SARS South African Revenue Service

INTERPRETATION NOTE 102

DATE: 17 July 2018

ACT	**:**	**INCOME TAX ACT 58 OF 1962**
SECTION	**:**	**SECTION 29A**
SUBJECT	**:**	**CLASSIFICATION OF RISK POLICY AND THE ONCE-OFF ELECTION TO TRANSFER CERTAIN POLICIES OR CLASSES OF POLICIES ISSUED BEFORE 2016 TO THE RISK POLICY FUND**

Preamble

In this Note unless the context indicates otherwise –

- **"insurer"** means any "long-term insurer" as defined in section 1 of the Long-term Insurance Act;
- **"Long-term Insurance Act"** means Act 52 of 1998;
- **"policy"** means "long-term policy" as defined in section 1 of the Long-term Insurance Act;
- **"section"** means a section of the Act;
- **"the Act"** means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

All binding general rulings referred to in this Note are available on the SARS website at **www.sars.gov.za**. Unless indicated otherwise, the latest issues of these documents should be consulted.

1. Purpose

This Note provides guidance on –

- the interpretation and application of the definition of "risk policy" in section 29A(1); and
- the once-off election by an insurer to transfer certain policies or classes of policies issued before 1 January 2016 to the risk policy fund under section 29A(13B).

2. Background

The taxable income derived by any insurer in respect of any year of assessment must be determined in accordance with the Act, but subject to sections 29A and 29B.[1]

[1] Section 29A(2).

Every insurer is required to establish five separate funds and to maintain such funds.[2] These funds form the foundation for the operation of section 29A as a whole. The taxable income derived by an insurer in respect of the untaxed policyholder fund, the individual policyholder fund, the company policyholder fund, the corporate fund and the risk policy fund must be determined separately in accordance with the Act as if each such fund had been a separate taxpayer.[3]

The risk policy fund[4] was introduced as one of the five funds because of concerns that the taxation of insurers under the previous four funds did not distinguish between investment and risk business. In practice, a risk policy will pay out a specified cash amount on the happening of an event regardless of the amount of investment income earned during the term of the policy. This could result in a loss in respect of a specific policy.[5] Section 29A was thus amended to provide that risk policies be taxed in the risk policy fund.

Some insurers requested guidance relating to which policies issued on or after 1 January 2016 can be classified as risk policies. The once-off election by an insurer to transfer qualifying policies or classes of policies to the risk policy fund also needs clarification.

3. The law

The relevant sub-sections are quoted in the **Annexure**.

4. Application of the law

4.1 Meaning of a risk policy

Section 29A(1) defines a "risk policy" as a policy issued by an insurer during the insurer's year of assessment commencing on or after 1 January 2016 under which the benefits payable cannot exceed the amount of premiums receivable, except where all or substantially the whole of the policy benefits are payable due to death, disablement, illness or unemployment and excludes a contract of insurance under which annuities are being paid. Any policy relating to which an election has been made as envisaged in section 29A(13B) is also considered to be a risk policy.[6]

The word "benefits" in the definition of "risk policy" is not defined in either the Act or the Long-term Insurance Act. In attributing meaning to the word one has to have regard to its ordinary meaning and the context in which it is used.[7] Based on the definition of a contract of insurance in *Lake and others NNO v Reinsurance Corporation Ltd and others*[8] it is suggested that "benefits" mean the payment of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest. The word "benefits" should, therefore, be interpreted widely to include all benefits payable under the policy, for example a claims-free

[2] Section 29A(3).
[3] Section 29A(10).
[4] See Taxation Laws Amendment Act 43 of 2014 effective from 1 January 2016.
[5] See Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014.
[6] See **4.4**.
[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[8] 1967 (3) SA 124 (W) at 127. See also *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W).

bonus as an optional additional benefit of a life policy.[9] The critical test in this regard is thus the contractual terms and conditions of the policy irrespective of the labelling of the specific benefits payable under the policy.

The test to determine whether a policy constitutes a risk policy is twofold. First, the benefits payable under the policy cannot exceed the amounts of the premiums receivable. The reference to whether the benefits cannot exceed the premiums is aimed at benefits payable on an event other than death, disability, illness or unemployment.

A policy which has a surrender or maturity value in excess of premiums would, therefore, not be classified as a risk policy. A risk policy may, however, be cancelled and premiums refunded (within certain limited periods), but the policy cannot pay out any form of investment gain except on death, disability, illness or unemployment.

The second test applies when the benefits exceed the amount of premiums receivable, but all or substantially the whole of the policy benefits are payable due to death, disablement, illness or unemployment. Policies under which annuities are being paid are specifically excluded from being classified as a risk policy.

The requirements of paragraph (*a*)(*i*) and (*ii*) in the definition of "risk policy" are applied separately to a policy. A policy that does not meet the requirement in (*a*)(*i*) can still qualify as a risk policy under the requirement in (*a*)(*ii*). If a policy is a risk policy under the first test, there is no need for the second test.

It is important to note that a risk policy may result in the payment of benefits in instalments under certain circumstances that can only be determined at the time that a claim arises. This does not necessarily result in a separate policy that pays annuities. Each case will thus have to be considered on its own facts and circumstances.

The test to determine whether a policy constitutes a risk policy "issued" during any year of assessment commencing on or after 1 January 2016 must be applied when the policy commences. This test includes the effect of any options included in the policy and considers the expected life of the policy. A policy, for example, that provides for a potential surrender value in excess of premiums after 5 years, would from the start not qualify as a risk policy.

The only reclassification of a policy could occur when the policy is varied other than by options included in it (see **4.3.2**). In such a case a policy may be treated as an entirely new policy.

The classification of a policy should be done on the day that it is issued, that is, a day 1 test and not an on-going evaluation unless the terms and conditions of the policy change. An insurer also cannot apply a discounted cash-flow basis, but should look forward with reference to all possible policy benefits that will be payable under the actuarial calculations over the lifetime of the policy, irrespective of the fact that a risk event may otherwise occur immediately.

[9] See Binding Private Ruling 250 "Risk policies".

4.2 Meaning of substantially the whole

The definition of "risk policy" initially required the policy benefits to be solely payable due to death, disablement, illness or unemployment. Some insurers were concerned that this definition was too restrictive because the word "solely" excludes predominantly life products which have small investment benefits, for example, a policy that has a savings element.

The definition of "risk policy" was subsequently amended to replace the word "solely" with "all or substantially the whole".[10]

Although the expression "substantially the whole" is used in various other sections it is not defined in the Act. In Binding General Ruling 20 (Issue 2) "Interpretation of the Expression 'Substantially the Whole' " it is stated that the expression "substantially the whole" is regarded by SARS to mean 90% or more. Public benefit organisations, recreational clubs and membership organisations, however, operate in an uncertain environment which makes proper planning difficult. In these circumstances SARS accepts a percentage of not less than 85%. The insurance industry, however, operates in a different environment and is able to more accurately determine their cash flows attributable to specific policy benefits. "Substantially the whole" for purposes of section 29A is, therefore, regarded as 90% or more.

The same meaning of the expression "substantially the whole" can also be applied to the definition of "risk policy" where the primary objective of the policy is to provide benefits due to death, disablement, illness or unemployment with incidental non-risk policy benefits. The rights and obligations of each policy will determine whether the "substantially the whole" requirement has been met. An example is a hospital plan policy which has a cash back benefit where the cashback benefit is less than 10% of the total benefits payable under the policy. Such a policy will be classified as a risk policy despite the accidental savings element.[11]

In order to give effect to the manner in which the insurance business is conducted, products having similar contractual rights and obligations could be grouped together as a class or sub-class of policies. The respective classes or sub-classes of policies should, however, comply with the "substantially the whole" requirement to qualify as risk policies.

4.3 Date of issue of a policy

The definition of "risk policy" requires a policy to be issued by the insurer. The date of issue depends on the facts of each case.

4.3.1 A new policy

A policy is issued following the conclusion of a contract. A contract is concluded when an offer is accepted by the other party and the latter has been informed of the acceptance. Both the offer and acceptance must comply with certain requirements.[12]

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[10] See Taxation Laws Amendment Act 25 of 2015.

[11] See **4.1** for a discussion of the meaning of "benefit".

[12] See ADJ van Rensburg et al "Contract" 9 (Third Edition Volume) LAWSA [on line] (My LexisNexis: 31 October 2014 in paragraph 299.

Generally a contract comes into existence when the acceptance of the offer is communicated to the offeror. There are, however, exceptions to this general rule. With a commercial contract the offeror may authorise the offeree to use postal communication. In such a case the contract comes into existence at the moment when the letter of acceptance is handed in at the post office. This principle does not apply if the postal services are not operating normally at the time of acceptance. In a case in which the offer is accepted by telefacsimile transmission the contract will come into existence analogous to contracts made *inter praesentes* (face to face), in other words the information theory applies.[13]

A contract concluded between parties by means of data messages is concluded at the time when, and place where, the acceptance of the offer was received by the offeror.[14] A data message is regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by him or her.[15]

The mere issuing of the policy, however, does not mean that it has commenced. The policy may commence at a later date. The parties may specify a commencement date in the policy or the policy may be made subject to certain suspensive conditions in which case it will commence only upon such commencement date or the fulfilment of the conditions.

Section 51 of the Long-term Insurance Act suspends a policy until payment of the first premium. It is, however, possible for a policy to commence in circumstances in which no premium has been paid or no arrangements have been made as contemplated in that section. The effect of section 51 is merely that the insurer may not provide policy benefits pending receipt of the premium or until arrangements have been made. It is, however, possible to provide cover pending receipt of the premium or the making of arrangements. A policy is in effect once cover commences. A policy will therefore be issued for purposes of section 29A –

- on the date that the contract is concluded;
- when a later date is specified in the policy, on that date; or
- if the policy is made subject to a suspensive condition, on the date of fulfilment of the condition.

The right of a policyholder to cancel a policy within the cooling-off period[16] does not result in a policy not having been issued as explained above.

Although it can be determined with certainty when a new policy is issued, uncertainty exists on the effect of amendments to an existing policy.

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[13] See above in paragraph 306 and 307.

[14] Section 22 of the Electronic Communications and Transactions Act 25 of 2002.

[15] See above section 23.

[16] See Regulation 6 of the Policyholder Protection Rules (Long-term Insurance) published in Government Notice R1129 in *Government Gazette* 26854 of 30 September 2004 as amended by Government Notice 1214 in *Government Gazette* 33881 of 17 December 2010.

4.3.2 Amendments to an existing policy

Amendments to a policy can be done in a large range of circumstances.[17] These amendments may sometimes result in the creation of a new policy.

Examples of amendments that do not result in a new policy include the following:

- Automatic increments (when the benefits, and potentially the premiums rise over time; this is built into the contract from the outset).
- Voluntary increments (when the contract gives the policy holder the right to opt for increments to apply).
- Buy-back of benefits (when there is an option to reduce the benefits and obtain a repayment of premiums).
- Rights to amend further or altered cover in certain eventualities, for example, moving home, divorce, some of which could certainly result in a new policy (e.g. two policies in place of a joint one following divorce).

Examples of changes that may result in novation when a new contract arises out of an existing one include the following:

- Conversion options (when the policy holder can switch to a policy that is not a risk policy).
- Changes or extensions to cover, the terms of which are freshly determined at the time, unless specifically allowed by the policy.

Novation occurs when the rights and obligations under an existing contract come to an end and are replaced with new rights and obligations under a new contract.

A person can generally freely cede the rights under a contract. Such a cession will not result in novation. The position is, however, different with obligations. An obligation cannot be transferred from one debtor to another. It can be "transferred" only by means of a tripartite agreement under which the existing parties to an agreement agree that the current debtor may be replaced with a new debtor. This results in a novation of the contract, where the one contract comes to an end and is replaced with a new contract. A transfer of obligations will only happen in exceptional circumstances, for example where one insurance company is replaced with another insurance company.

If a novation occurs after 1 January 2016, a new contract will come into force commencing after that date. However, to the extent that insurance business is transferred with the sanction of the High Court under the Long-term Insurance Act and the new insurer steps into the shoes of the old insurer and tax relief is granted under the Act, for purposes of section 29A the tax dispensation of the old insurer will continue in the new insurer and therefore a new policy does not come into force.

A replacement of a beneficiary in a policy will normally not result in a novation. A policyholder may nominate a beneficiary under a policy. Such a nomination is revocable during the life of the policyholder who may change beneficiaries without impacting the policy. The nominated beneficiary, before acceptance of the benefits,

[17] The definition of "long-term policy" in section 1 of the Long-term Insurance Act provides for the variation of a policy.

which may happen only following the death of the policyholder, has no personal right to claim the benefits and merely has a *spes (hope).* Replacement of beneficiaries will in the normal course not result in a novation and therefore a new policy will not come into force.

The above refers to so-called revocable nominations, that is, it can be revoked by the policyholder before his or her death. The position is different in the case of an irrevocable nomination. In such a case the beneficiary, once accepting the benefits (during the life of the policyholder), will have a personal right against the insurer to claim the benefits at the death of the policyholder. To the extent that such a personal right is ceded to a third party, it will not impact the policy.

A more common scenario may be a case in which an existing policy is amended and new benefits or new insured lives are added. Under these circumstances it has to be established on a case-by-case basis whether the adding of new assured lives constitutes a totally new agreement or a valid amendment under an existing agreement.

It will be necessary to determine whether any amendment constitutes in substance a new policy, that is, a policy providing for totally new premiums and benefits, in which case the amendment will result in a new policy, or whether the amendment constitutes a mere change to existing benefits allowed under the policy. To the extent that insured lives may be added under a policy, a new policy will not come into force (for example key-man risk policies taken out by a corporate).

The question arises whether a policy can be re-allocated after it has been issued. The assets relating to a policy will remain in the risk policy fund for the duration of the policy, notwithstanding the fact that the policy terms might be varied throughout the term of the policy and which might result in the value of the benefits payable falling below the 90% threshold due to a risk event, provided a new policy is not issued. The assets in relation to the risk policy will be reallocated to the untaxed fund only if an annuity becomes payable under that particular policy.

4.4 Once-off election to transfer policies or classes of policies to the risk policy fund

Some insurers encounter challenges relating to risk policies with accounting systems and internal processes in which they amongst others have to –

- for accounting purposes, distinguish between premiums that are received for risk business prior to and post years of assessment commencing on or after 1 January 2016; and
- amend systems to allow the separation of risk business prior to and post years of assessment commencing on or after 1 January 2016.[18]

Section 29A was therefore amended to provide all insurers a once-off election to transfer all their existing qualifying policies or one or more classes of qualifying policies to the risk policy fund without triggering any negative tax consequences.

[18] See Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015.

4.4.1 Policies that qualify for transfer

Section 29(A)(13B)[19] provides that an insurer may make a once-off election to allocate all policies or one or more class of policies that share substantially similar contractual rights and obligations that would have constituted risk policies if they were issued prior to 1 January 2016 to the risk policy fund with effect from the first day of the year of assessment commencing on or after 1 January 2016. Such an election is binding for the duration of the policies relating to which the election is made. Once the election has been made, the insurer will not be allowed to opt out of the election.[20]

4.4.2 Allocation of assets to the risk policy fund

An insurer that elects to allocate all existing policies or one or more classes of policies that share substantially similar contractual rights and obligations to the risk policy fund must allocate assets with a value equal to the value of liabilities[21] as determined at the end of the previous year of assessment relating to those policies from any of the three policyholder funds, namely, the untaxed policyholder fund, individual policyholder fund and the company policyholder fund to the risk policy fund.[22] In accordance with the definition of "value of liabilities" the statutory value of liabilities as determined by the Chief Actuary of the Financial Services Board, in consultation with the Commissioner, should be used and not the adjusted IFRS value, as this is the way in which the assets and liabilities were determined at the end of the previous year of assessment.

The amount of assets allocated to the risk policy fund shall not be deducted from the income of the policy holder fund from which it is transferred and shall not be included in the income of the risk policy fund to which it is transferred.[23] This transfer of assets relating to existing risk policies from the policyholder funds to the risk policy fund will thus be exempt from tax.[24]

The policy holder fund that disposed of capital assets to the risk policy fund will be deemed to have disposed of the assets at their base cost at the date of the disposal. The policyholder fund that disposes of the assets and the risk policy fund that acquired the assets will be deemed to be the same person with regard to the date of acquisition of the assets and the value of the assets. Roll-over relief will therefore apply with regard to the risk policy fund. The same principles will apply *mutatis mutandis* to assets disposed of by the policyholder fund to the risk policy fund as trading stock.[25]

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19 This section has been inserted by the Taxation Laws Amendment Act 25 of 2015 with effect from 1 January 2016.
20 See Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015.
21 Section 29A(1).
22 Section 29A(13B)(*b*).
23 Section 29A(13B)(*c*).
24 See Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015.
25 Section 29A(13B)(*d*).

The election to allocate the qualifying policies to the risk fund involves the following three steps:

- Identification of the policies or classes of policies.
- Determination whether the individual policies qualify as risk policies or the policies included in the class constitute mainly risk policies as defined.
- Determination whether the class of policies as a whole will meet the definition of a risk policy by determining whether all or substantially the whole of the policy benefits of the entire class are payable due to death, disablement, illness or unemployment compared to other benefits that may become payable and excludes contracts of insurance under which annuities are being paid.

4.4.3 Identification of class of policies

The once-off election refers to all policies or one or more classes of policies that share substantially similar contractual rights and obligations. The word "substantial" used in the context of this election refers to the contractual rights and obligations of the class of policies and not the policy benefits themselves.

A class of policies would substantially share similar contractual rights and obligations if the terms and conditions of the relevant policies selected have substantially similar product design features, premium patterns and benefit structures incorporated in their terms and conditions. "Substantially" in this context means that at least 90%[26] of a combination of the elements mentioned must be similar in nature. These elements must be incorporated in the policy itself because the emphasis is on the rights and obligations that arise from the policy.

A class of policies can also be a sub-class of a product range; for example, within a particular product range a sub-division can be made between age-rated, level or fixed increasing and renewable premium patterns. These sub-classes are therefore different "classes of policies" with similar rights and obligations and should be separated for purposes of the once-off election.

In the event that it is determined that at least 90% of a certain class of policies meets the requirement of the definition of "risk policy", the definition may for practical reasons apply to all policies within that class.

4.4.4 Determination whether a policy or class of policies qualify as a risk policy

The individual policies selected must meet the requirements of the definition of "risk policy".

Some classes of policies may have individual policies which meet and others that do not meet the requirements of a "risk policy". In order to determine whether a "class of policies" fits into the definition of a "risk policy", a two-step approach must be applied.

First, each individual policy must be evaluated to determine the number of individual policies within the class that meet the definition of a risk policy. The number of policies that meet the definition of "risk policy" over the total number of policies within the particular class of policies is then expressed as a percentage. This test is

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[26] Binding General Ruling 20 (Issue 2) "Interpretation of the Expression 'Substantially the Whole' ".

performed to ensure that the class of policies is regarded mainly (more than 50%) to be risk related although not a requirement for tax purposes. For existing policies already issued, a practical method to assess this could be to look at characteristics shared with new business policies that are issued and, model the history based on those policies that are similar.

Secondly, a consolidated evaluation must be performed at a class level to determine the value of risk related policy benefits payable in relation to all policy benefits payable in respect of the class of policies. Should the value of total benefits on a risk event relating to policies in a class of policies over the value of all benefits payable for all policies in the class be more than 90%, the class of policies will be regarded as a risk policy.

The method to perform the tests must be in a manner which is consistent with and appropriate to the manner in which the insurer's business is conducted and valued.

Both tests must be met as set out above before one can deal with the class concerned. In the event that either of these tests is not met, the transfer cannot be implemented. The 90% level is viewed as a prudent level and should ensure that the class is indeed a risk class.

The same test described above should also be applied to all new business written in the risk policy fund.

4.4.5 Risk policies in claim stage

Once a class of policies has been identified for allocation to the risk policy fund, all the policies relating to that class should be allocated to that fund. This also includes policies relating to claims that are in the process of payment and claims initiated but not yet paid. This will keep a class of policies in one tax fund and not split across tax funds.

4.4.6 Date of disclosure of election

Insurers should disclose the election to allocate policies to the risk policy fund in the tax return for the 2016 year of assessment in the manner and form the Commissioner prescribes.[27]

In practice the once-off election will be disclosed in the prescribed IT14L income tax return for the insurer relating to the first year of assessment commencing on or after 1 January 2016 in the form and manner required by the IT14L return for that year of assessment.

4.5 Reinsurance arrangements

4.5.1 Allocation of new policies

Section 29A(1) defines "owner" in relation to a policy to mean the person who is entitled to enforce any benefit provided for in the policy. The definition stipulates further that where a policy has been reinsured by one insurer with another insurer, the reinsurance policy shall be deemed to be owned by the owner of the insurance policy so insured.

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[27] Section 29A(13B)(*a*)(ii).

A reinsurer must, therefore, have regard to the “owner” of the policy when it allocates same to the respective policyholder funds contemplated in section 29A(4), namely, the untaxed policyholder fund, the individual policyholder fund and the company policyholder fund. This means that when an insurer allocates a policy to a specific policyholder fund, a reinsurer must follow the same allocation. For example if the insurer has allocated a policy to the individual policyholder fund, the reinsurer must also allocate the policy to the individual policyholder fund.

Since the introduction of the risk policy fund, an insurer and a reinsurer must, however, first determine whether a particular policy issued during any year of assessment commencing on or after 1 January 2016 meets the requirements of a risk policy, regardless of the “owner” in relation to that policy. A reinsurer must therefore independently determine whether any new policy so issued is a risk policy, regardless of the approach taken by the insurer. The allocation by the insurer to the respective policyholder funds must be followed by the reinsurer only if the policy issued does not meet the definition and requirements of a “risk policy”.

4.5.2 Date of issue of a reinsurance policy

The date of issue of a reinsurance policy by a reinsurer must be determined independently without having regard to the date of issue of the original policy which is reinsured. If, for example, a reinsurer writes a treaty during any year of assessment commencing on or after 1 January 2016 taking over a book of in-force policies written prior to that date, it will be regarded as a new policy issued after that date. A treaty that existed prior to 1 January 2016 will not constitute a new policy if any further policies are added to the same treaty on or after 1 January 2016. Further policies under such treaty will be assigned to the policyholder funds in proportion to the allocation established on 31 December 2015 under the previous look-through basis as defined in ”owner” in section 29A(1).

A reinsurance treaty that is simply renewed (for example, the renewal of underlying FAC slips, or the change in terms and conditions through addenda to the original agreement) at the end of a guaranteed period or when lives are added to an existing treaty will not constitute a new policy even though it is a risk policy for the insurer.

The terms of the reinsurance treaties will therefore require no changes to take effect of the introduction of the risk policy fund and the requirement to classify policies as risk policies.

4.5.3 Once-off election to transfer reinsurance policies or classes of policies to the risk policy fund

Section 29A(13B) also applies to existing reinsurance treaties. A reinsurer can thus make an independent election to allocate existing in-force reinsurance treaties to the risk policy fund on the basis that they would have constituted risk policies as defined.

The discretion of reinsurers to reallocate all treaties or one or more classes of treaties that share substantially similar contractual rights and obligations must not be applied having regard to the allocation by the insurer. The once-off election discretion exercised by the reinsurer is not dependent on what the insurer has elected.

The reinsurer must consequently apply the same principles as outlined above when it considers whether all treaties or one or more classes of treaties that share substantially similar contractual rights and obligations must be allocated to the risk policy fund with effect from the first day of the year of assessment commencing on or after 1 January 2016.

The reinsurer is not affected by a once-off election done by an insurer that might have reinsured some of the policies that are the subject matter of the once-off election.

5. Conclusion

The risk policy fund has been introduced as a fifth fund for insurers to distinguish between investment and risk business. Any policy issued by an insurer during any year of assessment commencing on or after 1 January 2016 meeting the requirements of the definition of "risk policy" must be allocated to the risk policy fund.

The rights and obligations of each policy will determine whether the requirement of "substantially the whole" has been met. In order to give effect to the manner in which the insurance business is conducted, products having similar contractual rights and obligations could be grouped together as a class or sub-class of policies. The respective classes or sub-classes of policies should, however, comply with the "substantially the whole" requirement to qualify as risk policies.

An insurer has a once-off election to transfer all policies or one or more classes of policies issued before 1 January 2016 to the risk policy fund if those policies or classes of policies meet the necessary requirements.

Legal Counsel
SOUTH AFRICAN REVENUE SERVICE

Annexure – The law

Section 29A

"**owner",** in relation to a policy, means the person who is entitled to enforce any benefit provided for in the policy: Provided that where a policy has been—

(a) ceded or pledged solely for the purpose of providing security for the performance of any obligation, the owner shall be the person who retains the beneficial interest in such policy; or

(b) reinsured by one insurer with another insurer, the reinsurance policy shall be deemed to be owned by the owner of the insurance policy so insured;

"risk policy" means—

(a) any policy issued by the insurer during any year of assessment of that insurer commencing on or after 1 January 2016 under which the benefits payable –

(i) cannot exceed the amount of premiums receivable, except where all or substantially the whole of the policy benefits are payable due to death, disablement, illness or unemployment and excludes a contract of insurance in terms of which annuities are being paid; or

(ii) other than benefits payable due to death, disablement, illness or unemployment, cannot exceed the amount of premiums receivable and excludes a contract of insurance in terms of which annuities are being paid; or

(b) any policy in respect of which an election has been made as contemplated in subsection (13B);

"risk policy fund" means the fund contemplated in subsection 4(e);

"value of liabilities" means, in respect of a policyholder fund or a risk policy fund, an amount equal to the value of the liabilities of the insurer in respect of the business conducted by it in the fund concerned calculated on the basis as shall be determined by the chief actuary of the Financial Services Board, appointed in terms of section 13 of the Financial Services Board Act, in consultation with the Commissioner;

(13B) (a) An insurer may elect that all policies or one or more classes of policies that share substantially similar contractual rights and obligations that would have constituted risk policies under paragraph (a) of the definition of "risk policy" in subsection (1) had those policies been issued during any year of assessment commencing on or after 1 January 2016 be allocated to the risk policy fund with effect from the first day of the year of assessment commencing on or after 1 January 2016, which election—

(i) is binding for the duration of the policies in respect of which the election is made; and

(ii) must be in a manner and form as the Commissioner may prescribe.

(b) Assets with a value equal to the value of liabilities, as determined at the end of the previous year of assessment in respect of policies allocated to the risk policy fund in terms of paragraph (a), must be allocated to the risk policy fund with effect from the first day of the year of assessment commencing on or after 1 January 2016.

(c) The amount of assets as contemplated in paragraph (b) shall not be deducted from the income of the policyholder fund from which it is transferred and shall not be included in the income of the risk policy fund to which it is transferred.

(d) Where as a result of the election as contemplated in paragraph (a) an asset as defined in paragraph 1 of the Eighth Schedule, other than an asset that is trading stock, is disposed of by the policyholder fund to a risk policy fund—

(i) the policyholder fund that disposes of that asset must be deemed to have disposed of that asset for an amount equal to the base cost of that asset on the date of that disposal; and

(ii) the policyholder fund that disposes of that asset and the risk policy fund that acquires that asset must, for purposes of determining any capital gain or capital loss by the risk policy fund that acquires that asset in respect of a disposal of that asset, be deemed to be one and the same person with respect to—

(aa) the date of acquisition of that asset by the policyholder fund that disposes of that asset and the amount and date of incurral of any expenditure by the policyholder fund that disposes of that asset in respect of that asset allowable in terms of paragraph 20 of the Eighth Schedule; and

(bb) any valuation of that asset effected by the policyholder fund of that asset as contemplated in paragraph 29(4) of the Eighth Schedule.

(e) Where as a result of the election as contemplated in paragraph (a) a policyholder fund disposes of an asset that is held as trading stock to a risk policy fund that acquires that asset as trading stock—

(i) that asset must be deemed to have been disposed of in an amount equal to the amount taken into account in terms of section 11(a) or 22(1) or (2) in respect of that asset by the policyholder fund; and

(ii) the policyholder fund and the risk policy fund must, for purposes of determining any taxable income derived by the risk policy fund, be deemed to be one and the same person with respect to the date of acquisition of that asset and the amount and date of incurral of any cost or expenditure incurred in respect of that asset as contemplated in section 11(a) or 22(1) or (2).