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The Market Inquiry into the Private Healthcare Sector
To: The Competition Commission
The DTI Campus
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30 June 2014

RE: MEDSCHEME HOLDINGS PROPRIETARY LIMITED'S COMMENTS TO THE COMPETITION COMMISSION'S DRAFT STATEMENT OF ISSUES AND DRAFT GUIDELINES FOR PARTICIPATION IN THE MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR

1. INTRODUCTION

1.1. We refer to the Commission's "*Draft Statement of Issues – Market Inquiry into the Private Healthcare Sector*" (the "**Draft Statement of Issues**") and the Commission's "*Draft guidelines for participation in the market inquiry into the private healthcare sector*" (the "**Draft Guidelines for Participation**") which were published on 30 May 2014. In terms of the aforementioned documents, members of the public and affected stakeholders are invited to submit comments on the aforementioned documents.

1.2. The purpose of this letter is to note Medscheme's comments on the Draft Guidelines for Participation and the Draft Statement of Issues in response to the Commission's invitation.

2. PARAGRAPH 20.8 OF THE DRAFT GUIDELINES FOR PARTICIPATION

2.1. Medscheme's first comment relates to paragraphs 20.1(f) and 20.8 of the Draft Guidelines for Participation.

2.2. Paragraph 20.1 states that parties making written submissions should, on the form "HI1" or a form substantially similar provide:

"*(f) Where other individuals or firms are specifically affected adversely by the content of the submission, the name of that individual or firm, together with sufficient particulars to enable the Panel to give notice to the affected individual or firm.*"

2.3. Similar to what is stated in paragraph 20.1 as set out above, paragraph 20.8 states as follows:

"If the [written] submission contains information that specifically adversely affects another or other parties, this should be noted clearly in the submission and form HI1 to enable the Panel to give the affected party an opportunity to respond to the submission or to be heard on the issues raised about them in the submission."

2.4. Parties who intend to make written submissions are, thus, based on the relevant paragraphs outlined above, expected to identify the name of any adversely affected party as well as sufficient particulars so as to enable the Panel to give the adversely affected party an opportunity to respond to issues raised in the submission.

2.5. Medscheme appreciates the rationale of the abovementioned paragraphs in that same may serve to increase transparency and afford an adversely affected party the opportunity to appropriately and sufficiently respond to any relevant statements during the Healthcare Inquiry.

2.6. Notwithstanding the aforegoing, Medscheme respectfully submits that the requirement to explicitly name a party who may be adversely affected by a written submission may, in certain circumstances, place an unfair onus on a willing participant to the proceedings for the following reasons:

2.6.1. In certain instances it may be difficult to identify an "*adversely affected party*" –

2.6.1.1. this is because written submissions made during the Healthcare inquiry will not necessarily be prepared with the primary focus of implicating role players, but rather with the view of open, honest and accurate disclosure of competitive dynamics as they are (the Healthcare Inquiry is not intended to comprise an investigations of particular named firms); and

2.6.1.2. the general factual content of certain written submissions may not make it easily ascertainable which (if any) roleplayers may be adversely affected by any statements, though such statements may inadvertently directly or indirectly have such effect.

2.6.2. Furthermore, the requirement to identify an adversely affected party may have the unintended consequence of turning what is meant to be an inquisitorial, truth-seeking process potentially into an unnecessarily adversarial or defensive one and may serve to skew the preparation of written submissions from being open, honest and accurate to being adversarial or defensive.

2.7. In light of the above, while Medscheme understands that the intention of the Commission as regards the aforegoing is to ensure a proper ventilation of issues, it may be that a balance might need to be struck to preserve the inquisitorial nature of the Healthcare Inquiry. To this end, Medscheme submits that the obligation to expressly name an "*adversely affected party*" in a submission be removed to cater for those participants who do not wish to expressly name such parties (potentially for fear of retaliation) or who are unable to do so given that same is not easily apparent. Participants who wish to name potentially adversely affected parties would still be entitled to do so. However, there should be no compulsory obligation in this regard.

2.8. This, it is submitted, will not serve to undermine the interests of transparency and a proper ventilation of issues as relevant firms which may be adversely affected by any submissions will have the opportunity to respond to such issues during the public hearings and given that witnesses will be making available a summary of the issues in their testimony prior thereto.

2.9. Further, given that submissions are public (to the extent that same is not confidential) parties likely to be affected by the Healthcare Inquiry are able to monitor such submissions and would be able to comment on same. It may also be useful if the Commission could publish a summary of the relevant themed issues which they are focussing on and which may adversely affect firms once the written submissions have been analysed. The aforegoing may be beneficial in serving to focus the relevant issues once all submissions have been made. Adversely affected firms may otherwise be side-tracked in focusing on irrelevant issues if they are informed about every slight remark which may not be in their interests.

3. PARAGRAPH 23.8 OF THE DRAFT GUIDELINES FOR PARTICIPATION

3.1. Medscheme's second comment to the Draft Guidelines for Participation relates to paragraph 23.8, which states as follows:

3.2. "*The Chairperson may allow participants, upon request, to call their own witnesses to deal with issues. Where reasonably possible, advance notice will be given by the Panel, through the Evidence Leader or otherwise, of the names of witnesses to be called and the summary of their expected testimony. Participants wishing to call witnesses of their own should provide similar advance notice as well as a summary of the expected testimony to the Chairperson and/or the appointed Evidence Leader in sufficient time before the relevant hearing to enable the Panel to prepare. Where it is intended that a witness will refer to a document or audio-visual presentation in the course of his or her testimony, that fact, as well as the content of the document or presentation, or the means of readily identifying it among previous*."

3.3. The second sentence in paragraph 23.8 above provides the Panel with powers to, itself, call for witnesses and provide a summary of their testimony. Medscheme respectfully requests that the Commission re-draft paragraph 23.8 so as to confirm the aforegoing and provide details as regards, *inter alia*, the following:

3.3.1. Who will be responsible for preparing and disseminating the summary of the Panel's witnesses; and

3.3.2. Any further information in respect of the process to be followed by the Panel in calling for witnesses.

4. PARAGRAPH 23.9 OF THE DRAFT GUIDELINES FOR PARTICIPATION

4.1. Medscheme's third comment to the Draft Guidelines for Participation relates to paragraph 23.9, which states as follows:

"At any hearing, the Chairperson may call upon the Evidence Leader or other person designated for the purpose to question witnesses, and afford a similar opportunity to members of the Panel. The Chairperson may also allow participants to question witnesses, directly or through the chair as the Chairperson considers appropriate in the circumstances, in order to allow for proper ventilation of information on contested issues. Leave to question a witness, where the need to do so could reasonably be appreciated prior to the hearing, must be sought on sufficient and reasonable notice to the Chairperson, stating the reasons for the request."

4.2. Medscheme understands the rationale of the abovementioned paragraph in order to ensure a proper ventilation of issues. Medscheme further applauds that the default

position with regard to the aforegoing is that participants may not automatically question witnesses; and that participants who wish to raise any questions must raise such questions through the Chairperson.

4.3. Notwithstanding the aforegoing, Medscheme respectfully submits that paragraph 23.9 be slightly amended to ensure that any questioning by participants may *only* be done in circumstances where there is a reason to believe that a full and proper ventilation of issues would not take place through questioning by the Chairperson or the Evidence Leader. In addition, any requests by participants who wish to question witnesses directly must clearly motivate why they are of the view that a full and proper ventilation of issues would not take place through questioning by the Chairperson, and reasonable notice must be given to the Chairperson and the witness concerned.

4.4. Medscheme considers that the above amendment does not serve to detract in any way the imperative of ensuring a proper ventilation of issues which paragraph 23.9 seeks to achieve. Rather the proposed amendment serves to re-enforce such imperative while ensuring that the process remains inquisitorial. Cross-examination may lend itself to an adversarial process if it is not appropriately curtailed. Medscheme thus submits that its proposed amendment will give effect to the Commission's rationale while preserving the spirit of the Healthcare Inquiry.

5. THE DRAFT STATEMENT OF ISSUES

5.1. Medscheme's final comment relates to the Draft Statement of Issues.

5.2. Medscheme respectfully submits that the issue of compulsory medical scheme membership for employed people earning above a certain threshold be incorporated into the Draft Statement of Issues for further exploration. This is given the challenge experienced by the private healthcare sector to attract young and healthy members.

5.3. The aforegoing will serve to explore the benefits for consumers and the private sector alike of making such membership compulsory which may influence cost effective interventions in the healthcare process and a greater affordability of healthcare services for consumers with growing age.

6. We trust that the above has been instructive. Please note the contents of this submission are not confidential.

7. Please do not hesitate to contact us should you have any questions regarding the aforegoing. Kindly forward all communication to kevina@medscheme.co.za; jdrust@afrocentrichealth.com and waynep@medscheme.co.za.

8. Medscheme notes its ongoing commitment to the Healthcare Inquiry and in dealing with the Panel going forward.

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Kevin Aron
Managing Director Medscheme South Africa
(CEO: Medscheme Holdings, effective 1 July 2014)