

WALK the line

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 final article of three that investigates this issue.

When moving a book of business, the different contractual relationships and the legalities around changing those contractual relationships or replacing those contractual relationships to give effect to the moving of a book of business should be considered.

Contractual relationships

In parts one and two of this series of articles, which appeared in the November and February editions of FAnews respectively, we discussed the contractual relationships and the legalities around changing those contractual relationships or replacing those contractual relationships to give effect to the moving of a book of business.

Changing and replacing

In this final part of the series, we will focus on the moving of a book of business by changing or replacing the following contractual relationships:

- An insurer or binder holder wants to move binder functions with respect to insurance policies to or from a binder holder;
- an insurer or outsourced service provider wants to move services with respect to insurance policies to or from that outsourced service provider; and
- overarching considerations when a book of business is moved.

Involving the binder holder

When an insurer or binder holder wants to move binder functions with respect to insurance policies to or from a binder holder, the contractual relationship that must be amended to give effect to this move of a book of business is the contractual relationship between the insurer and the binder holder.

In terms of the Binder Regulations, the binder agreement must provide for a termination period, irrespective of the circumstances under which the agreement is terminated, of at least 90 days that will allow:

- the binder holder and insurer to comply with any legislative requirements relating to the policies referred to in the binder agreement; and
- for the transfer or sharing of all electronic and paper-based records in respect of the policies referred to in the binder agreement, including the names and identity numbers of all policyholders, insured persons and beneficiaries.

A word on replacements

The contractual relationship can generally be changed by way of a replacement, which means the binder agreement with one binder holder will be terminated and the insurer will enter into a binder agreement with another binder holder with respect to a book of business.

Even though the client's permission is not needed for this transaction, care should be taken to ensure fair outcomes to clients as part of this process, and the relevant disclosures regarding the transaction must be made to clients. Binder functions such as settling claims should be uninterrupted during the process of replacement.

It is also important that the parties comply with their obligation to report the termination of the binder agreement to the Financial Service Board (FSB).

In terms of the binder regulations, a binder agreement must prohibit the binder holder to delegate, assign or subcontract any of the binder functions. A binder holder would therefore not be able to cede and assign its obligations in terms of a binder agreement to another binder holder.

Moving from an outsourced provider

When an insurer or outsourced service provider wants to move services with respect to insurance policies to or from that outsourced service provider, the contractual relationship that must be amended to give effect to this move of a book of business is the contractual relationship between the insurer and the outsourced service provider.

In terms of Directive 159.A.i, the written agreement between the parties must deal with the circumstances under which the insurer may terminate the contract. This contractual relationship can also be changed by way of a replacement, which means the outsource agreement with one service provider will be terminated and the insurer will enter into an outsource agreement with another service provider with respect to a book of business.

In terms of Directive 159.A.i, the outsourcing of control, management or material functions must be reported to the FSB no later than one month prior to the effective date of the outsourcing agreement. An insurer must also immediately notify the FSB of any material developments, such as pending termination or material non-performance with respect to the outsourcing.

Sub-outsourcing is allowed subject to the requirements of Directive 159.A.i and outsourced service providers would be able to move services with respect to insurance policies to another service provider by sub-outsourcing those functions.

Overarching considerations

To give effect to the moving of a book of business, the parties would inevitably deal with the client's confidential information. There are various regulatory requirements around dealing with client confidential information.

As previously mentioned, the Financial Advisory and Intermediary Services Act (FAIS) requirements in this regard must be adhered to. Privacy legislation should be considered and complied with where confidential information is dealt with as part of the moving of the book of business.

TCF considerations

The Treating Customers Fairly (TCF) outcomes based regulatory and supervisory approach followed by the FSB must be considered. The transfer of a book of business must be done in a way that ensures fair outcomes for clients while the transfer takes place and after the transfer.

In terms of the FAIS General Code of Conduct, a provider and a representative must avoid - and where this is not possible mitigate - any conflict of interest between the provider and a client or the representative and a client.

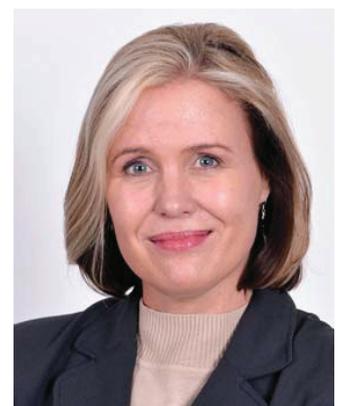
A conflict of interest is any situation in which a provider or a representative has an actual or potential interest that may, in rendering a financial service to a client, influence the objective performance of his, her or its obligations to that client. Either this, or prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client, including, but not limited to a financial interest, an ownership interest, any relationship with a third party.

Where the client's consent is required to establish the contractual relationships or amend the contractual relationships to effect the move of a book of business, specific consent is required. Negative consent, where the client's failure to either agree to or decline an offer is interpreted as consent, is not sufficient.

Important considerations

Contractual obligations must be considered. Some contractual arrangements are structured in such a way that the relevant contract cannot be amended or cancelled to give effect to the transfer of a book of business; or it imposes additional requirements where a book of business is moved. This is often specifically included by parties to protect their books of business.

In conclusion, regardless of the true nature of the transaction referred to as the move of a book of business, the relevant contractual and regulatory requirements must be carefully considered to properly give effect to the moving of the book of business and to avoid the risk of regulatory action as a result of non-compliance with regulatory requirements.



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