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The Legal Update is prepared by Hollard Group Legal on a regular basis. The purpose of the Legal Update is to alert you to upcoming legislation and regulation, amendments to existing legislation and regulation and case law that impact on your business. This document is not intended to constitute legal advice – this document contains a short summary of relevant information. Please consult your legal adviser if you require any further information in this regard.

Enforcement News

Saxum Insurance Limited – premium collection – R 75 000 penalty

The Registrar of Short-term Insurance referred a matter against Saxum Insurance Limited to the Enforcement Committee of the FSB. The referral relates to contraventions of the following legislation:

• Section 45 of the Short-term Insurance Act read with Regulation 4.1(1) and 4.3(3), respectively, of the Regulations under the Short-term Insurance Act; and
• Rule 7.4 (c) (iv) read with subsections (g) and (h) of the Policyholder Protection Rules.

In terms of the abovementioned legislation, no independent intermediary may receive, hold or in any other manner deal with premiums payable under a short-term policy entered into or to be entered into with a short-term insurer, and no short-term insurer shall permit an independent intermediary to receive, hold or in any other manner deal with premiums, unless authorised to do so by the short-term insurer concerned as prescribed by regulation. A short-term insurer must, in writing, authorise an independent intermediary to receive, hold or in any other manner deal with premiums payable to it under short-term policies and a short-term insurer may not authorise more than one person to receive a premium in relation to the same policy if it is a policy forming part of personal lines business.

During the period from October 2012 to February 2013, Saxum failed to properly authorise another FSP to collect premiums on its behalf and authorised more than one person to receive premiums in relation to the same short-term personal line policies.

In mitigation, the Registrar considered that Saxum accepted responsibility for the contraventions, put measures in place to rectify the majority of the contraventions and fully cooperated with the Registrar during the enforcement process. The Registrar agreed to a penalty of R 75 000.

Upcoming Legislation and Regulation

Prohibition against sign-on bonuses - proposed amendments to the FAIS General Code of Conduct
The FSB published a document titled “FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002: INVITATION TO COMMENT ON PROPOSED AMPENDMENT TO THE GENERAL CODE OF CONDUCT FOR AUTHORISED FINANCIAL SERVICES PROVIDERS AND REPRESENTATIVES, 2003” on 1 September 2014.

In terms of the document, the purpose of the amendment is to prohibit an FSP or its representative from offering or receiving a sign-on bonus.

The following changes are proposed to the FAIS General Code of Conduct:

1. The following definition is added:
   “outsourced” means an arrangement of any form between a product supplier and another person, whether that person is supervised under any law or not, in terms of which that person performs a function or activity related to any aspect of the business of that product supplier, whether directly or indirectly, which would otherwise be performed by the product supplier itself

2. The following definition is added: “sign-on bonus” means any financial interest offered or received directly or indirectly, with or without conditions
   (a) as an incentive to recruit or to become a representative or provider; or
   (b) as compensation for the-
      (i) potential or actual loss of any benefit including any form of income (or part thereof) resulting from any act, the result of which is that a person is recruited to or become a representative or provider; or
      (ii) cost associated with the establishment of a provider’s business or operations, including the sourcing of business, relating to the rendering of financial services; or
   (c) in the form of a loan, advance or credit facility and-
      (i) where the utilisation or servicing of that loan, advance or credit facility is linked to the performance of any activity or the meeting of any target or standard relating to the rendering of financial services; or
      (ii) the repayment of the loan or advance is in any manner linked to the termination of any act, the result of which was that a person was recruited to or became a representative or provider;"

3. Section 3A of the General Code of Conduct is amended by inserting the following prohibition: “A provider or representative may not directly or indirectly, through a third party or otherwise, offer to or receive a sign-on bonus from any person.”

Comments were due on or before 16 September 2014.

Proposed Amendments to the Binder Regulations

The National Treasury (NT) and the Financial Services Board (FSB) published proposed amendments to the Binder Regulations on 11 July 2014.

The proposed amendments include:

1. An amendment to the definition of associate.
2. An attempt to clarify the meaning of incidental binder functions.
3. A requirement that all incidental functions must be provided for in the binder agreement.
4. An exclusion of SASRIA from the scope of the binder regulations.
5. An extension of the definition of a UMA.
6. Authority for the FSB to prescribe maximum binder fees by means of a Gazetting process.
7. Clarifying that NMIs with a cell captive arrangement is not prohibited from receiving dividends.

In terms of the proposed changes all agreements concluded before the effective date of the amendment must be aligned with the amended regulations within one year from the amendment coming into operation.

The main purpose of the amendments is to address Conflicts of Interest.


Comments must reach NT by 30 September 2014.

Second Draft Regulations on the Demarcation between Health Insurance Policies and Medical Schemes

Hollard provided information regarding the draft Demarcation Regulations in previous issues of the Legal Update.

ASISA and SAIA submitted comments to NT on 31 July 2014. There have been no further developments in this regard. NT is considering hundreds of submissions received regarding the Demarcation Regulations.

Amendment to the FAIS Act – section 13

The FSB published a draft Guidance Note on the interpretation and application of section 13(1)(c) of the FAIS Act on 11 September 2014. Comments must reach the FSB on or before 13 October 2014.

In terms of section 13(1)(c): “A person may not render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative”.

The draft Guideline mainly aligns with Hollard’s interpretation of the new section 13(1)(c), but we have the following concerns:

1. There are some technical legal errors that we need to address;
2. We agree with the statements around premium collection and IGF as contained in the draft Guidance Note.
3. We are concerned about the statements around Binder Agreements as contained in the draft Guidance Note. These statements do not align with the approach that
Hollard followed in interpreting the Binder Regulations in the LTIA and STIA. Binder Agreements are regulated under the LTIA and STIA and FAIS does not (and should not) regulate binder contracting. Hollard contracted with juristic representatives directly around binder functions to provide better risk management around binder functions and to ensure proper compliance with the LTIA and STIA. In terms of the draft Guidance Note, Hollard would need to cancel existing Binder Agreements with juristic representatives and recontract with FSPs around these binder functions. This will expose Hollard to risks. The proposed Guideline creates concerns regarding prohibited associate relationships under the Binder Regulations. Hollard will prepare a submission to the FSB to motivate the deletion of the section dealing with Binder Agreements from the Guidance Note.

Please contact your Legal Adviser if you need a copy of the draft Guidance Note.

**Legislation and Regulation**

**Information Letter 2/2014 (LT): Conducting of insurance business in respect of assistance and life policies through co-administration agreements (also referred to as profit sharing or 80/20 agreements)**

FSB Information Letter 2 of 2014 (LT) was issued on 29 August 2014. This Information Letter is only applicable to Long-term Insurance business, and more specifically assistance and life business (funeral business).

The purpose of the Information Letter is to raise certain regulatory and conduct of business concerns in respect of co-administration agreements (also referred to as profit sharing or 80/20 agreements) entered into by long-term insurers in respect of assistance and/or life policies.

In the Information Letter, the FSB indicates that co-administration agreements between long-term insurers and funeral parlours/funeral administrators that directly or indirectly provide for the following, are not consistent with the regulatory framework:

- the funeral parlour or funeral administrator makes the policies of the insurer available to the clients of the funeral parlour; and
- the funeral parlour or funeral administrator, in addition to marketing the policies of the insurer to the funeral parlour's clients, intermediates between these clients and the insurer and performs certain binder functions and outsourced services in respect of these policies; and
- the funeral parlour or funeral administrator collects the premiums that are payable in respect of these policies; and
- the funeral parlour or funeral administrator pays an agreed percentage of the premiums to the insurer and retains the remainder of the premiums in its business account for the purpose of paying claims to policyholders.
The funeral parlour or funeral administrator then follows one of the following processes:

- forwards claims submitted by the funeral parlour’s clients to the insurer for consideration and pays the claim once the insurer has indicated that the claim must be paid; or
- considers and pays or rejects claims submitted by the funeral parlour’s clients in accordance with the criteria provided for in the arrangement; or
- pays claims submitted by the funeral parlour’s clients in advance if the basic criteria provided for in the arrangement are met and then forwards the claims to the insurer for consideration. If the insurer decides that a claim was paid in error the insurer recovers the claim amount from the funeral parlour.

AND at the end of an agreed period, the funeral parlour or funeral administrator becomes entitled to the remaining premiums, if any. The insurer settles all pending claims in instances where claims exceed the retained premiums.

The Information Letter provides reasons why the abovementioned arrangements are not consistent with the regulatory framework. The Information Letter is immediately effective (no opportunity to comment) and:

- all new co-administration agreements must comply with the Information Letter; and
- all existing co-administration agreements must be aligned with the legislative framework and the Information Letter by no later than 120 days after the issue date of the Information Letter (approximately 20 December 2014); and
- an insurer that is not able to align its agreements with the legislative framework and the Information Letter within 120 days must notify the FSB accordingly within 60 days (approximately 28 October 2014).

Please speak to your Legal Adviser if you need a copy of the Information Letter or more information regarding the Information Letter.

**Protection of Personal Information Act (POPI)**

The only sections of POPI that came into force on 11 April 2014 are:

- Section 1 – Definitions;
- Part A of Chapter 5 - regulating the establishment, duties and powers of the Information Regulator; and
- Sections 112 and 113 - provisions regulating the right of the Minister of Justice and Constitutional Development (Minister) to issue regulations and the procedure the Minister must follow in doing so.

Section 114, which deals with transitional arrangements around POPI, has not come into force. This means that the 12 month grace period to ensure compliance with the provisions of POPI has not yet commenced.

**Amendment to the Prescribed Rate of Interest in Litigation Claims**
The prescribed rate of interest for litigation matters in South Africa has, since 1 October 1993, been 15.5%, making litigation (and particularly the delay thereof) fairly lucrative for claimants. The Minister of Finance announced that, with effect from 1 August 2014, the prescribed rate of interest will be reduced to 9%. It must be noted however that, unless the court decides otherwise, the interest rate applicable to a claim is determined according to the prescribed rate at the date when the liability for interest arises.

**Employment Equity Amendment Act**

The President has signed January 2014’s *EE Amendment Act (EEA)* into power and it became fully effective on Friday 01 August 2014. Consequently there is no transitional period for compliance.

There are 26 amendments to the Act and if a company employs more than 50 people or if its turnover is over the EEA threshold for the relevant industry, the said company will be required to comply with all 26 amendments.

The most important amendments are summarised below:

- **The “designated group definition” has been amended.** Accordingly, beneficiaries of affirmative action measures will be limited to black people, women, and people with disabilities who are citizens of South Africa by birth or descent.

- **Introduction of Equal Pay for Equal Work claim:**
  - Employers must ensure that employees performing the same or similar work, or work of equal value have the same terms and conditions of employment (such as wages etc.).
  - If there are differences that are directly or indirectly based on one or more of the listed grounds, this will constitute unfair discrimination, unless the employer can show that such a difference is based on objective criteria and is justified.
  - It is imperative to consider the terms and conditions of employment of all categories of employees in a company to ensure that it does not fall foul of this amendment.

- **Discrimination disputes in CCMA:**
  - Employees earning below the Earnings Threshold of R205 433.30 can now refer unfair discrimination disputes to the CCMA for adjudication, and no longer need to pursue these disputes in the Labour Court.
  - All employees (irrespective of their earnings) can refer a sexual harassment dispute to the CCMA.
  - If the parties agree, any discrimination dispute can be heard by the CCMA.
  - The arbitration award handed down by the CCMA can be taken on appeal (not review) to the Labour Court within 14 days of the award being issued.

- **Amendments to section 11 deal with the burden of proof in relation to unfair discrimination cases,** where the employer will now bear the onus to prove that unfair discrimination did not take place where discrimination is alleged on one of the listed grounds (e.g. race, gender, etc.), while the employee will bear the onus if the discrimination is alleged to be on an arbitrary ground (not a listed ground).

- **Employers using psychometric testing must have these tests certified by the Health Professions Council of South Africa or by any other body which is authorised by law to certify such tests.**
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- There are stricter enforcement mechanisms where employers do not comply with their obligations in terms of the EEA.
- Fines payable by employers due to non-compliance with certain provisions of the EEA are linked to annual turnover (2% - 10% of turnover).

The Department of Labour has also withdrawn the controversial proposed regulations relating to the use of national and regional demographics. New draft regulations are awaited.

The amendments to the EEA should also be read in conjunction with the proposed amendments in relation to part time employees, fixed term employees and labour broking, which have yet to be implemented.

CIS Advertising, Marketing and Information Disclosure Requirements

Board Notice 92 of 2014 containing the CIS Advertising, Marketing and Information Disclosure Requirements was published on Friday 8 August 2014. The effective date for compliance is 15 March 2015.

The Notice aims to-
- provide a legal framework within which managers of collective investment schemes may advertise and market their products in a manner which ensures that investors base their investment decisions on full, accurate and comprehensive information;
- protect investors from deceptive, misleading, unfair or fraudulent conduct by managers through advertising and marketing material;
- promote the fair treatment of investors;
- encourage fair competition amongst managers;
- promote the use of plain and understandable language by managers in respect of any information provided or displayed to investors;
- ensure alignment with relevant international information disclosure standards and practices;
- encourage investor understanding of the key features of a collective investment scheme through the manager’s use of suitable disclosures for the intended target market; and
- determine the manner in which managers must lodge advertising and marketing material.

The Notice applies to-
- the marketing, advertising and information disclosure by managers of all collective investment schemes registered or approved under the CIS Act, including foreign collective investment schemes, and where the collective investment schemes are listed, the JSE Equity Rules also apply.

The Notice states further that a manager must take reasonable steps to satisfy itself that any product supplier or financial services provider that markets or distributes its CIS portfolios, has processes in place to comply with this Notice to the extent applicable, and in particular to ensure investors are provided with MDD’s.

Please speak to your Legal Adviser if you need a copy of the Board Notice.
Ombudsman matters

THE SHORT-TERM OMBUDSMAN

The complainant had two cell phone handsets which were used interchangeably with the same SIM card. One of the handsets was stolen and the complainant lodged a claim with his insurer. The claim was declined on the basis that the insured SIM card was not in the insured phone at the time that it was stolen. It was pointed out to the complainant that cover was excluded if the SIM card noted on the policy was not in the insured phone at the time of loss. The complainant submitted that he was never made aware of that particularly limiting clause in the contract of insurance. However, the insurer was adamant that the policy wording was handed to the complainant at sales stage.

Ruling of the Ombudsman:

It often happens that individuals purchasing insurance policies are not aware of the nature of the policy or the extent of indemnification at the time that the policy is purchased. In order to ensure that there is clarity regarding the agreement entered into between the insurer and the insured, section 4.3(i) of The Policyholder Protection Rules (PPR) was enacted. This section requires from a direct marketer of an insurance policy that concise details of any limiting clauses be disclosed to the insured in a language and manner appropriate to the individual to ensure that there is an understanding prior to the inception of the policy so that an informed decision may be made by the policyholder regarding the purchase of the policy.

As evidence of compliance with PPR, the insurer produced a signed insurance proposal. It was however the view of the Ombudsman that the conditions printed in fine print on the back of the policy, (which is simply handed to an insured for signature at sales stage), was not evidence that the limiting clause, had been highlighted to the complainant at sales stage. It was also the view of the Ombudsman that such a unique and extremely limiting clause of a policy would require the insurer to show that the condition or term was explained at sales stage as it went to the core of what the complainant understood he was purchasing. It was suggested that where such a unique clause exists, the clause should be clearly printed on the policy proposal with a field for acknowledging that the specific condition was explained and not just that the insured was informed that there are terms and conditions which must be taken note of after the inception of the policy.

The insurer responded to this by submitting that the complainant also had a duty to ensure that he availed himself of the terms and conditions of the policy before simply signing the document.

It was pointed out to the insurer that PPR places a duty on the insurer in that the insurer is in a much better position to ensure that there is clarity at sales stage than the complainant. The fine print on the back of a page is often missed, considered unimportant and impractical to read while concluding a face to face transaction.

The insurer was accordingly requested to settle the claim, which they agreed to do.
Conditional Acceptance
Some insurers specifically mention in the application form that the acceptance of the risk is conditional upon there being no change in health between the dates of application and the cover commencing.

Summary of facts:
The policy in question was applied for in June 2009 but a medical incident i.e. haemoptysis, coughing up blood, occurred on 7 July 2009. The policy was accepted prior to 7 July 2009 but only issued on 13 July 2009.

When a claim was lodged following a pulmonary embolism the insurer found out about the haemoptysis incident and it relied on the following clause in the application to void the policy:

"Should this application be accepted by the Insurer, it will be conditional upon there having been no material alteration to the facts on which the acceptance was based and no illness or injury suffered by the Life Covered between the date of this application and the date the Insurer issues your Benefit, or 30 days prior to the first premium due date elected by you, whichever is the later."

Ruling of the Ombudsman:
The Ombudsman was of the view that this was not a question of non-disclosure but the application of a condition. A reinsurer had given its opinion that it would have been reasonable for an insurer to have deferred the underwriting decision until more information (in the form of a further medical report) had been obtained. There had thus been a "material alteration" of the facts on which the insurer relied to accept the policy.

The insurer was entitled to rely on the abovementioned clause. The condition for acceptance of the application had not been fulfilled as there had been a material alteration of the facts.

Therefore the insurer's acceptance of the policy fell away.

Duty to disclose material terms
Section 7(1) (a) of the FAIS General Code of Conduct, provides that an FSP, other than a direct marketer, must provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision.

Section 7(1)(c)(vii) of the FAIS General Code of Conduct provides that an FSP, other than a direct marketer, must, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information and concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances where benefits will not be provided.
Summary of facts:
The complainant, Mr. Victor, insured his motor vehicle with ABSA Insurance via his broker. About a year later the motor vehicle was stolen and ABSA Insurance repudiated Mr. Victor’s claim on the grounds that the insured did not abide by a policy condition to install a tracking device.

The only condition that Mr. Victor was aware of was a gear lock requirement which was met. On further investigation, it transpired that the broker failed to communicate two subsequent endorsement schedules from ABSA Insurance for onward submission to Mr. Victor. The endorsement required Mr. Victor to fit a tracking device as a condition upon which indemnity against theft and hijacking would be met.

Insurer’s submission:
In their response to the Ombud, the brokerage stated that the initial quote upon which the insurance was ultimately concluded, had no requirement for a tracking device. They also stated that it was company policy to inform clients to read through the policy schedule, so that clients may confirm that the policy meets with their requirements.

Ruling of the Ombudsman:
The Ombudsman ruled that the brokerage was negligent in that they never forwarded the additional terms and conditions to Mr. Victor. It was held that it was incumbent upon the FSP to pertinently draw Mr. Victor’s attention to the additional terms on the policy schedule which was not included in the initial quotations.

The complaint was upheld and the FSP was ordered to pay Mr. Victor an amount of R87 300.

Important note:
In matters such as these it is important to note that although in terms of common law there is no general duty on a broker to explain each and every clause of the policy to the insured, there is a legal duty to do so. This duty requires that the insured be informed of the existence of any onerous policy conditions and also that the importance of these conditions are explained fully to the client.

Furthermore, when the policy is renewed, the broker must also satisfy himself/herself that there have not been any material changes to the policy.