a separation of a body or partnership where there is a separate enterprise being conducted by a body from its members. It is recommended that

the opening wording in the section be amended so as not to refer to shareholders of a company or partners in a partnership or members of a body as this creates confusion with reference to section 51.

Response: Accepted. Changes will be made in the 2022 Draft TLAB in this regard.

2022 Draft Tax Administration Laws Amendment Bill

12. CUSTOMS AND EXCISE ACT: ADMINISTRATION

12.1. Insertion of definition for "invoice" and related reference changes

(Main reference: Section 1 of the Customs and Excise Act: Clause 7 of the Draft TALAB)

Comment: Recommendation that the words "in particular circumstances" should be deleted from definition for "invoice".

Response: Noted. The wording of the definition for "invoice" will be reconsidered.

Comment: It is recommended that the definition of invoice clearly makes reference in some form that an invoice is time-dated commercial document that itemises and records a transaction between a buyer and a seller. In addition, what makes an invoice true, correct, and sufficient? A clear link needs to be made to a section or some rules that establishes what SARS deems to be a "true, correct and sufficient" commercial document?

Response: Noted. The wording of the definition will be reconsidered. The intention of providing a definition was to avoid repetition and to ensure consistency in relation to wording referring to invoices or particulars on invoices in the Act. Throughout the Act there are different words used when referring to an invoice, for example *"prescribed invoice"*, *"invoice as prescribed"*, *"correct and sufficient invoice"*, *"true, correct and sufficient invoice"* and *"relative prescribed invoice"*. As explained in the Memorandum of Objects to the Bill, the invoice itself cannot be prescribed by SARS because it is up to the seller what their actual invoice looks like. SARS' aim is to avoid qualifying "invoice" in every instance where it is used by stating additionally that it must be true, correct and sufficient for the purposes of a making a valid entry and contain any additional information as may be prescribed. The words "true, correct and sufficient" have their normal meaning and can be determined in relation to the factual situation, namely is the invoice a true and correct reflection of the facts in the particular case. "Sufficient" refers to completeness – does the information that is reflected thereon constitute all the information necessary to make a valid entry and arrive at the correct transaction value in the particular instance.

12.2. Enabling Commissioner to prescribe period within which entry must be made in respect of particular type of cargo

(Main reference: Section 38 of the Customs and Excise Act: Clause 9 of the Draft TALAB)

Comment: The type of cargo must be clearly defined in the rules, and industry must be consulted.

> *Response:* Accepted. When the draft rules have been finalised they will be published for public comment which will be considered as per SARS' usual procedure.

12.3. Clarification of requirements for invoices in respect of imported goods, enabling Commissioner to prescribe particulars in respect of invoices

(Main reference: Section 41 of the Customs and Excise Act: Clause 12 of the Draft TALAB)

Comment: Section 41(1). In relation to the proposed insertion of *"a true, correct and sufficient"* certificate of value industry requires clarity as to what a certificate of value is. Define what particulars need to be reflected on a certificate of value to make it true, correct or sufficient.

> *Response:* Noted. "Certificate of value" is an existing term which is not being amended. It is taken to be a document to determine value which is used in instances where there is no invoice.

Comment: Section 41(2). Although not motivated, the commentator proposes the deletion of the reference to "goods …*exported to or from* or manufactured in the Republic". The recommendation is to rather replace with "goods ….*imported, exported* or manufactured in the Republic".

> *Response:* Not Accepted. The recommendation relates to existing wording which is not being amended. The provision deals with the requirement that goods exported to or from the Republic must have a distinctive and permanent identification number, code, description, character or other mark, which must be quoted or reproduced in all invoices relating to such goods.

Comment: Section 41(4)(a). Although not motivated, the commentator proposes the deletion of the reference to imported goods in the proposed amended provision, as well as replacing the words "*final* amount of the transaction value" with "*total* amount of the transaction value".

> *Response*: Not Accepted. This provision deals with invoices for imported goods. Furthermore *"final amount of the transaction value"* is part of the existing wording which is not being amended. For purposes of assessing the correct duty due the final (ultimate) amount and not the total (aggregate) amount of the transaction

value is required. The final amount must be differentiated from the total amount of the transaction value. There may be instances where the final amount is still to be determined for e.g. royalties or proceeds from the subsequent sale of the goods that will accrue to the seller, and for this reason there is a discretion allowed to the Commissioner in the provision.

Comment: Section 41(4)(c). Although not motivated, the commentator seems to recommend that paragraph *(c)* should apply not only in respect of imported goods, but also to exported goods. It is furthermore suggested that the proposed inserted reference to *"document purported to be an"* invoice be deleted from the provision.

Response: Not Accepted. Subsection (4)*(c)* refers back to particulars referred to in subsection (4)*(a)*. As mentioned above, subsection (4)*(a)* relates to invoices for imported goods. Paragraph *(c)* therefore currently applies only in respect of imported goods. It seems that the explanatory note on the reason for inserting *"document purported to be an"* invoice has not been taken into account. The context of this provision indicates that the document referred to cannot be an *"invoice"* as defined because it does not contain all of the required information (viz. *"If any of the particulars …are not declared in …".*). For this reason, the word *"invoice"* must be qualified as a *"document purported to be an invoice"*.

12.4. Correction of wrong cross-references in section 47 amendment

(Main reference: Section 47 of the Customs and Excise Act: Clause 13 of the Draft TALAB)

Comment: Please correct the cross-reference to section 74H(2)*(b)*.

Response: Accepted. The reference should be to section 74G(2)*(b)*.

12.5. Transitional provision relating to validity period of a binding determination

(Main reference: Section 49 of the Customs and Excise Act: Clause 14 of the Draft TALAB)

Comment: It is proposed that a binding origin determination issued under section 49(8) of the Act which is in force when Chapter IXA comes into effect should remain valid for a period of three years from the date of receipt by the applicant.

Response: Not Accepted. Binding origin determinations currently remain valid for a period of three years from date of issue in terms of section 49(8)*(f)*. No change is proposed in this respect. The date on which the Commissioner issues the determination to the applicant will determine the validity, which is from an administrative perspective a more certain way to determine the validity period.

Clause 14(2) contains a transitional arrangement relating to what will happen to binding origin determinations that have already been issued when the new system of advance rulings come into effect.Paragraph *(b)* of subclause (2) regulates the validity of such binding origin determinations already in place, namely providing that they remains valid for three years from the date of issue. At the time that the new advance rulings system comes into effect there could, for argument's sake, be binding origin determinations which have already been in force for two years. This provision merely means the validity of such determinations will continue for another year, even though the section in terms of which it was issued has been repealed.

12.6. Proposal to allow emergency or 24- hour valuation determination

(Main reference: Section 65 of the Customs and Excise Act: Clause 15 of the Draft TALAB)

Comment: We welcome the introduction of an advance customs valuation ruling, however there is a concern in respect of instances where an urgent determination needs to be made when importing goods, especially goods which are required for manufacturing or for equipment or machinery repairs that are desperately required for the manufacturing process. We kindly request that an emergency or a 24-hour valuation determination be allowed in the case of urgent import or export entries. Alternatively allow for the release of the goods on preliminary application and facts and finalise the binding ruling afterwards without penalties or fines should there be a difference in opinion.

Response: Not Accepted. This proposal cannot be accommodated under the advance rulings system due to the binding nature of the rulings. Non-binding determinations can, however, be requested through current processes. Although a request for a value determination can only be submitted upon importation, a client may be able to obtain a conditional release if the customs value of the imported goods cannot be determined at the time of importation.

12.7. Inserted Chapter IXA-Advance Rulings

12.7.1. Timeframe for issuing of advance rulings

(Main reference: Section 74D of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: Please incorporate timeframes for issuing advance rulings. There is a concern that the time used for consideration may exceed the timeframe within which the transaction for which the application was made, comes into effect.

Response: Noted. A timeframe for issuing the ruling will be considered during the rule making process. Alternatively service standards may be set, as is the case for advance tax rulings.

12.7.2. Application of advance valuation rulings

(Main reference: Section 74B of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: A valuation ruling appears to only apply to imports and not exports under section 72. Allow for export valuation rulings.

> *Response:* Not Accepted. The advance ruling system will at this stage be limited to registered importers to allow for a managed introduction of the system. Changes will be effected to other provisions of the Draft Bill to clarify that the advance ruling system does not apply in respect of registered exporters. As the programme matures, other client types may be considered.

12.7.3. Applicant's tax matters to be in order

(Main reference: Section 74B read with Section 74C of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: The purpose of section 74B(2) is confusing. The question is asked whether it is a reference to a qualifying criterion for the application or a definition or a subsection to "valuation criterion"?

> *Response:* Noted. Subsection (2) is the second subsection of section 74B which deals with the interpretation of the Chapter on advance rulings. Subsection (2) is an interpretation provision like subsection (1). The application for an advance ruling must be refused in terms of section 74D(3)*(c)* if the applicant's tax matters are "not in order". The interpretation provision in section 74B(2) states when tax matters are considered to be "in order".

Comment: An advance ruling should be a means of facilitating compliant trade. Considering and resolving a person's complete tax matters will hinder the applicant's good intention of applying for a binding ruling to ensure future customs compliance. An advance ruling should not be seen as an incentive for customs compliance but rather a tool to aid taxpayers to be compliant and to avoid further tax cases. If an applicant under the TAA wishes to apply for a ruling, they are required to have no outstanding payments in terms of a "tax Act" which as defined in the TAA, excludes customs and excise legislation. This means that a party applying for a ruling in terms of the TAA could possibly have outstanding payments in respect of customs and excise legislation, and the ruling would still be granted. However, if an applicant under the proposed rulings system in Chapter IXA wishes to apply for a ruling, all of their tax payments arising under any tax legislation need to be up to date in order to have their customs and excise advance ruling application considered. This unequal treatment could deter applicants from using the proposed ruling process, even applicants who

have legitimate disputes with SARS regarding amounts demanded from them under the Customs Act. This proposed requirement should be dropped or amended to only apply to outstanding customs and excise liabilities, and only in cases where the applicant is not legitimately disputing the liability with SARS.

Response: Partially Accepted. Tax compliance is currently a requirement for registration, licensing and accreditation and will be verified on application for a binding ruling. Furthermore, an advance ruling benefits an applicant because it creates certainty due to its binding nature. The applicant must be tax compliant to obtain this benefit. It should be noted that tax compliance is not a requirement to obtain a determination. The proposed amendment will, however, be adjusted to make provision for cases where arrangements acceptable to SARS have been made to file outstanding tax returns or pay outstanding tax debt.

12.7.4. Applications for advance rulings limited to tariff, value and origin

(Main reference: Section 74C of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: The provision should be amended to allow applications to be brought to obtain clarity, consistency and certainty regarding the interpretation and application of the Customs Act. A substantial portion of customs and excise disputes with SARS arise due to disagreements on the interpretation of provisions of the Customs Act. The Internal Administrative Appeal ("IAA") process is costly, time-consuming, and often fails to provide certainty on matters of interpretation. A system allowing for advance rulings on interpretational issues could assist with this issue and help reduce the burden on customs and excise Appeal Committees. The narrow focus of the proposed system which only provides for rulings on tariff classification, customs valuation, and the origin of goods, means that the IAA process remains the only internal mechanism to resolve questions of interpretation under the Customs Act. We submit that wording similar to that governing the advance rulings system under Chapter 7 of the TAA could be incorporated into the proposed Chapter IXA of the Customs Act, to widen its ambit as suggested above. Alternatively, the proposed Chapter IXA could incorporate wording similar to that of section 114A of the Customs Act, in terms of which a specific part of the TAA is deemed to apply to the Customs Act, with any necessary changes as the context may require. The latter option is arguably the more elegant solution, and there is precedent for it in section 114A.

Response: Not Accepted. Advance rulings in the customs context should not be confused with advance rulings in the tax context, which relate to interpretation issues and specifically provide for SARS to reject ruling applications relating to the value of an asset. The reason for specifically enabling a system of advance rulings in respect of tariff, valuation and origin is South Africa's commitment in terms of Article 3 of the World Trade Organisation Trade Facilitation Agreement. Article 3 obliges member states to provide for a system of advance rulings for the tariff classification and origin of goods as well as on the appropriate method or criteria to be used for determining the customs value of goods. South Africa

has committed to implementing such a system by 2028. Interpretation rulings are not foreseen at this stage but may be considered as the programme matures.

12.7.5. Limiting applicants to importers and exporters

(Main reference: Section 74C of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: The requirements may unnecessarily exclude certain applicants with legitimate interests. We submit that applications should be allowed to be made on behalf of a "class" as this could allow entities representing diverse members who share common interests to approach SARS for rulings. A broader array of applicants should be encouraged to apply for advance rulings on a wider variety of topics, and unnecessarily onerous restrictions should not be placed on applicants.

> *Response:* Not Accepted. The facility will only be available to applicants who are registered importers. Representatives authorised to do so may submit on behalf of individual applicants. Class rulings are not foreseen because the tax matters of the applicant, which is a requirement of registration, licensing and accreditation, will also be verified on application for a binding ruling. Furthermore, advance rulings relate to a client's specific circumstances/goods. Although advance rulings in the tax context include class rulings, the distinction between customs and tax context above should again be noted.

*Comment: S*ubsection (1) limits the person that may apply for an advance ruling to registered "importers and exporters" only, whereas there are other participants in the customs and excise arena that may benefit from the advance rulings process.

> *Response:* Not Accepted. It is foreseen that registered importers will be the persons in the customs environment who will make application for advance rulings on tariff, value and origin. Changes will be effected to the provisions of the Bill to reflect this position. Representatives authorised to do so may submit applications on behalf of individual applicants.

12.7.6. Manner of submission of applications

(Main reference: Section 74C of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: Allow for manual submissions should e-filing applications not be possible.

> *Response:* Accepted. The manner of submission will be dealt with in the rules to be drafted; there will be provision for manual submission if electronic submission is not possible.

Comment: The rules should be published for comment so that feedback and comments can be given to ensure that industry can meet SARS customs requirements.

Response: Accepted. The draft rules will be published for public comment as per SARS' normal process.

Comment: In relation to the Commissioner being empowered to request additional information, please incorporate a timeframe in the rules to ensure that all applications are treated uniformly by all officers and branches. Please allow for additional time should it be required, as with our SARS requests.

Response: Noted. The rules will deal with all of the formal aspects in relation to such requests. Not all requests for documentation or information may however require a standard amount of time. SARS will ensure that applications are treated uniformly. Also note that the issuing of advance rulings is anticipated to be a centralised function at Head Office which will mitigate the risk on non-uniform treatment.

Comment: Please consider waiving the fee for AEO clients. This would be an incentive to apply for accreditation.

Response: Noted. SARS will consider including this as a benefit under the Accreditation rules after internal consultation. Any proposed rule changes will be published for public comment.

12.7.7. Considerations of applications

(Main reference: Section 74D of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: We kindly ask that specific and generic conditions be published in the rules so that there is uniformity amongst all branches and offices.

Response: Noted. This will be considered during the rule making process. The consideration of applications is however anticipated to be a centralised function which will mitigate the risk on non-uniform application of conditions.

Comment: How is "sufficient certainty" envisioned in relation to the requirement that an application may be granted only if there is sufficient certainty as to the application of the advance ruling to the goods to which the ruling will relate? Recommend changing the words "sufficient certainty" to state "true and accurate".

Response: Not Accepted. The proposal is not suitable for this context. The concept of sufficient certainty merely means that SARS must be reasonably certain that any documents provided by the applicant such as brochures, photographs, plans, catalogues, copies of technical literature, laboratory analysis results, or other documents can be linked to the goods referred to in the application.

Comment: Does the requirement that the Commissioner must refuse an application if the applicant is not a registered person as contemplated in section 74C(1) mean that the importer or exporter as the "registrant" would have to do the application themselves? Does it mean that applications submitted by tax practitioners will be rejected?

> *Response:* Noted. Please note that there is a difference between the applicant and the person submitting the application on behalf of the applicant. An application submitted by an authorised representative will not be rejected for that reason. Representatives authorised to submit applications may submit applications on behalf of applicants that are entitled to apply. This will be clarified in the rules.

Comment: Concern was expressed in relation to the provision stating that the Commissioner must refuse an application where the application raises an issue that is the same or substantially similar to an issue that is either pending before a court or being dealt with in terms of the SARS' internal remedies. Where clarification is not provided, an applicant for an advance ruling that is none the wiser that a similar issue is already before a court or SARS, may spend time, resources and money in applying for a ruling only to be informed by SARS that the issue is the same as or substantially similar to an issue already being dealt with either in litigation or through internal remedies.

> *Response:* Accepted. The provision will be adjusted to refer to an issue involving the applicant.

Comment: Provide for remedial measures in case of a refusal or rejection.

> *Response:* Comment Misplaced. The outcome of an application for an advance ruling constitutes administrative action and therefore a "decision" for purposes of section 77A, which is subject to internal dispute resolution.

12.7.8. Granting of applications

(Main reference: Section 74E of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: In relation to the requirement that the name of the recipient must be inserted on the advance ruling, please confirm that the "recipient" is the same person as the "registrant" or "importer or exporter. We recommend that applicant reference be consistently applied or referred too with the section.

> *Response:* Not Accepted. "Recipient'' means a person to whom an advance ruling has been issued, in other words the successful applicant. If an application is granted, the person that has applied for the ruling is the recipient of the ruling. In the introductory portion it states that the Commissioner must send the ruling

to the applicant. The document received is the ruling, which must contain the name of the recipient of the ruling.

Comment: If binding rulings are not going to be issued by head office or a dedicated division but rather from branch offices please include the name of the office that issued the binding ruling.

Response: Noted. It is foreseen that a SARS Head Office division will be responsible for issuing advance rulings.

12.7.9. Validity period of rulings

(Main reference: Section 74F of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: A validity period of two years is too short. A period of five years is recommended given that business transactions don't change that frequently, especially in relation to contractual relationships between committed parties, and where it comes to related parties. A shortened period will necessitate re-applying for a ruling. The administrative burden and cost for applying for the ruling will act as a deterrent as opposed to a means of facilitation trade between SARS and the traders.

Response: Not Accepted. The validity period is linked to liability for duty which is 2 years and not to business practice. As the programme matures and is assessed a longer period of validity may be considered.

12.7.10. Entry of goods under advance rulings

(Main reference: Section 74H of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: Please indicate in the rules in which box on the SAD500 the ruling number needs to be declared in.

Response: Accepted. This will be dealt with in the rules which will be published for public comment or, alternatively, in the Completion Manual.

12.7.11. Recipient to advise Commissioner of change in circumstances

(Main reference: Section 74I of the Customs and Excise Act: Clause 17 of the Draft TALAB)

Comment: In relation to the requirement that the recipient of a ruling must within a prescribed timeframe give notice to the Commissioner of any change in circumstances which has an impact on the ruling. Please incorporate a timeframe in the rules to ensure uniformity of applications of changes.

Response: Accepted. This will be dealt with in the rules which will be published for public comment.

Comment: How does the recipient need to notify the Commissioner of change in circumstances? Can both a manual and or electronic notification facility be provided for?

Response: Noted. This will be dealt with in the rules which will be published for public comment.

Comment: Please incorporate the type of documents or information that needs to be submitted in case of a change in circumstances in the rules to facilitate this request. The recipient would be empowered and be prepared to submit the correct documentation timeously.

Response: Partially Accepted. This will be considered during the rule making process. It is to be noted that it in many instances it will not be possible to give a complete list as the documents must be relevant to the particular case and will therefore vary case by case.

12.8. Offence contemplated in section 79

(Main reference: Section 79 of the Customs and Excise Act: Clause 18 of the Draft TALAB)

Comment: Please correct the reference to section 74I*(b)* in the proposed amendment of section 79.

Response: Accepted. The correct reference is section 74H*(b)*.

12.9. Reference to "document purported to be an" invoice in sections 84, 86 and 107

(Main reference: Sections 84, 86 and 107 of the Customs and Excise Act: Clauses 19, 20 and 21of the Draft TALAB)

Comment: Although not clearly motivated, the commentator seems to propose the deletion of the words *"document purported to be an"* invoice.

Response: Not Accepted. It seems that the explanatory note on the reason for inserting *"document purported to be an"* invoice in various provisions of the Act is not taken into account. The context of this provision indicates that the invoice document referred to cannot be an *"invoice"* as defined because it does not contain all of the required information. For this reason, the word *"invoice"* must be qualified as a *"document purported to be an invoice"*.

The reference to where the proposed amendment to section 107 is to be effected was, however, omitted in clause 21 of the Bill. This will be rectified and clause 21(1) will refer to the substitution of the relevant words in subsection (3) of section 107.Tax Administration

13. TAX ADMINISTRATION ACT

13.1. Imposition of understatement penalty for employment tax incentives improperly claimed

(Main reference: Section 221 of the Tax Administration Act, 2011, read with section 10 of the Employment Tax Incentive Act, 2013: Clauses 26 and 29 of the Draft TALAB)

Comment: As it currently stands, the amendment will apply retrospectively to periods prior to the date on which the draft Bill comes into effect. The provisions would seemingly place SARS in the position whereby an assessment raised prior to the implementation date could not impose understatement penalties (USP) for a certain tax period, monthly PAYE tax periods in the current instance, whereas an assessment raised on or after the implementation date could impose understatement penalties for that same tax period. The effect of the amendment should be that taxpayers that claimed the employment tax incentive (ETI) in periods before the implementation date should face the same risk and should not be worse off or face additional understatement penalties, purely because of when they are audited and receive additional assessments. Consequently, the implementation date should be amended to state that the provisions will only come into operation on 1 March 2023 and will only apply to tax periods commencing on or after this date.

Response: Partially Accepted. The effective date will be changed to indicate that the proposed amendment will apply to returns filed on or after 1 September 2022.

Comment: The USP should only be imposed to the extent that the penalty under section 4(2) of the ETI Act is not also levied on the same amount. Section 4(2) levies a 100% penalty where the employer claims an ETI despite not being eligible in terms of section 4(1). The USP imposed should therefore either be excluded in full if an ETI Act penalty was imposed or should apply similar to para 20(2B) of the Fourth Schedule to the Income Tax Act where the penalty imposed in the ETI Act is deducted from the understatement penalty amount.

Response: Accepted. The interaction between section 4(2) of the ETI Act and the USP will be clarified to ensure that there is no duplication of penalties.

Comment: Clarification should be provided on how the proposed amendments will be applied and the methodology in calculating such penalty.

Response: <u>Noted.</u> SARS will provide guidance on how the penalty will be calculated.

13.2. Removal of a statutory recognised controlling body

(Main reference: Section 240A of the Tax Administration Act, 2011: Clause 27 of the Draft TALAB)

Comment: It is noted that this proposal follows the judgement against IRBA in the High Court [East Rand Member District of Chartered Accountants and Another v Independent Regulatory Board of Auditors and Others (64848/19; 46298/20) [2022] ZAGPPHC 245 (11 April 2022). This case relates to IRBA's legal ability to charge fees for tax practitioner regulatory matters.

Response: <u>Comment misplaced.</u> The proposed legislative amendment was already announced as part of the 2022 Budget Review during February this year and does not follow from the case mentioned.

Comment: According to the Memorandum of Objects (MoO) individuals registered with IRBA must now also be registered with a professional body accredited by IRBA and the only accredited body is SAICA, which is also a recognised controlling body (RCB) under the TAA. All disciplinary matters of a non-auditing nature must now be referred to SAICA. The MoO furthermore states that IRBA views tax practitioner activities as activities of a non-auditing nature and consequently, the removal of IRBA will have no impact on its members as the members are required by law to be registered with SAICA, which is already a recognised controlling body in terms of the TAA. The statement in the MoO is incorrect as it relates to registered auditors, registered as tax practitioners with IRBA, automatically getting tax practitioner status at SAICA by virtue of their compelled registration as a Chartered Accountant with SAICA. Tax practitioners registered with IRBA as their RCB will have to apply to SAICA, be registered with SAICA as their RCB, agree to its requirements and pay the relevant fee before SAICA becomes their RCB.

Response: *<u>Noted.</u>* As from 26 April 2021 when the Auditing Profession Amendment Act, 2021, came into effect, section 37(1A) of the Auditing Profession Act has only allowed registration with IRBA, and therefore as an auditor, if the individual is also registered with SAICA. Regarding the removal of IRBA as a RCB, SARS envisages that it will notify all tax practitioners who are currently registered with IRBA as their RCB, of the proposed change to the Tax Administration Act. Notwithstanding that the above requirement in the Auditing Profession Act provides that all IRBA members should already be registered with SAICA, the identified tax practitioners will be given an opportunity to choose and switch to their preferred RCB.

Comment: Arguably, any registered auditor who has selected IRBA as a recognised controlling body for purposes of section 240 will, on the promulgation of the Bill, be non-compliant as a tax practitioner if they have not yet gone through the tax practitioner registration process with SAICA (and with SARS). Provision should be made to

automatically migrate registered auditors who have elected IRBA as their RCB to SAICA for purposes of section 240 of the Tax Administration Act (TAA). These practitioners will now also be subjected to numerous new requirements not previously applicable to them including minimum annual CPD, annual CPD verifications, tax compliance verifications, periodical criminal checks and probably also compulsion to do SARS' new induction program.

> *Response*: Not Accepted. From a SARS perspective, such a change will not be considered a new registration but merely a change to the details of the tax practitioner. Hence, those who have completed the SARS Tax Practitioner Readiness Programme, submitted criminal record certificate, etc. whilst they were IRBA members do not have to do so again when they migrate to SAICA. To the extent that there are differences between IRBA and SAICA's CPD requirements, SAICA's requirements would only apply from the date of migration. SARS will consult with RCBs to provide more clarity and institute a standardised approach when tax practitioners change RCBs in the normal course.

Comment: The distinction between registered and statutory controlling bodies continues to undermine any argument of just and equitable treatment under law for the tax profession. It also allows the legal profession to escape and undermine all the "ethical" and "competence" requirements SARS itself has set for the profession, taking into consideration that the legal profession does not have tax law, tax administrative law, tax process and financial acumen as core competencies. The law societies and relevant bar councils are like all other voluntary bodies, at liberty to decide to also register with SARS to enable their members to practice as tax practitioners. Alternatively, those members can apply at other current registered RCB's for membership. SARS used to justify the discrimination based on the fact that the Law Societies were differently regulated, hence expanding this to IRBA on "similar terms". The replacement of the Law Societies to now mere members bodies and SARS then transferring the role of the controlling body to the Legal Practices Council (LPC) more than ever embeds the inequity with IRBA's removal. Taking this into account, and the inequality (in respect of CPD and numerous other requirements) that has existed since the implementation of the different types of RCBs (legislative versus statutory RCBs), it is proposed that the LPC should also be removed as a RCB and that the legislative versus statutory body distinction should be abandoned.

> *Response:* Not Accepted. It is striking to note that commentators that previously criticised earlier proposals for a statutory body regulating the tax profession on the grounds that they would give rise to dual regulation by a statutory regulator and a professional body have now changed their stance. Regardless of whether the tax practitioner is a member of a statutory controlling body, or a controlling body recognised by the Commissioner, all persons must meet the minimum requirements that the Tax Administration Act sets to be and remain a registered tax practitioner. As the requirements that the Legal Practice and Auditing Profession Acts set for their respective professions and controlling bodies dovetail with RCB and tax practitioner requirements under the Tax Administration Act, SARS is in process of ensuring that the former requirements include the latter as part of the initiative to update the criteria for tax practitioners and RCBs.

This includes making tax related core competencies and the SARS Tax Practitioner Readiness Programme one of the admission requirements for the registration of tax practitioners. In this process, IRBA has onboarded the Readiness Programme from 1 July 2022. Otherwise, both the Legal Practice and the Auditing Profession Acts require the LPC and IRBA to set minimum qualification and experience, continuing professional education and fit and proper requirements, the latter including criminal record certification, as part of the requirements for membership and continued membership to the legal and auditing profession. These requirements are overall more onerous than those set for tax practitioners under the Tax Administration Act. The Legal Practice and Auditing Profession Acts also require that LPC and IRBA *inter alia* institute and maintain codes of ethics and conduct, as well as disciplinary codes and procedures. As legal practitioners are officers of the Court, they are additionally subject to regulation by the judiciary.

13.3. Tax compliance status system abuse

(Main reference: Section 256 of the Tax Administration Act, 2011: Clause 28 of the Draft TALAB)

Comment: In paragraph 2.28 of the MoO reference is made to the submission of so-called "nil returns" in order to appear compliant. This is a risk management matter for SARS, as there would surely be a risk indicator if a taxpayer applies for a tax compliance status (TCS) PIN, and nil returns have been submitted. The individual cases where this happens can therefore be investigated by SARS prior to penalising the taxpayer.

Response: Not Accepted. The audit process requires a significant amount of time and involves a number of procedural steps which mean that the mischief intended by submitting nil returns will have been achieved by the time revised assessments can be issued.

Comment: It has been noted with concern the proposal to endorse TCS documents, and elsewhere, with a note to state that the taxpayer is a newly registered taxpayer. While the commentator understands that there are many instances of manipulation of the TCS system, mainly resulting in tender fraud, the risk will remain with the user of the TCS PIN. In (almost) all instances, a taxpayer submitting a tender will have to submit their CIPC registration documents, which will already indicate that the entity is newly registered and the user of the TCS PIN should be aware of this fact prior to contracting with the taxpayer. Based on the above, the commentator is concerned that the endorsement will be used to prejudice newly registered SMMEs in applying for tenders.

Response: Not Accepted. The indication of a taxpayer as a "newly registered taxpayer" will not prejudice newly registered SMMEs in any way if suppliers are already asking for this information at the time of applying for tenders. This information will in any event demonstrate that a taxpayer is a new taxpayer.

SARS demonstrating this as part of the taxpayer's TCS will have no further negative effect on the taxpayer.

Comment: The proposed new indicator for newly registered taxpayers is nonsensical in a number of respects. The indication applies only in respect of taxes for which the taxpayer is registered. So, for example, a taxpayer (being a dormant company which has never traded) could be registered for CIT and have submitted a nil return in respect thereof; however, it is not registered for VAT or employees' tax. In such circumstances, no such indication would be provided. Furthermore, an individual who is not required to submit a PIT return would always be flagged as newly registered because they would never reach the date on which they are required to submit return and nor would they submit a return.

Response: Partially Accepted. A taxpayer's TCS is based on actual history. The intention is that the indication whether or not a taxpayer is a "newly registered taxpayer" should only apply to the first date that a return would generally be required for the first tax for which the taxpayer is registered. After this date SARS would be in a position to determine whether the taxpayer in fact submitted a return or not, and therefore supply a tax compliance status based on actual history. If the taxpayer is not registered for a particular tax, this provision will not apply to that tax. Changes will be made to address the challenge that may be encountered by dormant companies registered for corporate income tax that are not required to submit tax returns or individuals registered for personal income tax that fall within the auto-assessment population (i.e. they are not required to submit tax returns). Hence, the proposed wording will be changed to indicate that a taxpayer will no longer be regarded as a "newly registered taxpayer" on the *earlier of* the following three events:

- The taxpayer has reached the first date on which the taxpayer is required to submit a return or make a payment under a tax Act, in respect of a tax for which the taxpayer is registered; or
- The taxpayer has submitted a return or made a payment, prior to the first date on which the taxpayer is required to submit a return or make a payment as mentioned; or
- A period of one year from the date the taxpayer was registered for a tax in terms of a tax Act has lapsed.

Comment: Should a taxpayer be registered for Income Tax, VAT and PAYE, the TCS will reflect "newly registered taxpayer" on the Income Tax, if the return, not yet due, has not been submitted, but PAYE and/or VAT has been submitted and no debt is outstanding on these two tax types it will not reflect any endorsement for these specific tax types. Is this correct?

Response: Noted. If the taxpayer is registered for more than one tax type, whenever the first return or payment is due or a return is submitted or payment is made prior to the due date, with regards to any of the tax types for which the taxpayer is registered, as from that date the taxpayer will no longer be regarded as a "newly registered taxpayer". Hence, if returns have already been submitted for PAYE and/or VAT as stated in the comment, the taxpayer would no longer be

indicated as a "newly registered taxpayer" from the date the first of those returns were submitted.

Comment: The wording implies that there must actually be fraud, misrepresentation or non-disclosure of material facts present before access can be revoked. This contrasts with the reading of the MoO which refers to a suspicion. The draft legislation makes no mention of a suspicion. The provision should refer to a suspicion of fraud, misrepresentation or non-disclosure of material facts.

Response: Accepted. Although the legislation refers to an allegation, the proposed change will be made to achieve additional clarity.

Comment: It is submitted that the legislation is too vague in respect of SARS' right to question the compliance status of the taxpayer. The term "questioned due to fraud, misrepresentation or non-disclosure of material facts" is a very subjective criteria and could lead to abuse or an unnecessary delay in obtaining a TCS. This may result in legitimate taxpayers' businesses being hindered by the delay in obtaining a tax clearance purely because there is a "question" raised by a SARS official on the correctness of the taxpayer's compliance status.

Response: Comment Misplaced. By the time that SARS initiates the process of potentially revoking the third-party access, the taxpayer already had a TCS, hence there is no upfront delay in obtaining the TCS. In terms of the proposed amendment SARS may only initiate the process of revoking third party access to the TCS where the correctness of the taxpayer's tax compliance status is questioned due to the listed circumstances, all of which are of a serious rather than a routine nature. Where SARS suspects that the correctness of the TCS is in question, SARS will engage with the taxpayer in order to provide the taxpayer with an opportunity to respond to SARS' allegation. It is only once SARS has considered the taxpayer's response and come to the conclusion that it does not resolve SARS' concerns that SARS may revoke the access.

Comment: Similar to the onus being on SARS in terms of section 99 of the Tax Administration Act, on proving that the "full amount of tax chargeable was not assessed due to fraud, misrepresentation or non-disclosure of material facts" in order to lift the veil of prescription, it is submitted that a similar onus should be placed on SARS before it delays or revokes such an application purely because an official questions the "correctness of the taxpayer's current compliance status".

Response: Not Accepted. Requiring SARS to hold this level of evidence prior to revoking access is equivalent to requiring SARS to be in a position to revise the taxpayer's assessments, which has been dealt with above.

Comment: SARS affording the taxpayer 10 days from such revocation within which to respond places the onus of proof on the taxpayer not SARS which (it is submitted) is an abuse of SARS power and goes against the spirit of the TAA which was drafted with the intention "to promote a better balance between the powers of SARS and the

rights and obligations of taxpayers". SARS should be required to bear the onus of proving their concern before providing the taxpayer with 10 days to respond.

> *Response:* Comment Misplaced. SARS will first give the taxpayer prior notice as well as an opportunity to respond to the allegations of at least 10 business days prior to the revocation. Hence, SARS will only revoke the third-party access once it has considered the taxpayer's response to the allegations and come to the conclusion that it does not resolve SARS' concerns.

Comment: The ability to revoke access to compliance status can have far-reaching consequences for taxpayers, including a restraint on its ability to conduct business. This power is afforded to SARS in general and is not reserved for senior SARS officials. The ability to revoke access to the compliance status in the case of fraud, misrepresentation or non-disclosure of material facts or the suspicion thereof should be reserved for senior SARS officials.

> *Response:* Accepted. The proposed legislation will be changed to reserve the power to revoke the access for a senior SARS official.

ANNEXURE A: LIST OF COMMENTATORS

1. Actuarial Society of South Africa
2. AJM
3. IRFA
4. ASISA
5. Baker & McKenzie
6. BDO Tax Services (Pty) Ltd
7. Beer Association of South Africa
8. British American Tobacco
9. Business Unity South Africa
10. Cement and Concrete SA
11. City of Cape Town
12. Cliffe Dekker Hofmeyr Inc
13. Cousins Vape
14. COSATU
15. Deloitte & Touche
16. Die Rooi Vlakvark
17. ENSafrica
18. Eskom Holdings SOC Ltd
19. Financial Intermediaries Association of Southern Africa
20. Financial Service and Conduct Authority
21. First Rand
22. Forestry South Africa
23. FTI Consulting
24. Global Investment Reporting (Pty) Ltd
25. Government Employees Pension Fund
26. Greater Tzaneen Municipality
27. Greenpeace Africa
28. GT Vape
29. Harmony Gold Mining Company Limited
30. Hollard Group
31. Industry Task Team on Climate Change
32. Individuals (x 30)
33. Juicy Joes Vape Store
34. Just Share
35. Keystone Actuarial Solutions
36. KPMG
37. Loyson Consulting
38. Mazars Advisory (Pty) Ltd
39. Medicross Healthcare Group
40. Medtronic
41. Minerals Council South Africa
42. MTN South Africa
43. NAAMSA Customs Working Group
44. National Council Against Smoking

45. Nedbank
46. Nelson Mandela Metro Municipality
47. Netcare Limited
48. Nostalgia
49. NTE Company (Pty) Ltd
50. NTE Company (Pty) Ltd
51. Old Mutual
52. OUTvest
53. Other Tobacco Products Distributors
54. PAMSA
55. Payroll Authors Group of South Africa
56. Pension Funds Adjudicator
57. PG Bison
58. Philip Morris South Africa (Pty) Ltd
59. PKF Durban
60. PvdZ Consulting (Pty) Ltd
61. PWC
62. Rebel Revolution Vape
63. Renmere Consulting Johannesburg (Pty) Ltd
64. RGA
65. Richard Bay Industrial Development Zone
66. SA REIT Association
67. SAAFF
68. South African Breweries
69. SAIA
70. SAICA
71. SAISI
72. SALBA
73. Sanlam
74. Santam Group
75. SAPPI
76. Sasol Limited
77. Sawmilling SA
78. South African Institute of Taxation
79. South African Medical Research Council
80. South African Securities Lending Association
81. Standard Bank
82. Tobacco, Alcohol and Gambling Advisory
83. Telkom
84. The Rustic Vape Shop Middelburg
85. The Steam Masters Pty Ltd
86. The Vape Factory
87. The Banking Association South Africa
88. Tobacco, Alcohol and Gambling Advisory
89. Transnet
90. University of Cape Town
91. University of Pretoria
92. Vanilla Vapes

93. **Vape Queen SA**
94. **Vapers Corner**
95. **Vaping Saved My Life**
96. **Vapour Products Association of South Africa**
97. **Vinpro**
98. **Vodacom**
99. **WealthPort**
100. **Webber Wentzel**
101. **Wiener Vape Co.**
102. **World Health Organisation**
103. **World Wide Fund for Nature**
104. **WILLIS TOWERS WATSON**