

Circular to all FIA members

Insurance Laws Amendment Act, 2008 – Draft amendments to the regulations made under Section 70 to be proposed to the Minister of Finance (Binder Agreements)

1. Background

As you are aware the Insurance Laws Amendment Act was gazetted on the 5th November 2008 amending both the Long Term (LTIA) and Short Term Insurance (STIA) Acts.

The amendments that are of specific reference to members in terms of this communication concern the substitution of sections 49 of Act 52 of 1998 (LTIA) and 48 of Act 53 of 1998 (STIA) with particular reference to the insertion of sections 49A (LTIA) and 48A (STIA). The essence of these two sections being applicable to independent intermediaries and underwriting managers who have “Binder agreements” (mandates) from Insurers.

Sections 49A and 48A apply to your business if you answer ‘yes’ to the following question; “Do you “enter into” and commit the Insurer to risk which they become aware of after the fact and which is not a real time (live) transaction on the Insurers’ system?”

There has been much concern on the part of the Regulator regarding the behavior of a number of “binder holders” where they have acted outside of prudent business practice and ethical standards by, for example, not passing on premiums to the Insurer, underwriting for their own account and eventually either pocketing the premiums and disappearing or going into liquidation along with the premiums and client data.

Whilst there have been “agreements” in place between intermediaries and insurers, (not in all cases) the content has been superficial with the lines of accountability being vague.

Another area of concern to the regulator has been (and still is) the issue of the conflict of interest created by a binder holder being one and the same as the independent intermediary, this despite the “Chinese wall” structures created e.g. claim not paid by one entity benefits the results of another both controlled by the same parties.

The victims of some unscrupulous operators have been the unsuspecting client/policy holder.

Although this draft regulation also applies to the Long Term insurance act as well, it is considered that the impact in the Long Term industry will be limited, since there has not been large use of binder agreements in that industry. Where they do exist there is generally little conflict of interest or apparent abuse.

2. Regulators Reaction

The Regulators’ initial reaction to this was to prohibit all binding authorities.

In an effort to tighten up on the accountability of binder holders and insurers the regulator has introduced sections 49A and 48A which clearly set out the parameters of what is and isn't permitted, the lines of accountability between insurer, binder holder and client whilst at the same time mitigating areas of conflict of interest.

Going hand in hand with the Act are the regulations which expand on and give substance to the application of the Act. The process in drafting these regulations has taken the better part of eighteen months and was done by means of a work group comprising the FSB, FIA, SAIA and SAUMA, meeting, vigorously debating and consulting on all issues pertinent to practicable and enforceable regulation. The FIA were represented by Seamus Casserly and Barry Taylor (Short Term) and Gavin Came (Long Term) with Barry Taylor being invited to be part of the FSB regulations drafting team.

3. Action required

A copy of the draft regulations together with an explanatory memorandum is attached for your consideration and comment. We stress that the applicability is one of where a "binding authority" is in place or contemplated. Clearly there are issues that may be of concern to you, such as section 8(5) policy fees and other remuneration as well as clarity on the definition and roles of independent intermediary etc. These are a few issues that are currently being dealt with separately by the regulator and drafting team and will be made known as soon as possible. However this will not hold up the agreement of the regulations.

In order to manage the responses we request that any questions and comments be channeled through Peter Atkinson of the FIA National Office by no later than the 8th October. This will give us the opportunity to coordinate the responses to be with the FSB by the deadline of the 31 October 2010. This date will not be extended as the draft regulations will need to be put before Parliament by early November 2010.

Barry Taylor – Chair Short-Term Exco