



CIRCULAR

Reference : Circular 38 PMSA clarification
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Date : 21 February 2012

CLARIFICATION OF CIRCULAR 38 OF 2011 REGARDING PERSONAL MEDICAL SAVINGS ACCOUNTS

The Office has received a number of representations regarding the contents of the above circular, its interpretation and certain practical constraints relating to the implementation by 1 January 2012.

A meeting was held with a representative number of administrators and schemes to discuss the issues raised. The matter was then referred to Council and the following clarification is provided and should be read in conjunction with the requirements imposed by Circular 38 of 2011.

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Legal status of Omnihealth Judgment¹ and Circular 38 of 2011

Schemes were advised of the decision of the Omnihealth Judgment via Press release no 1 of 2007. Schemes have therefore had five years to comply with the requirements of the judgment and Regulation 10 of the Medical Schemes Act 131 of 1998 (the MSA).

The background to the judgment is that the intention of the Regulations was always to ring-fence the savings balances and to protect them from creditors of the scheme. The Registrar applied for the declaratory order to confirm this interpretation of the MSA. The judgment confirmed the Registrar's interpretation of the Act and Regulations.

The legal position is clear and therefore no useful purpose will be served in engaging in further discussions on the implications of the judgment. The nature of the savings accounts as trust monies that do not belong to the scheme is confirmed by the Omnihealth judgment and the requirements as set out in Circular 38 of 2011 are requirements of the MSA and the FI Act.

It is important to note that the Registrar is tasked with ensuring compliance with the law regarding medical schemes. It is to ensure such compliance that Circular 38 and this clarification have been issued.

The Nature of the trust monies

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[REDACTED]

[REDACTED]

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The Financial Institutions (Protection of Funds) Act 28 of 2001

These monies do however fall under The Financial Institutions (Protection of Funds) Act 28 of 2001 (FI Act). This was the finding in the Omnihealth judgment.

The following sections in particular support the requirements set out in Circular 38 of 2011:

The purpose of the FI Act is to provide for ".....the investment, safe custody and administration of funds and trust property by financial institutions".

Section 1 Definition of "financial institution"-: -means (b) any medical scheme contemplated in section 1 of the Medical Schemes Act 131 of 1998".

Trust property means "...any corporeal or incorporeal, moveable or immovable asset invested, held, kept in safe custody, controlled, administered....by any person....for, or on behalf of, another person....."

¹ Judgment of Du Plessis J in the matter of the Registrar of Medical Schemes and Lazarus Mpanana Ledwaba N.O., Alta van Wyk N.O., KwaZulu-Natal Medical Scheme and the Master of the High Court, case number 18545/06, Transvaal Provincial Division of the High Court.

Section 2(c) "A director ...official, employee...of a financial institution who invests, holds, controls,...administers any funds of trust property: (c) may not alienate, invest,...or make use of the funds or trust property,...in a manner calculated to gain directly or indirectly any improper advantage for himself...or any other person to the prejudice of ...the principal concerned.

Section 4(2) requires that trust property may not be invested "...otherwise than in the name of- (b) the financial institution in its capacity as administrator, trustee....."

Section 4(4) states that "A financial institution must keep trust property separate from assets belonging to that institution and must in its books of account clearly indicate the trust property as being property belonging to a specific principal (i.e member)."

Section 4(5) states that "...trust property invested, held, kept in safe custody, controlled or administered by a financial institution...under no circumstances forms part of the assets or funds of the financial institution..."

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Clarifying notes on the accounting for savings balances

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Savings contributions

In the event that short-payments are received, the scheme would be able to allocate it first against risk, and then against the savings component. As the savings plan contribution forms part of the registered contribution (and as such part of the contract between the member and the scheme), the scheme would be able to suspend the member until full payment is received.

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Solvency calculation

The argument regarding the suitability of the present solvency calculation has been debated for a number of years, especially whether the calculation should be based on net or gross contributions. Solvency requirements are to protect members against future events that may affect the performance of the scheme. It is not an exact predictor of a schemes ability to survive or not; it is merely a warning sign that the scheme’s financial stability is at risk.

Changes to the accounting for savings contributions occasioned by this circular does not in any way change the basic risk of the scheme. Savings contributions and claims have been excluded from the scheme’s income statement since 2007 (Circular 39 of 2007)

The net assets of the scheme have also not altered.

The debate around the adequacy or not of the existing solvency levels and requirements may continue in the future, but in the meantime the basis of the calculation will continue as provided for in the MSA and based on the registered contribution tables.

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National Credit Act 34 of 2005

The National Credit Act (NCA) specifically excludes from the application of the Act policies of insurance (section 8(2)(a)) and transactions between a stokvel and a member of that stokvel (section 8(2)(c)).

Medical schemes contracts are policies of insurance and medical schemes' activities have been likened to stokvels where members' funds are pooled for the benefit of members.

The NCA is concerned with the activities of those whose business is to provide credit to the public and who seek to profit by way of fees, charges and interest. (see JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and others 2010 (6) SA 173 (KZD) at paragraphs 16 and 19 as to what the NCA regards as a credit provider for the purposes of the Act). A medical scheme's focus is not the provision of credit and the securing of profit therefrom.

The NCA does not therefore apply to loans and advances made to members of medical schemes.

Banks Act 94 of 1990

The Banks Act regulates and supervises the business of public companies taking deposits from the public.

In section 1 Definitions the definition of a deposit states: "... But does not include an amount of money- (viii) paid to a benefit fund, as defined in section 1 of the Income Tax Act 58 of 1962, as a contribution by ...a member of that fund.

Section 1 Interpretation states that a "benefit fund means...- (b) any medical scheme registered in terms of the Medical Schemes Act.

Therefore as savings contributions are still contributions in terms of the MSA and the rules of the scheme the Banks Act does not apply to these monies.

Financial Intelligence Centre Act 38 of 2001

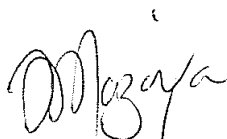
This Act applies to all Accountable Institutions' listed in schedule 1.

Institution 2 is " a person who invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act 57 of 1988". We have seen above that savings account monies do not fall under the Trust Property Control Act.

Institution- 11 includes "A person who carries on the business of lending money against the security of securities". A medical scheme does neither of those two things.

Therefore the Financial Intelligence Act does not apply to medical schemes.

Schemes are required to keep the Office updated on a regular basis on progress made in implementing the changes as clarified in Circular 38 of 2011.



Tebogo Maziya

**Head: Financial Supervision Unit
Council for Medical Schemes**

Annexure A

Illustration of additional financial statement disclosures required in terms of paragraph 17 of IAS 1 relating to Personal Medical Savings Accounts

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3. Gross contributions

Gross contributions per registered rules		
Less: Savings contributions received*		
Net contributions per statement of comprehensive income		

* The savings plan contributions are received by the scheme in terms of Regulation 10(1) and the scheme's registered Rules and held in trust on behalf of its members. Refer to note 1 to the financial statements for more detail on how these monies were utilised.

4. Relevant Healthcare Expenditure

4.1 Claims incurred excluding claims incurred in respect of risk transfer arrangements

Current-year claims		
Services provided to members in own facilities		
Movement in outstanding claims provision		
Over/ under provision in prior year		
Adjustment for current year		
Movement in provision arising from liability adequacy test		
Over/ under provision in prior year		
Adjustment for current year		
Claims paid from savings accounts*		
Managed care: healthcare services benefits		

* Claims are paid on behalf of the members from their savings plan accounts in terms of Regulation 10(3) and the scheme's registered benefits. Refer to note 1 to the financial statements for a breakdown of the movement in these balances.