



WALK the line

In part one of this article series we discussed general issues around moving books of business, and we concluded that this topical, but also often confusing and complicated subject in the financial services industry, can be defined as a change to the contracting parties to an insurance policy, or a change to the contracting parties in an agreement dealing with insurance policies, or the replacement of one insurance policy with another where such a replacement consists of the cancellation of one insurance policy and entering into another insurance policy soon thereafter. (Read the full article in the November 2016 edition)

We will now focus on the moving of a book of business by changing or replacing the following contractual relationships:

- A broker wants to move insurance policies from one insurer to another insurer while that broker remains the broker for the client; and
- one broker wants to move the functions he performs with respect to insurance policies to or from another broker while the insurance policies remain in force.

From one insurer to another

The relationship that would need to change to give effect to this type of move of a book of business is the contractual relationship between the policyholder and the insurer.

The broker is not a party to the contractual relationship that needs to be amended to give effect to this move. The broker might however be able to influence either of the parties to the insurance contract to change their contractual relationship to give effect to the move of the book of business.

If the broker can persuade the insurer to transfer the book of

business to a new insurer, or for the insurer to cancel the book of business, the legal requirements would be those discussed in more detail in part one of this series.

The legal requirements are those set out in sections 36 and 37 of the Long term Insurance Act of 1998 (LTIA) and the Short term Insurance Act, 1998 (STIA).

It is important to note that the consent of the policyholder is required to establish an insurance contract between the policyholder and the new insurer if the book is moved by way of replacement.

Attention must be given to the requirements of the new draft Policyholder Protection Rules (STIA and LTIA) that was published for comment on 23 December 2016 and will possibly become effective on 1 May 2017. Specific duties are placed on role players where policies are being replaced, or where an insurer cancels a policy.

Other options

Other options would be for the broker to render a financial service to the policyholder that will result in the policyholder changing the contractual relationship with the insurer by replacing the policy. This would entail cancelling the insurance policy with the one insurer and entering into a new insurance policy with another insurer.

The actions performed by the broker in this regard would most likely constitute the rendering of financial services as defined in the Financial Advisory and Intermediary Services Act, 2002 (FAIS) and the broker would need to comply with all the requirements of FAIS. In terms of the FAIS General Code of Conduct the broker would need to make specific disclosures to the client before advice is provided with respect to the replacement.

What is the correct way of moving a book of business? Are you complying with the requirements of the Financial Services Board (FSB)? This is the second article of three that investigates this issue, so be sure to read part three in the April edition.

In addition, if the relevant insurer is a long term insurer and a member of the Association for Savings and Investment in South Africa (ASISA), there would be additional obligations that must be complied with in terms of the ASISA Standard on Replacements.

RDR Phase I implementation

Brokers who implement a replacement process to move a book of business should also take note of the following :

- In terms of the new draft Policyholder Protection Rules and the proposed amendments to the Regulations under the LTIA (that will also possibly become effective on 1 May 2017) monitoring obligations are placed on insurers where long term risk policies are being replaced, and insurers may not pay commission where certain requirements around replacements have not been met by the broker.

Client consent

Where the move of a book of business requires consent from the client, the consent can be in the form of consent by the client that the broker can perform certain functions on behalf of the client. This would generally be where the broker is appointed as a mandated intermediary that can enter into certain transactions on behalf of the client.

It is important to note that there are certain limitations to these structures. In the Status Update document, the FSB states that appropriate amendments to FAIS will be considered to ensure that, where the broker holds a discretionary mandate in relation to insurance policies, any cancellations of insurance policies are indeed consistent with the mandate and that clients are aware of these transactions.

Moving from broker to broker

There is also an agreement between the broker and the client in terms whereof the broker renders financial services to the client. When a broker wants to move a book of business from one broker to another, it is the contractual relationship between the broker and the client that is being amended or replaced.

There are instances where one broker would want to move his book of business to another broker. This can typically happen where the broker for example retires and sells his business.

Whereas the agreement between the broker and the client can provide for the broker's rights and obligations in the agreement to be ceded and assigned to a new broker, it is important to know that there are various disclosure obligations and other considerations in this regard.

Immediate notification

In terms of FAIS, a provider who ceases to operate as such, must

immediately notify all affected clients accordingly and take, where reasonably necessary or appropriate in consultation with the clients and product suppliers concerned, reasonable steps to ensure that any outstanding business is completed promptly or transferred to another provider. Ceding and assigning the agreement is therefore not something that can take place in the background without the knowledge of the client.

Furthermore, where a provider renders a financial service to a client, the provider must at the earliest reasonable opportunity, furnish the client with full particulars regarding the business (business and trade names, registration number, address, telephone number and email address). The broker must further also supply the legal and contractual status of the provider whether the provider holds guarantees or professional indemnity or fidelity insurance cover or not and whether a representative of a provider is rendering services under supervision.

All of these disclosures must be made by the new broker and the client might decide not to proceed with the contractual relationship with the new broker.

Be careful what you say

Another consideration is the fact that, in terms of the FAIS General Code of Conduct, the broker cannot disclose any confidential information acquired regarding the client to the new broker without the prior written consent of the client.

The new broker would not be able to render a financial service without the confidential information, and the moving of a book of business from one broker to another broker without the appropriate consent will create difficulties for the new broker.

Client consent is important to effectively transfer the agreement between the broker and the client to a new broker.

It is important to note that there is also another relevant contractual relationship that must be taken into consideration when one broker moves his book of business to another. That is the contractual relationship between the broker and the product provider. The new broker would obviously need an agreement with the product provider to be able to continue rendering financial services with respect to existing products of the client.

Juanita Moolman
Partner
Webber Wentzel

