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FMA CIRCULAR

CONCERNING THE  
ACTIVITY OF  
INSURANCE  
UNDERTAKINGS AS  
TIED AGENTS  
PURSUANT TO  
ARTICLE 28 WAG 2007

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**Circular Letter of the FMA**  
of 27 June 2008  
**concerning the activity of insurance undertakings**  
**as tied agents pursuant to Article 28 WAG 2007**

In order to clarify the legal situation regarding any possible activity on the part of insurance undertakings in the capacity of tied agents (referred to in the following as “TA”) for a legal entity pursuant to Article 28 of the 2007 Securities Supervision Act (WAG 2007; *Wertpapieraufsichtsgesetz*), the Financial Market Authority wishes to draw attention to the following:

1. Insurance undertakings are not permitted to operate any non-insurance businesses. Article 3 para. 3 of the Insurance Supervision Act (VAG; *Versicherungsaufsichtsgesetz*) stipulates that, apart from contractual insurance, an insurance undertaking may only operate such businesses that are directly connected with it. This may specifically include the mediation of home-purchase savings plans, leasing agreements, shares in investment funds and the provision of services in the field of automatic data processing as well as the distribution of credit cards.

The provision contained in Article 3 para. 3 VAG is in turn based on Article 8(1)(b) of Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance and on Article 6(1)(b) of Directive 2002/83/EC concerning life assurance, which stipulates that “the home Member State shall require every assurance undertaking... to limit its objects to the business of insurance and operations directly arising therefrom, to the exclusion of all other commercial business”.

Thus, with direct reference to the provisions specified in Community law, the wording of Article 3 para. 3 VAG permits insurance undertakings only to operate contractual insurance and businesses that are immediately connected with it. Even the explicit listing of the examples of businesses in Article 3 para. 3 VAG does not signify that it is legitimate to operate such businesses in all cases. Insurance undertakings may only operate these businesses if they are immediately connected with the insurance business in the individual case.

2. According to the rulings of the ECJ, the prohibition of non-insurance business applicable to insurance undertakings is intended in particular to protect the interests of insured parties against the risks to the solvency of insurance undertakings that might arise from conducting activities not related to insurance (cf. ECJ 20 April 1999, C-241/97, ECR 1999 p. 1-1879, no. 47; ECJ 21 September 2000, C-109/99, ECR 2000 p. 1-7247, nos. 58 and 62). This prohibition is intended to exclude any business activity that might result in losses which could impair the solvency of the insurance undertaking.

3. It may be deduced from Article 3 para. 3 VAG that acting as agent for shares in investment funds can be directly connected with contractual insurance. This was taken into consideration in issuing WAG 2007 by including the special provision in Article 2 para. 2 WAG 2007. If, on the basis of the licence granted in accordance with the VAG, an insurance undertaking acts as an agent for investment fund shares within the scope of Article 3 para. 3 VAG, the insurance undertaking is obliged to comply with the provisions of WAG 2007 listed in Article 2 para. 2 WAG 2007.

The WAG 2007 does not, however, provide for any activity by an insurance undertaking that

goes beyond this scope. The reference in Article 2 para. 2 WAG 2007 stipulates that an insurance undertaking may make use of TAs as specified in Article 29 WAG 2007 when mediation of investment fund shares is permitted in the individual case. Yet, it is not conversely stipulated that an insurance undertaking may itself act as a TA as specified in Article 28 WAG 2007, i.e. without restriction by providing any and all investment services or by acting as an agent for other financial instruments.

4. This legal background information requires Article 3 para. 3 VAG to be interpreted in a manner excluding an insurance undertaking from acting as a TA for another legal entity as specified in Article 28 WAG 2007. In addition, according to the rulings of the ECJ, insurance undertakings may only be allowed to engage in non-insurance activities when no abstract threat to the solvency of the insurance undertaking arises consequently. Yet, the mere possibility of recourse claims being raised against the insurance undertaking as a result of such a non-insurance activity is sufficient to pose a comparable abstract threat to the undertaking's solvency.

The risk associated with acting as a TA is not limited, in fact. This is true even when the provision specified in Article 28 para. 2 WAG 2007 is taken into account: the legal entity is liable pursuant to Article 1313a of the General Civil Code (ABGB; *Allgemeines Bürgerliches Gesetzbuch*) for each and every act or failure to act of the TA. Specifically, by no means does this requirement prevent the legal entity from asserting recourse claims against the insurance undertaking. Due to the abstract threat to solvency and the associated impairment of insured parties' interests, even a conservative interpretation of the prohibition of non-insurance business activities as specified in Article 3 para. 3 VAG forbids insurance undertakings from acting as TAs.

On the basis of the foregoing arguments it must be concluded in summary that, in view of Article 3 para. 3 VAG, it is not lawful for an insurance undertaking to act as a TA for a legal entity pursuant to Article 28 WAG 2007.