

Tracing employers' liability insurers – historical policies

June 2013



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In this Policy Statement we report on the main issues arising from FSA Consultation Paper 12/14 (*Tracing employers' liability insurers – historical policies*) and publish the final rules.

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You can download this Policy Statement from our website: www.fca.org.uk. Or contact our order line for paper copies: 0845 608 2372.

Abbreviations used in this paper

| | |
|--------------|---|
| CBA | Cost benefit analysis |
| CP | Consultation Paper |
| DWP | Department of Work and Pensions |
| EL | Employers' liability |
| ELR | Employers' Liability Register |
| ELTO | Employers' Liability Tracing Office |
| FCA | Financial Conduct Authority |
| FSA | Financial Services Authority |
| FSMA | Financial Services and Markets Act (2000) |
| ICOBS | Insurance Conduct of Business Sourcebook |
| PS | Policy Statement |

1. Overview

Introduction

- 1.1** We are confirming new rules on employers' liability (EL) insurance. This means that firms which may have actual or potential EL insurance claims must conduct effective searches of their historical policy records when they receive a request from individuals, their representatives, employers, insurers, intermediaries or a qualifying tracing office.
- 1.2** The Financial Services Authority (FSA) consulted on the rules presented in this paper in July 2012. In April 2013 the FSA ceased to exist and the Financial Conduct Authority (FCA) came into force. **In this paper 'we' refers to the FSA (before April 2013) and the FCA (after April 2013).**

Who does this affect?

- 1.3** These rules will affect:
- UK-authorized firms that are carrying out contracts of insurance;
 - EEA firms passporting into the UK that are carrying out contracts of insurance; and
 - managing agents.

Is this of interest to consumers?

- 1.4** Our requirements may help consumers who suffer from a work-related disease and are facing difficulties claiming compensation because they cannot trace their EL insurer.

Context

- 1.5** Although like the Government and the insurance industry, we have initiated measures to help people unable to trace insurers, they mainly related to recent insurance policies. In these cases, many years may have passed since people have left the employment where they contracted an illness, causing them significant detriment. So our new rules relate to our consumer protection objective.

- 1.6** We consulted on proposals to require firms with actual or potential EL insurance claims to conduct effective searches of their historical EL policies when they receive a tracing request. This includes putting in place a written policy setting out how they comply with this requirement. We also set out the timing and contents of the response to the request.

Summary of feedback and our response

- 1.7** We received 25 responses to our proposals. In this Policy Statement (PS) we summarise the feedback to CP 12/14 and present our final rules.
- 1.8** Our response to the feedback on the consultation elements of CP12/14, the cost benefit analysis (CBA) and compatibility statement are covered in Chapter 2.
- 1.9** We are proceeding with most of our proposed changes but in light of consultation responses we have made changes in three areas:
- 1.10** We have amended our proposal about the time a firm should take to respond to a search request received outside of a qualifying tracing office; this will avoid creating any disincentive for consumers to use a qualifying tracing office.
- 1.11** We have spelt out the parties who can make a request to search – these are already defined in Insurance Conduct of Business Sourcebook (ICOBS) as individuals, their representatives, employers, insurers or intermediaries, when there is a potential claim. We also include qualifying tracing office in this list.
- 1.12** We make a minor amendment to our rules to make clear that a firm confirming cover does not automatically mean confirming liability for a potential claim.
- 1.13** The revised rules do not differ significantly from those we consulted on.

Equality and diversity

- 1.14** We said in CP12/14 we believed our proposals did not give rise to any equality and diversity concerns. No respondents commented. So we remain of this view.

What do you need to do next?

- 1.15** If your firm is affected by these changes, you need to implement our requirements no later than **4 December 2013**.

2. Summary of responses to CP12/14

2.1 This chapter sets out the feedback we received to our proposed new ICOBS rules.

2.2 We asked:

Q1: *Do you agree with our proposal requiring all firms with actual or potential liability for UK commercial lines employer's liability (EL) insurance to take reasonable steps to conduct effective searches of their records for historical policies?*

2.3 A significant majority respondents supported our proposal to require firms to take reasonable steps to conduct effective searches of their historical EL policies. However, a number of the respondents asked us to limit our proposals to enquiries received through Employers' Liability Tracing Office (ELTO) otherwise, there would be a significant potential for duplicate enquiries for firms that were members of ELTO. Currently, ELTO is the only tracing office that meets our requirements for a qualifying tracing office.

2.4 Some respondents asked what we meant by reasonable steps.

2.5 A few respondents told us they hold waivers from ELTO giving them a dispensation to search and questioned the impact on our requirements.

2.6 Some respondents noted that our description of those who can make a request was open to interpretation as we did not specify who we meant by 'third parties'. Furthermore, we didn't specify that there had to be a potential claim. Respondents expressed concern this could significantly increase the number of search enquiries.

Our response

We see the benefits in setting a regulatory framework around all searches including non-ELTO members. A consumer should expect the same standard of search whether they direct their enquiry to a firm direct or to ELTO to ask their members to search. We do not consider this multiplies enquiries for ELTO members as the consumer has no need to make multiple enquiries if all firms are subject to our requirements and searching to the same standard.

We do not think it is helpful to set out what 'reasonable steps' are as these will vary from firm to firm.

A waiver from ELTO does not have any effect on our proposals. A firm must comply with our requirements, which already allow a firm to decide when not to conduct a search.

In our rules, ICOBS 8.4.4R 2(c), we have a defined group of parties that can search the ELR– individuals, their representatives, employers, insurers or intermediaries when there is a potential claim. By third party we mean these groups and qualifying tracing office. To avoid any confusion we will amend our rules to reflect this.

2.7 We asked:

Q3: *Do you agree with our proposal requiring searches to be returned within one month of receipt of the request?*

2.8 Most respondents agreed with our proposal. Some respondents suggested claimants would bypass the ELTO database and go direct to the firm to get a quicker response and this could have the unintended and undesired consequence of increasing the number of search requests outside of ELTO.

Our response

There are many advantages to consumers searching the ELTO database in the first instance including that searches can be performed immediately. If consumers do not get a positive match, they can request ELTO to ask their members to search and this avoids them making search requests to multiple firms.

To avoid creating a disincentive for consumers to use ELTO, we have revised our requirements for direct search requests. When firms receive a request from a tracing office they must respond within a month. For direct enquiries, they must respond within two months. This broadly matches the time it could take for a consumer to receive a response from ELTO on a claim that isn't related to mesothelioma.

Although ELTO prioritises mesothelioma claims, we have not differentiated response times on this basis as firms may not know whether the enquiry relates to mesothelioma.

Tracing policy

2.9 We asked:

Q2: *Do you agree with our proposal requiring firms to put in place and operate in accordance with a tracing policy?*

2.10 A significant majority all respondents agreed with our proposal, confirming that they already have a tracing policy in place. They felt our proposal was a proportionate response and will introduce a best practice code. Respondents stressed that the tracing policy should be proportionate to the size, financial health and extent to which the firm wrote EL business.

Our response

Given the strong support we received for this proposal we will continue to implement this proposal without amendment.

Contents of the response

2.11 We asked:

Q4: *Do you agree with our proposals on the contents of the response?*

2.12 Some respondents commented that 8.4.17R (1) suggests a firm has to confirm cover.

2.13 Some respondents wanted to highlight that confirming cover does not mean confirming liability for a potential claim.

Our response

If a firm is unable to confirm cover, they can rely on 8.4.17R (2) instead which sets out our requirements if a firm is unable to confirm cover. However if a firm can confirm cover, then they must comply with our requirements in 8.4.17 (1).

We agree that confirming cover does not necessarily mean confirming liability for a potential claim. There is nothing in our new rules to suggest this. Neither does it mean that cover was provided in respect of a potential claim, a firm may have provided cover but for a different period to the potential claim in question. We have made a small amendment in the rules to make this clearer.

Implementation of our rules

2.14 We asked:

Q5: *Do you agree with our proposal for the timing of the implementation of our requirements?*

2.15 A number of respondents agreed with our proposal but some asked for longer to implement. Several respondents suggested the timing should follow the proposed legislation on compulsory membership of ELTO.

The Government will not be introducing legislation on the compulsory membership of ELTO. It is satisfied that initiatives including our new requirements, ELTO's tracing policy and the establishment of a technical committee to arbitrate on disputed claims, will achieve the intended outcome – improving the consumer's ability to trace an insurer and pursue a claim. We will continue to implement our proposals within six months of publishing this PS. Any delay could reduce the number of consumers who could potentially benefit from our requirements. We believe six months gives firms enough time to prepare.

Cost benefit analysis

2.16 We asked:

Q6: *Do you have any comments on our cost benefit analysis?*

- 2.17** Several respondents agreed our proposals were reasonable, did not place any substantial burden of firms and that firms are already undertaking these searches so costs are minimal. Some respondents felt our costs were conservative, that the digitisation and record collation costs could be up to £250,000. One firm believed that their yearly costs would go up to £150,000 per year and over 30 to 40 years this could mean costs in excess of £5m.
- 2.18** Several respondents thought we made an assumption that a successful trace leads to a payment of compensation, so we are overstating the benefits.
- 2.19** We quoted that the number of search requests received was in the region of between 20,000 to 30,000. Some respondents noted this was different to their figures but accepted this could be due to enquiries received outside of ELTO.

Our response

We set broad parameters for the costs and have explained that the costs will vary, depending on the number and type of historical records and whether a firm already has the systems and controls in place to conduct effective searches. We accept that for some firms they may have higher one-off costs because, for example, if they are uploading files onto a system, but then this should mean that their ongoing costs are reduced also, therefore their total costs are still within range.

In calculating our benefits we have not assumed a successful trace leads to compensation. But the more successful traces, the more consumers who have the ability to make a claim and this should lead to more compensation being paid.

When we estimated the search enquiries we did take into account direct enquiries as well as those through ELTO.

Compatibility statement

- 2.20** In CP12/14 we concluded that the proposals and draft rules were compatible with our general duties under section 2 of the Financial Services and Markets Act 2000 (FSMA) as it was then. We also concluded that the proposals and draft rules were compatible with the FCA's general duties as they were likely to be enacted. We do not consider that the impact will be different on mutuals because there is no difference in the way a mutual or other firms transact this insurance. We remain of this view, and conclude that this Policy Statement is compatible with s.1B of FSMA as amended.

Annex 1

List of non-confidential respondents

Allianz Insurance plc
Association of Personal Injury Lawyers
Aviva plc
AXA UK plc
BIBA
Cawrey Limited
Direct Line Group
Downlands Liability Management Limited
ELTO
Equitas Insurance Limited
Gill & Son (Norwich) Limited
GRF Services Limited
Insurance & Reinsurance Legacy Association Limited
International Group of P&I Clubs
International Underwriting Association
Lloyd's Market Association
National Federation of Builders
QBE Operations
Rowlands and Hames Insurance Brokers Limited
Royal Sun Alliance Plc
Sundhararaajan S, Srivathsan K.M & Prakaash Kumar S

Somo Japan Insurance Company of Europe Limited

The Cornish Mutual assurance Company Limited

The Dominion Insurance Company Limited

Zurich Insurance plc

Appendix 1

Made rules (legal instrument)

**EMPLOYERS' LIABILITY INSURANCE: DISCLOSURE BY INSURERS (NO 4)
INSTRUMENT 2013**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):
- (1) section 137A (General rule-making power);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 4 December 2013.

Amendments to the Handbook

- D. The Insurance: Conduct of Business sourcebook (ICOBS) is amended in accordance with the Annex to this instrument.

Citation

- E. This instrument may be cited as the Employers' Liability Insurance: Disclosure by Insurers (No 4) Instrument 2013.

By order of the Board
3 June 2013

Annex

Amendments to the Insurance: Conduct of Business sourcebook (ICOBS).

In this Annex, underlining indicates new text and striking through indicates deleted text.

8.4 Employers' Liability Insurance

Application

...

8.4.1 R ...

...

(3) In this section references to:

- (a) an 'employers' liability register' are to the employers' liability register referred to in *ICOBS* 8.4.4R(1)(a);
- (b) a '*director's* certificate' are to a statement complying with the requirements in *ICOBS* 8.4.4R(1)(b);
- (c) *employers' liability insurance* include business accepted under *reinsurance to close* covering *employers' liability insurance* (including business that is only included as *employers' liability insurance* for the purposes of this section); ~~and~~
- (d) a 'qualified *director's* certificate' are to the statement complying with the requirements in *ICOBS* 8.4.4R(1)(b)(ii); and
- (e) a 'historical policy' are to a United Kingdom commercial lines employers' liability insurance policy or other evidence of cover issued or renewed before 1 April 2011.

...

8.4.3 G The purpose of *ICOBS* 8.4 is to assist individuals with claims arising out of their course of employment in the *United Kingdom* for employers carrying on, or who carried on, business in the *United Kingdom*, to identify an *insurer* or *insurers* that provided *employers' liability insurance* (other than certain co-insurance and excess cover arrangements) by requiring *insurers* to produce an employers' liability register and to conduct effective searches for historical policies. In particular it aims to assist ex-employees whose employers no longer exist or who cannot be located.

...

Requirement to conduct effective searches for historical policies

- 8.4.14 R A firm with actual or potential liability for United Kingdom commercial lines employers' liability insurance claims must take reasonable steps to conduct effective searches of their records when they receive a request to carry out a search for a historical policy from persons falling into one of the categories in ICOBS 8.4.4R(2)(c) or a tracing office which meets the conditions in ICOBS 8.4.9R.
- 8.4.15 R A firm must put in place a written policy for complying with ICOBS 8.4.14R and operate in accordance with it. The policy must cover at least the following matters:
- (1) details of where the firm's historical policies are held or are likely to be held (including details of records which are archived or stored off site);
 - (2) details of the different types of records to be searched by the firm, such as electronic files, paper files, and microfiche; and
 - (3) details of how the searches will be carried out, including a description of how and in what circumstances the firm may decide not to conduct a search.
- 8.4.16 R (1) When a firm receives a request under ICOBS 8.4.14R, from a qualifying tracing office, it must provide a response, in writing, to the requestor within one month of receiving the request.
- (2) This rule does not apply when the firm has conducted a search but no historical policies have been found.
- (3) When a firm receives a request under ICOBS 8.4.14R, other than from a qualifying tracing office, it must provide a response, in writing, to the requestor within two months of receiving the request in accordance with ICOBS 8.4.17R.
- 8.4.17 R (1) Where a firm has established that a historical policy does exist, the response should confirm what cover was provided and set out any available information that is relevant to the request received.
- (2) Where there is evidence to suggest that a historical policy does exist, but the firm is unable to confirm what cover was provided, the response should set out any information relevant to the request and describe the next steps (if any) the firm will take to continue the search.
- (3) Subject to ICOBS 8.4.16R(2), where the firm has conducted a search, but no historical policies have been found, the response should set this out clearly and explain that reasonable steps were taken to conduct an effective search.



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