

MEMBER COMMUNIQUÉ

**To: The Board of Trustees
The Principal Officer
Administrators**

30th August 2006

MC.B06.81

Dear Colleagues,

THE NATIONAL CREDIT ACT AND MEDICAL SCHEMES

Guidelines for Contracting with Third Parties

Introduction

The detailed legal opinion on this issue entitled 'A Critical Analysis of the National Credit Act in the Context of Medical Schemes Business' was sent out to BHF members in a Communiqué on **22 August 2006 (MC.B.06.79)**. Members are urged to read it in order to more fully understand the background to this document.

Practical guidelines on contracting issues involving the National Credit Act are given below.

Commencement

The National Credit Act will come into effect in phases as follows –

1 June 2006	sections 1 to 11 (Chapter 1); sections 12 to 25 and 35 to 38 (Chapter 2, Part A, C and D); sections 39 to 59 (Chapter 3); section 69; section 73; sections 134 to 152 (Chapter 7); sections 153 to 162 and sections 164 to 170 (Chapter 8 excluding section 163); sections 171 to 173 (Chapter 9); Schedule 1; Schedule 2 and Schedule 3
1 September 2006	sections 26 to 34 (Chapter 2, Part B); sections 67, 68, 70 and 72
1 June 2007	sections 60 to 66 (Chapter 4, Part A); section 71; sections 74 to 88 (Chapter 4, Part C and D); sections 89 to 123 (Chapter 5); sections 124 to 133 (Chapter 6); section 163 shall come into operation.

DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijn

FK Robertson MCT Schultz

P Tlhabi

Dr D L Pearmain, Head: Health Services and Legislation

© Board of Healthcare Funders, August 2006



**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa

Tel: +27 11 537-0200
Fax: +27 11 880-8798

e-mail:

bhf@bhfglobal.com

Client Services:

0861 30 20 10



B·H·F
www.bhfglobal.com

DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnen

FK Robertson MCT Schultz

P Tlhabi

Juristic Persons

There is only limited application of the Act when the consumer is juristic person. Since these guidelines are given from the perspective of medical schemes as consumers of credit and since medical schemes are juristic persons this means that –

The following provisions of the NCA do *not* apply to a credit agreement or proposed credit agreement where the medical scheme is the credit consumer:

- (a) Chapter 4 - Parts C and D;
- (b) Chapter 5 - Part A - section 89 (2) (b);
- (c) Chapter 5 - Part A - section 90 (2) (o); and
- (d) Chapter 5 - Part C.

The detailed legal opinion referred to previously deals with the question of when, if ever, a medical scheme is a credit provider and so this aspect will not be repeated here.

Chapter 4, Parts C and D deal with credit marketing practices and over indebtedness and reckless credit. This means amongst other things that credit providers will not be penalised for granting credit to medical schemes if they do not first check the scheme's creditworthiness.

Chapter 5 section 89(2)(b) states that subject to subsections (3) and (4), a credit agreement is unlawful if the agreement results from an offer prohibited in terms of section 74 (1). This latter section states that a credit provider must not make an offer to enter into a credit agreement, or induce a person to enter into a credit agreement, on the basis that the agreement will automatically come into existence unless the consumer declines the offer. Section 89(2)(b) does not apply where medical schemes are consumers of credit because the whole of Part C of Chapter 4 does not apply and the former contains a reference to a section in the latter. Similarly section 90(2)(o) does not apply because it contains a reference to section 103 (4) which falls into Part C of Chapter 5. The latter is not applicable to credit agreements where the consumer is a juristic person.

Members are advised to bear the foregoing in mind when applying the guidelines below. These guidelines relate to contracts between medical schemes and persons *other than* their members

Practical Guidelines

1. All credit agreements as defined in the National Credit Act (NCA) fall within the scope of the NCA whether a credit provider is registered as such *or not*. Do not be deceived into believing that just because the third party is not a registered credit provider that the agreement is not a credit agreement that falls within the scope of the Act.
2. If an entity is registered as a credit provider under the NCA, this does *not* mean that every contract to which that entity is a party is a credit agreement for purposes of the Act. A registered credit provider can enter into contracts that are not credit agreements under the Act.
3. The Act only applies to credit agreements that satisfy the requirements of section 8. A good indication of whether or not an agreement is a credit agreement under the NCA is to ask –
 - (a) Is there provision in the contract for the scheme to incur debt that is payable within more than 30 days of the date on which the debt was incurred?

**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa

Tel: +27 11 537-0200

Fax: +27 11 880-8798

e-mail:

bhf@bhfglobal.com

Client Services:

0861 30 20 10

- (b) If so, does the contract impose a penalty for late payment in the form of interest, a higher rate of interest, a penalty amount or a fee in respect of the late payment?

If the answer to *both* questions is in the affirmative then schemes should be alerted to the fact that the proposed transaction is likely to fall under the National Credit Act and investigate the matter further.

4. Only the following provisions of the NCA apply to an incidental credit agreement:
- (a) Chapters 1, 2, 7, 8 and 9;
 - (b) Chapter 3, sections 54 and 59;
 - (c) Chapter 4, Parts A and B;
 - (d) Chapter 4, Part D, except to the extent that it deals with reckless credit;
 - (e) Chapter 5, Part C, subject to subsection (3) (a);
 - (f) Chapter 5, Parts D and E, once the incidental credit agreement is deemed to have been made in terms of subsection (2); and
 - (g) Chapter 6, Parts A and C.
5. The parties to an incidental credit agreement are *deemed* to have made that agreement on the date that is 20 business days after-
- (a) the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or
 - (b) a pre-determined higher price for full settlement of the account first becomes applicable,

unless the consumer has fully paid the settlement value before that date.

6. Medical schemes and health service providers, or alternatively medical scheme members and health service providers, could very well be deemed to have entered into an incidental credit agreement in terms of the provisions of section 5 of the Act (quoted in paragraph 6 above) where the health service provider starts to charge interest or a late payment fee.

7. It must be noted that whether the parties intended to or not, they will be *deemed* to have entered into an incidental credit agreement if they satisfy the criteria for such an agreement in the NCA.

8. In contracts between medical schemes and health service provider networks, terms that impose interest or a penalty fee or charge if payment is not made within a certain date are likely to satisfy the definition of an incidental credit agreement.

9. It must be noted that if a provider of health services is party, as a credit provider, to more than 100 incidental credit agreements, he or she does *not* have to register as a credit provider because section 40 of the Act specifically excludes incidental credit agreements from the requirement to register as a credit provider.

10. According to the NCA, an 'incidental credit agreement' means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

- (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
- (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the



B·H·F
www.bhfglobal.com

DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekgwa A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnen

FK Robertson MCT Schultz

P Tlhabi

**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa

Tel: +27 11 537-0200

Fax: +27 11 880-8798

e-mail:

bhf@bhfglobal.com

Client Services:

0861 30 20 10

higher price being applicable due to the account not having been paid by that date.

11. The provisions reflected above indicate certain contractual terms that are often standard in many agreements, and in service level agreements in particular.

Service level agreements are often signed in situations where an ongoing and essential service for business operations is required. Examples include information technology service contracts - especially for services such as computer network administration and maintenance, medical scheme benefit management by a third party (control of utilisation of benefits by scheme members) e.g. a PBM a managed care organisation etc.

12. Schemes should take special note of contractual terms which state that-

- (a) a higher fee or price is payable after a certain period of time has elapsed without payment by the medical scheme;
- (b) interest will be charged at a rate of x% on overdue payments;
- (c) an amount of Rx is payable for every day/week/month that payment is overdue;
- (d) the service to be provided by the other party is the payment of a certain kind of claim on behalf of the medical scheme in return for a repayment of the amount by the scheme together with a fee or charge for the service.

These contractual terms can be strong indicators that the agreement is a credit agreement that will fall under one of the subsets of such agreements identified in the NCA.

13. It is important to distinguish whether an agreement is an incidental credit agreement on the one hand or a credit facility or other credit transaction on the other because only certain provisions of the NCA apply to the former (see paragraph 4 above).

14. It is also important to bear in mind that one can inadvertently enter into an incidental credit agreement when payment becomes overdue and the creditor takes certain of the punitive actions referred to above. An incidental credit agreement only comes into existence if the creditor takes certain actions such as charging interest on the overdue account. Thus an agreement can change its status from a non-credit agreement to a credit agreement as a result of the actions of the creditor.

15. If an entity is party to 100 credit agreements, *other than incidental credit agreements*, or more as a *credit provider* then that entity must apply to be registered as a credit provider under the NCA. It is therefore unlikely that individual medical practitioners and other health professionals who charge interest on overdue accounts will have to register as credit providers. However caution should be exercised in the case of large groups such as pathologists, private hospitals and suppliers of pharmaceutical products and medical devices and provider networks since they may be more likely to enter into direct credit agreements as opposed to merely incidental ones.

16. There is a possibility that medical schemes may enter into contracts with third parties that constitute a credit facility in terms of the NCA. Section 8 of the Act lists the criteria for a credit facility as follows -

An agreement, irrespective of its form constitutes a credit facility if, in terms of that agreement-

- (a) a credit provider undertakes-

Dr D L Pearmain, Head: Health Services and Legislation
© Board of Healthcare Funders, August 2006



B·H·F
www.bhfglobal.com

DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnem

FK Robertson MCT Schultz

P Tlhabi

**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa
Tel: +27 11 537-0200
Fax: +27 11 880-8798
e-mail:
bhf@bhfglobal.com
Client Services:
0861 30 20 10



DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnem

FK Robertson MCT Schultz

P Tlhabi

- (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
- (ii) either to-
- (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
- (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
- (b) any charge, fee or interest is payable to the credit provider in respect of-
- (i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or
- (ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.
- 17 Where a third party agrees, for instance, to process pharmacy claims and to pay those that are in accordance with the scheme rules and then to recover the money from the scheme together with interest or a service fee or charge at a later date, this could constitute a credit facility in terms of the NCA.
- 18 Failure to register as a credit provider under the NCA as required means that all credit agreements entered into are unlawful. They are thus unenforceable in a court of law.
- 19 It is therefore important for medical schemes to ask the following questions when considering whether or not to enter into a contract with a third party –
- (a) Is the contract a credit agreement under the NCA? If so,
- (i) Does the third party know its status under the NCA? If so, what is such status? Does it qualify as a credit provider under the NCA?
- (ii) Is the third party required to register under the NCA? If so, has it done so?
- (b) Is the third party's business of such a nature that it is likely to enter into large numbers of direct credit agreements e.g. a bank or other financial institutions?
- (c) Is the contract an incidental credit agreement or does it contain a credit facility or constitute a credit transaction as defined in the NCA?
- (d) Is the third party aware that the proposed agreement is a credit agreement under the NCA?
- (e) Are there any terms in the contract that are prohibited by the NCA?
- 20 If a third party has not registered as a credit provider and is likely to be required to register then the scheme should not enter into the contract unless proof of registration is furnished.
- 21 If a scheme is uncertain whether or not the other party to the contract is required to register as a credit provider or not then it should ask the other party to confirm whether or not it is required to register. If the other party states that it does not have to register because it is not party as a credit provider to more than 100 credit agreements then scheme may choose to enter into the contract.
- 22 Not all credit providers have to register as such under the NCA. Only the larger ones will have to. This means that the proposed agreement may still be a credit agreement under the NCA even though the credit provider is not registered. The agreement will therefore still have to meet the requirements of the NCA and should be checked to ensure that it is lawful under the Act.

**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa

Tel: +27 11 537-0200
Fax: +27 11 880-8798
e-mail:

bhf@bhfglobal.com
Client Services:
0861 30 20 10



DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnen

FK Robertson MCT Schultz

P Tlhabi

- 23 A provision of a credit agreement is unlawful if –
- (a) its general purpose or effect is to-
 - (i) defeat the purposes or policies of the Act;
 - (ii) deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;
 - (b) it directly or indirectly purports to-
 - (i) waive or deprive a consumer of a right set out in this Act;
 - (ii) avoid a credit provider's obligation or duty in terms of this Act;
 - (iii) set aside or override the effect of any provision of this Act;
 - (iv) authorise the credit provider to-
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;
 - (c) it purports to waive any common law rights that-
 - (i) may be applicable to the credit agreement; and
 - (ii) have been prescribed in terms of subsection (5);
 - (d) the provision results from an offer prohibited in terms of section 74 (2) or (3);
 - (e) it purports to make the agreement subject to a supplementary agreement prohibited by section 91 (a);
 - (f) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by section 91 (a); or
 - (g) it purports to exempt the credit provider from liability, or limit such liability, for-
 - (i) any act, omission or representation by a person acting on behalf of the credit provider; or
 - (ii) any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement;
 - (h) it expresses an acknowledgement by the consumer that-
 - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the credit provider or a person on behalf of the credit provider; or
 - (ii) the consumer has received goods or services, or a document that is required by the Act to be delivered to the consumer, which have or has not in fact been delivered or rendered to the consumer;
 - (i) it expresses an agreement by the consumer to forfeit any money to the credit provider if the consumer-
 - (i) exercises the right of rescission in terms of section 121, except to the extent contemplated in section 121 (3) (b); or
 - (ii) fails to comply with a provision of the agreement before the consumer receives any goods or services in terms of the agreement;
 - (j) it purports to appoint the credit provider, or any employee or agent of the credit provider, as an agent of the consumer for any purpose other than those contemplated in section 102 or deems such an appointment to have been made;
 - (k) it expresses, on behalf of the consumer-
 - (i) an authorisation for any person acting on behalf of the credit provider to enter any premises for the purposes of taking possession of goods to which the credit agreement relates; or
 - (ii) a grant of a power of attorney in advance to the credit provider in respect of any matter related to the granting of credit in terms of the Act;

**BOARD of
HEALTHCARE
FUNDERS
of SOUTHERN AFRICA**

(Association Incorporated
under Section 21
Registration number
2001/003387/08)

37 Bath Avenue
Rosebank 2196
P O Box 2324
Parklands 2121
Johannesburg
South Africa

Tel: +27 11 537-0200

Fax: +27 11 880-8798

e-mail:

bhf@bhfglobal.com

Client Services:

0861 30 20 10



B·H·F
www.bhfglobal.com

DIRECTORS

Executive

ZH Zokufa (Managing)

Non-Executive

M Mxenge (Chairman)

A September (Namibia)

(Deputy Chairman)

TEG Borrill B Brooks

J Broomberg

MT Chaora (Zimbabwe)

B Dick

KA Ebineng (Botswana)

L Gabela BL Khan

J Mathekga A Meyer

N Motlana SG Motuba

B Nkosi RJ Parsons (British)

M Ramokgopa AO Rijnen

FK Robertson MCT Schultz

P Tlhabi

- (iii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed;
- (iv) a consent to a pre-determined value of costs relating to enforcement of the agreement except to the extent that is consistent with Chapter 6 of the Act;
- (v) a limitation of the credit provider's liability for an action contemplated in subparagraph (iv); or
- (vi) a consent to the jurisdiction of-
 - (aa) the High Court, if the magistrates' court has concurrent jurisdiction; or
 - (bb) any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept;

- (l) it expresses an agreement by the consumer to-
 - (i) deposit with the credit provider, or with any other person at the direction of the credit provider, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or
 - (ii) provide a personal identification code or number to be used to access an account;
- (m) it purports to direct or authorise any person engaged in processing payments to give priority to payments for the credit provider over any other credit provider;
- (n) it purports to authorise or permit the credit provider to satisfy an obligation of the consumer by making a charge against an asset, account, or amount deposited by or for the benefit of the consumer and held by the credit provider or a third party, except by way of a standing debt arrangement, or to the extent permitted by section 124 of the NCA; or
- (o) (not applicable where the consumer is a juristic person)

- 24. In any credit agreement, an abovementioned provision is void as from the date that the provision purported to take effect.
- 25. If a court cannot sever the offending provision from the rest of the agreement, the entire agreement can be declared void. This is not desirable given the time, effort and money it takes to negotiate an important agreement and the effect of the agreement on the scheme's business. It is therefore critical to ensure that when entering into a credit agreement with a third party, none of the prohibited clauses appear therein.
- 26. It is necessary to bear in mind that the fact that the other party does not regard an agreement as a credit agreement under the NCA or does not know that it is a credit agreement under the NCA does not change the fact that it is one.
- 27. In terms of the Medical Schemes Act a scheme may not directly or indirectly borrow money without the prior approval of the Council or subject to such directives as the Council may issue (s35(6) of the Medical Schemes Act). This must be borne in mind by schemes that propose to take the part of a credit consumer in terms of a credit agreement.

Compiled by:

Dr D L Pearmain

Head: Health Services and Legislation

Dr D L Pearmain, Head: Health Services and Legislation

© Board of Healthcare Funders, August 2006