

No. R. 609**22 July 2011**

**LONG-TERM INSURANCE ACT, 1998: PUBLICATION OF PROPOSED AMENDMENT
OF REGULATIONS MADE UNDER SECTION 72 FOR PUBLIC COMMENT**

I, Pravin J Gordhan, Minister of Finance, in accordance with section 72(2B) of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), hereby publish the proposed amendment of the Regulations made under section 72 of the Long-term Insurance Act and published under GNR.1492 of 27 November 1998, and amended from time to time, as set out in Schedule A hereto, to be made under section 72(1)(gA) of the Long-term Insurance Act, for public comment.

An explanatory memorandum on the proposed amendment is set out in Schedule B hereto.

Comments on the proposed amendment may be submitted in writing on or before 05 September 2011 to the National Treasury per email to LTBinders@treasury.gov.za.

The proposed draft amendment of the regulations is available on the National Treasury's website at www.treasury.gov.za and the Financial Services Board's web site at www.fsb.co.za.



PRAVIN J GORDHAN
MINISTER OF FINANCE

SCHEDULE A

1. Substitution of Part 6 in the Regulations under the Long-term Insurance Act, 1998 as published in GN R1492 of 1998 and amended by GN R197 of 2000, GN R164 of 2002, GN R1209 of 2003, GNR.1218 of 2006, GN R186 of 2007 and GN R952 of 2008:

The following Part is hereby substituted for Part 6 of the Regulations:

“PART 6 BINDER AGREEMENTS

Definitions and interpretation

6.1 (1) In this Part 6, unless the context indicates otherwise -

“**administrative FSP**” has the meaning assigned to it in the Codes of conduct for administrative and discretionary FSPs published in Board Notice No. 79 of 8 August 2003, and amended from time to time, under section 15 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

“**associate**” has the meaning assigned to it in the General Code of Conduct for Authorised Financial Services Providers and Representatives as published in Board Notice No. 80 of 2003, and amended from time to time, under section 15 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

“**binder agreement**” means an agreement contemplated in section 49A;

“**binder holder**” means a person with whom an insurer has concluded a binder agreement;

“**enter into**” means any act that results in an insurer becoming liable to provide policy benefits under a policy where that insurer becomes aware of such liability only after it has arisen;

“**independent intermediary**” has the meaning assigned to it in regulation 3.1;

“**insurer**” means a long-term insurer;

“**mandated intermediary**” means an independent intermediary that holds a written mandate from a potential policyholder or policyholder that authorises that intermediary, without having to obtain the prior approval of that potential policyholder or policyholder, to –

(a) terminate the policy of that policyholder; or

- (b) perform any act, in relation to a policy, that legally binds that potential policyholder or policyholder, other than an act directed only at changing the underlying investment portfolio of a policy;

“non-mandated intermediary” means a representative or an independent intermediary, other than a mandated intermediary or an underwriting manager;

“policy” means a long-term policy;

“renew” means any act that results in the renewal of an insurer’s liability to provide policy benefits under a policy where that insurer becomes aware of the renewal of liability only after it has arisen;

“representative” has the meaning assigned to it in regulation 3.1, but excludes an employee of an insurer;

“settle a claim” means any act that results in –

- (a) the acceptance of a claim for policy benefits or a part thereof;
- (b) the determination of the liability of an insurer under a claim for policy benefits; or
- (c) the rejection of or refusal to pay a claim for policy benefits or a part thereof;

where the insurer becomes aware of the acceptance, determination, rejection or refusal only after these acts have been performed;

“this Part” means this Part 6;

“underwriting manager” means a person that –

- (a) performs one or more of the binder functions referred to in section 49A(1)(a) to (e);
and
- (b) if that person renders services as an intermediary as defined in Part 3A of the Regulation, -
 - (i) does not perform any act directed towards entering into, maintaining or servicing a policy on behalf of an insurer, a potential policyholder or policyholder (including the performance of such an act in relation to a fund, a member of a fund and the agreement between the member and the fund);
and
 - (ii) renders those services (other than the services referred to in paragraph (i) above) to or on behalf of an insurer only; and
- (c) is not an associate of a mandated or non-mandated intermediary, a representative of a mandated or non-mandated intermediary, or an administrative FSP; and

“vary” means any act that results in the variation, termination, repudiation or denial of an insurer’s liability to provide policy benefits under a policy where that insurer becomes aware of that variation, termination, repudiation or denial of liability only after it has arisen, and includes any act declaring a policy void.

- (2) (a) An underwriting manager who is a binder holder of one insurer cannot also be a binder holder of other insurers, unless all the relevant insurers have agreed thereto in writing.
- (b) Paragraph (a) does not apply if an underwriting manager enters into a binder agreement with an insurer during a termination period referred to in regulation 6.2(2)(n) in respect of a binder agreement with another insurer and that underwriting manager may not perform any binder functions on behalf of that other insurer during that termination period.

Requirements, limitations and prohibitions relating to binder agreements

6.2 (1) An insurer may have a binder agreement with only one or more of the following persons -

- (a) a non-mandated intermediary that is not an associate of a mandated intermediary;
- (b) an underwriting manager; or
- (c) an administrative FSP.

(2) A binder agreement must, in addition to those matters provided for under section 49A(2) -

- (a) specify if the binder holder is a non-mandated intermediary, an underwriting manager or an administrative FSP;
- (b) specify the duration of the agreement;
- (c) specify the level and standard of service that must be rendered to a policyholder, where relevant, and to the insurer;
- (d) require that the binder holder has appropriate management systems, risk management systems and information technology systems in place to render the services under the binder agreement;
- (e) specify the Rand value of the remuneration or consideration contemplated under regulation 6.3 payable by the insurer to the binder holder in respect of each policy and generally, or, if the Rand value is not fixed or determinable on entering into the

- agreement, the basis on which the remuneration or consideration payable will be calculated;
- (f) specify the disclosures that must be made and the information that must be provided to a policyholder, and the manner in which such disclosures or information must be made or provided when a binder holder –
 - (i) enters into, varies or renews a policy;
 - (ii) determines the wording of a policy;
 - (iii) determines premiums under a policy;
 - (iv) determines the value of policy benefits under a policy; or
 - (v) settles a claim under a policy;
 - (g) provide for the type and frequency of reporting by the binder holder on the services rendered under the binder agreement;
 - (h) provide for the manner in and the means by which an insurer must monitor the binder holder's performance under and compliance with the binder agreement;
 - (i) provide for periodic performance reviews of the binder holder and the regular review of the binder agreement;
 - (j) specify that the insurer has continued access to policyholder and policy information held by the binder holder;
 - (k) provide for the intervals, which may not be longer than 60 days, at which the binder holder will update policyholder and policy information in the records of the insurer, which information must, at least, enable the insurer to identify the policyholders, contact the policyholders and assess its liability under the policies;
 - (l) set out any warranties or guarantees to be furnished and insurance to be secured by the binder holder in respect of its ability to fulfill its contractual obligations;
 - (m) provide for a dispute resolution process;
 - (n) provide for a termination period, irrespective of the circumstances under which the agreement is terminated (including the lapsing or non-renewal of the agreement), of at least 90 days, that will allow –
 - (i) the binder holder and insurer to comply with any legislative requirements relating to the policies referred to in the binder agreement; and

- (ii) for the transfer or sharing of all electronic and paper-based records in respect of the policies referred to in the binder agreement, including the names and identity numbers of all policyholders, insured persons and beneficiaries; and
 - (o) provide for the continuity of service if the binder holder is placed under curatorship, business rescue, becomes insolvent, is liquidated or is for any reason unable to continue to render the services in accordance with the binder agreement.
- (3) Sub-regulation (2)(n) does not prohibit a binder agreement from providing that an insurer may –
 - (a) limit or prevent a binder holder from performing certain or all binder functions during the termination period; or
 - (b) take reasonable measures to limit any risks it may be exposed to resulting or associated with a binder agreement or the termination thereof.
- (4) (a) A binder agreement may only provide for matters referred to in section 49A of the Act, this Part and matters incidental thereto, and may not regulate any other arrangement or relationship with the binder holder, irrespective of such other arrangement or relationship being dependent on the conclusion of a binder agreement or that the binder agreement is in addition to or consequential on such other arrangement or relationship.
 - (b) A binder agreement may not prohibit an insurer from communicating directly with any independent intermediary or its policyholder.
- (5) A binder agreement concluded with a non-mandated intermediary, in addition to the matters provided for under sub-regulation (2), must limit the discretion of the binder holder in respect of -
 - (a) the maximum value of policy benefits that may be determined under each policy or the maximum value of any claim that may be settled by the binder holder under the policies to which the binder agreement relates;
 - (b) the morbidity and mortality risk factors, where appropriate, that must be considered by the binder holder when entering into, varying or renewing a policy or determining the value of policy benefits under a policy;
 - (c) other parameters in accordance with which the binder holder must render the services provided for in the binder agreement.

(6) A binder agreement concluded with a non-mandated intermediary may not authorise the binder holder to –

- (a) refuse to renew a policy;
- (b) reject or refuse to pay a claim for policy benefits or a part thereof;
- (c) terminate, repudiate or deny an insurer's liability to provide policy benefits under a policy; or
- (d) declare a policy void.

Requirements, limitations and prohibitions relating to any consideration that may be offered or provided to a binder holder, and any participation by a binder holder in profits attributable to the policies referred to in a binder agreement

6.3 (1) An insurer may pay a binder holder a fee for the services rendered under the binder agreement, which fee must be reasonably commensurate with the actual costs of the binder holder associated with rendering the services under the binder agreement, with allowance for a reasonable rate of return for the binder holder.

(2) Any fee referred to under sub-regulation (1) payable to a non-mandated intermediary that may settle claims or determine the value of policy benefits under a binder agreement, may not constitute or be based on a percentage of the difference between an amount claimed or the maximum value of policy benefits payable under a policy and the policy benefits actually provided to a policyholder in settlement of a claim.

(3) A non-mandated intermediary that is a binder holder, in respect of the services rendered under the binder agreement, may not directly or indirectly receive or be offered any share in the profits of the insurer attributable to the type or kind of policies referred to in the binder agreement.

(4) An administrative FSP or underwriting manager, in respect of the services rendered under the binder agreement, may share in the profits of the insurer attributable to the type or kind of policies referred to in the binder agreement.

(5) Any fee referred to under this regulation 6.3, payable to a non-mandated intermediary that is a binder holder, must be disclosed to a policyholder, which disclosure must be included in the disclosures contemplated under regulation 6.2(2)(f).

Reporting requirements

6.4 An insurer must, 60 days before the expiry of the termination period referred to under Regulation 6.2(2)(n), inform the Registrar in writing and in the format required by the Registrar

- (a) of the date on which the binder agreement will terminate;
- (b) of the reasons for the termination of the binder agreement;
- (c) how the policies to which the binder agreement relates will be dealt with;
- (d) how any legislative requirements relating to the termination of the binder agreement or policies, if one or more policies to which the binder agreement relates will be terminated, will be complied with.

Transitional arrangements

6.5 Any agreement concluded before or on the date on which this Part commences, which would have been subject to this Part if it had commenced at the time that the agreement was concluded, must be aligned with this Part within one year of this Part coming into operation."

2. Insertion of Part 7 in the Regulations under the Long-term Insurance Act, 1998 as published in GN R1492 of 1998 and amended by GN R197 of 2000, GN R164 of 2002, GN R1209 of 2003, GNR.1218 of 2006, GN R186 of 2007 and GN R952 of 2008:

Part 7 is hereby inserted after Part 6 of the Regulations:

"PART 7

TITLE AND COMMENCEMENT

7.1 These regulations are called the Regulations under the Long-term Insurance Act, 1998.

7.2 (1) Regulations 1 to 4 came into operation on commencement of the Act.

(2) Regulations 3A and 5A came into operation on 1 December 2006.

(3) Regulations 3B and 5B came into operation on 1 January 2009.

(4) Regulation 6 came into operation on [insert date].

(5) Any amendments to regulations 1 to 6 come into operation on the date of publication thereof in the *Government Gazette* or on such other date specified by the Minister in the *Government Gazette* or specified in a regulation."

SCHEDULE B EXPLANATORY MEMORANDUM

1. PURPOSE

The purpose of this Explanatory Memorandum is to provide insight into the principles that informed the draft regulations and explain how these principles are reflected in the draft regulations.

2. BACKGROUND

The enhancement of the legislative framework relating to binder agreements commenced with the enactment of the Insurance Laws Amendment Act No. 27 of 2008.

The latter Act amended the existing provisions of the Short-term Insurance Act and introduced provisions in the Long-term Insurance Act relating to binder agreements. Before the enactment of the latter Act, binder agreements in the long-term insurance industry were not regulated.

The Long-term Insurance and Short-term Insurance Acts, as amended (the Insurance Laws), afford the Minister of Finance legislative authority to make regulations on a number of matters relating to binder agreements.

Subsequent to the enactment of the Insurance Laws Amendment Act, a Binder Task Team with representation from the National Treasury, the Financial Services Board and industry associations (ASISA, SAIA, FIA and SAUMA) was constituted. The mandate of the Binder Task Team was to draft binder regulations for consideration by the Minister of Finance. In addition, the Financial Services Board met separately with industry associations to discuss the potential impact of binder regulations on the long-term and short-term insurance industries.

The draft binder regulations are therefore the result of robust and inclusive consultation with interested and affected stakeholders.

3. SCOPE OF THE DRAFT REGULATIONS

The draft regulations represent but one of a series of initiatives and projects of the National Government and the Financial Services Board.

The draft regulations therefore do not address the following aspects, which are the subject of separate processes, –

- 3.1 the issues relating to intermediary relationships raised in the Contractual Savings Discussion Document;
- 3.2 the outsourcing of core insurer functions to third parties holistically. The draft regulations only address a subset of outsourcing namely the outsourcing of binder functions;
- 3.3 ownership structures (including ownership structures in respect of cell arrangements)¹, in particular conflicts of interests that are inherent in these structures and arrangements.

Binder functions are the collective term used for those functions that a binder holder performs as the agent of the insurer. The binder holder acts on behalf of the insurer, as if the binder holder is the

¹ The draft regulations, however, do apply to any binder functions performed by, under or in terms of these ownership structures.

insurer, when interacting with potential policyholders and policyholders. Binder functions differ from intermediary services in that binder functions are the actual act of entering into, varying or renewing a policy (in other words, the insurer will only be aware of the new policyholder liability after the fact), while intermediary services constitute any acts towards a person entering into, maintaining or servicing a policy.

4. RELEVANT ACTS AND THE DRAFT REGULATIONS

- 4.1 **The Long-term Insurance Act:** The Long-term Insurance Act (the Act) contains the fundamental policy or underlying principles relating to binders. It provides for the basic or minimum issues and powers necessary to regulate binders and delegates legislative (law-making) and other authority to implement and enforce the Act to the Minister of Finance.

The draft regulations are the detailed regulation of matters provided for in the Act. They supplement the Act by prescribing detailed and technical rules.

The draft regulations must be read with the Act.

The relevant extract from the Act (section 49A) is included at the end of this Schedule as Annexure 1.

- 4.2 **The Financial Advisory and Intermediary Services Act:** The draft regulations refer to the Financial Advisory and Intermediary Services Act (the FAIS Act). This is so to, in as far as reasonably possible, ensure consistency in respect of terminology used and to avoid any interpretation difficulties that may arise in implementing the draft regulations.

The draft regulations must be read with the FAIS Act.

5. BROAD PRINCIPLES THAT INFORMED THE DRAFT REGULATIONS

The following broad principles informed the draft regulations:

- 5.1 **Accountability of the insurer:** The insurer is responsible for complying with the Act, irrespective of the fact that the insurer outsources some of its functions to a third party.
- 5.2 **Responsible outsourcing:** Where an insurer outsources "binder functions" to a third party, the insurer must ensure that the contractual arrangements, and the oversight and management of the contractual arrangements, facilitate (not impede) the insurer's compliance with the Act and the fair treatment of policyholders.
- 5.3 **Policyholder protection:** Policyholder interests and the fair treatment of policyholders may not be prejudiced by the outsourcing of "binder functions" by an insurer.
- 5.4 **Conflicts of interest:** Any potential conflicts of interest that may arise where a non-mandated intermediary is a binder holder must be avoided.

6. SUMMARY OF THE DRAFT REGULATIONS

6.1 Who may be a binder holder?

[See regulations 6.2(1)]

An underwriting manager, an administrative FSP or a non-mandated intermediary (who is not an associate of a mandated intermediary) may be a binder holder.

Underwriting manager

[See regulations 6.1 and 6.2(1)]

An underwriting manager is defined in the draft regulations as a person that –

- performs one or more of the binder functions referred to in section 49A;
- may render services as an intermediary to or on behalf of an insurer, but when rendering such services does not perform any act directed towards entering into, maintaining or servicing a policy on behalf of an insurer, a potential policyholder or policyholder (i.e. solicit, market or sell a policy); and
- may not be an associate² of a mandated or non-mandated intermediary, or a representative³ of a mandated or non-mandated intermediary or an administrative FSP.

The person therefore acts as the agent of the insurer (i.e. as if that person is the insurer) and does not act on behalf of a policyholder, potential policyholder or an independent intermediary. The person also therefore does not solicit policies from, or market or sell policies to, the public or any segment of the public on behalf of an insurer.

An underwriting manager who is a binder holder of an insurer cannot also be a binder holder of another insurer, unless the insurers have agreed thereto in writing.

Administrative FSP

[See regulations 6.1 and 6.2(1)]

An administrative FSP is defined in the draft regulations as having the meaning assigned to that term in the Codes of conduct for administrative and discretionary FSPs⁴.

An administrative FSP (administrative FSP) acts as the agent of the insurer (i.e. as if the administrative FSP is the insurer), but may hold a written mandate from a policyholder that authorises that administrative FSP to change the underlying investment portfolio of a policy without having to obtain the prior approval of that policyholder. This does not mean, however, that the administrative FSP has the mandate to terminate the policy itself without the prior written approval of the policyholder.

Non-mandated intermediary

[See regulations 6.1 and 6.2(1)]

In preparing the draft binder regulations, industry stakeholders indicated that it is essential, in the interest of administrative efficiency, that non-mandated intermediaries be permitted to perform certain binder functions. However, by allowing this it is essential to manage any conflict or potential conflict of interest appropriately as non-mandated intermediaries simultaneously act or may act on behalf of an insurer and a policyholder.

A non-mandated intermediary is defined in the draft regulations as a representative or an independent intermediary, other than a mandated intermediary, underwriting manager or administrative FSP.

A mandated intermediary is defined as an independent intermediary that holds a written mandate from a potential policyholder or policyholder that authorises that intermediary (without having to obtain the prior approval of that potential policyholder or policyholder) to terminate the policy of that policyholder or perform any act, in relation to a policy, that legally binds that potential policyholder or policyholder. This means that a mandated intermediary has a written mandate from a potential policyholder or policyholder to move a policy or "book of business" to another insurer without having to secure the prior approval of the policyholder or all policyholders. It should be noted that very few, if any,

² A list of relevant definitions is included at the end of this Schedule as Annexure 2.

³ A list of relevant definitions is included at the end of this Schedule as Annexure 2.

⁴ Codes of conduct for administrative and discretionary FSPs published in Board Notice No. 79 of 8 August 2003, and amended from time to time, under section 15 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002).

independent intermediaries currently have such a written mandate to enter into, vary or renew a policy on behalf of a policyholder without the need for prior consultation with or approval of that policyholder.

This means that a non-mandated intermediary may be a binder holder, but is not permitted to move a policy or "book of business" to another insurer, unless the non-mandated intermediary has, in respect of each move, –

- expressly secured the prior written approval of each policyholder or complied with section 37 of the Long-term Insurance Act; and
- met the requirements relating to replacement products as set out in section 8 of the General Code of Conduct for Authorised Financial Services Providers and Representatives⁵.

In order to limit potential conflicts of interest, a non-mandated intermediary that is a binder holder cannot simultaneously be a mandated intermediary, nor may it be an associate of a mandated intermediary. What constitutes an associate is defined in the draft regulations with reference to the definition of this term in the Code of Conduct for Authorised Financial Services Providers and Representatives.

As to the use of the term "writing", please note that the Electronic Communications and Transactions Act No. 25 of 2002, in section 12, provides that a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and accessible in a manner usable for subsequent reference.

A non-mandated intermediary may be a binder holder for all types of business or just some, but this must be expressly specified in the binder agreement.

6.2 What may a binder holder do and not do on behalf of an insurer?

Definitions

[See regulation 6.1]

The Act allows an insurer, in terms of a written agreement and in accordance with any requirements, limitations or prohibitions that may be prescribed by regulation, to allow another person to do any one or more of the following on behalf of that insurer:

- enter into, vary or renew a policy
- determine the wording of a policy
- determine premiums under a policy
- determine the value of policy benefits under a policy
- settle claims under a policy

The draft regulations define certain of these functions to ensure consistent interpretation. The draft regulations define the following terms "enter into", "renew", "vary" and "settle claim".

General

[See regulation 6.2(2) and (3)]

The draft regulations require binder agreements to include matters in addition to those required by the Act.

The draft regulations further prohibit a binder agreement from regulating any other arrangement or

⁵ The General Code of Conduct for Authorised Financial Services Providers and Representatives as published in Board Notice No. 80 of 2003, and amended from time to time, under section 15 of the Financial Advisory and Intermediary Services Act No. 37 of 2002.

relationship with the binder holder. The draft regulations also state that a binder agreement may not prohibit an insurer from communicating directly with independent intermediaries or its policyholders. These prohibitions on what may be included in a binder agreement are in addition to the prohibitions set out in the Act.

The Act states that a binder agreement may not authorise that other person to add an amount to any gross premium unless the regulations provides otherwise. After consideration of the issue, it was concluded that it would not be appropriate to provide in the regulations for any additions to gross premiums or deductions from claims in respect of policies referred to in binder agreements, as all costs associated with the policy should be determined by the insurer and included in gross premiums.

The draft regulations together with the Act therefore clearly stipulate what a binder holder may and may not do.

A binder holder may not further delegate binder functions. This does not however prohibit a binder holder from outsourcing certain functions that do not fall within the definition of binder functions.

It is important to read the Act together with the draft regulations when drafting or entering into a binder agreement.

Limitations on binder agreements with a non-mandated intermediary

[See regulation 6.2(4) and (5)]

The draft regulations require a binder agreement concluded with a non-mandated intermediary to limit the discretion of the binder holder in respect of -

- the maximum value of policy benefits that may be determined under each policy or the maximum value of each claim that may be settled by the binder holder under the policies to which the binder agreement relates;
- the risk factors that must be considered by the binder holder when entering into, renewing or varying a policy or determining the value of policy benefits under a policy;
- other parameters in accordance with which the binder holder must render the services provided for in the binder agreement.

The draft regulations further prohibit a binder agreement concluded with a non-mandated intermediary from allowing that binder holder to refuse to renew a policy, reject or refuse to pay a claim for policy benefits or a part thereof, terminate, repudiate or deny an insurer's liability to provide policy benefits under a policy, or declare a policy void. This does not mean that the binder holder may not inform a policyholder that a claim cannot be dealt with until the documents and other information required under the policy have been received.

These additional requirements relating to binder agreements concluded with non-mandated intermediaries are necessary to prevent any potential conflicts of interest that may arise for non-mandated intermediaries when simultaneously acting on behalf of an insurer and a policyholder.

It should be noted that the prohibition on a non-mandated intermediary binder holder to reject claims for policy benefits or a part thereof, is not in conflict with Rule 16 of the Long-term Policyholder Protection Rules. The Rule must be read with the Act holistically, including any regulations issued under the Act. Rule 16 does not authorise any person other than the insurer to reject a claim. The Rules merely relate to, *inter alia*, what must be done where a person that may be authorised by an insurer under the Acts or Regulations, rejects a claim. This means that where an insurer may not authorise a person to reject claims on its behalf, Rule 16(2) cannot apply.

6.3 What must a binder agreement provide for?

[See regulation 6.2(2) to (5)]

As mentioned above, the draft regulations require binder agreements to include matters in addition to

those required by the Act and prohibit matters in addition to those prohibited by the Act. Further, specific requirements are provided for binder agreements concluded with non-mandated intermediaries.

In this regard, it must be noted that regulation 6.2(2)(k) that requires a binder agreement to provide for the intervals at which the binder holder must update policyholder and policy information in the records of the insurer does not conflict with the Act that requires a binder holder to make available to the insurer, its statutory actuary and its auditors the policies to which the binder agreement relates and any information relating thereto upon request. The two requirements must be read together. The regulation provides for the regular updating of information and the Act provides for *ad hoc* information requests. Regulation 6.2(2)(k) and the Act do not impact on the constitutional rights of non-mandated intermediaries, underwriting managers and administrative FSPs to trade and to protect their commercially sensitive information. A policy constitutes a contract between the policyholder and the insurer under which the insurer has a responsibility to provide policyholder benefits. A non-mandated intermediary, underwriting manager or administrative FSP is not a party to that contract and, as a binder holder, acts on behalf of the insurer. A non-mandated intermediary or underwriting manager therefore has no right to withhold the information.

Further, it must be noted that regulation 6.2(2)(n) does not prohibit an insurer from stopping the binder holder from performing certain binder functions or taking steps to mitigate its risks pending the termination of the binder agreement. The minimum 90-day period is necessary to provide for the orderly winding-up of the binder agreement.

6.4 What consideration may a binder holder receive under a binder agreement?

General

[See regulation 6.3]

The draft regulations allow an insurer to pay a binder holder a fee for the services rendered under the binder agreement.

This fee must be reasonably commensurate with the actual costs incurred by the binder holder associated with rendering the services under the binder agreement, with allowance for a reasonable rate of return for the binder holder. This criterion is necessary to deter circumvention of the commission regulations and inappropriate incentives.

The regulation does not negate the payment of a market-related fee based on the value of assets under management, if the fee meets the criterion of being reasonably commensurate with the actual costs of the binder holder associated with rendering the services under the binder agreement.

The draft regulations do not affect any commission that may be payable to a non-mandated intermediary for rendering services as an intermediary in relation to the policies to which the binder agreement relates or an outsourcing fee payable for outsourced functions performed by the binder holder on behalf of the insurer, provided that –

- the commission regulations are complied with; and
- a person / intermediary may not be remunerated for the same or a similar service twice.

The Financial Services Board is currently developing proposals to clarify the interpretation of the definition of intermediary services for which regulated commission is payable versus outsourced insurer or policyholder services for which a fee may be payable.

Underwriting manager or administrative FSP

[See regulation 6.3(1) and (4)]

The draft regulations allow an underwriting manager or administrative FSP that is a binder holder to share in the profits of the insurer attributable to the type or kind of policies referred to in the binder

agreement.

Non-mandated intermediary

[See regulation 6.3(1), (2), (3) and (5)]

The draft regulations prohibit any fee payable to a non-mandated intermediary that may settle claims or determine the value of policy benefits paid under a binder agreement, from constituting or being based on a percentage of the difference between an amount claimed or the maximum value of policy benefits payable under a policy and the policy benefits actually provided to a policyholder in settlement of a claim. This is necessary to prevent a non-mandated intermediary (that is supposed to act also in the interest of policyholders) from acting in the interest only of the insurer to the detriment of policyholders.

The fee payable to a non-mandated intermediary that is a binder holder must be disclosed to a policyholder.

The draft regulations further prohibit a non-mandated intermediary that is a binder holder from (directly or indirectly) receiving or being offered any share in the profits of the insurer in respect of, specifically, the services rendered under the binder agreement. This prohibition is therefore not a general prohibition on profit sharing *per se*. It merely prohibits a non-mandated intermediary from being entitled to a percentage of the profits that the intermediary generates because of its performance of the binder functions provided for in the binder agreement. This is again necessary to prevent a non-mandated intermediary (that is supposed to act also in the interest of policyholders) from acting in the interest only of the insurer to the detriment of policyholders.

6.5 What must an insurer report to the Registrar when a binder agreement will terminate?

[See regulation 6.4]

The draft regulations require an insurer, pending the termination of a binder agreement, to report the following to the Registrar -

- the date on which the binder agreement will terminate;
- the reasons for the termination of the binder agreement;
- how the policies to which the binder agreement relates will be dealt with;
- how any legislative requirements relating to the termination of the binder agreement or policies, if one or more policies to which the binder agreement relates will be terminated, will be complied with.

This is necessary to enable the Registrar to ensure that the termination and consequences of termination are managed in the best interest of the policyholders.

6.6 Must binder agreements entered into prior to the effective date of the draft regulations comply with the draft regulations?

[See regulation 6.5]

Binder agreements concluded before or on the date on which these draft regulations commence must be aligned with the draft regulations within one year of it coming into operation.

7. IMPLICATIONS FOR PARTICULAR PARTIES

The draft regulations will have particular implications for various parties often referred to in industry terms as "administrators". The term administrator is used broadly to refer to a variety of business models involving a range of administrative services, some of which may fall into the definition of binder functions or intermediary services.

As a binder agreement may only be entered into with a non-mandated intermediary, an underwriting manager or an administrative FSP, parties currently referred to as administrators, including assistance business group scheme administrators, wishing to perform binder functions must choose to do so as:

- a non-mandated intermediary, subject to the limitations on the binder function and policyholder mandate described above; or
- an underwriting manager; or
- an administrative FSP.

Administrators providing services that do not fall under either the definition of intermediary services or binder functions may continue to provide these administrative services to an insurer on an outsourced basis without having to be recognised as a non-mandated intermediary, underwriting manager or administrative FSP for the purposes of these regulations.

The Financial Services Board is currently developing a directive and guideline in respect of the outsourcing of services and functions by insurers to ensure that adequate governance, internal controls and risk management are in place in respect of such outsourcing.

8. WHAT ARE THE CONSEQUENCES OF NOT COMPLYING WITH THE ACT AND THE REGULATIONS

Non-compliance with section 49A and the regulations issued under section 49A a criminal offence for insurers and binder holders (see sections 67(1)(b) and 66(1)(b), respectively, read with the definition of "this Act" in section 1)).

Further, the Registrar, under section 6A of the Financial Institutions (Protection of Funds) Act No. 28 of 2001, may refer any non-compliance with Act or regulations issued thereunder to the enforcement committee established under section 10 of the Financial Services Board Act No. 97 of 1990.

ANNEXURE 1 TO SCHEDULE B

EXTRACT FROM THE LONG-TERM INSURANCE ACT: SECTION 49A

Binder agreements

49A. (1) A long-term insurer may, in terms of a written agreement only, and in accordance with any requirements, limitations or prohibitions that may be prescribed by regulation, allow another person to do any one or more of the following on behalf of that insurer:

- (a) Enter into, vary or renew a long-term policy, other than a long-term reinsurance policy, on behalf of that insurer;
- (b) determine the wording of a long-term policy;
- (c) determine premiums under a long-term policy;
- (d) determine the value of policy benefits under a long-term policy;
- (e) settle claims under a long-term policy.

(2) A written agreement referred to in subsection (1) must—

- (a) set out which of the activities referred to in subsection (1) that other person may perform and the particular kinds of long-term policies in respect of which those activities may be performed;
- (b) set out the particular kinds of long-term policies which may be entered into, varied or renewed by that other person;
- (c) state if that other person is authorised to determine the wording of the policies referred to in paragraph (a), and if authorised, the extent to which and the circumstances under which the wording may be determined;
- (d) state if that other person is authorised to determine premiums in respect of the policies referred to in paragraph (a), and if authorised, the gross premiums or the basis for the calculation of gross premiums that may be determined, and the extent to which and the circumstances under which the premiums may be determined;
- (e) state if that other person is authorised to determine the value of policy benefits, and if authorised, the maximum value of the policy benefits that may be determined under each kind of long-term policy referred to in paragraph (a), and the extent to which and the circumstances under which the benefits may be determined;
- (f) state if that other person is authorised to settle claims under the policies referred to in paragraph (a), and if authorised, the extent to which and the circumstances under which the claims may be settled;
- (g) state the basis on which that other person will be remunerated for services rendered in terms of paragraphs (b) to (f), which basis must be consistent with any requirements, limitations or prohibitions as may be prescribed by regulation;
- (h) oblige that other person to —
 - (i) disclose to policyholders of policies referred to in paragraph (a) -
 - (aa) the name of the relevant long-term insurer, and the fact that that other person is acting in terms of an agreement contemplated in this section; and
 - (bb) any remuneration payable to that other person in terms of an agreement contemplated in this section;
 - (ii) include the name of the long-term insurer underwriting the long-term policy in any advertisement, brochure or similar communication which relates to the long-term policy referred to in paragraph (a);
 - (iii) keep and maintain proper books of account and other records in respect of the policies referred to in paragraph (a) and allow the long-term insurer, its statutory actuary and its auditors full and unfettered access to those books of account and records; and

- (iv) make available to the long-term insurer, its statutory actuary and its auditors the policies referred to in paragraph (a) and any information relating thereto, including the names, identity numbers and contact details of policyholders, insured persons and beneficiaries, upon request;
- (i) prohibit that other person to delegate, assign or subcontract any of the functions referred to in paragraphs (b) to (f) to another person; and
- (j) state the circumstances under which the agreement will lapse or may be terminated, and the necessary steps that must be taken to ensure the effective and efficient termination of the agreement taking into account the interests of policyholders.

(3) A written agreement referred to in subsection (1), subject to any requirements, limitations or prohibitions as may be prescribed by regulation—

- (a) may not authorise that other person to add an amount to any gross premium referred to in subsection (2)(d);
- (b) may not authorise that other person to deduct any amount from any claims referred to in subsection (2)(f); or
- (c) may provide or prohibit that person to directly or indirectly participate in the profits attributable to the policies referred to in subsection 2(a).

(4) A person that entered into an agreement contemplated in subsection (1) with a long-term insurer may—

- (a) render the services contemplated in subsection (1)(a) to (e) in respect of any kind of long-term policy issued by that long-term insurer identified in the agreement only in accordance with any requirements, limitations or prohibitions as may be prescribed by regulation; and
- (b) not render any of the services contemplated in subsection (1)(a) to (e) in respect of any kind of long-term policy issued by that long-term insurer not identified in the agreement.

(5) Despite any term to the contrary contained in an agreement contemplated in subsection (1) the long-term insurer that entered into the agreement remains—

- (a) responsible for compliance with this Act;
- (b) liable for any claims relating to policies included in the agreement, including any claims that may arise because of the failure of that other person to comply with the agreement; and
- (c) the owner of any information and documentation relating to the policies contemplated in the agreement, which must, upon termination of the agreement, be returned to the long-term insurer.

(6) Any party to a written agreement referred to in subsection (1) must make a copy of that agreement available to the Registrar on request.

ANNEXURE 2 TO SCHEDULE B

RELEVANT DEFINITIONS

LONG-TERM INSURANCE ACT NO. 52 OF 1998: REGULATION 3.1 OF THE REGULATIONS ISSUED UNDER SECTION 72 OF THE LONG-TERM INSURANCE ACT

"independent intermediary" means a person, other than a representative, rendering services as intermediary;

"rendering services as intermediary" means the performance by a person other than a long-term insurer or a policyholder, on behalf of a long-term insurer or a policyholder, of any act directed towards entering into, maintaining or servicing a policy or collecting, accounting for or paying premiums or providing administrative services in relation to a policy, and includes the performance of such an act in relation to a fund, a member of a fund and the agreement between the member and the fund;

"representative" means a person—

- (a) employed or engaged by a long-term insurer for the purpose of rendering services as intermediary only in relation to policies entered into or to be entered into by—
 - (i) that insurer;
 - (ii) another insurer which is a subsidiary or holding company of that insurer; or
 - (iii) another insurer which has entered into a written agreement with that insurer in terms of which persons employed or engaged by that insurer may render services as intermediary in relation to the other insurer's policies;
- (b) on conditions of employment or engagement complying with the principle of "Equivalence of Reward", in terms whereof the remuneration paid by an insurer, whether in cash or in kind, shall substantially be in accordance with this Part, as determined by the Registrar, but excludes such a person in respect of whom the Registrar has made a determination under regulation 3.2 (5);

Financial Advisory and Intermediary Services Act No. 37 of 2002**Codes of conduct for administrative and discretionary FSPs published in Board Notice No. 79 of 8 August 2003**

"administrative FSP" means a FSP, other than a discretionary FSP -

- (a) that renders intermediary services in respect of financial products referred to in paragraphs (a), (b), (c) (excluding any short-term insurance contract or policy referred to therein), (d) and (e), read with paragraphs (h), (i) and (j) of the definition of "financial product" in section 1(1) of the Act, on the instructions of a client or another FSP and through the method of bulking; and
- (b) acting for that purpose specifically in accordance with the provisions of this Code, read with the Act, the General Code (where applicable), and any other applicable law;

"discretionary FSP" means a FSP -

- (a) that renders intermediary services of a discretionary nature as regards the choice of a particular financial product referred to in the definition of "administrative FSP" in this subsection, but without implementing any bulking; and
- (b) acting for that purpose specifically in accordance with the provisions of the Code set out in Chapter II of this Schedule, read with the Act, the General Code (where applicable) and any other applicable law;

Section 1 of the Financial Advisory and Intermediary Services Act

“financial product” means, subject to subsection (2) -

- (a) securities and instruments, including -
 - (i) shares in a company other than a “share block company” as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
 - (ii) debentures and securitised debt;
 - (iii) any money-market instrument;
 - (iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);
 - (v) any “securities” as defined in section 1 of the Securities Services Act, 2002;
- (b) a participatory interest in one or more collective investment schemes;
- (c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;
- (d) a benefit provided by -
 - (i) a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or
 - (ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;
- (e) a foreign currency denominated investment instrument, including a foreign currency deposit;
- (f) a deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990);
- (g) a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act No. 131 of 1998);
- (h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the *Gazette* to be a financial product for the purposes of this Act;
- (i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;
- (j) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (i), inclusive;

General Code of Conduct for Authorised Financial Services Providers and Representatives as published in Board Notice No. 80 of 2003

“associate” -

- (a) in relation to a natural person, means -
 - (i) a person who is recognised in law or the tenets of religion as the spouse, life partner or civil union partner of that person;
 - (ii) a child of that person, including a stepchild, adopted child and a child born out of wedlock;
 - (iii) a parent or stepparent of that person;
 - (iv) a person who is recognised in law or appointed by a Court as the person legally responsible for managing the affairs of or meeting the daily care needs of the first mentioned person;
 - (v) a person who is the spouse, life partner or civil union partner of a person referred to in subparagraphs (ii) to (iv);
 - (vi) a person who is in a commercial partnership with that person;

- (b) in relation to a juristic person -
- (i) which is a company, means any subsidiary or holding company of that company, any other subsidiary of that holding company and any other company of which that holding company is a subsidiary;
 - (ii) which is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), means any member thereof as defined in section 1 of that Act;
 - (iii) which is not a company or a close corporation as referred to in subparagraphs (i) or (ii), means another juristic person which would have been a subsidiary or holding company of the first-mentioned juristic person -
 - (aa) had such first-mentioned juristic person been a company; or
 - (bb) in the case where that other juristic person, too, is not a company, had both the first-mentioned juristic person and that other juristic person been a company;
 - (iv) means any person in accordance with whose directions or instructions the board of directors of or, in the case where such juristic person is not a company, the governing body of such juristic person is accustomed to act;
- (c) in relation to any person -
- (i) means any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of the person first-mentioned in this paragraph;
 - (ii) includes any trust controlled or administered by that person.