



**BHF Southern African Conference**

**Medical Scheme Governance in view of the Consumer  
Protection Act and the Protection of Personal  
Information Bill**

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■ Corporate Governance

# WHAT IS CORPORATE GOVERNANCE?

- “Corporate governance mainly involves the establishment of structures and processes, with appropriate checks and balances that enable directors to discharge their legal responsibilities, and oversee compliance with legislation.”

*King III*

# WHAT IS CORPORATE GOVERNANCE?

- “The term ***medical scheme governance*** focuses primarily on the *manner* by which medical schemes are *directed and managed*. It encompasses a variety of activities such as strategic development, risk management and performance evaluation.
- There exists a need for effective governance structures and internal control systems to identify, monitor and control potential *risks*. Medical schemes’ governance is essential not only to the well-being of the individual medical scheme, but also as a critical ingredient in maintaining a financially sound and robust private health care industry.”

***Proposed Corporate Governance Guidelines  
Office of the Registrar of Medical Schemes (2008)***



King III

 a meeting  
of minds  
The BHF Southern  
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Sun City 22-25 August 2010

- Implementation Date: 1 March 2010
- Application: To all entities regardless of manner and form of incorporation or establishment – public, private and non-profit sectors
- Medical schemes: Supplement common law
- Onerous reporting requirements
- Corporate governance practices, codes and guidelines lift the bar of what is regarded as appropriate standards of conduct
- Failure to meet recognised standards of governance (even if not legislated) may render a board or individual director (trustee) legally liable



■ Duties of Trustees

- S 57 (Medical Schemes Act): Trustees must be fit and proper to *manage* business of medical scheme
- Medical Schemes Amendment Bill, 2008: BOT must *direct* business of scheme
- Number of different duties
- Fiduciary duty
- Corporate governance
- Common law: Duty of Obedience
- Section 57(4)(h):  
*“Ensure that the rules, operation and administration of the medical scheme comply with the provisions of this Act and all other applicable laws.”*



Consumer Protection Act

- Implementation
  - 24 April 2010:
    - National Consumer Commission and Minister's powers to make Regulations as well as Section 61 (Product Liability)
  - 24 October 2010: Balance of the Act...could be extended for 6 months
    - Regulations are still outstanding
- Extensive consumer protection envisaged
- If other legislation also applicable:
  - All apply concurrently to extent possible...without contravening one
  - Otherwise, one offering greater protection to consumer applies

# APPLICATION OF ACT TO MEDICAL SCHEMES

- All transactions (agreements) in RSA for *supply of goods and performance of services*
- Certain Exclusions e.g.:
  - When consumers are juristic persons and annual turnover / asset value exceeds threshold value to be determined by Minister
  - Transactions falling within industry-wide exemption
    - Responsibility of Regulatory Authority

# APPLICATION OF ACT TO MEDICAL SCHEMES

- “Services” *include*
  - Undertaking performed for direct / indirect benefit of another
  - Provision of education, information, advice or consultation (Except advice subject to FAIS Act)
  - Undertaking, underwriting or assumption of risk by person on behalf of another  
(Excluding advice / intermediary services ito FAIS Act, Long-Term and Short-Term Insurance Acts)
- Application:
  - Medical scheme cover
  - Medical scheme administration services
  - Risk-sharing arrangements
  - Medical services (treatment, etc.)

- “Goods” *include*
  - Anything marketed (supplied) for human consumption
  - Any tangible object, including any medium on which anything is written or encoded
  - Any information, data, software, code or other intangible product written or encoded on any medium, license to use intangible product
- Application:
  - Medicines
  - Devices / Consumables
  - Prosthesis
  - Software system
  - Membership records
  - Reports

- Consumers
  - Beneficiaries of medical schemes
  - Patients
  - Health care practitioners
- Suppliers
  - Medical schemes
  - Medical scheme administrators
  - Service providers
  - Managed care organisations

# ACTIVITIES REGULATED

- All marketing activities related to goods and services subject to Act
- Representations regarding material facts may not be false, misleading or deceptive representations e.g.
  - Benefit entitlements
  - Most pertinent risk factors / side-effects to be discussed with patient
  - Off-label prescription of products
- Unfair discrimination prohibited in terms of supply, quality, price, target marketing, treatment (interaction), etc.
- Loyalty programmes

# ACTIVITIES REGULATED

- Unethical/unconscionable conduct prohibited
  1. Physical force, coercion, undue influence, pressure, duress, harassment or unfair tactics by supplier / agent when
    - Supplying goods / services
    - Enforcing agreement to supply goods / services
    - Collecting payment for goods / services
  2. Unconscionable if supplier knowingly takes advantage of fact that consumer is substantially unable to protect own interests because of
    - *Physical, mental disability; illiteracy; ignorance; inability to understand language of agreement; any similar factor*
- Care to be exercised
  - Debt collection
  - Application of rules / legislation

- Quality Service
  - Right to timely performance and completion of services
  - Timely notice of unavoidable delay
  - Performance of services in manner and of quality that persons are generally entitled to expect
  - Service does not meet standards: Remedy defect / Refund reasonable proportion of price

# ACTIVITIES REGULATED

- Notices, documents provided / displayed to consumers in terms of CPA or *any other law* (e.g. Medical Schemes Act)
  - Form prescribed
  - If no form prescribed: Must be in plain language (defined, average literacy skills, understand content/import, etc.)
  - E.g. Scheme rules, protocols, informed consent

- Sales Records (Remittance advices, invoices, etc.)
- Contract terms e.g.
  - *Unfair, unjust and unreasonable* contract terms e.g.
    - Excessively one-sided in favour of person other than consumer
    - So adverse to consumer that inequitable
  - *Impermissible* terms and conditions (void) e.g.
    - Waive or deprive consumer of right in terms of CPA
    - Indemnification of supplier for gross negligence
  - Bring specifically to attention of consumer in prescribed form, if e.g.
    - Limit risk / liability of supplier e.g. benefit limits
    - Constitute assumption of risk / liability by consumer
    - Is acknowledgement of any fact by consumer

# ACTIVITIES REGULATED: LIABILITY (S 61)

- Producer, importer, distributor or retailer liable *irrespective* of any *negligence* on their side for harm caused wholly or partly as consequence of
  - Supplying unsafe goods (E.g. extreme risk of personal injury)
  - Product failure, defect or hazard in goods or
  - Inadequate instructions / warnings to consumer to hazard associated with goods
- Entire supply chain could be held liable (“jointly and severally”)
  - Doctor prescribing medicine
  - Scheme enforcing particular formulary

- Exceptions in respect of liability, e.g.
  - Unsafe product characteristic, failure, defect or hazard
    - Attributable to compliance with public regulation
    - Unreasonable to expect distributor / retailer to have discovered it
    - Did not exist at time that goods were supplied
    - Attributable to compliance with instructions
  - Claim for damages brought 3 years after death / injury / last date on which economic loss suffered
- Harm...apportioned

# ENFORCEMENT

- Individuals, class actions, associations on behalf of members, person acting in public interest with permission from Tribunal / court, accredited consumer protection group, etc.
- Mechanisms...in addition to other mechanisms that exist in terms of other legislation
  - National Consumer Commission, National Consumer Tribunal
  - Ombud, Courts, Alternative Dispute Resolution
- Various offences and penalties...Fine and/or imprisonment of 12 months
- Administrative fines (Tribunal)
  - Maximum = Greater of 10% of annual turnover or R1m
  - Factors to be considered



# ■ Protection of Personal Information Bill

# PROTECTION OF PERSONAL INFORMATION BILL

- Status
- Transitional period
- Give effect to Constitutional right to privacy
  - Safeguarding of personal information
  - Comprehensive regulation of processing, storage and disclosure of confidential information
- Significant implications for persons / entities receiving, processing and/or storing personal information
- If other legislation exists that regulates processing of personal info
  - It operates concurrently with Bill, if possible
  - If not possible, more extensive safeguards for protection of personal information in other legislation prevail

# APPLICATION

- Receive personal information about members and health care practitioners
- Service providers receive information about patients / beneficiaries
- Share information (Referrals, business relationships, etc.)
- Disclose information to administrators, MCOs, insurers, others
- Keep medical records
- Selling of information

# PERSONAL INFORMATION: DEFINITION

- Information relating to identifiable, living, natural person / juristic persons, *such as*
  - Information relating to race, gender, sex, pregnancy, marital status, sexual orientation, age, physical or mental health, well-being, disability, birth
  - Information relating to medical
  - Any identifying number, e-mail address, physical address, telephone number
  - Blood type or any other biometric information
  - Personal opinions, views or preferences of person
  - Views or opinions of another individual about person
  - Name of person if it appears with other personal information relating to person or if disclosure of name itself would reveal information about person

- **Data subject**
  - Person to whom personal information relates
- **Responsible party**
  - Public or private body or any other person that determines purpose of and means for processing personal information
- **Information Protection Officer**
  - Private body: Head (PAIA)

- Inform Regulator of processing
- Consent
  - Data subject (exceptions)
  - Person may object
  - Regulator can consent in certain circumstances
- Collection
  - Data subject must be aware of collection...prescribed information
  - Collect from data subject...only from another source in certain defined circumstances
  - Collect for specific, explicitly defined and lawful purpose related to function or activity of responsible party

- Information collected must be complete, accurate, not misleading, updated where necessary....correct
- Processing of info related to children under parental control, health, sexual life, race, etc. only in permitted circumstances
  - Consent
  - Health information
    - Necessary for treatment and care of person; administration of medical practice
    - Necessary to assess insured risk; performance of medical scheme agreement; enforcement of contractual rights and obligations
    - Obligation of confidentiality imposed

- **Records**
  - Only keep for as long as necessary to achieve purpose of collection and processing (exceptions)
- **Security safeguards**
  - System requirements
  - Inform Regulator and data subject (member) of security breaches
- **Codes of Conduct**
- **Register with Regulator as Information Protection Officer**



■ Conclusion

# RESPONSIBILITY OF TRUSTEES

- Ensure & monitor compliance....understand responsibilities
- Identify risks
- Systems & Processes
- Reporting
- Fiduciary responsibility
- Liability
- Cost of compliance

- *Good corporate governance is a powerful force to build business excellence*
- *Greatest gain is for the members*



■ Thank You



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