Guidance

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The Insurance Act 2015

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Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

Who is this guidance for?

SRA authorised bodies and persons that are required to have a professional indemnity insurance policy in place that meets the required minimum terms and conditions.

This guidance should be read in the context of decision making at the SRA and other guidance documents listed at the end of this document. It is a living document and we will update it from time to time.

Purpose of this guidance

To explain changes to the minimum terms and conditions (MTC) of solicitors' professional indemnity insurance (PII) which came into force on the 12 August 2016 (with the introduction of the Insurance Act 2015) and your obligations.

What has changed and why?

The Insurance Act 2015 (the Insurance Act) came into force on 12 August 2016 and made changes to the law on non-disclosure and misrepresentation in relation, in particular, to non-consumer contracts including professional indemnity insurance (PII) held by SRA authorised firms.

The minimum terms and conditions (MTC) of PII were amended with effect from 12 August 2016 to bring them into line with some aspects of the Insurance Act when it came into force. The changes are shown in the SRA Indemnity Insurance Rules [https://guidance.sra.org.uk/solicitors/standards-

regulations/indemnity-insurance-rules/] - Annex 1 SRA minimum terms and conditions of professional indemnity insurance.

Which policies of qualifying insurance are affected by the MTC changes?

The MTC changes apply in the same way as the Insurance Act applies, that is to insurance contracts which are entered into or varied on or after 12 August 2016. This means that if a contract is entered into or varied before that date, but with a commencement date on or after the 12 August 2016, the unamended MTC will apply.

Contracts of qualifying insurance in existence prior to 12 August 2016 will not need to be varied to comply until the policy is renewed or replaced, or the policy period is extended, or a period of 18 months has elapsed since the commencement of the policy.

What is the effect of the change?

The changes focus on the reimbursement and disclosure sections of the MTC. The test that applies determines whether there has been non-disclosure by a firm at the proposal stage which means that firms seeking cover will need to make 'a fair presentation of risk'.

This extends the basis on which insurers may seek reimbursement from firms to include any breach of the duty to make 'a fair presentation of risk' rather than currently simply for 'non-disclosure'. It is important that firms understand and comply with the higher standard of disclosure to minimise the risk that insurers may seek reimbursement from a firm for non-compliance.

Insurers will still not be able to avoid a claim or cancel a policy on the ground that a firm has failed to comply with the standard of disclosure so there should be no direct impact on consumer protection. However, this does not absolve firms and their managers from their obligation to act with honesty and with integrity as set out in the SRA Principles.

What steps can you take to comply with the standards of disclosure?

For non-consumer contracts, the Insurance Act requires that the insured makes a "fair presentation of the risk" to insurers. This duty replaces the existing duty of disclosure and misrepresentation.

This requires law firms to disclose not only risks of which they are aware but also those that they ought to be aware of, or to have discovered after making reasonable enquiries. The information must be made available to the insurer in clear and accessible way but does not need to be contained in only one document or oral presentation.

Information which would influence the judgement of a prudent insurer in determining whether (or on what terms) to accept the risk or which would put a prudent insurer on notice that it must make further enquiries concerning the risk must be included. Circumstances which diminish the risk, which the insurer knows, ought to know or is presumed to know it, or where disclosure has been waived do not need to be disclosed.

The changes put the onus on the firm seeking insurance cover to properly investigate and understand all the risks in the business. This highlights the importance of existing good practice in firms to focus on internal risk and compliance procedures and to educate staff on risk management.

What remedies will an insurer have if a firm breaches the new standard of disclosure?

The changes do not alter the current position that insurers cannot avoid or repudiate cover for "non-disclosure" or misrepresentation, they can seek only reimbursement.

However, the remedies that apply under the Insurance Act will be relevant to any decision about what is 'just and equitable' if insurers seek reimbursement from firms under MTC where they think an insured has not made a fair representation of risk.

Under the Insurance Act, if a law firm has deliberately or recklessly failed to make a fair presentation, the insurer will be entitled to avoid the policy and must return premiums paid. In all other circumstances, remedies proportionate to the effect of the failure to present the risk fairly will be applied. For example, where the insured has failed to mention a particular fact, the insurer may have a remedy to apply terms or conditions to the contract that they would have applied had the fact been presented to them. Similarly, where the insurer would have required a higher premium to cover the risk, a proportionate deduction will be made to any claims paid under the policy.

Where can further guidance be found?

The changes being introduced by the Insurance Act have general effect so there is a range of guidance available on the internet. The British Insurance Brokers' Association and Mactavish have produced a handy factsheet for customers.

For more detailed information they have also produced an implementation guide with guidance on fair presentation and reasonable search (page 15) and compliance for customers (page 25).

Our expectations

We expect that firms will contact their brokers / insurers for further advice specific to each firm's circumstances.

What Rules apply?

You should have particular regard to the SRA Indemnity Insurance Rules [https://guidance.sra.org.uk/solicitors/standards-regulations/indemnity-insurance-rules/] - Annex 1 SRA minimum terms and conditions of professional indemnity insurance.

In addition you should have regard to the Principles and Standards and Regulations [https://guidance.sra.org.uk/solicitors/standards-regulations/principles/] . The most relevant Principles in relation to your duties are:

Principle 1 - You act in a way that upholds the constitutional principle of the rule of law and the proper administration of justice.

Principle 2 - You act in a way that upholds public trust and confidence in the solicitors profession and in legal services provided by authorised persons.

Principle 4 - You act with honesty

Principle 5 - You act with integrity

The most relevant Regulations in relation to your duty are:

Paragraph 2.1 of the Code of Conduct for firms - You have effective governance structures, arrangements, systems and controls in place that ensure:

a. you comply with all the SRA's regulatory requirements, as well as with other regulatory and legislative requirements which apply to you.

Further help

If you require further assistance in relation to your referral arrangements contact the Professional Ethics guidance team [https://guidance.sra.org.uk/home/contact-us/#helplines] .