

SRA BOARD
1 June 2016

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The Insurance Act 2015 and consequential changes to the Handbook

- 1 The Insurance Act 2015 (the Insurance Act) will come into force on 12 August 2016 and will make changes to the law on non-disclosure and misrepresentation in relation, in particular, to commercial insurance contracts. From this date different tests of where there has been 'non-disclosure' will apply to consumer and non-consumer contracts. The Insurance Act modernises and clarifies insurance law which should lead to fairer outcomes for policyholders.
- 2 The Board is asked to make SRA Indemnity Insurance Rules 2013 (Amendment) Rules [2016] that amend the SRAs minimum terms and conditions of professional indemnity insurance (MTC). The amendments will raise the standard of disclosure that will be required of firms seeking insurance from "non-disclosure" to "failure to fairly present the risk". These reflect changes that the Act makes in relation to business or "non-consumer" contracts, such as those between solicitors firms and insurers. The changes to the MTC will take effect on 12 August 2016, which is the date that the Insurance Act comes into effect, subject to approval by the Legal Services Board.
- 3 These are technical changes to the MTC in response to wider changes in insurance law. Six out of seven respondents to our consultation paper were positive– including the Law Society. One respondent was negative on the basis that it would impose too great an administrative burden on small firms. Some respondents suggested that guidance for firms to help them prepare for the change would be helpful. We will look to ensure that appropriate guidance is available before the change comes into effect.
- 4 A summary of the issue, the consultation responses, our response, recommendations and draft rules are set out below.

The Insurance Act 2015 and consequential changes to the Handbook

Introduction

- 5 The Minimum terms and Conditions (MTC) in our indemnity insurance rules include provisions designed to limit the effect of the current law on non-disclosure and misrepresentation in relation to the insurance available for firms to cover negligence claims from consumers. They effectively provide that any such non-disclosure or misrepresentation will not affect the cover under the policy (or allow the insurer to avoid the policy) but the insurer may seek to recover claims paid from insureds where it is fair and equitable to do so.
- 6 The Insurance Act 2015 (the Insurance Act) will come into force on 12 August 2016 and will make changes to the law on non-disclosure and misrepresentation in relation, in particular, to commercial insurance contracts. From this date different tests of where there has been 'non-disclosure' will apply to consumer and non-consumer contracts.
- 7 For consumer insurance contracts the insured has a duty to take reasonable care not to make misrepresentation to the insurer. For non-consumer contracts, The Insurance Act requires that insureds make a "fair presentation of the risk" to insurers. This duty replaces the existing duty of disclosure and misrepresentation (under insurance law). 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 disclosed. The Insurance Act also requires disclosure of circumstances an insured *ought* to know (i.e. which would be revealed through a reasonable search of information available to them).
- 8 Whilst the expected standard of disclosure has been lowered for consumer contracts it will be raised for non-consumer contracts.
- 9 The Act creates a positive duty of inquiry for the insurer too. An insurer will also be presumed to know things which are common knowledge, or which an insurer offering insurance of the class in question to insureds in the field of activity in question would be expected to know in the ordinary course of business.

Consultation

- 10 We issued a consultation document on 12 February 2016 seeking views on which standard of non-disclosure should be adopted in the MTC and also the proposed amendments to the MTC.
- 11 The reasons for adopting the non-consumer standard set out in the consultation paper remain:
 - the contract between a firm and its insurer is a non-consumer contract so we would need compelling evidence that the market was not working to impose the lower consumer standard;

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- under the MTC participating insurers cannot avoid cover so we take the view that they are entitled to expect firms to meet a high standard when presenting the risk; and
 - the proposal will have a neutral impact on the overall level of consumer protection as under the current MTC the only issue is the point at which the insurer's rights of reimbursement against the firm are triggered.
- 12 The consultation closed on 24 March 2016. We received a total of seven responses. Six of the seven respondents, including the Law Society, agreed with our reasoning that the MTC should adopt the non-consumer standard of non-disclosure once the Insurance Act comes into effect. This is on the basis that an insurance contract between a firm and its insurer is a non-consumer contract. The Leicestershire Law Society was against the adoption of the non-consumer standard on the basis that "it would impose too great an administrative burden on remaining small firms".
- 13 A number of respondents favoured the production of guidance or protocols for firms setting out what a standard fair presentation of risk should include. One respondent suggested that there may be an indirect impact on consumers where a firm fails to fairly present the risk and the insurer seeks reimbursement from the firm under the terms of the MTC. This would have a financial impact on the firm and subsequently a knock on impact on consumers.

SRA response

- 14 Most respondents accept the rationale for adopting the non-consumer standard, so we will go with this. The change being introduced by the Insurance Act will affect all policies of insurance so small firms will need to satisfy this duty in respect of all insurance. None of the respondents have supplied strong evidence that adopting the consumer standard is a proportionate intervention.
- 15 We acknowledge that there may be an indirect risk to consumers in circumstances where a firm fails to fairly present the risk and the insurer seeks reimbursement. In some cases this could impact on the overall financial viability of the firm. Guidance will be available to support firms which will mitigate the risk and help firms, including small firms, to comply with the new standard.

Recommendation: to make SRA Indemnity Insurance Rules 2013 (Amendment) Rules [2016]

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SRA Indemnity Insurance Rules 2013 (Amendment) Rules [2016]

Rules made by the Solicitors Regulation Authority Board on [date of SRA Board meeting] under sections 31, 37, 79 and 80 of the Solicitors Act 1974, section 9 of the Administration of Justice Act 1985, and section 83 of, and paragraph 19 of Schedule 11 to, the Legal Services Act 2007.

Approved by the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007 on [date of approval by LSB].

Rule 1

Amend Appendix 1 to the SRA Indemnity Insurance Rules 2013 as follows:

- (a) in clause 4.1, replace "non-disclosure or misrepresentation, whether fraudulent or not" with "any breach of the duty to make a fair presentation of the risk, or any misrepresentation, in each case whether fraudulent or not";
- (b) in clause 7.2 (a)(i), replace "non-disclosure" with "any breach of the duty to make a fair presentation of the risk,";
- (c) in the remainder of clause 7.2, replace "non-disclosure" (in each place) with "failure to make a fair presentation of the risk";

Rule 2

These amendment rules come into force on 12 August 2016 or on the seventh day after the date of approval of the Legal Services Board, whichever is the later.