



## THE NEW DUTY OF FAIR PRESENTATION – INSURANCE ACT 2015

### Executive summary

1. The Insurance Act 2015 (the Act) will come into force on 12 August 2016 and affect all policies which incept or are renewed, and variations of existing policies on or after that date<sup>1</sup>. The Act introduces a new 'duty of fair presentation', which insureds will owe insurers when entering into business insurance contracts.
2. This document provides guidance for ICAEW members on the new duty. Members seeking to take out or renew their professional indemnity insurance (PII) on or after 12 August 2016 are strongly recommended to seek their broker's assistance in determining how the new duty will affect their firm.
3. We have taken advice on the impact of the Act and have agreed changes to the minimum approved wording together with ICAS and CARB. These take effect from 12 August 2016. The revised wording will be available on [icaew.com/pii](http://icaew.com/pii).

### Background

4. Under current law a prospective insured<sup>2</sup> must disclose to its insurer all material circumstances that it either knows or is deemed to know, during the pre-contract phase. An insured will be deemed to know any circumstance which, in the ordinary course of business, an insured 'ought to know'. A material circumstance is defined as one which would influence the judgement of the prudent insurer in determining whether to take on the risk and, if so, on what terms.
5. It was recognised that the existing duty was unclear and that many insureds did not fully understand what they 'ought to know' and whose knowledge should be disclosed to the insurer. For medium to large firms in particular it was also recognised that the duty was difficult to comply with and (in some cases) this led to 'data dumping' where over-cautious insureds would disclose vast amounts of unsorted information for fear of omitting something that might be considered material. The Act seeks to clarify the law around what needs to be disclosed and how the information should be presented to insurers.

### The duty of fair presentation

6. The new duty contained in the Act requires insureds to:
  - a) disclose every material circumstance that they know or ought to know (or, failing that, provide the insurer with sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances); and

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<sup>1</sup> if the policy is subject to the laws of England and Wales, Scotland or Northern Ireland

<sup>2</sup> The new duty of fair presentation relates to business insurance contracts only.

- b) present the disclosure in a manner which would be 'reasonably clear and accessible to a prudent insurer'; and
- c) not misrepresent the position (i.e., every material representation as to a matter of fact should be substantially correct and every material representation as to a matter of expectation or belief should be made in good faith).

### **Materiality and knowledge**

7. Although the Act does not change the definition of 'material circumstance' it does provide some examples of what could be considered material, i.e. –
  - special or unusual facts relating to the risk;
  - particular concerns which led the insured to seek cover for the risk; and
  - anything which insurers concerned with that class of business or field of insurance activity would generally consider should be included within a fair presentation for that type of risk.
8. The insured's primary duty is to disclose all material circumstances that it knows or ought to know. However there is a fall-back position in cases where it may not be possible to disclose every material circumstance. In those cases the insured may still discharge its duty if it has clearly presented sufficient information to the insurer as to put the prudent insurer on notice that it needs to make further enquiries.
9. The duty of fair presentation requires an insured to disclose every material circumstance that it 'knows'. Knowledge is defined as:
  - knowledge of the insured's 'senior management'; and
  - knowledge of the individuals responsible for arranging the insurance.
10. 'Senior management' means those individuals who play a significant role in making decisions about how the firm's activities are to be managed or organised.
11. The insured's duty of disclosure also extends to material circumstances that it 'ought to know'. This includes circumstances that should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means). This includes material information that is held both within the firm and by agents or intermediaries outside the firm.
12. It is important to note that what will constitute a 'reasonable search' will be an objective test and will depend on the type, size and complexity of the firm.

### **Manner of Disclosure**

13. The new duty also requires prospective insureds to disclose information to insurers in a manner which is 'reasonably clear and accessible to the prudent insurer'. This measure aims to prevent insureds from 'data dumping' during the proposal phase. To comply with this element of the duty, firms will need to take care to present information to insurers in a clear and structured format. This may necessitate the use of indexes, headings or signposts where appropriate to assist insurers in assessing the proposed risk.

## **Misrepresentation**

14. There has been no change to the existing duty on insureds to not misrepresent matters to their insurer. As is required now, every material representation as to matter of fact has to be 'substantially correct', so that a prudent insurer would not consider the difference between what was represented and what is actually correct to be material. Every material representation as to a matter of expectation or belief must be made in good faith.

## **Tips for complying with the new duty**

15. At an early stage we recommend firms should:

- consider whose knowledge will be regarded as actual knowledge of the firm;
- where possible agree with insurers who in the firm falls within the definition of 'senior management' and who is 'responsible for insurance';
- alert those individuals about the nature of the duty and what will be required of them during the pre-contract disclosure process;
- consider how best to carry out a reasonable search of information held by the firm, and outside it, and the personnel who should be involved;
- where possible agree with insurers the scope of the search to be undertaken;
- consider how best to present this information to insurers; and
- document the decisions and steps taken to comply with the duty so that if necessary these can be demonstrated to insurers; and
- keep a record of the presentation made to the insurer and responses to any pre-contractual enquiries.

## **Conclusion**

16. The new duty of fair presentation applies from 12 August 2016 when the Insurance Act 2015 comes into force. This document is intended for use as brief guidance for ICAEW members on the new duty. We recommend that firms renewing or varying their PII on / after this date should discuss with their broker what the duty means for their firm.

## **Source:**

**Marsh & McLennan Companies: "Adviser – The Insurance Act 2015- The New Duty of Fair Presentation"**

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