



**21 May 2021**

Sarah-Jane Owen  
PII & Regulatory Manager  
ICAEW

*Response submitted via e-mail and online portal*

Dear Sarah-Jane,

### **Changes to ICAEW's Minimum Approved Wording<sup>1</sup>**

We are writing to provide comments on the 12<sup>th</sup> April 2021 market consultation on amendments to the ICAEW's minimum terms wording to address the increasing focus of regulators on cyber risks and also the increasing exposure ICAEW member firms face from such exposures. Though we are responding as a representative trade association, we expect that a number of our members will also submit responses in their own right. We will also submit comments through the consultation portal.

#### General Comments

1. We are pleased to continue our engagement with ICAEW on this issue, particularly given that the proposed changes are largely based on our underlying work. As we understand it, the IUA clauses 04-017 and 04-018 have formed the basis for the clauses predominantly used in the wider PII market and therefore adopting similar language in the ICAEW minimum terms provides a welcome degree of continuity and familiarity for insurers.
2. As noted in the consultation paper, the IUA clauses start from the basic premise of affirming that traditional PI exposures remain covered, but cyber related losses without a direct professional negligence element are excluded – these being more appropriately covered by a standalone cyber product. We recognise that our interpretation of this goes beyond the proposed ICAEW first party / third party distinction as our clauses exclude cover where there are third party losses arising directly from a cyber act (i.e. malicious activity or malware transmission) or failure of a computer system. The use of the 'directly' trigger is key, of course. This also applies to third party mitigation costs (first party mitigation costs being excluded in the ICAEW proposals via B24). The fact that the ICAEW does not follow this strict delineation, whilst not necessarily a surprise, represents a departure from the broad view expressed by PII insurers in our extensive market survey. So, whilst many of the proposed ICAEW amendments are supportable, particularly the consideration of the breadth of coverage afforded under the

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<sup>1</sup> The [International Underwriting Association of London \(IUA\)](#) represents international and wholesale insurance and reinsurance companies operating in or through London. It exists to promote and enhance the business environment for its members. IUA's London Company Market Statistics Report shows that overall premium income for the company market in 2019 was £27.633bn. Gross premium written in London totalled £21.436bn while a further £6.197bn was identified as written in other locations but overseen by London operations.

Defence Costs definition and consequent tie back in B24, this is one area of potential difficulty for insurers.

3. As a more general point of construction, several insurers have commented on references to first party exclusions in a PII policy, noting that PII has never been, or intended to be, a first party liability policy. If this is a widespread concern expressed by respondents to the consultation proposals, it may be more attractive to utilise a full exclusion with a professional services (tied in third party liability) writeback.
4. One of the core reasons that we landed on the affirmation / exclusion approach of the IUA clauses was a widespread concern that providing cover for third party liabilities arising from IT infrastructure failure, out of control of the insured and unrelated to their professional activities, would mean that insurers would not be able to adequately quantify or manage their aggregate exposures arising from such a systemic loss. This would pressure their own internal capital management and regulatory prudential requirements and, ultimately, impact the type and cost of product they are able to provide. We recognise that the exclusion in E21 contains a professional services writeback, which is reasonable from our perspective. However, given the potentially systemic nature of infrastructure loss, we would favour including a further option to allow insurers the ability to aggregate their exposures.
5. On a point of drafting, the trigger language to the exclusions section, *"This policy shall not indemnify the Insured against any Claim"* sits awkwardly in the first party context in that such losses by definition will likely not arise from a claim against the Insured. So, whilst we understand the broad intention here, this needs to be clarified in respect of application to E20.
6. Exclusion E20 refers to *"...Relevant First Party Loss directly caused by, directly resulting from, or directly arising out of ..."*. We would question the inclusion of the 'directly' trigger. Whilst it is hard to conceive that 'indirect' first party losses should trigger a response from a PII policy, including 'directly' possibly inadvertently suggests that it should. We may be missing a nuance here but, on balance, we would add "or indirectly" or remove "directly" to make clear the scope of the exclusion in the first party context.
7. Whilst the MTC's obviously only apply to participating insurers on the primary layer of cover, the excess markets have more flexibility in their terms, which could lead to differing levels of cover through the coverage tower. We may also see some markets considering leaving the primary markets for the excess layers to better manage their potential cyber exposures. Moreover, it is currently unclear how reinsurers will be approaching this issue but, clearly, the matters noted above will be under consideration. The reaction of the reinsurance market will be critical to dictating how flexibly primary market insurers are able to act. In a sense, this is not something the ICAEW can control but we raise the point here to reiterate that the primary market may be more constrained dependent upon the wider market dynamics.
8. Each participating insurer will ultimately develop their own commercial response to the proposals, based on their internal assessment of the cyber risk at the firm in question, their existing portfolio of business, premium base and corporate appetite for PII. One might certainly expect, though, that there will be more detailed questions of firms on their potential cyber

exposures, on their network security and, particularly, on whether they have cyber response insurance in place. Much of this is already embedded into the underwriting process, but feedback from members suggests that one may see increased scrutiny, more selective underwriting and differential terms going forward, dependent upon the responses to the questions raised. This is reflective not only of the wider cover required in the minimum terms (compared to the 'non-regulated' professions) but also that the cyber risk itself is increasing in both potential frequency and severity. For insurers, the amended approach to cyber risk is not solely borne of regulatory compliance.

9. We submit that the ICAEW could do more to highlight the benefits of standalone cyber cover for regulated firms and the additional (particularly first-party) protections that that product commonly provides. It may be critical to many businesses that they have such protection. First party cover, which may enable an insured's business to be up and running after a cyber act or cyber incident, may also help reduce exposure to third party claims.

We hope you find these comments useful in furthering the ICAEW minimum terms and conditions. We would be willing to clarify or expand on our position as required and remain willing to work with the ICAEW on finalising its work in this area and representing participating insurers therein.

Yours sincerely,



**Christopher Jones**  
**Director of Legal & Market Services, IUA**