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Clientèle LIFE

NATIONAL TREASURY

Via email: LTDemarcation@treasury.gov.za

Date: April 23rd, 2012

Dear Sir/Madam

RE: LONG-TERM INSURANCE ACT, 1998: Publication of Proposed Amendment of Regulations made under Section 72 for Public Comment

Document compiled by ***Dr. Gary Simpson***, Compliance Officer for Clientele Life Assurance Company Limited (FSP 15268), including comments by Edward Nathan Sonnenbergs (ENS) Incorporated (in red).

Please address any return correspondence in this matter to the writer, via email, on gsimpson@clientele.co.za

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As you are aware our target market is LSM 3 to LSM 7 and our representations are based on our understanding of that target market and the impact on that market of the draft regulations.

We (Clientele) would like to raise certain issues of principle and then deal with certain specifics.

The draft regulations appear to be based on the premise that Health Policies issued by Insurance companies are enticing the younger and lot healthier participants in Medical Aid Schemes to leave and take out Health Policies with Insurance companies. We contend that the majority of Health Policies in our target market are purchased by individuals who are unable to afford membership of a Medical Aid Scheme and Clientele is accordingly servicing a sector of the market not serviced by Medical Aid Schemes. The draft regulations do not acknowledge this and the "catch-all" approach is prejudicial to many individuals.

Furthermore, numerous statements are made as fact and we (Clientele) question if any empirical evidence exists to support said statements. Some examples (but not limited to these) include:

- That an Insurance Health Policy detracts from a Medical Aid Scheme (with specific reference to our (Clientele) target market, the majority of whom cannot afford a Medical Aid Scheme);
- That those forced to "give up" an existing Insurance Health Policy will in fact migrate to a Medical Aid Scheme (or will they simply do without health care?);
- That the removal of hospital plans will reduce the cost of Medical Aid Schemes (currently less than 20% of the population enjoy (can afford) a Medical Aid Scheme);
- That the market perceives an Insurance Health Policy to be "replacing" a Medical Aid Scheme (we argue that it does not);
- That members of Medical Aid Schemes "buy down benefit options" and supplement with insurance products, particularly the young and healthy.

We (Clientele) assert that if the principle intention is to address these situations referred to in these statements, then a more targeted approach would be more equitable and more effective.

We now deal with certain specific representations:

PART 7: Categories of contracts identified as Health Policies under paragraph (b) of the definition of Health Policies

Table – Category 1

- We (Clientele) suggest that Treasury should separate the explanation and benefits of "*lump sum*" and "*income replacement*" in Category 1 health contracts. We find the current wording unclear as it inadvertently removes existing critical illness benefits, and other such lump sum benefits;

- With regard to the "*lump sum*" benefits, there is very little detail in the draft regulations relative to amounts/limits, terms & conditions, etc. A lot more detail in this regard is required please;

- We also believe that the draft regulations do not provide adequate criteria as to exactly how the maximum benefit should be limited, other than that it should be limited to 70% of daily net income (and we again draw your attention to the fact that this creates prejudice to policyholders in our target market). Given that income is often informally earned it is therefore difficult to prove, is often not a regular source of income, and that some people (for example, retrenched individuals) do not receive income for a period of time;

- The proposed limitation(s) will further impede access to low-income earners (who cannot afford a medical scheme) to affordable meaningful health policies provided by the insurance industry, by making such policies commercially infeasible, and of little value to the low income earners.

- **ENS Comment:** *"We agree with Clientele, and argue in support thereof based on sections 6(2)(f)(iii)(a) and/or section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") read together with section 33(1) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"); and the rule of law, in particular the "principle of legality", contained in section 1(c) of the Constitution"*

Arguments under PAJA

- Whether or not delegated legislation (regulators, for example) constitutes administrative action, and falls to be governed by PAJA, is unclear. In *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) ("**New Clicks**"), Chaskalson CJ strongly viewed delegated legislation to be "administrative action", referring to it as an "essential part of public administration". This was not, however, the view of the majority of the court. That notwithstanding, the Supreme Court of Appeal has in later decisions accepted that New Clicks found delegated legislation to constitute administrative action (*see Competition Commission of SA v Telkom SA Ltd* (2010) 2 All SA 433 (SCA) at para 11); and we proceed on this basis.

- Section 6(2)(f)(iii)(aa) of the PAJA provides that an administrative action is judicially reviewable if that action itself is not rationally connected to *"the purpose for which it was taken"*. In terms of section 33(1) of the Constitution, to which the PAJA gives effect, *"everyone has the right to administrative action that is lawful, reasonable, and procedurally fair"*. Section 6(2)(f)(iii)(aa), therefore, delineates a particular aspect of reasonableness, viz., rationality, contained in section 33(1). This is inconsistent with the reasoning of the Constitutional Court which has historically in its jurisprudence distinguished between reasonableness and mere rationality (for a discussion of this distinction see Cora Hoexter *Administrative Law* 2e (2007) at 340Off; and *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at para 46). In other words, an administrative action which is irrational will be unreasonable and, consequentially, unconstitutional, even though the reverse does not necessarily hold.

- One of the policy principles that underpin the draft regulations, as well as the Constitution, is affordability and accessible healthcare services for all (See section 27 read together with section 39 of the Constitution; and para 3 of the draft regulations). To the extent that the

draft regulations do not give effect to this principle, the draft regulations are unjustifiably irrational, and must be interpreted in conformity with it. Should the draft regulations further infringe on other rights in the Bill of Rights, this may constitute an unjustifiable limitation.

- We (ENS) are advised that the draft regulations, specifically the 70% limit on Category 1 contracts, will cause a vast portion of low-income earners, who cannot afford medical scheme rates, to be negatively penalised, since many health care policies that target the low-income market will no longer be commercially feasible (and/or offer meaningful cover). As a result, the draft regulations will foreclose an indispensable mechanism for low-income earners to access health insurance, increasing their exposure to financial and health risk. Therefore, the draft regulations are irrationally connected to the purpose they wish to achieve.

- The draft regulations also arguably limit the right to equality (section 9(3)) (The 70% limit indirectly discriminates between persons on the basis of race and social origin by effectively depriving low-income earners of meaningful health benefits); the right to human dignity (section 10); the right to life (section 11); and the right to healthcare services for children (section 28(1)(c)).

- Another aspect of reasonableness, apart from rationality, contained in section 33(1) of the Constitution is proportionality. Indeed, conducting a limitations analysis in respect of the aforementioned rights, necessarily requires a court in terms of section 36(1)(e) to consider *"less restrictive means to achieve the purpose"*. The motivation for considering proportionality is *"to avoid an imbalance between the adverse and the beneficial effects..... of an action and to encourage an administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end"* (Hoexter op cit at 334). The drafters of the PAJA did not, however, include proportionality as a stand-alone provision, but rather replaced it with section 6(2)(h). Section 6(2)(h) provides that a court or tribunal has the power to judicially review an administrative action if:

  "the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.....".

- In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), O'Regan J held that section 6(2)(h) should be interpreted to require an administrative

decision to be reviewable *"if it is one that a reasonable decision-maker could not reach"* (Para 44). She continues to list factors to be considered in a reasonableness enquiry including the nature of the decision, the nature of competing interests involved, and the impact of the decision on the lives and well-being of those affected. These factors give content and scope to the concept of reasonableness, which is missing from the PAJA, and, in particular, appear overtly to contemplate a proportionality enquiry (Hoexter op cit at 349-350).

- We (Clientele) argue that less restrictive means, rather than the 70% daily income limit, be considered, namely a minimum daily capped benefit based on a combination of a fixed amount and a percentage of income. A fixed amount (e.g. R2500) set at such a level as to include the proportion of the population that are not able to afford medical scheme contributions, with the 70% income limit only applying above this limit (the greater of the two). This will prevent higher net worth individuals using insurance as a replacement for medical scheme benefits and promote low income (and no income) earners to relatively cheap insurance cover.

- To the extent that the aforementioned means suggested by us (Clientele) impact less on low-income earners than the draft regulations, but achieve the same purpose as the draft regulations, the draft regulations are disproportional and, therefore, would be reviewable for being unreasonable if they were to be promulgated in this form.

Arguments under the Principle of Legality

- In terms of section 1(c) of the Constitution, the supremacy of the Rule of Law is a founding value of South African law. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (2) SA 1115 (SCA) ("**Fedsure**") the Constitutional Court first described the principles of legality as an aspect of the Rule of Law (Cora Hoexter "The Principle of Legality in South African Administrative Law" (2004) 4 Macquarie Law Journal 165 at 181). It constrains all acts of public power regardless of whether they are categorised under PAJA as administrative action or not (Notwithstanding the broad application of this principle, however, public power should be assessed primarily with reference to PAJA: while employing the principle of legality in review applications is typically more attractive than negotiating the narrow provisions of the PAJA, where the PAJA applies, however, it must be complied with and the principle of legality cannot serve as a mechanism for evading legislation).

- Since the legislators of PAJA did not explicitly include the doctrines of vagueness in its provisions, we have chosen to deal with it under the Principle of Legality. In Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC), Ngcobo J held: "*the doctrine of vagueness is founded on the rule of law, which ....is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*". (Para 108).

- The absence of adequate criteria in the draft regulations for determining how the maximum daily benefit should be limited, and its failure to consider informal sources of income or individuals that have intermittent income, creates unreasonable uncertainty for us (Clientele), and other insurance participants, as to how it should match its conduct to conform to the draft regulations. In our view, this is an infringement on the doctrine of vagueness, explicated above, and the draft regulations should be amended to eliminate the uncertainty that is created.

- The same uncertainty and argument applies relative to the lump sum benefit(s).

Section 7.3: Marketing & Disclosures

- We (Clientele) do not agree with the prohibition on the use of the words "*medical*", "*hospital*" or "*any derivative thereof*". These are normal descriptive words in every-day language and the prohibition of their use is contrary to open transparent communication and in conflict with Treating Customers Fairly. According to the draft regulations insurers will be forced to contradict or not fully disclose the terms and conditions of the policy in the marketing materials. We should have the right to call them by their rightful names.

- ENS: The arguments in support of rationality, proportionality, and clarity, set out above would apply *mutatis mutandis*.

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Section 7.4: Reporting of Product Information

- We (Clientele) have no problem with the submission of the information to both Registrars as stipulated. We do however have a strong opinion, and concern, with this having to be done for "pre-approval". The regulations should clearly stipulate the parameters for compliance, and the insurers should comply fully with said parameters without the pre-approval of either Regulator. In addition, the pre-approval process will hamper innovation which has, by and large, benefited consumers (e.g. critical illness policies introduced in South Africa, later becoming a worldwide benefit enjoyed by millions of policyholders worldwide). We see no reason why the health insurance regulations should be any different to how current insurance regulations are imposed by the FSB. If an insurer is found to be acting outside current regulations, the FSB will investigate and act accordingly. However, as a regulator, the FSB allows the insurers, in the first instance, to decide whether they are acting within the boundaries of the existing legislation.

- ENS: The arguments in support of rationality, proportionality, and clarity, set out above would apply *mutatis mutandis*.

Section 7.5: Transitional Arrangements

- We (Clientele) are of the opinion that the legislation should not be applied retrospectively, but effective as at a date determined which is post-promulgation.

- We (Clientele) argue that any policies sold between 15 December 2008 and current-day, are binding in that we have a contractual relationship with the policyholder, the terms and conditions of which are binding upon both parties. Accordingly it would be "problematic" to impose a new set of terms and conditions which have a worsening impact (significantly reduced benefits) on the policyholder.

- Further to the above point, clarity is required around the intention of the regulator to force insurers to cancel long-term in-force policies. If this is indeed the intention then this contradicts the concept of TCF. By its very nature, long-term insurance coverage is bought over a period of time with certain policyholders claiming early on and others later on. By terminating policyholders who have already paid a premium results in them not enjoying future benefits which they have already paid for implicitly. In fact, the termination of long-term insurance policies will be tantamount to the removal of an asset from the policyholder.

- **ENS: Constitutional Arguments against the arbitrary deprivation of property**

  - Section 25 of the Constitution of the Republic of South Africa, 1996 ("Constitution") affords property rights to anyone, including both juristic and natural persons *(First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002(4) SA 768 (CC) ("FNB") at para 45.

  - At the outset, section 25 provides that *"no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"*. Therefore, it is legally permissible for the State to deprive a person of their property provided it occurs in a non-arbitrary way through a "law of general application".

  - In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) the court held that *"no universally recognised formulation of the right to property exists"* (Para 72). Therefore, a comprehensive definition of property in section 25 does not exist; although it is clear that ownership of corporeal property or land is a protected property right (Roux "Property" in Constitutional Law of South Africa, 2nd ed., Original Service: Dec 03 at 46-9).

  - With regard to the loss in value of shares or the loss of an insurance policy, it is clear that we are not concerned with corporeal property but incorporeal property. We are not aware of any case in which a South African court has considered the question whether incorporeal property is constitutionally protected. Following the guidance of the Constitutional Court in the FNB case (FNB supra at n 1), however, it is necessary to consider the nature and object of the right, as well as the need to balance public and private interests in property (Roux op cit at 46-9).

  - We would argue that as *"debts and claims that sound in money"* and *"shares in companies"* have been recognised as constitutional property in most jurisdictions (AJ Van der Walt *Constitutional Property Law* (2005) at 96 and 98), there is no reason that this approach will not be adopted in South Africa. If this view is adopted, the rights contained in equity shares and insurance policies will be considered property for purposes of section 25 of the Constitution. (In German and Australian jurisprudence, for example, is the principle that legitimate and justifiable regulatory action that *"destroys or changes"* the nature or value of a

debt or money claim or that awards the claim to someone else is *"valid like any other normal, legitimate regulatory deprivation of property"*.

- The question that the courts will have to consider are as follows:
  - Has there been a deprivation of property rights by the Government?
  - If there has, is such deprivation in terms of a law of general application and is not arbitrary?

- It is not clear to the extent that an insurance policy has a quantifiable pecuniary value, which may be ceded, its cancellation will result in loss for the policyholder. Similarly, the diminution in share value, caused by the cancellation, will result in shareholders suffering financial loss. In our view, and in the light of global trends, the answer to the first question is in the affirmative.

- The test for arbitrariness is set out in the *FNB* case and includes:
  (While the FNB judgement contemplates corporeal property only, we see no reason why the test should be any different for incorporeal property if a court were to find that incorporeal property is a property right as contemplated in section 25 of the Constitution).
  - The relationship between means employed, namely the deprivation in question and the ends sought to be achieved;
  - The complexity of the relationships;
  - The extent of the deprivation;
  - Less restrictive means to achieve the purpose, and
  - The nature of the property in question.

- This test is directly comparable to the reasonableness enquiry, and in our view, an *arbitrary* deprivation amounts to an *unreasonable* deprivation, and the arguments of irrationality and disproportionality would apply *mutatis mutandis* in this regard.

- In our view, therefore, the draft regulations unreasonably and unjustifiably infringe on the property rights of shareholders and policyholders, and should not be passed in their current form.

- We (Clientele) would like the words "introduced" and "launched" better defined.

- We (Clientele) have no problem with the regulator advising us that we are operating outside the clearly defined rules pertaining to the legislation. We do, however, have a concern with the regulator interpreting loosely formed rules.

- **ENS**: The arguments in support of rationality, proportionality, and clarity, set out above would apply *mutatis mutandis*.

In closing, should you require any clarity on any of the abovementioned points then please contact the writer on gsimpson@clientele.co.za

Assuring you our keenest attention at all times.

Yours faithfully