



Day1 Health (Pty) Ltd – Medical Insurance
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23 November 2016

Attention: Minister Pravin Gordhan
National Treasury: Office of the Finance Minister
Pretoria

Email: minreg@treasury.gov.za

Fax: 012-323 3262

Dear Sirs

NOTICE OF OBJECTION TO DRAFT DEMARCATION REGULATIONS TABLED IN PARLIAMENT ON THE 28TH OF OCTOBER 2016 AND APPEAL THAT THESE REGULATIONS ARE NOT PASSED INTO LAW

- 1 We have in correspondence with the Minister of Health addressed some of the general issues relating to the proposed demarcation regulations. Our letter in that regard is attached.
- 2 We have taken advice from our attorneys regarding the constitutionality of the proposed demarcation regulations. It appears that there are major issues in that regard. We draw your attention to the main issues below.
- 3 **Illegality**
 - 3.1 The accompanying response document from the National Treasury recognises that the proposed regulations limit rights in the Bill of Rights. The limitation on those who cannot afford medical schemes deprives them of rights to dignity, equality, bodily integrity and the right to healthcare services.
 - 3.2 The State must take legislative measures to achieve the progressive realisation of the right to healthcare services (Bill of Rights s 27(2)). Contrary to this, the demarcation regulations will deprive the most needy citizens of the rights to healthcare services.
 - 3.3 The National Treasury memorandum (page 20) purports to resolve the limitation issue by what is said to be a balance between the risks to the current system and the problem that the changes "may lead to discomfort for some".
 - 3.4 The proposed regulations will lead to widespread deprivation of health services for those who are most vulnerable (those who cannot afford medical schemes) in favour of those who are most advantaged (people who can afford medical schemes).
 - 3.5 The suggestion that less restrictive means do not exist and that there is no viable alternative is irrational. Leaving the status quo is the obvious alternative.



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- 3.6 It is suggested that the demarcation regulations will be reviewed in future and will depend on:
- (1) The proposed Twin Peaks approach;
 - (2) Low Cost Benefit Option medical schemes;
 - (3) The outcome of the Competition Commission Healthcare Inquiry;
 - (4) The outcome of the investigations of the Financial Services Board into insurance products; and
 - (5) The introduction of a National Health system.
- 3.7 None of these are in place and none of them are expected to be in place for a considerable time. Some of them are years away.
- 3.8 The response document records that the demarcation regulations have been under discussion since about the year 2000 so there is no basis for rushing them through now before any of the above has been achieved. There has also been a failure by government to prepare a tariff for healthcare service providers and this failure has increased the costs of medical services and medical schemes.
- 4 Deprivation of property**
- 4.1 The compulsory termination or major amendment to existing healthcare policies amounts to deprivation of property under s 25 of the Bill of Rights.
- 4.2 A number of constitutional court judgments have recognised that property does not only mean tangible property and includes contractual rights. The rights of policyholders under existing policies that are destroyed by the demarcation regulations are property and the regulations amount to a deprivation of property which is arbitrary and improperly compensated by the existing highly restrictive demarcation regulated products.
- 4.3 The National Treasury document refers to the fact that there are up to two million products affected, most of them with policyholders who are unable to afford medical schemes and who rely on those products for their constitutional rights including the essential right to healthcare services and the human dignity that goes with it.
- 4.4 The proposed deprivation of property is in the circumstances irrational, unreasonable, contrary to the principle of legality and unconstitutional. It is an unlawful limitation.
- 5 Regulations ultra vires**
- 5.1 The regulations are ultra vires because they oblige insurers to sell products based on irrational and unreasonable requirements relating to community rating, open enrolment and cross subsidisation.
- 5.2 This means, irrationally, that insurers are required to provide products exactly equivalent to medical schemes when the National Treasury has conceded that the medical scheme industry is not sustainable.



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5.3 It is also not possible for regulations to change the entire basis of insurance. Insurers are required to maintain financially sound products that treat customers fairly. This obligation is not achieved by the proposed regulations.

6 Consultation

6.1 The consultation process is deeply flawed because it is not proper consultation at all.

6.2 Proper consultation and proper response from stakeholders including the people who cannot afford medical schemes is not possible until all the steps referred to in 3.6 above have been completed and evaluated (save for the National Health system).

6.3 It is no answer to say that the demarcation regulations will be reviewed when all these things happen. In the meantime, there is an unlawful discrimination in the regulations and an unlawful deprivation of property without proper consultation.

6.4 Despite many requests over the last 16 years, it has never been demonstrated that the products provided by the insurance industry have had any material effect on the enrolment in medical schemes. The statistics in the National Treasury response do not support this contention to justify taking away the rights from two million policyholders, most of whom have no other equivalent option.

7 Some illustrations

7.1 The extent of deprivation is illustrated by a few examples.

7.2 HIV/AIDS products:

- (1) can only be provided on a group basis which deprives many potential insured of the rights to this insurance;
- (2) relate only to HIV, AIDS, tuberculosis and malaria testing and treatment. This overlooks other common illnesses such as diabetes and high blood pressure quite irrationally. It also means that there will be less use of HIV/AIDS clinics because they will be labelled as just that, namely HIV/AIDS clinics. Experience has shown that many people will not attend an HIV/AIDS clinic if it mainly treats HIV/AIDS because of confidentiality and stigma reasons; and

7.3 The inability for those who cannot afford medical schemes to get payment of hospital expenses is unfair discrimination. The proposed lump sum payment also has a poor outcome. If a lump sum is paid for every day in hospital, there is every reason to stay in hospital and clog up the system. It also encourages fraudulent collusion to keep people in hospital to get the daily benefit. If, on the other hand, hospital expenses are paid under a policy directly to the hospital, there is no benefit for the patient staying in hospital and these irrational outcomes are avoided.

8 Conclusion

8.1 There is therefore no basis for the National Treasury and the Health Department's media statement that the regulations will "ensure that health insurance products do not undermine the medical scheme environment, resulting in better protection for consumers".



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- 8.2 Firstly, as we have pointed out, there is no evidence that the health insurance products undermine medical schemes.
- 8.3 Secondly, most people who have health insurance products cannot afford medical schemes and never will be able to do so.
- 8.4 Thirdly, the "better protection for consumers" means better protection for those wealthy enough to afford medical schemes. It deprives the most vulnerable people of protection in relation to the provision of healthcare services.
- 8.5 In short, the proposed regulations take from the poor and give to the rich which is unconstitutional.
- 8.6 There is likely to be a huge outcry from politicians in all parties who represent the interests of the poor and vulnerable, the trade unions, and non-governmental organisations representing the interests of the vulnerable in relation to healthcare access to healthcare services.
- 8.7 It is submitted that the proposed demarcation regulations should be withdrawn and nothing more should be done until all the matters in clauses 3.6(1) to 3.6(4) above have been resolved.
- 8.8 In their present form, demarcation regulations will not, according to the advice we have been given, survive constitutional challenge and will be widely and highly criticised by everyone including the Constitutional Court whose recent judgments have shown the essential need to uphold the spirit and purport of the Bill of Rights where the poor and vulnerable are most affected.

Yours faithfully

A handwritten signature in black ink, appearing to read "R. Blackman", written over a horizontal line.

Richard Blackman
Chief Executive Officer



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18 November 2016

Dr. Aaron Motsoaledi
Minister of Health
Pretoria Office
Private Bag X399
Pretoria, 0001

Dear Dr. Motsoaledi

NOTICE OF OBJECTION TO DRAFT DEMARCATION REGULATIONS TABLED IN PARLIAMENT ON THE 28TH OF OCTOBER 2016 AND APPEAL THAT THESE REGULATIONS ARE NOT PASSED INTO LAW.

We write to you as Day1 Health (Pty) Ltd, a company which carries on business as a financial intermediary in terms of the Long-Term Insurance Act and Short-Term Insurance Act of 1998.

- 1.1 We respectfully contend that the proposed demarcation regulations would:
- (1) Bring to an end basic health cover enjoyed by hundreds of thousands of South Africans.
 - (2) Deny millions of South Africans the chance of access to basic healthcare services.
 - (3) Deny basic healthcare services to people who are not in regular or formal employment.
 - (4) Deny basic healthcare to employees who are not employed with a major employer.
 - (5) Unfairly discriminate against lower income people.
 - (6) Affect the dignity of those deprived.
- 1.2 **Section 27(1) of the Bill of Rights** says that "Everyone has the right to have access to healthcare services".
- 1.3 **Section 27(2) of the Constitution** says the State "must" take reasonable legislative and other measures, within its available resources, to progressively realise these rights, not deny them or diminish them.
- 1.4 **Section 27(3) of the Bill of Rights** says that no-one may be refused emergency medical treatment.
- 1.5 Despite these constitutional imperatives:
- (1) The demarcation regulations will deny millions the right to access to healthcare services. Anyone who cannot afford to be on medical aid is denied access to insurance for many of the healthcare services that members of medical aids enjoy.
 - (2) The State, if it passes the demarcation regulations, will not be achieving progressive realisation of the rights but will be taking away the rights of millions of people who have those rights at the moment and have had them since 1994.



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1.6 According to **section 9 of the Bill of Rights** “Everyone is equal before the law and has the right to equal protection and benefit of the law”.

1.7 The proposed demarcation regulations deny the equal protection and benefit of the law to people who are unable to afford medical schemes in favour of people who can afford the benefits. **Section 9(2)** provides for “full and equal enjoyment of all rights and freedoms”. The State is supposed to take measures designed to protect persons disadvantaged by unfair discrimination, not to disadvantage them especially in relation to those privileged enough to get full healthcare.

There are many people who are poor or have limited income who will be denied full and equal enjoyment of rights to healthcare. The Labour force and Trade Unions are the people who will be most affected by the enactment of the proposed legislation and they have not been consulted at all.

1.8 According to **section 9(3)** the State may not unfairly discriminate directly or indirectly against anyone on any ground and national legislation must be enacted to prevent or prohibit unfair discrimination (**section 9(4)**).

1.9 Instead the regulations will be national legislation that denies millions of people access to healthcare insurance and, worse, deprives them of rights they have now.

1.10 We propose that the current unlimited access to health insurance policies be continued for people below a certain income level. The minimum level is the earning threshold for the Basic Conditions of Employment Act, currently R193 805 per year.

2 **Proposed demarcation regulations tainted by illegality**

2.1 The Minister of Finance is tasked with making regulations under section 72(2A) of the Long-term Insurance Act, 1998 to identify the kind, type and category of contracts that are health policies lawfully provided by insurers even if they constitute the “business of a medical scheme” in the Medical Schemes Act, 1998.

2.2 In making the regulations, the Minister must have regard to the objectives and purpose of the Medical Schemes Act.

2.3 It is clear from the way in which the Medical Schemes Act forms only part of the overall plan for assisting South Africans to defray medical expenses, that medical schemes are not appropriate bodies to provide assistance to persons in the lower income scales or to persons who are not lucky enough to be in regular employment with major employers. The Medical Schemes Act has not, and medical schemes have never, offered products equivalent to health insurance policies provided by long-term insurers. They have not done so despite being able to do so and despite the examples set by the insurance industry in providing healthcare benefits for those not fortunate enough to have medical aid.

2.4 The draft regulations also overlook the many people in this country who are financially distressed and despite higher income cannot afford to join medical schemes.

2.5 The proposed demarcation regulations are so limiting and draw a line through so many useful insurance products for two million or more people that they do not have proper regard to the current objectives and purposes of the Medical Schemes Act.



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- 2.6 In addition, the Minister of Finance has to have regard to the principles of community rating, open enrolment and cross-subsidisation in relation to its place in the insurance industry where it clearly does not belong in this era of Twin Peaks regulation.
- 2.7 Despite this, the products currently offered by Day1 Health:
- (1) Are community rated because the premiums in relation to particular benefits do not discriminate in favour of younger and healthier persons. All members on a specific benefit option are treated similarly. There are no arbitrary differences in the premium rates applied by Day1 Health to different insured persons.
 - (2) The individual insured is not risk-rated. Premiums are not determined for individual persons or risks. There is therefore cross-subsidisation between insured persons.
 - (3) Day1 Health products also provide for open enrolment and give non-discriminatory access to private healthcare financing.
 - (4) Are so successful that premiums on some products have not increased since 2008.
- 2.8 And yet most of its policyholders will be badly affected and denied care.
- 2.9 The proposed demarcation regulations go far beyond regard for the objectives and purposes of the Medical Schemes Act, including community rating, open enrolment and cross-subsidisation. The demarcation regulations include many discriminatory provisions and many provisions that will prevent insurers from providing health insurance policies that give non-discriminatory access to healthcare to everyone.
- 2.10 There is no evidence that health insurance has ever reduced the number of persons who avail themselves of medical aid when they can afford to do so. None of Day1 Health's policyholders is likely to become a medical scheme member. And yet the proposed demarcation regulations will deny millions of people the right of access to healthcare insurance without offering them any other access to healthcare services.

3 Possible damages claims against government

- 3.1 Because the denial of the right to access to healthcare services by people in lower income bands (particularly those who enjoy cover at the moment) is unconstitutional and tainted by illegality, it is possible that claims will be instituted against the State for not fulfilling (or even retarding) its obligations under section 27.
- 3.2 Under section 38 anyone has the right to approach a court alleging that a right in the Bill of Rights has been infringed. This can also be done by way of class action. The court may grant "any appropriate relief" which could include ordinary damages for aggravated illness or injury or for death. It could also include constitutional damages because this is a specific infringement of constitutional rights.

4 Loss of Jobs and Increased burden on the State Facilities

Thousands of administrative staff members are destined to lose their jobs if this law is enacted and most of them have families to feed. What makes the passing of this law even more untenable is the fact that as more and more people opt out of Medical Schemes due to double digit year on year contribution increases coupled with normal economic pressures, the recent



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weakening of the Rand, rising fuel and food prices, these people will now have nowhere to go, other than to state facilities that are hopelessly inadequate and can no longer cope with the current burden. The removal of "accident and health" business from private hospitals will mean that they too will take the strain and some may fold and disappear. Surely this is not what is intended?

5 **Premature**

The proposed regulations are premature and proper consultation has not been done because:

- 5.1 The Health Market Enquiry is far from complete.
- 5.2 The National Health system is still a far off proposal.
- 5.3 There is no concrete proposal for low cost option benefit schemes against which to evaluate the proposal and the offerings of insurers.
- 5.4 The FSB have not released their finding following a request in 2015 for relevant information from insurers.
- 5.5 The entire Twin Peaks and new insurance legislation is far from full implementation.

6 **Conclusion**

- 6.1 It is our contention that the Demarcation Regulations must be withdrawn as, other than Accident and Health Insurance Policies, there is no suitable financial instrument available capable of assisting the majority of South Africa's people, namely the 42,5 million poor or financially distressed people, in the build up to the implementation of National Health Insurance NHI.
- 6.2 We accordingly urge you not to pass regulations that will, we respectfully say, not survive a constitutional and rationality challenge and will further distress those who can't afford medical schemes.

Yours faithfully

Richard Blackman
Chief Executive Officer