The Insurance Act 2015

The new client duty of disclosure
The Insurance Act 2015 ("the Act")

The Act comes into effect on 12 August 2016, replacing law that has been in place since 1906. It overhauls the existing law, and aims to rebalance the position between the buyers of insurance and insurers. Whilst it puts an Insured in a better position than currently, it does impose a new duty on them, the ‘duty of fair presentation’. This new duty will require you (the Insured) to change how information is provided to Insurers, and is explicit regarding who needs to be consulted when gathering such information.

The Act applies to policies that incept or renew on or after 12 August 2016, (although the new duty is likely to also apply to variations made to existing policies on or after this date).

This document gives an overview of the most significant changes, with practical guidance on how to prepare for the new rules. For further information, including more detailed guidance, please contact your usual Aon adviser.

Key points to consider are:

- Data gathering and renewal preparations may take you longer
- You may need to devise new processes for data collection and submission, which are likely to involve more people
- Senior managers will need to be involved and need to be aware that they may not have cover if they do not get involved
- You may need to consult other parties outside your organisation, e.g. consultants, agents, suppliers or those performing outsourced functions, to collect any material information that they may hold
- Keep a full audit trail and record all information that is disclosed to Insurers and the process you took in order to meet your reasonable search requirement.
The new "duty of fair presentation"

The duty of disclosure is now a “duty of fair presentation”. This requires a slightly different approach to renewal. Importantly, a “reasonable search” must be undertaken, with senior managers and the (internal and external) insurance team involved in the information sweep.

General duty to disclose all material facts.

• What needs to be disclosed?
  A circumstance that the policyholder knows or ought to know in usual business practice, which would have an effect on the mind of the prudent insurer when assessing the risk.
  Full disclosure of every material circumstance that you know or ought to know.
  Or, you must provide sufficient information to a prudent insurer, so they are aware of the need to make further enquiries to reveal material circumstances.
  (You must always aim to disclose all material circumstances).

• Whose knowledge is relevant?
  No explicit requirement.
  Material circumstances known by:
  • Your organisation’s “senior management”
  • Anyone involved in the process of procuring your insurance on your behalf (both employees and agents)
  • Those “involved in the process of procuring your insurance” is intended to include all those who participate in the insurance buying process, collate information about the risk, and negotiate with insurers, whether as your employee or as an agent.
  • The reasonable search will vary based on the size and type of organisation. It is intended to include information held by persons or entities who are covered by the insurance plus others who may hold information e.g. outside advisers and consultants, suppliers/service providers, and outsourced service partners.

• How disclosure is made?
  No explicit requirement.
  Must be presented in a clear, accessible and structured manner to the insurer.
  • It must not be too brief or cryptic. No “data-dumping” is allowed i.e. the provision of large amounts of undigested information.
  • Submitted all information to Aon in clear and organised documents.

Current law

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What does this mean in practice?

What happens if you fail to meet the new duty of fair presentation?

Under current law Insurers have only one remedy where the duty to disclose material information is not met, namely, full avoidance of the insurance policy. This is changing so that the consequences will vary depending on the reasons for failing to meet the duty of fair presentation, and depending on what the insurer would have done differently had the duty been met at the outset.

N.B. The following describes the default legal position. Your policy may not reflect this position, so it is important to check your own policy. If in doubt, please speak with your usual Aon adviser.

<table>
<thead>
<tr>
<th>Current Law</th>
<th>The Insurance Act 2015</th>
<th>What does this mean in practice?</th>
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<tbody>
<tr>
<td>• Any deliberate or reckless failure</td>
<td>The Insurer can avoid the policy.</td>
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</tr>
<tr>
<td>• The Insurer must return the premium.</td>
<td>The Insurer can avoid the policy.</td>
<td>A deliberate breach is where the insured knew they were in breach of the duty, whilst a reckless breach of duty is defined as not caring whether or not the duty is fulfilled.</td>
</tr>
<tr>
<td>• Not deliberate or reckless failure but the Insurer would not have provided insurance on any terms</td>
<td>The Insurer can avoid the policy.</td>
<td>Your policy may be invalidated.</td>
</tr>
<tr>
<td>• The policy terms may be worse than initially agreed and the policy may not respond as you expected.</td>
<td>The Insurer can avoid the policy.</td>
<td>This remedy can apply in addition to the insurer proportionately reducing a claim payment (described below).</td>
</tr>
<tr>
<td>• Not deliberate or reckless failure but the Insurer would have applied different terms (e.g. exclusions and conditions but not premium)</td>
<td>The Insurer can avoid the policy.</td>
<td>The Insurer can continue with the insurance but will apply those terms that they would have wanted from the date they would have applied.</td>
</tr>
<tr>
<td>• Not deliberate or reckless failure but the Insurer would have charged a higher premium</td>
<td>The Insurer can avoid the policy.</td>
<td>The policy terms may be worse than initially agreed and the policy may not respond as you expected.</td>
</tr>
<tr>
<td>• The Insurer can reduce proportionately the amount to be paid on a claim.</td>
<td>The Insurer can avoid the policy.</td>
<td>This remedy can apply in addition to applying different terms.</td>
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Other important changes

The Act changes the law on warranties and loss mitigation terms. It also abolishes Basis of Contract clauses. These changes improve the position for Insureds.

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<td>Warranties</td>
<td>Non-compliance automatically terminates the policy.</td>
<td>Warranties become “suspensive conditions”. Cover is suspended only whilst the policyholder is in breach of the warranty.</td>
</tr>
<tr>
<td>Non-compliance of a ’loss mitigation’ policy term that has no bearing on the claim</td>
<td>Any breach whether or not relevant to the loss can affect the way the policy responds. This depends on the type of policy term breached, but could, in the most severe case, terminate the policy.</td>
<td>For ‘loss mitigation’ terms (this includes warranties as well as conditions precedent and other policy terms), Insurers cannot limit or avoid a claim where the insured can show that the breach could not have increased the risk of loss. ‘Loss mitigation’ terms are those that relate specifically to a particular type of loss or a loss at a particular location or time. But this does not include terms that define the risk as a whole.</td>
</tr>
<tr>
<td>Basis of contract (BoC)</td>
<td>BoC clauses are allowed and the Insurer can avoid the policy for any misstatement within the information provided to them.</td>
<td>BoC clauses are prohibited. All information provided to Insurers (including answers to questions on a proposal form) can no longer be treated as a warranty, whereby any incorrect information automatically terminates the policy.</td>
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Disclosure: Practical considerations

Unquestionably, the new duty of fair presentation places an increased burden on policyholders to ensure details of all material circumstances known to them is disclosed, and to carry out a potentially wide-ranging search for further information. The following suggestions are intended to assist in preparing for this duty. Note that this is not intended to be an exhaustive list and are given no order of importance.
Actual knowledge

Knowledge of the policyholder’s senior management and those involved in the insurance procurement process.

• Have available a clear and up-to-date structure chart for each commercial insured

• Take early action to identify and document ‘senior management’ and ‘those involved in the insurance procurement process’

• This ought to be by office or role, rather than individual name, and may include those in subsidiary companies, joint ventures and the like, and those based overseas

• Consider what action is required to ensure the listings are maintained to reflect appointments and departures

• Decide what process will be adopted to collect information from senior management / insurance personnel, with due consideration to global presence and any inherent reporting issues

• Raise awareness now to ensure senior management and insurance personnel know what is expected of them and that they are aware of the importance to meet the new duty of fair presentation and the potential consequences of not doing so.

General

• Document and map the existing disclosure strategy and consider how this will need to be modified

• The process of data collection, validation and submission is likely to take longer. Consider whether the renewal timetables need to be adjusted to allow for timely collection, collation, validation and disclosure of information. Likewise, ensure the renewal timetable includes adequate time to respond to Insurers’ questions, and allows for timely placement of cover

• Identify which policies will be in scope, i.e. any insurance or reinsurance policy governed by the laws of England, Wales, Scotland and Northern Ireland. This may include policies written abroad but subject to UK law, or insurance for foreign entities where cover is placed in the UK and subject to UK law

• Remember that a proposal form does not negate the new duty to make fair presentation. A proposal form focuses on the typical, basic, material circumstances relevant to the type of insurance sought. Be aware that proposals will often require declaration of details of any other material circumstances which is known or ought to be known by the proposer

• Consider how details of new or changing material circumstances will be maintained during the year. Most policies have an explicit ongoing disclosure requirement. It is important that material circumstances evolving or emerging during the policy period are disclosed to Insurers in a timely way, e.g. information relating to acquisitions, process or product change

• You should prepare to spend longer discussing the details of your organisation with your broker, and where possible, your Insurer. Ensure they are aware of all activities and material circumstances

• It may be possible to obtain guidance from Insurers as to what they consider is material to the relevant risk, although this is in itself unlikely to limit the need to disclose additional information

• Consider how information will be documented and stored. Keep a complete and permanent copy of the presentation made to Insurers. It may be necessary, in the future, to make a historic search of the data collected and presented. An audit trail will be vital to evidence that you have met your duty to make a fair presentation of risk

• It will no longer be permissible to submit lengthy technical documents to support material disclosure. Consideration should be given to how details of material circumstances may be extracted from any such documents and disclosed to Insurers

• Do not point Insurers to your website without direction. Where particular information is provided on web-pages, consider how to accurately keep a record of its content for future reference. This may be required at a later date to evidence what information was provided to Insurers

• Take care not to include immaterial information. Use caution when using CD’s and data rooms to present information as this is a frequent issue. Ensure CD’s and data rooms are logical, indexed, organised and clear

• In partnership with your broking team, decide how information will be conveyed and how it will be presented to Insurers

• Likewise, consider an appropriate method for capturing and responding to Insurer questions in a timely and fully auditable manner.

The Act comes into effect on 12 August 2016
Knowledge that ‘ought to be known’
What should reasonably have been revealed by a reasonable search of information available to the policyholder, held by persons in the policyholder’s organisation and by any other person.

- Review policy wordings to identify the scope of insured parties and additional beneficiaries. For example, co-insureds, subsidiaries, additional insured’s, beneficiaries etc. or, contractors and sub-contractors included under a contractors all risks (CAR) policy or current and former directors under a directors and officers (D&O) liability policy
- Identify the types of operating areas or specialist functions that may be an in-house source of material circumstances, e.g. development teams, asset managers, site managers, finance, accounting, treasury, legal and human resources. Remember to include areas that may be less significant from an organisational perspective, but pose a higher risk in terms of activity, process and the like
- Consider how details of material circumstances will be captured from those identified areas. For example, it may be desirable to send detailed questionnaires. Of course, due consideration will need to be given to ensure the requirements are understood including an explanation of material circumstances and the potential consequences of failing to meet the duty
- Consider what other parties, outside your organisation, may hold details of material circumstances e.g. outsourced functions, suppliers, partners, financiers etc. Take steps to ensure all such parties can in fact be identified and contacted
- Agree who is responsible for searching and storing details of material circumstances held within the insurance broking organisation that needs to be disclosed as part of the reasonable search. Consider how such knowledge will be transferred should you change your appointed broker

The Act comes into effect on 12 August 2016

The new law has been written deliberately vaguely to allow for flexible interpretation and to suit the many different types of policyholders and insurances to which it will apply. As an unfortunate consequence, this makes provision of a definitive guide impossible. The suggestions included here are intended as a helpful guide, to assist you as you begin to prepare for your new duty. If you have any queries about the new duty of fair presentation or the wider provisions of the Act, please do not hesitate to get in contact with your usual Aon adviser.
About Aon

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