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Our ref: WG A/CP150 smb

Dear Richard

Response to CP 150 - The Authorisation Manual: Consultation on the Identification of Contracts of Insurance

The Panel does not propose to respond to the specific questions posed in CP 150, but it does have concerns about some of the issues raised.

Insurance Contract Criteria

In the Panel's view, the proposed guidance lays too much emphasis on providers in deciding whether a contract is an insurance contract or not. The FSA proposes to look primarily at the substance of the provider's rights and obligations under the contract when reaching a view. It does not necessarily follow that the provider's obligations are a mirror image of the consumer's rights and take no account of something that is sold to the consumer as insurance, or that the consumer interprets as insurance, but in substance is somehow not. The Panel believes that the reasonable expectations of the consumer are relevant and should be taken into account in deciding the obligations of providers.

It is explained in the paper that the Courts think that there has to be a contractual requirement to pay a benefit for there to be a contract of insurance. To take one of the examples given in the guidance, a discretionary medical scheme where the employee makes a contribution to the fund would not be a contract of insurance. But on what basis would most employees pay money into a scheme if they did not

believe that despite the absolute discretion they would benefit if needed? A significant level of consumer protection could be achieved by regulating such schemes as if they were insurance, particularly in the area of scheme providers having adequate resources to pay consumers what they expect on the basis of representations that have been made to them.

Warranties

There is also scope for consumer detriment in the area of warranties. It is not clear to the Panel which contracts the FSA is viewing as outside insurance. If goods are sold with manufacturers' warranties which have nothing to do with the retailers' obligation to sell goods of satisfactory quality, the manufacturer is assuming a liability he does not have. Manufacturers, retailers and credit card companies all give an assurance that if goods are accidentally damaged or stolen the guarantee will cover the loss. These too are not pre-existing obligations. The issue here is, in the Panel's view, whether the warranties impose obligations over and above the contract, rather than whether they are sold as a separate transaction. The example given at 1.7.14 in the guidance (tax investigation schemes) seems to support this view.

Service/Repair Guarantees

There is a further example of insurance-like contracts where the consumer's reasonable expectations are relevant. This is the type of guarantee which is a separate contract with a service company owned by the retailer which will carry out repairs. To the consumer it makes no difference to their perceived rights and expectations, but the FSA views these as excluded because the retailer accepts no risk.

Scope

The proposed scope of the FSA's regulation – and the insurance contract 'test' – take no account of the reasonable expectations of consumers. In the Panel's view there is a real risk that consumers will not understand which insurance products are regulated and which are not. There will also be an open door for future insurance product development outside the regulatory perimeter.

The Panel understands that a change to the scope of the legislation may be a matter for HMT, possibly involving an amendment to the Regulated Activities Order. The

Panel will be happy to raise this with HMT if appropriate.

Yours sincerely,



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