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**memorandum**

To Discovery Health Proprietary Limited  
Cc  
From ENSAfrica  
Date 2 July 2018

A Richards  
our ref  
your ref

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**IMPACT ON BROKERS OF CHANGES CONTEMPLATED IN THE MEDICAL SCHEMES AMENDMENT BILL, 2018**

1. On 21 June 2018 the Medical Schemes Amendment Bill (“**Bill**”) was published for public comment. Discovery Health Proprietary Limited has requested us to provide our initial thoughts in respect of the impact of the Bill on medical scheme brokers, should the Bill be brought into operation in its current form.
2. At the outset, although the Bill does not contain extensive provisions dealing with brokers, it appears clear to us that the numerous other changes proposed in the Bill, perhaps most notably the apparent replacement of prescribed minimum benefits with the concept of “comprehensive service benefits”, will require wide-ranging changes to the regulations published under the Medical Schemes Act No 131 of 1998 (“**MSA**”), alternatively the wholesale replacement of these regulations. This means that we may only fully understand the impact of the broker-related provisions of the Bill once an amended or replacement Chapter 7 (*Conditions to be Complied with by Brokers*) to the regulations is published for comment.
3. **Specific broker-related changes in the Bill**
  - 3.1. The definition of “broker” has been substituted with a new definition, but this does not appear to us to introduce any material change. The main change is introduction of the concept that brokers are persons whose business, or part thereof, entails providing broker services on a commercial basis. Although the term “commercial basis” is not defined, this would seem to us to mean that brokers are persons who receive some form of remuneration in exchange for the provision of broker services.
  - 3.2. The Bill introduces a new definition for “broker fees”. This term is defined to mean “the fees for broker services that a broker charges a member in terms of an agreement between the

broker and the member, or between the broker and an employer who acts on behalf of members in his or her employ with their explicit consent”.

3.3. The definition of “broker fees” raises a number of questions:

3.3.1. Will medical schemes continue to be entitled to deduct broker fees from member contributions or will members need to be charged directly?

As is discussed more fully below in connection with the new clause 32H (*Contribution Table*) of the MSA, it would appear to us that medical schemes will remain entitled to continue to include broker fees within total scheme contributions, and to pay these fees over to brokers.

3.3.2. What is meant by an employee’s “explicit consent”?

3.3.2.1. This term is not defined, but we would interpret this to mean that the employee has given his or her specific consent to his or her employer to contract with a broker on his or her behalf. Although the definition does not specify that this consent must be in writing, realistically an employee’s consent would need to be in writing (e.g. a term of employment in a written contract of employment or a separate written document such as an email) or a voice recording or similar in order to prove that explicit consent has been obtained.

3.3.2.2. We understand that it may be problematic for explicit employee consents to now be obtained from employers who have pre-existing agreements with brokers. In making submissions on the Bill, it may be advisable to propose that the wording of the definition be clarified to apply only prospectively to new employees (and employment contracts can be amended accordingly to cater for this consent, going forward).

3.4. Chapter 7 (*Conditions to be Complied with by Brokers*) of the regulations under the MSA refers to broker “compensation”, not broker fees, so presumably the regulations will need to be amended to accommodate the new concept of broker fees.

3.5. The definition of “broker services” has been amended to exclude “any service regarded as a normal or ordinary administrative service provided or to be provided by a medical scheme or an administrator”. This change does not appear to us to be material.

3.6. The Bill sets out a list of specific services which administration services will include which will appear in section 1(2) of the MSA. One of these services is “liaison with broker”.

- 3.7. The Bill introduces a new section 32H (*Contribution Table*) of the MSA. The section provides that the contribution table (defined as “a table forming part of the rules of a medical scheme which indicates the contributions determined by the scheme for the year in question and the allocations of such contributions by the scheme”) must specify separately in relation to each benefit option a number of specific listed items, including the amount allocated to the risk-pooled benefits, the amount allocated to the medical savings account, if any, and “the amount allocated to broker fees, if applicable”.
- 3.8. It appears clear to us that section 32H (*Contribution Table*), read with the definition of “contribution table”, means that it is intended that broker fees can be collected as part of contributions and paid over to brokers (otherwise why would you need to specify an allocation for broker fees in the contribution table).
- 3.9. In terms of section 57(3)(b) of the MSA as currently in force, a broker cannot be a trustee of a medical scheme. The new section 56B (*Composition of Board of Trustees*) in the Bill expands this prohibition to employees, directors, officers of a person who provides broker services, as well as a person who “has a material relationship with any person contracted by the medical scheme to provide administrative, marketing, broker, managed health care or other services, or with its holding company, subsidiary, associate or joint venture partner”. Unfortunately, the term “material relationship” is not defined and clarity should be sought on the meaning of this term in the comment period for the Bill.
- 3.10. The same prohibitions in paragraph 3.9 apply in relation to holding the office of chief executive officer of a medical scheme (the new name for the position of principal officer).
- 3.11. A new subsection 2A has been added to section 66 of the MSA which provides, amongst other things, that any person who carries on the business of a broker without being accredited as such in terms of the MSA is guilty of an offence and liable upon conviction to a fine not exceeding R10,000,000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment. This is not a new offence, in that it is an offence under the MSA as it is currently in force to act or offer to act as a broker without accreditation (see section 65(1), read with section 66(1)(a)), but the maximum fine has been increased from an effective R200,000 to R10,000,000.

#### 4. High-level analysis

- 4.1. Section 65 of the MSA is the primary section of the MSA dealing with brokers. It is important to note that this section is not proposed to be amended by the Bill. This means that, on the face of it and subject to the limited changes discussed above in paragraph 3, it would appear that current operations of brokers will remain as they are for brokers. As section 65 is intended to remain in force, the accreditation requirements and the ability of the Minister of Health to determine the conditions for compensation of brokers is still in place.

- 4.2. As mentioned above, however, it may be that Chapter 7 (*Conditions to be Complied with by Brokers*) to the regulations under the MSA will be amended or replaced. This means that we will not have a full understanding of what is intended for brokers until we have sight of the amended regulations applicable to brokers, if any.
- 4.3. In light of the above, as things currently stand:
- 4.3.1. All accreditation requirements applicable to brokers remain in place, including the application of the Financial Advisory and Intermediary Services Act, 2002.
- 4.3.2. The Gazetted maximum applicable commission will continue to apply.
- 4.4. In addition, as discussed more fully above, it is clear to us that section 32H (*Contribution Table*), read with the definition of “contribution table”, means that it is intended that broker fees will remain included as part of scheme contributions, which can then be paid over to brokers, when the Bill comes into force.

**ENSafrica**  
**July 2018**