

10/13**

Financial Services Authority

Tracing employers' liability insurers

June 2010

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 14 September 2010.

Comments may be sent by electronic submission using the form on the FSA's website at (www.fsa.gov.uk/Pages/Library/Policy/CP/2010/cp10_13_response.shtml).

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A confidential response may be requested from us under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Tribunal.

Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

List of acronyms used in this paper

Association of British Insurers	(ABI)
Companies House Reference Number	(CHRN)
Consultation Paper	(CP)
Decision Procedure and Penalties Manual	(DEPP)
Department for Work and Pensions	(DWP)
Employers' Liability	(EL)
Employers' Liability Compulsory Insurance	(ELCI)
Employers' Liability Insurance Policies	(ELCOP)
Employers' Liability Register	(ELR)
Employers' Liability Tracing Office	(ELTO)
Employer's Reference Number	(ERN)
Enforcement Guide	(EG)
European Economic Area	(EEA)
Financial Services and Markets Act 2000	(FSMA)
Her Majesty's Revenue and Customs	(HMRC)
Insurance: Conduct of Business sourcebook	(ICOBS)
Interim prudential sourcebook for insurers	(IPRU (INS))
Senior Management Arrangements, Systems and Controls	(SYSC)
Supervision Handbook	(SUP)

1 Overview

On 10 February 2010, the Department for Work and Pensions (DWP) published a consultation paper¹ (the DWP's consultation), which included proposals to create the Employers' Liability Tracing Office (ELTO), which would manage an electronic database to help people track down Employers' Liability (EL) insurance policies. This consultation closed on 5 May 2010.

On 25 February 2010, the Ministry of Justice announced a range of measures to support people who have been exposed to asbestos in particular. This identified that creating the ELTO would help those who develop an asbestos-related disease to trace the relevant insurers and obtain full compensation.

The Justice Minister's statement² recognised that since 1999, the Association of British Insurers (ABI) and the Lloyd's Market Association have had a voluntary Code of Practice for tracing EL insurance policies. However, although the tracing service has resulted in some improvements, many individuals are still left without help.

The statement considered that an essential first step was to create a UK-wide employers' liability tracing office to manage an electronic database of EL policies, and to operate the existing tracing service.

The ABI agreed to drive work forward on the ELTO to help claimants and their representatives, taking into account the outcome of the DWP's consultation. On 1 April 2010, the ABI announced the ELTO would be established to help anyone suffering from a disease or injury caused at work, to find their former employer's EL insurer. The ELTO is developing a comprehensive database to hold all new and renewed EL policies.

1 *Accessing Compensation – Supporting people who need to trace Employers' Liability Insurance – public consultation*, Department for Work and Pensions, 10 February 2010.

2 Pleural plaques: Jack Straw statement, 25 February 2010.

Our consultation

The proposals contained in this Consultation Paper (CP) will be of interest to past and present UK employees who may need to trace details of EL insurance, to their employers and to insurers and Lloyd's members. This is particularly relevant to those insurers and Lloyd's members with potential liabilities in respect of UK EL cover, whether they are based inside or outside the UK.

Our powers to make rules and guidance, and the processes we must follow are set out in the Financial Services and Markets Act 2000 (FSMA). Section 138, in particular, is relevant to this paper's proposal.

Paragraphs 52 and 53 of the DWP's consultation suggested – with our agreement – that FSA rules could be made to require all insurers that write EL insurance to publish relevant policy details. Insurers could also be permitted to submit the details to a database, instead of publishing them, on condition that the insurer and the database continue to satisfy certain requirements.

However, FSA rules cannot compel insurers to submit data to the ELTO and to comply with its ongoing requirements. This is because it is beyond our powers to sub-delegate the consumer protection requirements we place on firms to an organisation over which we have no control. This may mean that tracing information would be available from several sources, rather than just the ELTO. Nevertheless, we can introduce rules to improve consumer protection until primary legislation is in place. The purpose of this paper is to consult on proposals for such rules.

Our consultation is in response to information about consumer detriment following the recent government policy review. Our proposals intend to secure improvements in consumer protection in the longer term, recognising that government policy, the ELTO or other tracing offices that meet certain conditions may change in the future, and that consumer detriment may continue or increase if we do not take action. Our consultation is not therefore concerned with the appropriate operation, membership, funding or governance of tracing offices, but with the information needs of potential claimants and how to satisfy these.

Nor is our consultation concerned with the Employers' Liability Insurance Bureau, proposed by the DWP's consultation.

2 Employers' liability insurance and tracing records

By law, most employers must have EL Compulsory Insurance (ELCI).³ Employees may be injured or become ill because of their work and may need to claim compensation from their employer. ELCI means that most employers have insurance cover against such claims and this provides protection for employees against the risk that their employer is not able to meet the claim. We understand that not all employers that were required to do so have had ELCI in place, however.

Employees may consider it unlikely they will contract a disease as a result of their employment and not be able to claim against their employer or their employer's insurer. So, while they are working for the employer, they may not confirm their employer has EL cover or find out who the EL insurer is. When, possibly many years later, they are diagnosed with an employment-related disease, any records may have been lost or destroyed. The employer may no longer exist or may not be traceable and information about who the EL insurers⁴ were at the time of employment may not be readily available from other sources.⁵

To help employees, employers are required to display their employers' liability certificate in the workplace and, until recently, were required to keep copies of their EL certificates for 40 years. While most claimants can find an employer or insurers to claim against, the number of claimants who cannot do so every year – 3,210 in 2008 – is such that we regard it as inconsistent with an appropriate level of consumer protection. In such cases, it is either not possible to pursue the corresponding claims or the cost of doing so is prohibitively high.

3 ELCI is required by the Employers' Liability (Compulsory Insurance) Act 1969. This requires employers carrying on business in Great Britain to insure their liability to the employees for bodily injury or disease sustained in the course of their employment in Great Britain. (A separate scheme applies in Northern Ireland.) Employers that are exempt from ELCI include, for example, most public organisations, including government departments, local authorities, several organisations financed through public funds; family businesses where all employees are closely related and which are not incorporated as limited companies; and companies employing only their owner where that employee also owns 50% or more of the issued share capital in the company. There is a penalty of up to £2,500 for failure to insure on any day. The Act came into effect on 1 January 1972 and although prior to that, Employers' Liability insurance was not compulsory, in practice many employers arranged cover.

4 Or co-insurers with joint and several liability.

5 Employees have the right to take legal action directly against the employers' liability insurer under the Third Parties (Rights against Insurers Act) 2010 in the event of the employer winding up or becoming insolvent.

Proposed requirement

Our aim is to help consumers covered by their employers' EL insurance to obtain sufficient access to justice so we can meet our statutory objective of protecting consumers. As this applies whether the employer provided compulsory or voluntary EL cover, our proposal therefore extends to both. However, it does not extend to employees of organisations that were not required to have ELCI cover, e.g. government departments, unless the organisations chose to insure their employers' liability on a voluntary basis.

Firstly, we propose to require all general insurers⁶ to notify us whether they carry out, i.e. are potentially liable for, UK commercial lines EL insurance contracts.

Secondly, we propose to make it a requirement for all insurers carrying out UK commercial lines EL insurance to make, as a minimum, certain policy and other information they have generally available for tracing purposes in a specified and readily accessible form. The information may be made available via the insurer's website. Alternatively, if an insurer uses a tracing office that meets certain conditions, it may arrange for the information to be made available on the tracing office's website. Even if most insurers were to use a tracing office, our requirements relating to the insurers' websites provide a fall-back position if, for any reason, a tracing office ceased to exist.

The requirement to make tracing information generally available will apply both to UK authorised firms (including UK branches of non-EEA insurers authorised in the UK) and EEA firms passporting into the UK, whether providing cover cross-border under freedom of services or through a UK branch. We therefore propose a consequential change to the general good provisions in SUP⁷ 13A, Annex 1, adding to the rules in our Handbook that apply to EEA incoming firms.

The purpose of the proposed tracing information is purely to identify which insurer was providing EL cover during the relevant periods of employment. It cannot establish whether the insurer definitely is liable or the extent of any liability in a particular case. In other words, identifying that an insurer provided cover is no guarantee that a claim will be successful. For a claim to be successful, liability by the employer needs to be established. This liability then needs to be covered by a policy providing EL cover and the terms of that policy need to be satisfied.

Relevant insurers

To apply our proposed requirement to make tracing information generally available, it is necessary to identify all insurers with potential UK EL liabilities in respect of employers (i.e. excluding reinsurance liabilities to other insurers). We also understand that the relevant source of consumer detriment is commercial lines business. Information currently provided by insurers does not enable all relevant insurers to be identified, as explained below.

6 In this consultation paper 'insurers' includes run-off insurers and Lloyd's managing agents unless otherwise stated. For Lloyd's managing agents reference to 'carrying out' contracts of insurance and potential liability should be read as a reference to carrying out relevant business by, and the potential liability of, the relevant syndicate members.

7 The Supervision Handbook, part of the FSA Handbook.

Insurers subject to prudential supervision in the UK (other than Lloyd's managing agents) are required to submit FSA returns that identify some EL cover, e.g. reporting category 271 in Form 20A as specified in IPRU (INS).⁸ However, EL cover may also be an additional ancillary benefit or part of a commercial or liability insurance package and may not be separately identified as category 271. EL cover may also be part of personal lines business (e.g. as part of home insurance to cover the employment of home helps, etc.).

Insurers subject to prudential supervision in other European Economic Area (EEA) states with permission to transact EL business in the UK are not required to submit FSA returns. The permissions we grant are normally insufficiently granular to identify whether an EEA insurer specifically transacts EL business. For example, an insurer may be permitted to transact General Liability business which includes EL. This may, but does not necessarily, mean the insurer has potential liabilities for EL cover.

Because the information needed to identify all relevant insurers is not currently available, we propose to introduce into ICOBS⁹ a new requirement. This would state that all insurers with permission to carry out contracts of general insurance¹⁰ in the UK must notify us as to whether they carry out – i.e. are potentially liable for – UK commercial lines EL contracts. We also propose to require insurers with potential liability to include in their notification the website address of the relevant tracing information. Firms would be required to obtain director level sign-off of the notification and to update it and re-notify us within seven days when changes arise. We propose to publish on our website a list of general insurers, showing whether they have potential EL liabilities and the links to the tracing information required.

Q1: Do you agree with our proposal to require all insurers with permission to carry out contracts of general insurance in the UK, to notify us, with director approval, whether they carry out (i.e. are potentially liable for) UK commercial lines EL contracts, and for us to publish a list of general insurers showing whether they are potentially liable and including a link to the tracing information required?

Specific tracing information

The DWP's consultation suggests that certain data be recorded to aid easy tracing and asks 'Is this the correct data to be recorded or is something else needed to properly identify EL policies?' Responses to the DWP consultation in this respect will be taken into account when finalising our proposals.

We propose to add a rule to ICOBS to require insurers who are potentially liable for employer's liability cover to make an Employers' Liability Register (ELR) available

8 The interim prudential sourcebook for insurers in the FSA Handbook.

9 The Insurance: Conduct of Business sourcebook in the FSA Handbook.

10 'Carrying out contracts of insurance as principal' is a regulated activity specified in article 10(2) of the Regulated Activities Order (the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)). This includes meeting all obligations under a contract of insurance whenever that contract was made and applies to insurers in run-off as well as those who continue to write new business.

showing relevant policies. This will help EL insurers to be traced. The ELR would list policy numbers, employers' names and addresses and coverage dates. The names of all employers covered, including subsidiaries and any changes in name would be included. Please see the Annex of the draft instrument in Appendix 1 for more details.

The purpose of the ELR is to make available, in a readily accessible form, the most appropriate tracing information insurers have to maximise the likelihood of the claimant identifying the employers' insurer using the information the claimant has. Our proposal sets the minimum amount of information to be included in the ELR. It does not prevent additional information from being added to better achieve the ELR's purpose.

In proposing the design of the ELR, we recognise that the information on the register may not itself be sufficient for a claimant to trace an insurer. For example, if an employee worked for an employer at an address other than the address recorded on the policy records, the ELR may only give a partial match, which may not provide conclusive evidence of who the insurer was.

Q2: Do you agree with our proposal for the tracing information to be included in an Employers' Liability Register?

Employers' and Companies House reference numbers

The specific information required in the Annex of the draft instrument in Appendix 1 includes the Employer's Reference Number (ERN) provided by Her Majesty's Revenue and Customs (HMRC) and, for most employers, their Companies House Reference Number (CHRN) as using such numbers will improve the effectiveness of searches.

The DWP's consultation asks 'Is there a better unique employer identifier than the employer's reference number ("ERN") provided by Her Majesty's Revenue and Customs to facilitate tracing of EL insurance policies?' We will have regard to the responses to the DWP's consultation, where relevant, when finalising our proposals.

It has been suggested that the ERN would form an effective unique identifier for tracing purposes as this is printed every year on an employee's P60. HMRC can also provide an employment history in writing upon written request from the employee or their authorised representative, and this could include the ERN.

It has also been suggested that the CHRN, allocated by the Registrar of Companies, would also provide an effective company identifier for most employers. We understand that when tracing EL insurers there are many examples of companies which have taken on the trading names of other companies, through various business arrangements. Such arrangements can lead to wholesale changes in the company's make up, but the CHRN cannot be changed. We understand that CHRNs are stored even after companies have gone out of business.

We propose to require insurers that enter into or renew EL cover in future to keep a record of the ERNs and (where relevant) CHRNs of all employers covered by their policies.

Q3: Do you agree with our proposal to require insurers that enter into or renew Employers' Liability cover in future to keep a record of the Employers' Reference Numbers provided by Her Majesty's Revenue and Customs and any Companies House Reference Numbers allocated by the Registrar of Companies for all employers covered by a policy

Access to tracing information

The ELR would either be made available through the insurer's website or that of a tracing office. An individual claimant (or their appointed representative) would have full and ready access to the register so they can search it effectively, for example, to find all matches in the register to any specified character string and to common variations in the spelling of names. 'Ready access' means the insurer or tracing office would need to respond to search requests without delay.

We have conducted an initial assessment of the impact of equality issues in this area. We believe that it is important that firms ensure the register is accessible to all users, for example those with disabilities, and intend to remind firms of the importance of user access.

The Compensation Act (2006) introduced joint and several liability on insurers for claims arising from mesothelioma, a cancer caused by exposure to asbestosis. This means that a claimant suffering from mesothelioma who may have been exposed to asbestos over several years only needs to find one insurer covering part of that exposure and may obtain compensation in full from them when due (providing the amount is within policy limits). It is then left to that insurer to seek recovery against any other insurers providing relevant coverage. We consider, therefore, that insurers with potential liability for UK commercial lines EL insurance cover should also have access to the ELR in respect of individual claims.

Screening access to the ELR would, however, be permitted to help ensure that the information is only used for the intended purpose of tracing insurers to pursue potential EL claims. For example, a registration process may be used to record the contact details of those accessing the ELR, therefore monitoring their usage. Copying or downloading the ELR may be prevented to avoid, for example, automated processing the ELR for commercial purposes, e.g. for targeting other companies' customers or constructing an understanding of competitors' strategies.

Q4: Do you agree with our proposals for access to the Employers' Liability Register?

Q5: Do any discrimination issues arise from our proposals?

Relevant policies

The more complete the ELR is, the more effective it is likely to be in helping to trace relevant insurers, and the quicker it will be in resolving the current issues associated with tracing insurers.

However, it is recognised that the older an EL policy is, the more costly it may be for insurers to extract information for inclusion in the ELR. This is especially the case for policies that started before November 1999. We understand that many earlier records are in paper format and, in some cases, insurer records have been lost or destroyed.

The DWP's consultation describes how, in signing up to the Code of Practice for tracing Employers' Liability Insurance Policies (ELCOP) in November 1999, the industry agreed to keep the historical data they had, and to record and maintain all current and future policies for a period of 60 years in a form that facilitates searches.

In addition, in formulating our proposals, we have considered the possibility that new sources of liability in respect of past cover may emerge in the future and that historical information will become increasingly difficult to capture over time. We therefore consider it reasonable to expect insurers to make generally available for tracing purposes the information they have on policies providing UK commercial lines insurance for which they are potentially liable that, on or after 1 November 1999, were entered into or renewed or for which claims were made.

To help ensure that information remains available following a transfer of business, we also propose a rule requiring transferring firms to provide to transferees the specific tracing information for the EL cover that has been transferred.

The DWP's consultation asked 'Which historic records would it be feasible and proportionate for the insurance industry to include in any electronic database?' We will have regard to the responses to the DWP's consultation in this respect, where relevant, when finalising our proposals.

The proposal to make information about certain policies generally available for tracing purpose does not change the existing requirement for insurers to keep records of all policies for which they are potentially liable. Under SYSC¹¹ 3.2.20R (1), insurers are required to take reasonable care to make and retain adequate records of matters and dealings (including accounting records) which are the subject of requirements and standards under the regulatory system. In particular, we expect that, in order to meet this requirement, an insurer would retain all records relating to contracts of insurance under which it is potentially liable, whenever written, to ensure it meets claims when due. Correspondingly, insurers should continue to search for tracing information requested by claimants, irrespective of the policy date.

If insurers consider the requirements to make tracing information generally available to be unduly onerous in their particular circumstances, FSMA, Section 148 allows firms to apply for a waiver or modification of FSA rules. However, to grant a waiver or modification we must be satisfied that the statutory tests are met – namely that either the rules are unduly burdensome in the firm's particular circumstances, or they do not give effect to policy, and that the waiver or modification would not give rise

11 Senior Management Arrangements, Systems and Controls in the FSA Handbook.

to undue risk to consumers. This process is well established and most waivers and modifications we have granted are available to view on our website.

The question of relevant policies and historical records is addressed further in Annex 1: the cost-benefit analysis.

Q6: Do you agree that the ELR should include at least those policies for which insurers are potentially liable that, on or after 1 November 1999, were entered into, renewed or for which claims were made?

Frequency of updating the ELR

Although, we do not consider that it would be proportionate to require the ELR to be updated every time a policy commences, is renewed or a claim is made, a frequent update is likely to be consistent with administrative effectiveness and data reliability.

We would therefore propose that the ELR is updated at least quarterly and that each update is made available within 30 days of its effective date.

Q7: Do you agree that the Employers' Liability Register (ELR) should be updated at least quarterly?

Directors' certification and audit

To help ensure tracing information remains reliable, we propose the ELR is certified by a director each time it is updated and that it is audited annually. The directors' certificate would be required to be made available with the ELR and the audit report may be included in the firm's annual audit report.

Q8: Do you agree with our proposal that the ELR should be certified by a director each time it is updated and that it should be audited annually?

Sanctions for non-compliance

We require compliance with our requirements as an ongoing supervisory matter. Where appropriate, we have regard to our enforcement policy, as set in our Decision Procedure and Penalties Manual (DEPP) and our Enforcement Guide (EG), so we can consider enforcement action, with the possibility of imposing penalties for significant sanctions. For example, failure to comply with our requirements to provide tracing information may, in very serious cases, lead to us concluding that a firm is not 'fit and proper' to carry out contracts of insurance and may result in the firm's permission being withdrawn.

Insurers wishing to withdraw from the market will be required to comply with our requirements. 'Carrying out contracts of insurance' is a regulated activity, and, to protect policyholders, all insurance liabilities must be fully extinguished before insurers cease to be regulated in respect of those contracts. The insurer remains responsible for its liabilities unless they have been transferred to another insurer by way of insurance business transfer.

Tracing offices

Although we do not have the powers to regulate unauthorised persons providing tracing facilities, we can apply requirements to the insurers that use them. An insurer may choose to make the ELR available on its website or, if the insurer has adequate evidence that a tracing office meets certain conditions, by arranging for that tracing office to make it available on its website.

If the insurer chooses to use a tracing office, the insurer would be required to:

- maintain records of all the tracing information and copies of all documents it has provided to the tracing office; and
- keep full ownership of the information and documents provided to the tracing office, so that the insurer could use the information as it wished. In particular, it could provide that information or documentation to another tracing office or make it available itself.

The insurer would need to have adequate evidence that the tracing office:

- maintains a database that:
 - accurately and reliably stores the information submitted in accordance with our rules;
 - is adequately updated with the new information provided by firms; and
 - has an effective search function (which includes finding all matches in the database to any specified character string and to common variations in spelling names);
- maintains adequate records of the director's certificate and audit reports sent to it by firms under the proposed rules;
- has adequate arrangements for information security, information back up and business continuity;
- accepts search requests concerning individual claimants and insurers with potential claims and provides responses without delay;
- has adequate arrangements for providing the firm with a full copy of information on the database upon request and without delay;
- includes in its published annual report a certificate from the directors of the tracing office and a report from its auditors stating whether the tracing office has met the above conditions in relation to the period covered by the annual report;
- provides the firm with a copy of its annual report promptly after publication; and
- provides the firm with a full copy of the information on the database that the firm has provided upon request and without delay.

We propose to include on our website a list of tracing offices that have published a director's certificate and audit report which show they meet the above conditions. While these conditions refer to the tracing office's annual report, a tracing office

may publish an audit/director's certificate before the annual report is due to help insurers to obtain evidence that the relevant conditions are met.

If a tracing office cannot produce a director's certificate and audit report, insurers that have made arrangements with the tracing office would need to consider appropriate action. Insurers may have to make all tracing information and any documents they had provided to the tracing office available on their websites or another tracing office's website which meets the conditions.

Placing these requirements on insurers to have adequate evidence that any tracing office it uses meets these conditions will, we believe, give complainants access to tracing information which is as effective as accessing information from insurers' websites.

We believe we would not be using our time and resources appropriately if we operated a tracing office ourselves, when this can be done more effectively by separate organisations, including those who appropriately represent the interests of the insurance industry, consumer and employers. Neither do we consider it necessary or appropriate for us to be involved in such an organisation's governing boards.

Q9: Do you have any comments on our proposals to allow insurers to arrange for tracing offices to make tracing information available, the requirements that would apply to insurers using a tracing office and the conditions the tracing office needs to meet of which the insurer would need to have adequate evidence?

Draft legal instrument

A draft legal instrument is contained in Appendix 1. This specifies the proposed rules and guidance, including detailed tracing information requirements and proposes transitional arrangements for the rules coming into force to help ensure ELRs are properly prepared in accordance with the rules from the outset.

Q10: Do you have any comments on the draft instrument in Appendix 1?

Cost-benefit analysis

General

In formulating our proposals, we identified that the ELR can be updated for future new policies, renewals and claims as part of normal policy processing. Nevertheless, insurers will need to make changes to their processes (e.g. on renewal) to capture information on all employers covered, including employers' and Companies House reference numbers.

We have also learned that there would be serious practical difficulties in achieving the ideal of providing full information concerning all policies for which insurers are potentially liable for UK commercial lines EL cover. These difficulties include:

- The quantity of the information. The DWP consultation refers to estimates that there are 1.2 million business enterprises with one or more employees in operation at any one time in the UK. To capture all potential liabilities, full information would require a history for each employer for each year over, approximately, the past 50 years or more.
- Information accessibility. Information about employers may not all be in one place or in convenient form. Collating such information for all EL cover over a long period, when only a relatively small proportion of the information is likely to help claimants, would be inordinately time-consuming, expensive and disproportionate to the benefits of improving facilities to enable claimants to trace insurers.
- Identifying the employer. Claimant employees may have worked for a subsidiary of an employer registered with the insurer under a different name, or may not accurately recall their employer's name.

Our proposals recognise these difficulties by requiring historical records to be made generally available for tracing purposes only in respect of policies that, on or after 1 November 1999, were entered into or renewed or for which claims were made. Since then, insurers were fully aware of the tracing issue and many insurers agreed voluntarily to hold information in readily searchable form. Our requirement to provide information on claims made on or after 1 November 1999 means that information on some policies that commenced before that date will also be included.

Such information is relevant to future claimants as the nature of workplace exposure means employers will often have more than one claim made against them.

Our proposals would require an initial exercise of populating the ELR with the historical information already recorded by insurers. Once the historical information has been made available, updating the ELR will become part of normal policy processing.

Benefits

Our requirements are expected to generate consumer benefits by raising the accessibility of compensation, thus reducing the subsidy¹ by claimants to insurers and increasing the number of compensations for legitimate claims.

The benefits of our proposed requirements are expected to be an immediate improvement in claimants' ability to trace relevant insurers, thereby reducing their search costs. In addition, over time, the information provided under our requirements will include an increasing proportion of policies for which insurers are potentially liable and the information available will increasingly help searches. Ultimately, all such policies and information will be included. The benefits are therefore expected to increase further over time.

Introducing regulatory requirements for insurers to provide appropriate information is efficient given the small number of insurers relative to the number of employers that hold EL cover and the fact that insurers tend to be more stable than employers in general.

We also expect the requirement to result in a long-term benefit for insurers by reducing on-going costs. Collating the information reduces the need for every incidence to be investigated by each relevant insurer, irrespective of whether they are the responsible insurer.

Our requirement for insurers to provide specific information introduces a degree of compulsion for all relevant insurers, which will potentially support consumer protection initiatives such as the ELTO, if insurers have adequate evidence that they can use them, and choose to do so. To the extent that the ELTO is used it is expected to:

- bring additional benefits from a consumer protection perspective by making information available in a central database;
- include additional information on the database, e.g. past and future results of successful searches by the tracing service for information which is not on the database and data collected from other stakeholders;
- enable the continuation of the tracing service for information that is not contained on the database until ultimately, after many years, all policies for which there is potential liability are included in the database;
- improve the audit of tracing activity by insurers that are members of the ELTO; and

¹ The subsidy is a result of a beneficiary with a legitimate claim not having access to compensation that is covered by the employer's premium payments.

- help reduce to zero the number of employers that do not have ELCI cover but are required by law to do so by comparing the database with other information about employers in the UK.

Costs

In analysing the costs of our proposal, given that the ELTO is the best example of a tracing office available, we have assumed, for the purpose of our cost-benefit analysis only, that the ELTO will be in place; most relevant insurers will have adequate evidence that the ELTO meets the relevant conditions; and they will join the ELTO.

As insurers can decide on which channel they can make the required information available, we recognise that some firms may decide not to join the ELTO but provide the information in a different way. If firms decide not to use the ELTO, the costs of setting up and running the ELTO would not arise. Other costs, however, would arise and certain services needed (such as auditing), which may be at least as expensive as a result of the lack of economies of scale, and possibly scope.

While there may be also be non-economic factors that affect a firm's choice, a large part of the costs, such as historical data processing, arise whatever the choice. We can still therefore generally assume that firms will choose the most cost-efficient options. As a result, we consider that the costs identified by assuming that the ELTO will be fully used for the cost benefit analysis, reflects an upper bound on the compliance costs to insurers.

Over time, the ELTO is expected to free up insurers' resources. Instead of each insurer searching its records in response to individual requests, only the ELTO's database would need to be searched.

The DWP's consultation included a draft impact analysis of the ELTO (policy option 2).

The set up costs for the ELTO structure and database are estimated to be £1.7m as in the DWP's analysis. Internal insurer costs of adapting IT systems and providing necessary resources are now estimated to be around £10.5m across the insurance industry. On the basis of the available information, we assume that the one-off costs to brokers of adapting their systems to provide more detailed information to insurers are assumed to be approximately 10% of the cost to insurers, adding a further £1.5m. The one-off cost of including historical information since 1999 in the ELR is estimated to be £17m. This gives total one-off industry costs of £30.7m. The one-off costs of including historical information are expected to vary considerably across firms depending on how they currently hold their information.

The average annual cost is estimated to be £3.1m including legal costs arising from additional successful traces and the costs of ongoing running of the ELTO and recording of information. It is assumed that there will be no significant additional costs to employers of providing ERN and CHRN details of all companies for new policies and renewals as such current information is expected to be readily available to employers at the relevant time.

Q11: Do you agree with our cost assumptions?

Transfers

There will also be transfers of financial resources from insurers/other policyholders to claimants/government for claims that are compensated as a result of our proposal that would otherwise not have been paid. The size of a transfer depends on whether a claim is admissible, and the number of people that make a claim but would not have done so without our proposal. Currently we face a situation where insurers/other policyholders are inappropriately subsidised by claimants that are unable to trace the relevant insurance company and/or are not aware of the existence of a potential coverage. An immediate addition to successful claims of 322 in the first year in respect of transactions on or after 1 November 1999 rising ultimately to 2500 per year with an average claim amount of £8,000² would result in a transfer of £2.6m in the first year rising ultimately to £20m per year. Given the figures involved we do not expect that the requirements will have a negative effect on the stability of the industry as a result of the potential increase in legitimate benefit payments, which may otherwise have been relevant to how the proposals were phased in. In addition we believe that the potential increase in legitimate claims as a result of improved search facilities will not be material enough to have a significant effect on premiums and thereby on other policyholders.

Q12: Do you have any comments on our cost benefit analysis?

2 Based on average gross claims incurred per year over the last five years of £1.5 billion and average number of claims per year over the last five years of 186,000.

Compatibility statement

We propose adding new rules and guidance to our Handbook that enable us to better achieve our regulatory objective of protecting consumers by requiring insurers to make information generally available that will help claimants to trace relevant employers' liability insurers.

We consider that our proposals represent the most appropriate way of meeting our objectives by requiring relevant tracing information to be made available either on insurers' websites or through tracing offices.

Our proposals take into account the principles of good regulation in section 2(3) of FSMA. We consider that the proposals allow the most efficient use of our resources. We have recognised the responsibilities of management by setting robust requirements in respect of historical and ongoing data. Proportionality of regulatory requirements has been observed by recognising the practical difficulties of collating information. The options as to how firms may make available the required information help to minimise the effect our proposals have on competition.

Q13: Do you have any comments on our compatibility statement?

List of questions

- Q1: Do you agree with our proposal to require all insurers with permission to carry out contracts of general insurance in the UK, to notify us, with director approval, whether they carry out (i.e. are potentially liable for) UK commercial lines EL contracts, and for us to publish a list of general insurers showing whether they are potentially liable and including a link to the tracing information required?
- Q2: Do you agree with our proposal for the tracing information to be included in an Employers' Liability Register?
- Q3: Do you agree with our proposal to require insurers that enter into or renew Employers' Liability cover in future to keep a record of the Employers' Reference Numbers provided by Her Majesty's Revenue and Customs and any Companies House Reference Numbers allocated by the Registrar of Companies for all employers covered by a policy?
- Q4: Do you agree with our proposals for access to the Employers' Liability Register?
- Q5: Do any discrimination issues arise from our proposals?
- Q6: Do you agree that the ELR should include at least those policies for which insurers are potentially liable that, on or after 1 November 1999, were entered into, renewed or for which claims were made?
- Q7: Do you agree that the Employers' Liability Register (ELR) should be updated at least quarterly?

- Q8: Do you agree with our proposal that the ELR should be certified by a director each time it is updated and that it should be audited annually?
- Q9: Do you have any comments on our proposals to allow insurers to arrange for tracing offices to make tracing information available, the requirements that would apply to insurers using a tracing office and the conditions the tracing office needs to meet of which the insurer would need to have adequate evidence?
- Q10: Do you have any comments on the draft instrument in Appendix 1?
- Q11: Do you agree with our cost assumptions?
- Q12: Do you have any comments on our cost benefit analysis?
- Q13: Do you have any comments on our compatibility statement?

Draft Handbook text

**EMPLOYERS' LIABILITY INSURANCE: DISCLOSURE BY INSURERS
INSTRUMENT 2010**

Powers exercised

- A. The Financial Services 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 138 (General rule-making power);
 - (2) section 156 (General supplementary powers); and
 - (3) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purposes of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [*date*].

Amendments to the Handbook

- D. The Insurance: Conduct of Business sourcebook (ICOBS) is amended in accordance with Annex A to this instrument.
- E. The Supervision manual (SUP) is amended in accordance with Annex B to this instrument

Citation

- F. This instrument may be cited as the Employers' Liability Insurance: Disclosure by Insurers Instrument 2010.

By order of the Board
[*date*] 2010

Annex A

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

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

After ICOBS 8.3 insert the following new section. The text is not underlined.

8.4 Employers' Liability Insurance

Application

- 8.4.1 R (1) The general application *rule* in *ICOBS* 1.1.1R applies to this section *ICOBS* 8.4 subject to the modifications in (2).
- (2) This section applies to:
- (a) any *firm* solely with respect to:
 - (i) the activities of *carrying out contracts of insurance*; or
 - (ii) *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's*,in relation to *general insurance contracts* and, in either case, including business accepted under *reinsurance to close*;
 - (b) to all *incoming EEA firms* or *incoming Treaty firms* falling in (a) including those providing *cross border services*.
- (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 the statement complying with the requirements in *ICOBS* 8.4.4R(1)(b); and
 - (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).
- 8.4.2 G *ICOBS* 8.4 does not generally apply to activities carried out in relation to a *reinsurance contract* (see *ICOBS* 1.1.2R and *ICOBS* 1 Annex 1 Part 2 1.1R) save that it does apply to business accepted under *reinsurance to close*.

Purpose

- 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*. In particular this would assist ex-employees whose employers no longer exist or are unable to be located.

Principal obligation to produce an employers' liability register and supporting documents

- 8.4.4 R (1) *A firm carrying out contracts of insurance, or a managing agent managing insurance business, including in either case business accepted under reinsurance to close, which include commercial lines employers' liability insurance for employers carrying on, or who carried on, business, and in relation to their employees' course of employment, in the United Kingdom, must:*
- (a) produce an employers' liability register complying with the requirements in (2) and *ICOBS* 8 Annex 1;
 - (b) obtain a statement by a *director* of the *firm* responsible for the production of the employers' liability register, as at the effective date included in the register in accordance with (2)(a), that the register has been properly prepared in accordance with the requirements of *ICOBS* 8.4 and that to the best of the *director's* knowledge the contents of the register are true and accurate;
 - (c) obtain a report, prepared by an auditor satisfying the requirements of *SUP* 3.4 and *SUP* 3.8.5R to 3.8.6R, stating whether, in the opinion of the auditor, and as at the effective date included in the register in accordance with (2)(a), the register has been properly prepared in accordance with the requirements of *ICOBS* 8.4.
- (2) For the purposes of (1)(a) the employers' liability register is required to:
- (a) include the effective date at which the information contained has been determined, as updated in accordance with *ICOBS* 8.4.10R(2);
 - (b) include a database which:
 - (i) accurately and reliably stores information;
 - (ii) has an effective search function;
 - (c) allow for requests for information to be made from individuals or *insurers* with a potential claim; and

- (d) allow for responses to requests in (c) to be provided without delay.

FSA notification requirements

- 8.4.5 R A *firm* must:
- (1) notify the *FSA*, within 7 *business days* of falling within *ICOBS* 8.4.1R(2), as to whether or not it, or, if relevant, a *member* of the *syndicates* it manages, carries on business falling within *ICOBS* 8.4.4R(1) and, if it does, include details of the internet address at which the employers' liability register is made available;
 - (2) ensure that the notification in (1):
 - (a) is approved and signed by a *director* of the *firm*; and
 - (b) contains a statement that it has been properly prepared in accordance with the requirements of *ICOBS* 8.4 and that to the best of the *director's* knowledge the content of the notification is true and accurate.
- 8.4.6 G Commercial lines business comprises *contracts of insurance* carried out in relation to *persons* whose *employers' liability insurance* relates to a business or profession they carry on. It does not include *employers' liability insurance* provided for retail consumers, for example, in relation to insurance taken out to cover liability in relation to domestic arrangements such as home help.

Requirement to make employers' liability register and supporting documents available

- 8.4.7 R (1) A *firm* must make available the employers' liability register, *director's* certificate and, unless (3) applies, auditor's report, either:
- (a) on the website at the address notified to the *FSA* in *ICOBS* 8.4.5R(1); or
 - (b) by arranging for a tracing office meeting the conditions in *ICOBS* 8.4.8R to make them available on the tracing office's website.
- (2) If a *firm* arranges for a tracing office to make information available for the purposes of (1)(b) the *firm* must:
- (a) maintain records of all the tracing information and copies of all documents it has provided to the tracing office;
 - (b) retain all legal rights in relation to the ownership and use of the information and documents provided to the tracing office to enable the *firm* to provide that information or documentation to another tracing office or to make it available itself.

- (3) The requirement in (1) does not apply to a *firm* in relation to its auditor's report to the extent that the *firm* has included the information required in *ICOBS* 8.4.4R(1)(c) in its annual audit report.

Qualifying tracing offices

8.4.8 R The conditions referred to in *ICOBS* 8.4.7R(1)(b) are that the tracing office is one which:

- (1) maintains a database which:
 - (a) accurately and reliably stores information submitted to it by *firms* for the purposes of complying with these *rules*;
 - (b) has systems which can adequately keep it up to date in the light of new information provided by *firms*;
 - (c) has an effective search function;
- (2) maintains adequate records of the *director's* certificates and auditor's reports sent to it by *firms* for the purposes of complying with these *rules*;
- (3) has adequate arrangements for information security, information back up and business continuity;
- (4) accepts search requests in relation to information in (1) and documents in (2) from individuals or *insurers* with a potential claim;
- (5) provides responses to requests in (4) without delay;
- (6) has adequate arrangements for providing to a *firm*, upon request and without delay, a full copy of the information on the database that the *firm* has provided to it;
- (7) includes in its published annual report:
 - (a) a certificate from the directors of the tracing office; and
 - (b) a report from its auditors;stating whether the tracing office has complied with the requirements in (1) to (6) in relation to the period covered by the annual report; and
- (8) provides to a *firm* making use of the tracing office for the purposes of *ICOBS* 8.4.7R(1)(b):
 - (a) a copy of its annual report promptly after publication;
 - (b) upon request and without delay a full copy of the information on the database that the *firm* has provided to it.

- 8.4.9 G (1) *ICOBS* 8.4.4R(2)(b) and *ICOBS* 8.4.8R(1) require a *firm*, or a tracing office used by a *firm*, to have an effective search function in relation to the employers' liability register database. In the *FSA*'s view an effective search function is one which finds all matches in the register to any specified character string and to common variations in the spelling of names.
- (2) *ICOBS* 8.4.4R(2)(c) and *ICOBS* 8.4.8R(4) allow a *firm*, and a tracing office used by a *firm*, to limit the use of the database's search facility to individual claimants, or their appointed representatives, and *insurers* that have joint and several liability with other *insurers*, in respect of an individual claimant.
- (3) In order to assist *firms* with their obligations under these *rules* the *FSA* has agreed to publish on its website at [] a list of *persons* providing tracing office facilities which have published a directors' certificate and auditor's report referred to in *ICOBS* 8.4.8R(7).

Updating and verification requirements

- 8.4.10 R (1) A *firm* must notify the *FSA*:
- (a) of any information provided to the *FSA* under *ICOBS* 8.4.5R which ceases to be true or accurate;
 - (b) of the new position, in accordance with the notification requirements in *ICOBS* 8.4.5R;
- within 7 *business days* of the change.
- (2) A *firm* producing an employers' liability register must:
- (a) update the information in the register, and obtain a revised *director's* certificate in relation to it, as at an effective date no later than 3 months from the most recent effective date of the register included in accordance with *ICOBS* 8.4.4R(2)(a);
 - (b) make available, in accordance with *ICOBS* 8.4.7R, no later than 30 days after the effective date of the *firm's* update in (a), the most recently updated version of the register and the revised *director's* certificate relating to it, in each case, in place of the previous version;
 - (c) obtain an auditor's report:
 - (i) no later than 12 months after the most recent auditor's report, obtained under *ICOBS* 8.4.4R(1)(c), or under this *rule*;
 - (ii) complying with the requirements, and containing the statement, set out in *ICOBS* 8.4.4R(1)(c);

(iii) in relation to the most recent version of the employers' liability register made available in accordance with (2)(b); and

(d) make available, in accordance with *ICOBS* 8.4.7R, the auditor's report in (c) no later than 3 months after the effective date of the register to which it relates, in place of the previous report.

8.4.11 G A *firm* may satisfy the requirement to obtain and make available an up to date audit report by including in its annual audit report the information required in *ICOBS* 8.4.10R(2)(c).

8.4.12 R The transferor in an *insurance business transfer scheme* must provide the transferee with the information and documents the transferor holds in compliance with *ICOBS* 8.4 in respect of the insurance business transferred.

8 Annex 1 Employers' liability register

See *ICOBS* 8.4.4R(1)(a): information to be included in the employers' liability register

1 Post 1 November 1999 activity

1.1 R In respect of *policies* being *carried out* by the *firm* which were entered into, or renewed, or for which a claim was made, on or after 1 November 1999, a *firm* must :

(a) include the information required by the form in 1.3R (in accordance with the notes) in relation to each *policy* entered into, or renewed, after [start date of rules];

(b) include the information required by the form in 1.3R (in accordance with the notes) in relation to *policies* entered into, or renewed, before [start date of rules] to the extent that the *firm* has the information; and

(c) use the layout set out in 1.3R and include the notes.

1.2 G A *firm* may include the information required by the form in 1.3R for *policies* not falling in 1.1R.

1.3 R FORM (*see next page*)

EMPLOYERS' LIABILITY REGISTER (effective date: [])

FRN (Firm Reference Number)	Name of Insurer						
Policy Number	Policy inception date	Policy end date					
Employer's Name 1.1	Postcode	Address Line 1	Address Line 2	Town/City	County	ERN (HMRC Employer reference number)	CHRN (Companies House reference number)
Employer's Name 1.2	Postcode	Address Line 1	Address Line 2	Town/City	County		
Employer's Name 1.3	Postcode	Address Line 1	Address Line 2	Town/City	County		
...							
Policy Number 2	Policy inception date	Policy end date					
Employer Name 2.1	Postcode	Address Line 1	Address Line 2	Town/City	County	ERN (HMRC Employer reference number)	CHRN (Companies House reference number)
...							

NOTES

1. The register must be completed by all insurers and managing agents managing the insurance business of syndicates of Lloyd's members that are carrying out contracts of insurance providing commercial lines employers' liability cover to employers carrying on, or who carried on, business in, and in relation to their employees' course of employment in, the UK.
2. All policies under which UK commercial lines employers' liability cover has been provided to employers which commenced or were renewed or for which claims were made on or after 1 November 1999 must be included.
3. The register must be completed in policy inception date order.
4. The FRN number is that given to the insurer by the FSA.
5. All employers covered by a policy including all names by which an employer has been known must be listed.
6. The employer's address is the latest address included in the insurer's policy documentation for that employer.
7. The ERN is the employers' reference number provided by Her Majesty's Revenue and Customs for that employer included in the insurer's policy documentation.
8. The CHRN is the employers' reference number provided, where relevant, by the Registrar of Companies.

2 Pre 1 November 1999 activity

- 2.1 R In respect of *policies* not falling within 1.1R, information relating to which is not included in the register, a *firm* must, beneath the form in 1.3R, state the following, where applicable:

“Whilst we have potential liability for policies not included in the register under which UK commercial lines employers’ liability cover has been provided to employers and which commenced or were renewed before 1 November 1999 and in respect of which no claims were made on or after 1 November 1999, we are not required to make details of those policies available in this register under FSA rules. Enquiries may be made about these policies by individual claimants, or *insurers* with potential claims, by contacting [contact details]”

Amend the following as shown.

TP 1 Transitional Provisions

...

Employers' liability insurance: disclosure by insurers

7 R For the purposes of *ICOBS* 8.4.5R a *firm* must ensure that the notification is:

(a) effective as at a date no earlier than [start date of rules] and,

(b) submitted to the *FSA* no later than 7 *business days* after [start date of rules].

This rule applies until [30 days from start date of rules]

8 R In relation to *ICOBS* 8.4.4R(1)(c), a *firm* must ensure that by [60 days after start date of the rules] it has obtained an auditor's report satisfying the requirements of *SUP* 3.4 and *SUP* 3.8.5R to 3.8.6R stating that the *firm's* employers' liability register has been properly prepared in accordance with the requirements of *ICOBS* 8.4.

This rule applies until [start date of rules plus 3 months].

9 G The effect of TP 8 is that a *firm* must obtain confirmation from its auditors, within 60 days from the [start date of the rules] that it has complied with *ICOBS* 8 in the preparation of its employer's liability register. This means that a *firm* will have to take steps to ensure that it will be in a position to obtain a positive audit report by [60 days from the commencement of the rules] in relation to its compliance with *ICOBS* 8.4.

10 R For the purposes of *ICOBS* 8.4.4R(2)(a), in relation to the initial version of the employers liability register a *firm* must use an effective date which is the latest date that the *firm* can practicably update the information required and continue to comply with the provisions of *ICOBS* 8.4 and in any event, a date no earlier than 1 month prior to [start date of rules].

This rule applies until [start date of rules plus 3 months].

ICOBS Schedule 2: Notification requirements
ICOBS Sch 2.1 G

~~There are no notification requirements in *ICOBS*.~~

<u>Handbook reference</u>	<u>Matters to be notified</u>	<u>Contents of notification</u>	<u>Trigger event</u>	<u>Time allowed</u>
<u>ICOBS 8.4.5R</u>	<u>Whether or not business falling within <i>ICOBS</i> 8.4.4R(1) is being carried out</u>	<u>Statement by <i>director</i> that notification has been prepared in accordance with <i>ICOBS</i> 8.4 and content is true and accurate, and if relevant details of the internet address at which the employers' liability register is made available</u>	<u><i>Firms or syndicate members carry out contracts of insurance which are general insurance contracts</i></u>	<u>7 business days</u>
<u>ICOBS 8.4.10R</u>	<u>Changes to the accuracy of the contents of the notification in <i>ICOBS</i> 8.4.5R</u>	<u>Details of the change and of the new position</u>	<u>Changes to the accuracy of a notification made under <i>ICOBS</i> 8.4.5R</u>	<u>Within 7 business days of the change</u>

Annex B

Amendments to the Supervision manual (SUP)

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

13A Annex 1G Application of the Handbook to Incoming EEA Firms

...

(1) Module of Handbook	(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom	(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom
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...

<i>ICOBS</i>	<i>ICOBS</i> applies except to the extent necessary to be compatible with European law. Guidance on the territorial application of <i>ICOBS</i> is contained in ICOBS <u>ICOBS</u> 1 Ann 1 Part 4.	<u><i>ICOBS</i> 8.4 applies except to the extent necessary to be compatible with European law. Other chapters of <i>ICOBS</i> does do not apply, except to the extent necessary to be compatible with European law. Guidance on the territorial application of <i>ICOBS</i> is contained in ICOBS <u>ICOBS</u> 1 Ann 1 Part 4.</u>
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PUB REF: 3826

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