



Keeping you up to date on legal developments

Being a provider of financial services, whilst it may not be the business' core activity, does warrant management attention because of the risks of non compliance related to the FAIS Act, LTIA, STIA and indeed other legislation.

In the distribution of products emanating from third party insurance cell structures provided by Guardrisk Insurance and Guardrisk Life, we have a number of clients that perform various administration services with respect to the insurance products emanating from the cell structures. Depending on the nature and structure of the facilities, cell owners may include professional underwriting management agencies and other clients that have a client base into which they want to distribute insurance products, for example different kinds of retailers.

Such clients need to be registered as financial service providers in terms of the Financial Advisory and Intermediary Services Act ("FAIS") to the extent that they are either rendering financial intermediary services and or providing financial advice.

In addition, such cell owners would also need to either comply with various aspects of the Long Term Insurance Act ("LTIA") or the Short Term Insurance Act ("STIA") as the case may be depending on the type of business. Alternatively, the conduct of cell owners may have an impact on compliance requirements placed on the aforementioned Guardrisk companies with respect the LTIA or STIA as the case may be.

As we deal with our cell owners on a day to day basis, we field a number of questions and or enquiries relating to legislative developments and the interpretation thereof applicable to the various insurance products in so far as the administration, distribution and engagement with and servicing of clients. It is our intention to issue a quarterly publication in which we'll deal with a number of the topics that we feel will be of some interest to our clients and will hopefully highlight issues for consideration.

This is the first issue of *Compliance and Legal Matters* and we would welcome feedback from clients, especially in relation to topics of interest. Not all the topics that we've covered are new developments but all are issues raised during interaction with our clients. This publication aims to help you understand how these issues may apply to your company. how they may be applicable to you

Please send any comments you have about the publication to compliance@guardrisk.co.za. However, if you have any questions related to compliance in your organisation please direct these to your compliance officer.

This publication contains important information that you simply cannot afford not to know!

Please feel free to forward it to anyone in your organisation who needs to be kept up to date on legal and compliance developments and issues in the insurance industry.

Inside this issue

Amendments to the insurance laws

- Special powers concerning the Registrars
- Offences by persons other than long term or short term insurers
- Binder agreements
- Accident and health policies

Financial advisory and intermediary services legislation

- Amendments to the General Code relating to conflicts of interest
- Financial soundness
- Requirements for professional indemnity & fidelity insurance cover

This publication is issued by Guardrisk's Legal and Compliance Department for the general information of clients.

Nothing in this publication should be construed as legal advice and readers should seek professional advice before any action is taken based on any of the interpretations and / or views expressed by the editors of this publication.

Amendments to the insurance laws

The Insurance Laws Amendment Act, No 27 of 2008 (“the ILA Act”) was signed by the President and published in Government Gazette (“GG”) no 31578 on the 5th of November 2008. The ILA Act took effect in December 2008 by virtue of the GG 31726 signed by the Minister of Finance.

Although enacted some time ago and it is appreciated that our clients may be fully conversant with the provisions, we would like to highlight a number of interesting provisions.

Special powers concerning the Registrars

Applicable to both, the LTIA and STIA (“the insurance Acts”) the Registrars of the LTIA and STIA (“the Registrars”) may issue a directive to any person or persons to whom the provisions of these Acts apply in order to not only ensure compliance but also to prevent any possible contravention of the Acts. Such a directive can be general in nature or it may be limited in its application to a particular person or persons, kinds of persons or any other manner. In addition, the Registrars are empowered to amend or revoke any issued directives and if deemed necessary, to protect the public the Registrars may publish the directive in the Gazette or any other media they deem appropriate.

Therefore, the Registrars are able to engage any person or persons (and not limited to regulated insurance companies) through the use of these directives to enforce compliance or curtail possible contravention of the Acts.

Offences by persons other than long term or short term insurers

The penalties provided for in the Acts for contraventions or offences by persons other than insurers have been increased from a fine not exceeding R100 000 (one hundred thousand) fine and or imprisonment for a period not exceeding a 1 year period to a fine not exceeding R1 000 000 (one million) and or imprisonment not exceeding 10 years.

These sanctions apply to persons other than insurance companies and

of course cell owners performing services related to insurance products should be aware of these penalties.

The two provisions highlighted above dispel any perception that cell owners and intermediaries are far removed from the ambit of the insurance Acts. When read together, it is evident that the Registrars have administrative sanctions at their disposal which could be invoked directly against intermediaries in so far as activities governed in terms of the insurance Acts and therefore it is not only the regulated insurers that may be called to account.

Although parts of the ILA Act came into effect in December 2008, a number of sections were deferred to come into effect at later dates. Two of the deferred sections that are of significant interest to our business relate to:

Binder agreements

Insertion of Section 49.A into the LTIA and Section 48.A into the STIA both of which deal with the requirements relating to binder agreements including:

- provisions that insurers must have written agreements allowing other persons (“binderholders”) to enter into, vary, renew, determine wordings, determine premiums, determine policy values, settle claims on the insurer’s behalf;
- provisions relating to the minimum information that must be contained in the aforementioned written agreements;
- provisions obliging the binderholders to disclose certain information relating to the insurer to policyholders, keep and maintain proper books of account and records relating to policies and make available upon request from the insurer, its auditors or statutory actuary any information relating to the policy holders.

Notwithstanding any contrary terms contained in the binder agreements, insurers remain responsible for compliance to the LTIA and STIA, liable for claims relating to policies

contemplated in the agreements and lastly remain the owners for the information and documentation related to the policies.

Accident and health policies

Substitution of the definition of the term “accident and health policy” in Section 1 (1) of the STIA. The new definition, similar to the previous one, defines the term and lists a number of exclusions related to these policies but then it goes further in that it introduces a clause in terms of which the Minister of Finance (“the Minister”) may by way of regulation identify certain categories of policies as accident and health policies.

Section 70(2A) provides that the Minister may through regulation identify any kind, type or category of contract as an accident and health policy but on condition that such regulation must be made only:

- in consultation with the Minister of Health;
- after consultation between National Treasury, the Registrars of Short Term Insurance and of Medical Schemes;
- after having given regard to the objectives and purpose of the Medical Schemes Act including community rating, open enrolment and cross-subsidisation.

Prior to promulgation, the regulations must be published in the Government Gazette for public comments and must be submitted to Parliament.

The concept of binder agreements is new to the long term insurance environment whilst quite established in the short term insurance environment. In addition to the accident and health provisions summarised above pertaining to short term insurers, there are also provisions that affect long term insurers.

Although the enabling provisions for the topics of binder agreements and accident and health were published in terms of the ILA Act, as mentioned previously they are not yet in force. The negotiation, consultation, drafting and formulation of the regulations are still underway.

Financial advisory and intermediary services legislation

This section contains some analysis on three amendments to the Financial Advisory and Intermediary Services Act ("FAIS Act"), one of which is a recent amendment from April 2010 and the other two having been enacted some time ago in late 2008.

Amendments to the General Code relating to conflicts of interest

Board Notice ("BN") 58 of 2010, was published in Government Gazette ("GG") 33133 on the 19th of April 2010 and amended the General Code of Conduct for Authorised Financial Service Providers and Representatives published in BN 80 of 2003.

The amendments introduce significant changes that'll govern the way in which Financial Service Providers ("FSPs") and Representatives ("Reps") deal with actual or perceived conflicts of interest as defined.

- **Amendments to section 1 of the General Code** have seen the introduction of a number of new terms including for example "associate", "conflict of interest", "third party", "distribution channel"; "financial interest", "ownership interest".

These definitions come into force on the date of publication of BN58 (published on the 19th of April 2010) and provide the framework within which the rest of the amendments will take effect.

- **Amendments to section 3 of the General Code** provide that FSPs and Reps must avoid or if this is not possible mitigate any conflicts of interest arising with clients.

Furthermore the conflict must be disclosed to clients in writing including: the measures taken to avoid or mitigate the conflict in terms of the conflict of interest management policy; the existence of any ownership or financial interest; the nature of any relationship with a third party that gives rise to a conflict of interest and lastly the clients must be informed of the existence of the conflicts of

interest management policy and how it can be accessed.

The changes in this section come into force three months from the date of publication of BN58 (will come into effect on the 19th of July 2010).

- **Insertion of Section 3A in the General Code** sets out the specific types of financial interest that FSPs or Reps will be permitted to receive from third parties such as commission, fees, remuneration within the parameters set out.

The limitations are also set out such as those pertaining to FSPs who will not be able to provide any financial interest as defined to its Reps for giving preference quantity of business secured, giving preference to specific product suppliers where they're able to recommend more than one supplier etc. Furthermore, this section provides the requirements for the adoption, maintenance, implementation and monitoring of conflicts of interest management policies and the minimum content that must be contained therein.

Some of the changes in this section come into force six months from the date of publication of BN58 and others twelve months (meaning they'll come into effect on the 19th of July 2010 and 19th of April 2010 respectfully).

The changes introduced in this amendment, a summary of which is provided, are far reaching and it is advisable that clients carefully analyse BN58 to determine the impact.

In particular, companies that are part of group structures in which there are multiple FSP licenses may be particularly affected taking into account the introduction of the newly defined terms such as "associates", "distribution channel", "third party" etc which are seemingly wide definitions.

Financial soundness

Part IX of BN106 set out various financial soundness provisions which are applicable to financial service providers ("FSP") the provisions of which apply on the basis of license category:

- **Category I FSPs that do not hold** client assets or receive premiums or money must at all times ensure that the assets of the FSP (excluding goodwill, other intangible assets and investments in related parties) must at all times exceed the FSP's liabilities (excluding loans validly subordinated in favour of all other creditors);
- **Category I FSPs that hold** client assets or receive premiums or money must at all times comply with the following requirements:
 - Total assets of the FSP (excluding goodwill, other intangible assets and investments in related parties) must exceed the FSP's liabilities (excluding loans validly subordinated in favour of all other creditors);
 - Must maintain current assets sufficient to meet current liabilities; and
 - Maintain liquid assets equal to or greater than 4/52 weeks of annual expenditure.

The significance of the category of FSP is important as the requirements are clearly become more onerous, for example in relation to liquid assets, Category II FSPs will be required to hold 8/52 weeks of annual expenditure and Category IIA and III will need to hold 13/52 weeks. However, we expect that most of our clients who are FSP's fall into Category I and hence our focus on this category.

It's important for clients to analyse these requirements and get an understanding as to how they apply to your business with respect to being a registered FSP. Seemingly simple provisions or definitions may be more complex than they appear, such as

what do “liquid assets” comprise? Or does the term “annual expenditure” only apply to the FSP’s expenditure in relation to the financial services for which it is licensed or would it be the total expenditure for the legal entity as a whole that happens to be licensed as an FSP in relation to certain financial services?

Annual Expenditure is defined as the expenditure set out in the latest set of financial statements of the provider for the year in question and in the case of an applicant commencing business, the budgeted expenditure as expressed in the budget or other accounts, less staff bonuses, employees and directors or members share in profits, other appropriation of profits to the directors or members and emoluments of directors, members, partners or sole proprietor.

Whilst the provision relating to total assets exceeding liabilities (first sub-bullet above under clients holding client assets or receiving premiums) came into effect in October 2008, the other provisions summarised above are to come into effect on the 15th of October 2010 (i.e. 24 months from the effective date of BN106).

Requirements for professional indemnity & fidelity insurance cover

Board Notice 123 (“BN123”) was published in Gazette 32582 on the 21st of September 2009. Board Notice 37 of 2009 previously published in Gazette 32037 was consequently repealed.

BN123 amended the General Code of Conduct for FSPs, providing that all FSPs maintain suitable professional indemnity and fidelity insurance cover to the extent set out.

- **Category I or IV providers that do not receive or hold** client’s financial products or funds on the date of commencement must, with effect from a date 12 months after that date, maintain in force in respect of clients:
 - suitable guarantees of a minimum of R1 million; or
 - suitable professional indemnity cover of a minimum amount of R1 million.

- A person who is a Category I or IV provider and who receives or holds clients’ financial products or funds on behalf of a client on the date of commencement must, with effect from a date 12 months after that date, maintain in force in respect of the clients:
 - suitable guarantees of a minimum amount of R1 million; or
 - suitable professional indemnity and fidelity guarantee insurance cover of a minimum amount of R1 million.

Once again, as with the financial soundness provisions, the category of FSP is important as the requirements are more onerous for Categories II, IIA and III.

Notwithstanding these minimum guarantees or insurance requirements applicable to FSP’s, our short term insurance clients that have been authorised to collect premiums have the additional consideration relating to the requirements of the STIA specifically as it relates to the IGF or acceptable guarantees in this respect.

The STIA requires that a person (independent intermediary) is required to hold security for an amount not less than R100 000 and not exceeding R80m for the period 1 April 2010 to 31 March 2011. The amount of security required is determined in accordance with a stipulated formulae set out in the Act and is usually provided by the Intermediaries Guarantee Facility (IGF).

Nothing in this publication should be construed as legal advice. The articles published are general summaries of developments or principles of interest and may not apply directly to any specific circumstances. Professional advice should therefore be sought before action based on any article is taken.

Contact us

Guardrisk Insurance Company Limited

Registration Number: 1992/001639/06
Guardrisk Insurance is an authorised Financial Services Provider, License Number: 26/10/75
Johannesburg: Alexander Forbes Place, Fourth Floor, 90 Rivonia Road, Sandton, 2196
PO Box 786015, Sandton, 2146.
Telephone (+27 011) 669-1000
Fax (+27 011) 669-1931

Cape Town: Block A, The Boulevard, Searle Street, Woodstock.
P O Box 3060, Cape Town, 8000.
Telephone (+27 021) 401-9929
Fax (+27 021) 415-4741

Guardrisk Life Limited

Registration Number: 1999/013922/06
Guardrisk Life is an authorised Financial Services Provider, License Number: 26/10/76
Johannesburg: Alexander Forbes Place, Fourth Floor, 90 Rivonia Road, Sandton, 2196
PO Box 786015, Sandton, 2146.
Telephone (+27 011) 669-1000
Fax (+27 011) 669-1931

Cape Town: Block A, The Boulevard, Searle Street, Woodstock.
P O Box 3060, Cape Town, 8000.
Telephone (+27 021) 401-9929
Fax (+27 021) 415-4741

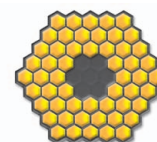
Guardrisk Allied Products and Services (Pty) Ltd

Registration Number: 2007/016202/07
Guardrisk Allied Products & Services is an authorised Financial Services Provider, License Number: 10411
Johannesburg: Alexander Forbes Place, Fourth Floor, 90 Rivonia Road, Sandton, 2196
PO Box 783542, Sandton, 2146.
Telephone (+27 011) 669-3000
Fax (+27 011) 669-2240

Pretoria: 189 Clark Street, Cnr Clark & Fehrsen Streets, Brooklyn, 0181.
P O Box 2435, Pretoria, 0001.
Telephone (+27 012) 452-7345
Fax (+27 012) 452-7522

Kwazulu Natal: 10 Torsvale Crescent, Torsvale Park, La Lucia, Durban.
P O Box 782, Umhlanga Rocks, 4320.
Telephone (+27 031) 573-8054
Fax (+27 031) 573-8733

Cape Town: Block A, The Boulevard, Searle Street, Woodstock.
PO Box 3060, Cape Town, 8000.
Telephone (+27 021) 401-9888



Guardrisk