CONTENTS:

Companies Act of 2008 as amended

There are four types of profit companies: "state-owned", "private", "personal liability" or "public".

- **State-owned** if owned by the State;
- **Private** if its Memorandum of Incorporation ("MOI") prohibits it from offering any of its securities to the public and restricts its securities from being transferred;
- **Personal liability** if it meets the criteria for private and its MOI states it is a personal liability company;
- **Public** in all other cases. We have considered the definitions and, taking into account the requirements of the existing insurance legislation as well as the issuing of shares to clients etc, we concluded that our insurance companies will be public companies. Section 35(2) of the Act provides that shares do not have a nominal or par value, subject to item 6 of Schedule 5 (Schedule 5 deals with transitional arrangements). The relevant points of item 6 in essence provide that shares of a pre-existing company issued with a nominal or par value before the effective date, continue to have the nominal or par value but subject to the requirements of the regulations. However, the Regulations must preserve the rights of shareholders associated with such shares at the effective date or if not, provide for the company to compensate shareholders for the loss of any such rights. Regulation 31 (2) provides that a preexisting company may not authorize any new par value shares or shares having a nominal value on or after the effective date. Regulation 31 (3) provides that, if immediately before the effective date, a pre-existing company has any authorised class of par value or nominal value shares from which it has not issued any shares before the effective date, or from which it has issued shares, all of which had been re-acquired by the company before the effective date: (a) the company may not issue any shares of that class on or after the effective date until it's converted that class of shares in accordance with paragraph(b); and (b) the board of the company may convert that class, or those classes, of authorised shares to shares having no nominal or par value, by adopting a board resolution to do so, and filing a notice of that resolution (using the specified form), without charge, at any time after the effective date. The authorised shares which we issue to clients for the purposes of incepting cells are currently par value shares or shares having a nominal value. As such, in accordance with the transitional requirements, we may be required to convert any authorised but unissued shares to be shares of no par value by way of board resolutions. An important point for clients to note is that shareholders' rights should remain unaffected. Section 6 in essence provides that a company is not permitted to make any distribution (the definition of which includes dividends) unless:

- it pertains to an existing legal obligation or court order;
- a board resolution authorises it;
- it reasonably appears that the solvency and liquidity test will be satisfied immediately after completing the distribution; and
- a board resolution is passed confirming that the solvency and liquidity test has been applied and the company will satisfy the test requirements immediately after completing the

distribution. Taking into account our current practices, we do not see any difference in practise regarding the payment of dividends to client shareholders, save now for the explicit assessment of the specific requirements for the solvency and liquidity test as set out in the new Act. Section 133 of the Act provides that during business rescue proceedings, no legal proceedings, including enforcement action, may be taken against the company in respect of which business rescue proceedings may have been instituted or in relation to any property belonging to the company except:

- with the written consent of the practitioner;
- with the leave of the court and in accordance with any terms the court considers suitable;
- as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
- criminal proceedings against the company or any of its directors or officers;
- proceedings concerning any property or right over which the company exercises the powers of a trustee; or; and
- proceedings by a regulatory authority in the execution of its duties after written notification to the business practitioner. During business rescue proceedings, a guarantee (excluding guarantees issued as insurance policies by a registered short-term insurer) or surety by a company in favour of any other person may not be enforced against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances. Section 136(2) provides that subject to the provisions of sub-section 136(2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may:
- entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that:
- arises under an agreement to which the company was party at the commencement of the business rescue proceedings; and
- would otherwise become due during those proceedings;
- apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in sub- section 136(1)(a) (note: this sub-section that deals with employees that were in employment immediately before the beginning of the proceedings). In terms of our business, this would be of relevance to us in the event that a particular client who is a cell owner and is therefore subject to our shareholders agreement) becomes unable to respond to his obligations as set out in the agreement when called upon to do so. However, various exceptions are provided for as set out above and in this respect, remedies may be enforced through various means, for example with the written consent of the practitioner or through the courts. Notwithstanding the application of this general moratorium, management is confident that a number of controls inherent to the business model will mitigate the possible risks including:
- Each clients cell is actively monitored to ensure that it is adequately capitalised at all times on a stand-alone basis;
- Formal, periodic onsite reviews of clients cells are performed which includes an assessment of the financial soundness of each client. Collectively, these and other controls mitigate the risk that a client would end up in a situation requiring business rescue without advance warning and appropriate actions having been taken.

Revised Guidance Note Issued by the FSB dealing with Intermediary Services & Representatives (FAIS)

The Financial Services Board issued a revised guidance note (revision date 12 January 2011) which seeks to clarify the confusion regarding persons that provide intermediary services on behalf of licensed financial service providers and whether or not such persons should be regarded as representatives in terms of the Financial Advisory and Intermediary Services Act ("FAIS Act").

High level summary

- If such a person provides advice to a client (as defined) for or on behalf of a licensed financial services provider in terms of conditions of employment or any other mandate, the answer is always YES; they will be regarded as a "representative".
- If however, such a person does not provide advice, reference must be made to the exclusions which are found in the definition of the term "representative". If the intermediary services which the person is providing are excluded, the answer would be NO; they would not be regarded as "representative". The term "representative" is defined as any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service:

High level summary

(a) does not require judgment on the part of the latter person; or

(b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.

In our view, this revised guidance note is welcomed as it seeks to provide clarity in an area where many of our clients struggle in determining whether certain staff should be representatives. Particularly taking into account the business and distribution models of many of our clients including specifically our volume and affinity clients who sell insurance into their client bases as ancillary offering to their core business i.e. retail stores, car dealerships etc.

To summarise; although a company may need to be licensed as a financial service provider performing intermediary services, any staff involved in the offering of financial services (that are not providing advice) should be assessed to determine whether their functions are purely clerical, technical etc and their actions do not require judgement or lead a client to any specific transaction. (It is our recommendation that affected clients obtain a copy of the guidance note and review the contents carefully to position themselves to perform the subjective test required).

Amendments to the Policyholder Protection Rules: Claims Rejections

The Policyholder Protection Rules for Short-term and for Long-term insurers (PPR) were amended as published in Government Gazette No. 33881, which was released in December 2010. The amendments dealt with variations for the rejection of claims by insurers.

- Insurers, when rejecting a claim, must do so in reasonable time and must notify policyholders within 10 days of their decision;
- Policyholders must be informed of the reasons for a claim being rejected or the quantum being disputed;
- Policyholders must be afforded a minimum period of 90 days to make representations regarding rejected claims or a dispute regarding the quantum of a claim

For policies entered into before 1 January 2011 - any time limit for instituting legal action must be extended by the 90 day period given to the policyholder for representations regarding the rejection or dispute of a claim or the quantum of a claim and a period of at least 6 months given to institute legal action;

- For policies entered into after 1 January 2011 – such policies may not include the 90 day period given to policyholders to make representations regarding rejected or disputed claims in calculating the time limits for the instituting of legal action;
- For policies entered into after 1 January 2011 – such policies must allow a period of not less than six months after that 90 day period for the institution of legal action;
- Policyholders have to be informed that they may make representation directly to the insurer and the insurer has to respond within 45 days;
- Should there be no clause in a policy relating to time periods for instituting legal action, the policyholder has to be referred to the Prescription Act.
- Policyholders must be informed of their right to lodge a complaint with the appropriate ombud under the Financial Services Ombud Scheme Act, 2004.