MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2018

1. PURPOSE OF BILL

The Bill proposes to amend the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Value-Added Tax Act, 1991, the Securities Transfer Tax Act, 2007, the Tax Administration Act, 2011, and the Customs Control Act, 2014.

2. OBJECTS OF BILL

2.1 Income Tax Act, 1962: Amendment of section 1

Section 3(5) of the Income Tax Act currently provides that the Commissioner may delegate the function to approve a fund contemplated in the definition of a “pension fund”, “pension preservation fund”, “provident fund”, “provident preservation fund” or “retirement annuity fund” for purposes of the Income Tax Act to the Executive Officer of the Financial Services Board (FSB). The function to approve retirement funds for the purposes of the Income Tax Act, 1962, was delegated to the FSB from 1 April 2012.

The Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), repealed certain provisions of the Financial Services Board Act, 1990 (Act No. 97 of 1990) (the FSB Act), which impacts on the performance of certain functions entrusted to the Executive Officer by or in terms of this or any other Act.

The position of the Executive Officer of the FSB is only still in existence to finalise the financial statements of the FSB. A new regulatory body, the Financial Sector Conduct Authority (FSCA), has been established in terms of section 56 of the Financial Sector Regulation Act with effect from 1 April 2018 to perform most of the regulatory functions previously performed by the FSB.

In order to accommodate these legislative changes, consequential amendments are required to the Income Tax Act as well as section 70 of the Tax Administration Act which currently provides for information to be disclosed to the FSB in order for it to perform its duties and functions in terms of the FSB Act which regulatory functions are performed by the FSCA with effect from 1 April 2018.

2.2 Income Tax Act, 1962: Amendment of section 64K

In order to ease the compliance and administrative burden the proposed amendment repeals the requirement for a person receiving a tax-exempt dividend to submit a return.

2.3 Income Tax Act, 1962: Amendment of section 66

The proposed amendment is a consequential amendment to the draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2018.

2.4 Income Tax Act, 1962: Amendment of section 89quat

The proposed amendment deletes the reference to a repealed provision.

2.5 Income Tax Act, 1962: Amendment of paragraph 1 of Fourth Schedule

Ad paragraph *(a)*: The proposed amendment removes directors of private companies from the definition of employee for purposes of the Fourth Schedule. These directors are no longer subject to PAYE in terms of that Schedule in line with other amendments such as the repeal of paragraph 11C of the Schedule.

Ad paragraph *(b)*: The opening words of paragraph *(a)* of the definition of "provisional taxpayer" provide that any person who derives any income by way of any remuneration from an unregistered employer and an amount that does not constitute remuneration or an allowance, is automatically a provisional taxpayer. "Income" means income as defined in section 1 of the Act. Capital gains are a direct inclusion in taxable income, and are not included in income. Thus, if a person who receives remuneration from a registered employer (a salaried employee who is not a provisional taxpayer for any other reason) realises a capital gain, the person is not a provisional taxpayer with regards to those gains. This creates an exception for these taxpayers to the general rule that taxes should be paid during the year of assessment and not left to final assessment. For example, a capital gain made when an asset is disposed of on 11 March 2018, would only be disclosed to SARS when the 2019 tax return is filed on 15 September 2019, therefore more than a year and a half later. This could create problems for collecting any debt arising from that gain. The proposed amendment aims to address this issue.

2.6 Income Tax Act, 1962: Amendment of paragraph 13(1A) of Fourth Schedule

Currently an employer is permitted to use any date within 14 days before or after the last day of February of any year at its own discretion, without the approval of SARS, for employees' tax purposes. This may allow an employer to manipulate its employees tax rates where there is a change in tax rates from one year to another. As an example, if tax rates were to decrease from 1 March, the employer could close its employees' tax year 14 days earlier, so its employees would get the benefit of the lower rate for an additional 14 days. The

employees' tax year could be closed 14 days later if tax rates were to increase. In order to address the potential manipulation an amendment is proposed that will require SARS' approval in these cases.

2.7 Income Tax Act, 1962: Amendment of paragraph 1 of Seventh Schedule

Non-executive directors of companies were removed from the definition of employee for purposes of the Fourth Schedule. Consequently, these directors are not subject to PAYE in terms of that schedule. The proposed amendment aims to deem a non-executive director to be an employee as far as a taxable benefit in terms of the Seventh Schedule is concerned. These taxable benefits are included in the definition of remuneration and hence the non-executive director will be required to pay PAYE on such taxable benefit.

2.8 Customs and Excise Act, 1964: Insertion of section 58A

An amendment to the Customs and Excise Act, 1964, was announced in the Budget Review 2018 to prevent "forestalling" in respect of excisable goods which was explained as "a practice through which abnormal volumes of products are moved from warehouses into the market to avoid increases in excise duty rates". The proposed amendment inserts a new provision into the Act, aimed at combatting forestalling before an anticipated increase in the rate of excise duty and allowing the Commissioner to limit the quantities of excisable goods that may be entered for home consumption during a controlled period leading up to the anticipated increase. Provision is made for the Commissioner to determine by rule the excisable goods to which the anti-forestalling measures applies, the controlled period before the increase during which the measures will apply, the quantities of goods that may be entered for home consumption during such period, the formula for calculating such quantities and penalties.

2.9 Customs and Excise Act, 1964: Insertion of section 114A

The proposed amendment inserts a new provision into the Customs and Excise Act, 1964, which provides for the writing off or compromise of debt in terms of the Customs and Excise Act, by making Chapter 14 of the Tax Administration Act, 2011, applicable to such debt.

2.10 Value-Added Tax Act, 1991: Amendment of section 20

It happens in practice that after a vendor, being a supplier, issues a tax invoice, the supplier is informed by the recipient that certain information (other than the information pertaining to the VAT, value or consideration of the supply), on that document is incorrect. Technically the document issued by the supplier then does not qualify as a tax invoice. Hence, the recipient is unable to use that document for purposes of deducting input tax and has to request the supplier to issue a document with the correct information such that it qualifies as a tax invoice as defined. This creates uncertainty by vendors whether the issuing of a new

document with the correct information will result in two tax invoices being issued for the same supply and, consequently, result in the vendor committing an offence.

The proposed amendment aims to clarify that under the circumstances described above, where a vendor, being a supplier, cancels the initial document and re-issues a document with the correct information, that vendor will not be committing an offence. The amendment will also require the supplier to maintain a proper audit trail between the initially issued document, the manner of cancellation and the re-issued document. The amendment requires a material error which means that the error is of a nature where the document in question will be precluded from being used by a vendor to deduct input tax in terms of section 16(2) of the Act, if not corrected.

2.11 Value-Added Tax Act, 1991: Amendment of section 21

The proposed amendment aims to clarify that where an enterprise is sold as a going concern, the purchaser of the enterprise is allowed to issue a credit note in respect of goods that were supplied by the seller of the enterprise but is returned to the purchaser. The proposed amendment will ease the compliance for purchasing vendors and consequently VAT will not be a cost to the business.

2.12 Value-Added Tax Act, 1991: Amendment of section 25

Section 27(4B) was deleted by section 28(1)*(f)* of the Tax Administration Laws Amendment Act, 2014, with effect from 1 July 2015. The proposed amendment aims to delete the reference to this repealed provision.

2.13 Value-Added Tax Act, 1991: Amendment of section 29

An amendment is proposed in order to give effect to operational efficiency changes made by SARS which will, as opposed to special returns from vendors, only require relevant material to be retained by the vendor for purposes of when special returns are required to be submitted. The relevant material is to be submitted to SARS only when requested. The proposed amendment will ease the compliance burden for vendors as filing of returns will no longer always be required but only if specifically requested by SARS.

2.14 Value-Added Tax Act, 1991: Amendment of section 41

Section 41A of the Value-Added Tax Act, 1991, was repealed by section 271 of the Tax Administration Act, 2011. The proposed amendment removes the reference to the repealed section 41A.

2.15 Value-Added Tax Act, 1991: Amendment of section 44

The policy position for VAT, being a self-assessment tax, is that the erroneous overpayment prescribes if the vendor does not claim the overpayment within a period of 5 years from the date it was paid to SARS. Section 190(4) does not require such a claim, it merely deals with the situation if a claim is made. The proposed amendment aims to ensure that the prescription rule prior to the introduction of the Tax Administration Act will apply and that claims will not be considered valid if the enterprise's banking details for the payment of the refund have not been provided.

2.16 Value-Added Tax Act, 1991: Amendment of section 50

The Value-Added Tax Act allows a vendor that carries on enterprises in branches or divisions, to separately register such branches or divisions for VAT. Further, the Act regards such branches or divisions as separate vendors, albeit that the branches or divisions are carried on by one and the same legal entity. The proposed amendment aims to simplify SARS' set-off and recovery provisions and to provide legal certainty that set-off and recovery provisions will apply across such separately registered branches and divisions. The main business and the branch operate as the same legal entity and any legal action can only be taken against the legal entity.

2.17 Value-Added Tax Act, 1991: Amendment of section 51

The proposed amendment aims to provide legal certainty that all the members of a joint venture may be jointly and severally liable for the VAT debts of the joint venture.

2.18 Securities Transfer Tax Act, 2007: Amendment of section 8

The Commissioner prescribes declarations to be submitted to participants in order to qualify for exemptions from the payment of securities transfer tax. In practice, transactions are initiated by members (authorised users) and, accordingly, they should receive the prescribed declarations in order to process exemptions and keep records for SARS audit purposes. The proposed amendment aims to broaden the scope of this section to require declarations to be lodged with authorised users.

2.19 Tax Administration Act, 2011: Amendment of section 42

The proposed amendment aims to ensure that taxpayer be notified at the start of an audit as part of efforts to keep all parties informed.

2.20 Tax Administration Act, 2011: Amendment of section 44

The proposed amendment is a technical correction to align the use of a term in paragraph (3) with paragraph (4).

2.21 Tax Administration Act, 2011: Amendment of section 70

See paragraph 2.1.

2.22 Tax Administration Act, 2011: Amendment of section 129

The proposed amendment is a technical correction.

2.23 Tax Administration Act, 2011: Amendment of section 170

The proposed amendment clarifies that it is an appeal instituted in terms of Chapter 9 of the Tax Administration Act that is being referred to and not any other appeal.

2.24 Tax Administration Act, 2011: Amendment of section 190

The proposed amendment aims to clarify that an amount will not be regarded as a payment to the National Revenue Fund if a taxpayer claimed a refund prior to the expiry of the three year period in the case of an assessment by SARS or a five year period in the case of a self-assessment, but the refund was not paid by SARS prior to the expiry of the relevant period. SARS may, if satisfied that it is due, pay the refund after expiry of the relevant period.

2.25 Tax Administration Act, 2011: Amendment of section 221

The Tax Administration Act uses the phrase "submit a return required under a tax Act or by the Commissioner". "Default in rendering a return" is old wording taken from section 76 of the Income Tax Act and may cause confusion if it is meant to refer to a return not submitted under the Tax Administration Act. The proposed amendment aims to align the wording used in the Tax Administration Act.

2.26 Tax Administration Act, 2011: Amendment of section 222

Ad paragraph (a): The proposed amendment is a technical correction. The Tax Administration Act uses the term "submit a return required under a tax Act or by the Commissioner" – refer for example sections 25 to 27. "Default in rendering a return" is old wording taken from section 76 of the Income Tax Act, 1962.

Ad paragraph (b): Pursuant to recent case law, it appears to be arguable that if no return is submitted, there could not be a shortfall under section 222(3)*(a)* of the Tax Administration Act as SARS would never "accept" a failure to render a return (refer ITC 13725 & VAT1426/IT13727&VAT1096 par [25] to [27]). Although this argument was not accepted in the case, if may be accepted in other matters. The amendment is accordingly proposed to provide clarity on this issue. The alternative proposal is

based on the possibility that if such an argument ever was accepted, it could be applicable to all the scenarios under section 222(3) as the additional assessment that SARS may impose pursuant to the understatement could conceivably result in tax chargeable under *(a)*, refundable under *(b)*, or even an amount carried forward under *(c)*. Each one uses the amount that SARS would have "accepted" in the calculation of the shortfall. It is, therefore, alternatively proposed that clarity is provided in respect of the whole of subsection (3) under a new subsection (4)*(b)*.

2.27 Tax Administration Act, 2011: Amendment of section 240

An amendment is proposed to ensure that persons or registered tax practitioners that are tax non-compliant as a result of outstanding returns or tax debts are not registered or are deregistered, respectively. If a registered tax practitioner has been thus non-compliant repetitively or for a continuous period of at least three months during a period of six months and does not remedy the non-compliance within the period specified in a notice delivered by SARS, the practitioner will be deregistered as a tax practitioner. The tax practitioner may be reregistered once he or she is remedies the tax non-compliance and the above conditions are no longer met.

2.28 Customs Control Act, 2014: Amendment of section 1

Ad paragraph (a): The proposed amendment to the definition of "cargo reporter" aims to clarify that persons like so-called "slot charterers" that fall within paragraph *(a)* of the definition of "carrier" are not excluded from the definition of "cargo reporter" just because they do not "actually" transport the goods on board.

Ad paragraph (b): The proposed amendment to the definition of "FCL container" aims to broaden the definition to also cater for a scenario where the goods contained in such a container is consigned from one consignor to a single consignee.

2.29 Customs Control Act, 2014: Amendment of section 71

The proposed amendment is aimed at ensuring that reporting of the departure of a truck due to leave the Republic is adhered to irrespective of whether the truck has cargo on board as is contemplated in section 47(1)*(a)* of the Customs Control Act.

2.30 Customs Control Act, 2014: Insertion of section 705A

The proposed insertion provides for the writing off or compromise of debt owed to the Commissioner in terms of the Customs Control Act, by making Chapter 14 of the Tax

Administration Act, 2011, (with the necessary changes as the context may require), applicable to debt in terms of the Act, owed to the Commissioner for credit of the National Revenue Fund.

2.31 Short title and commencement

The clause makes provision for the short title of the proposed Act and provides that different provisions of the Act may come into effect on different dates.

3. CONSULTATION

The amendments proposed by this Bill were published on SARS's and National Treasury's websites for public comment. Comments by interested parties were considered. Accordingly, the general public and institutions at large have been consulted in preparing the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

An account of the financial implications for the State was given in the 2018 Budget Review, tabled in Parliament on 21 February 2018.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the National Treasury and South African Revenue Service are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.