

THE PIASA BRIEFS: THE NEW CONSUMER PROTECTION ACT

Implications for the consumers of medical scheme products and services

This brief forms part of a series developed by the Pharmaceutical Industry Association of South Africa (PIASA) in the interest of patient education. It explores specific implications of this new Act for the medical scheme sector, current and future members (who are all customers in terms of the law), and agents, such as brokers and administrators. The views expressed in this brief do not constitute legal opinion or legal advice, and consumers should seek assistance to take any matter further.

The right to fair and responsible marketing

The new Consumer Protection Act (CPA) includes a number of key fundamental consumer rights. The Act will come into force in the near future.

One of these rights is this right to fair and responsible marketing. It includes provisions on, amongst others:

- The general standards applicable to the marketing of goods or services, i.e. how should a service provider, such as a medical scheme, market itself and its options to consumers?
- Bait marketing, i.e. marketing that just gets you into a position where you show some interest, and then offer you something else
- Negative option marketing, i.e. where you become an “automatic” member and then have to resign to not be a member anymore
- Direct marketing to consumers, which is subject to cooling-off
- Catalogue marketing, which also includes marketing which leads to the consumer calling the service provider (as is the case with some short-term health insurance cover)
- Trade coupons and similar promotions, such as price reductions and special offers
- Customer loyalty programmes, which is very popular in the medical scheme environment
- Promotional competitions
- Referral selling
- Agreements with persons lacking legal capacity, such as children

General standards for marketing of goods or services

Section 29 of the CPA prohibits the marketing of goods or services in a false or misleading manner. The prohibition also covers all representations (i.e. information contained in brochures, guides, articles, etc and not only advertisements and marketing) made in relation to goods or services.

Marketing will be “false” or “misleading” if:

- It is not clear what the goods or services are, and what their properties, advantages or uses are.
- It is not clear how goods or services are supplied, i.e. what it means that services can, mostly, only be obtained at designated facilities, and such facilities will mostly be public sector hospitals, for example.
- It is not clear on the price of the goods or service and statements that something is cheaper or better than that of a competitor, or that they are doing things in a different way.
- It is not clear that an event or article is sponsored by some business.

Bait marketing

Consumers may also not be misled in relation to the availability of goods or services at a supplier, at a specific price, in terms of section 30. If the supplier cannot supply the goods or services so advertised s/he has to procure that for the customer from another supplier.

Negative option marketing

Section 31 covers so-called “opt-out” marketing and contracts. This is where goods or services are provided, and one has to decline them, failing which one has automatically consented to the provision of such goods or services and become liable to pay for such. It also covers agreements that automatically renew. A classic example is gymnasium membership, which are sometimes bundled with loyalty memberships, associated with medical scheme membership.

Direct marketing to consumers

Section 32 will compel direct marketing to be according to regulations, i.e. it must inform the consumer, in a specific manner and form, of the right to cancel the agreement. If any goods are left with the consumer without requiring or arranging

payment for them, those goods are unsolicited goods and the consumer cannot be expected to pay for it.

Catalogue marketing

Section 33 covers all agreements not entered into in person, i.e. agreements concluded telephonically or by postal order or fax, a number of criteria set by the section, have to be complied with, such as licensing information of the supplier has to be provided. It also has to mention the address of the supplier, the suppliers refund and cancellation policy, etc.

Trade coupons and similar promotions

Section 34 applies to “promotional offers”, i.e. any prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services. It requires of documents that make promotional offers to clearly state the nature of the prize, reward, gift, free good or service, price reduction, etc, as well as the goods or services to which the offer relates and what would be required of a consumer to take up the offer. The supplier should be able to fulfill all reasonable demands for the promotion. Various conditions, such as quality and the prohibition to charge for administration, apply.

Customer loyalty programmes

In terms of section 35, loyalty programmes must honour the rewards promised. Loyalty programmes must state certain information, such as the steps the consumer must take to participate, including when the consumer can access any loyalty credit or awards. Awards or credits should be available should the consumer wish to access them, should not be of inferior quality, may not be subject to administrative charges, and may not require the purchasing of additional goods before the award may be accessed.

Promotional competitions

Promotional competitions are subject to the provisions of section 36. It also applies to the promoter, organizer or

conductor of a competition, and not only to the supplier or entity sponsoring it. The DTI will also stipulate values of competition to which this section will apply. It prohibits telling a person that s/he “might already have won” prior to the competition actually having taken place, or if prior to the announcement, the person is expected to provide something further in the competition (e.g. a subscription to some programme or requiring the person to buy something at a price that is higher than the price normally charged for such goods or services). Promoters may not charge any fees to consumers for entering the competition, other than the cost of submitting the entry. Competition rules must also be prepared before the competition is launched and such rules must be made available at no cost to participants and promoters are expected to keep such rules for a period that will be set by regulations. Requirements are also set for competition communications (e.g. entry forms, or banners or brochures announcing a competition).

Referral selling

Section 38 prohibits inducing a consumer by means of rebates, commissions, etc on goods or services to the consumer in exchange for that consumer providing the supplier the names of other consumers or requiring such consumer to assist in providing goods or services to other consumers.

Agreements with persons lacking legal capacity

Section 39 aims to protect consumers who are minors or mentally ill or disabled. Such agreements will be invalid if the supplier knew, or could have determined, that the person fell into the category of persons lacking legal capacity. Where the consumer commits fraud in this regard, the supplier will not be held liable. As far as consent to healthcare services are concerned, it should be noted that the provisions of the Children’s Act of 2003 will apply as well, which gives children of 12 the right to access and consent medical treatment without their parents present.

Examples

Various forms of marketing and competitions may be offered by medical schemes, or their administrators or other entities. Some events may be aimed at healthcare professionals or the suppliers of services, others may be aimed at members or potential members of a medical scheme. This means, for example, that competition rules must be available, and that the competition must be open to all similarly situated persons. The competition may not require of a person to buy something and pay more than they normally would, for such product. Medical scheme marketing material must be clear and correct. If it says “comprehensive cover” it has to explain what is meant by such cover. If stating that it provides “affordable cover” it has to be clear that such cover may be unlikely to provide wide ranges of choices and access to the latest technology. Loyalty programmes are popular in the medical scheme sector, and should conform to the criteria set by the Act, e.g. must include a document that clearly describes the nature of the programme, it may not impose additional administrative charges before one can access the benefits and it has to offer goods and services that are of good quality.

The Pharmaceutical Industry Association of SA (PIASA) is a trade association of companies involved in the manufacture and/or marketing of medicines in South Africa. The membership includes a broad representation of foreign multinational pharmaceutical companies and local and generic companies, both large and small.