

**RULE CHANGE APPLICATION MADE BY THE PATENT REGULATION
BOARD AND THE TRADE MARK REGULATION BOARD
AS THE INTELLECTUAL PROPERTY REGULATION
BOARD
TO THE LEGAL SERVICES BOARD
UNDER PART 3 OF SCHEDULE 4 TO THE
LEGAL SERVICES ACT 2007**

4 DECEMBER 2019

**APPLICATION TO AMEND REGULATIONS TO INTRODUCE AN
EXPLICIT REQUIREMENT FOR RUN-OFF COVER**

CONTACT DETAILS

Fran Gillon

Chief Executive

The Intellectual Property Regulation Board

Fifth Floor, Outer Temple

222-225 Strand

London WC2R 1BA

NB - from Monday 16 December our address will be:

20 Little Britain

London EC1A 7DH

Tel: 020 7353 4373

Email: fran.gillon@ipreg.org.uk

Introduction

1. IPReg is applying to change its regulatory arrangements to:
 - make explicit the requirement to put in place professional indemnity insurance (“**PII**”) run-off cover when a firm closes (if there is no successor practice that has (i) assumed all its PII liabilities and (ii) is regulated by another legal services regulator) to ensure that former clients of the firm remain protected by PII;
 - introduce a requirement that once a run-off cover policy has been taken out, information about the insurer must be provided to current and former clients as soon as possible (and in any event within one month);
 - introduce a requirement for attorneys/firms in private practice to provide information about their primary layer PII insurer within 5 working days of receiving a request;
 - make explicit the requirement to provide IPReg with information within the timescale specified by IPReg.
2. The proposed amendments sought will result in changes to Rule 17 (Professional Indemnity) of IPReg’s [Rules of Conduct](#).

Details of existing arrangements

3. Section 21(1)(g) of the Legal Services Act 2007 (“**LSA**”) provides that the regulatory arrangements of an applicable regulatory body include its indemnification arrangements.
4. Section 275A(1)(b) of the Copyright, Designs and Patents Act 1988 (“**CDP Act**”) provides that the keeper of the register of patent attorneys may make regulations which regulate the carrying on of work by registered persons. Section 275A(2)(j) of the CDP Act allows for those regulations to include provision about the indemnification of registered persons or regulated persons against losses arising from claims in respect of civil liability incurred by them.
5. Similarly, section 83A(1)(b) of the Trade Marks Act 1994 (“**TM Act**”) provides that the keeper of the register of trade mark attorneys may make regulations which regulate the carrying on of work by registered persons. Section 83A(2)(j) of the TM Act allows for those regulations to include provision about the indemnification of registered persons or regulated persons against losses arising from claims in respect of civil liability incurred by them.
6. IPReg’s [Rules of Conduct](#) are made pursuant to section 21 of the LSA. For the purposes of this application, the relevant rules are set out below.

Rule 4 – Competence

7. Currently Rule 4 states:

Regulated persons shall carry out their professional work with due skill, care and diligence and with proper regard for the technical standards expected of them. A regulated person should only undertake work within his expertise or competence.

Rule 5 – Integrity

8. Currently Rule 5 states:

Regulated persons shall at all times act with integrity putting their clients’ interests foremost subject to the law and any overriding duty to any Court or Tribunal.

Rule 17 Professional Indemnity

9. Currently Rule 17 states (amongst other things):

Without prejudice to any obligation contained in the Special Rules of Professional Conduct applicable to Litigation Practitioners, each registered person must ensure that its Professional Indemnity Insurance is commensurate with the risks at large arising from the extent and size of their practice, with due regard to Rule 4 (Competence).

In relation to that professional indemnity insurance, each registered person or his firm in private practice must take out and maintain a policy with a participating insurer.

Any limitation of liability for negligence must be clearly drawn to the attention of a client and be understood and accepted by him.

10. IPReg-regulated firms and individuals can only take out a PII policy with “participating insurers” that have agreed to provide cover that meets our [minimum terms and conditions](#) (MTCs). This is to ensure that there is a basic standard of consumer protection in place across all regulated firms and attorneys. The MTCs allow a participating insurer to require the insured attorney or firm to notify it of any claim or notice of intention to make a claim and of any circumstances that may give rise to a claim. The insurer can refuse to indemnify the attorney or firm (or may reduce the sum payable) if this is not done.

Rule 19 – Information to Regulation Boards

11. Currently Rule 19 states:

Regulated persons shall submit in a timely manner such information as the Regulation Boards may reasonably require.

12. Information about primary layer PII that attorneys and firms have is provided to IPReg during the annual re-registration process.

Rationale for changes

13. The desired outcome of these changes is to ensure that:
 - when an attorney or firm exits the market, their clients retain the protection that PII provides for at least six years;
 - consumers are able to obtain information about an attorney or firm's primary layer of PII and/or run-off cover if they need to make a claim or to inform their decision about who to instruct.

Explanation of run-off cover

14. PII works on a "claims made" basis. This means that when an issue comes to light that may lead to an insurance claim, it is the insurer who is providing cover on the date the claim is made that would consider the claim (this may not be the insurer who was providing cover when the event occurred). In many areas of law including intellectual property, issues may not come to light until some time after the event occurred; this may be after a practice has stopped trading. Run-off cover extends the protection that PII provides; it covers claims that are made after a practice closes. It is put in place and the premium is paid as part of the process of closing a practice.

Current position and proposed change – run off cover

15. IPReg considers that it is consistent with the requirement in its Rules of Conduct to act with integrity and to put clients' interests foremost for those it regulates to continue to have PII cover in place after their practice has closed. If all the clients of the practice that has closed have been taken on by another regulated firm (often called a 'successor practice') which is regulated by another legal regulator, it is likely that its PII will cover any claims because all legal regulators require PII. In that case, there would be no requirement to take out a run-off policy (subject to IPReg being satisfied that all clients were in fact covered by the successor practice). However, if there is no successor practice, a run-off policy must be taken out to ensure that former clients remain protected by PII.
16. The requirement to take out a run-off policy is not currently explicitly stated in our Rules of Conduct. Our experience is that, although most attorneys do take out run-off cover when they close their practice, some do not. If a run-off policy has not been taken out, there is no insurance in place if a former client makes a claim. Although it would be open to the former client to pursue the matter through the courts, we consider it would be targeted and proportionate to amend our Rules of Conduct to make explicit the requirement to take out run-off cover.

Current position and proposed change – provision of information to clients about PII

17. IPReg's recently published [Guidance](#) on improving information for consumers and small businesses suggested that it would be helpful to consumers to have an explanation of the protection that a regulated firm or attorney's PII provides. We are aware of at least one firm

that provides information on its website about who its insurer is.¹ We consider that it is good practice to make this information available. However, we are aware of some instances where clients have requested information from an attorney or firm about who their insurer is (because they want to make a claim) and the attorney or firm has refused to provide the information. This could put the client at a significant disadvantage if the attorney or firm does not report to their insurer the fact that the client wants to make a claim because under the MTCs the insurer can deny the claim or reduce the amount it pays (see paragraph 10).

18. We consider that it would be consistent with our approach to improving information for consumers and small businesses to provide guidance to firms and attorneys who are in private practice about the desirability of including on their websites information about their primary layer PII insurer. We will monitor the implementation of this information and consider whether a rule is required when we conduct our wider review of regulatory arrangements.
19. As a safeguard for consumers, in case information is not available on a website, we consider that it is proportionate to introduce a rule to provide information about PII promptly when requested. To avoid disagreement about what “promptly” means, we have specified that the information must be provided within 5 working days of the request.

Current position and proposed change - provision of information to IPReg about PII

20. When attorneys and firms complete their annual return (in December/January each year), they have to provide details of their PII policy to IPReg. Our experience is that although most attorneys do provide this information, a significant number either do not provide it or provide out of date information (e.g. a previous year’s policy number). Therefore, we have designed our new CRM system to include a verification process that, for those insured by PAMIA,² will not allow of date policy numbers to be entered. For these attorneys/firms, the annual return process cannot be completed until a valid policy number has been entered and failure to provide it therefore risks being suspended from the register.
21. There are some attorneys and firms that are insured with a participating insurer other than PAMIA. In addition, the PAMIA policy year runs from July to June whereas IPReg registration runs for a calendar year. In due course, we may conduct an exercise to identify earlier in the year those registrants who have not renewed their PII (whether with PAMIA or another insurer).³ In the meantime, we will continue to investigate on a case by case basis attorneys/firms that do not appear to have compliant PII or run-off cover. In order to ensure that we can take swift regulatory action if needed, we consider that it would be targeted and consistent to amend our Rules of Conduct to make explicit that information about PII and/or run-off cover must be provided on request to IPReg within the timescale that it specifies.

¹ We understand that most firms include information about insurance in their terms of business and/or engagement letter, but it is not clear whether this includes details about their insurer.

² PAMIA is a mutual insurer and is the main primary layer insurer for IPReg-regulated attorneys and firms.

³ Depending on priorities, this is likely to be no earlier than 2021 – i.e. once the new CRM has fully bedded in and a second annual return process has been undertaken.

Consultation process

22. On 25 July 2019, IPReg published a consultation paper on the proposed changes Annex A. The consultation set out the existing regulatory framework and the suggested draft of the new Regulations. We received responses from:
- CITMA
 - CIPA
 - PAMIA (the IP mutual insurer)
 - Legal Services Consumer Panel (“LSCP”)
 - 5 individual attorneys

A summary of the responses received is set out below.

Question 1: *What are your views on including in the Rules of Conduct an explicit requirement to take out run-off cover in the event that a practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator?*

23. CITMA and CIPA supported the proposal. CITMA considered that it would provide greater clarity for the regulated community as well as appropriate client protection. CIPA recognised that the requirement would be likely to have a greater impact on small to medium-sized firms and that sole traders were most likely to be affected. CIPA is happy to work with IPReg in raising awareness of the new requirement.
24. PAMIA says that it encourages attorneys to take out run-off cover and most do so. It considers that requiring run-off cover would mitigate two risks: that clients are not in a position to obtain compensation if the uninsured attorney has insufficient assets; and a retired attorney’s assets might have to be sold to finance a liability. PAMIA stated that its premium for six years run-off cover is twice the practice’s last annual premium and considers that in most cases this is a small percentage of fee income (although it made the point that premia might increase in future if PAMIA’s assessment of risk were to change). PAMIA confirmed that attorneys could renew their run-off cover on expiry of the initial six-year period. PAMIA considers that it should always be a matter for insurers to decide whether and on what terms to offer insurance; it suggested alternative drafting to accommodate this point. PAMIA does not want run-off cover to be included in IPReg’s minimum terms and conditions.
25. The LSCP considers that the current situation is unsatisfactory and believes that consumer protection would be strengthened if the requirement for run-off cover was made explicit. It considers that this would be proportionate to the risk of consumers’ financial detriment.
26. Of the individual attorneys who responded to the specific question:
- A patent attorney (“**Respondent A**”) said that a requirement for run-off cover would increase costs and raise prices. Respondent A considered that the consultation had not identified any situation where there was “no surviving PI cover” and so a requirement would seem to be a negative trade off for the public. Respondent A considered that the experience of other professions might change this assessment. If a requirement is introduced, Respondent A considered that:

- Patents can last for 20 years or more and that run-off cover for this length of time was not feasible. A period of a few years should be recognised as appropriate;
 - Any changes should not apply to run-off periods that are already in progress.
- A patent attorney (“**Respondent B**”) considered that an explicit requirement for run-off cover was “entirely unnecessary”. Respondent B stated that the cost of PII is a significant proportion of revenues for small and sole practitioners and was becoming prohibitive. Respondent B considered that the type of practices that were likely to close without a successor practice were those who were “highly experienced but semi-retired, part time, carer and/or disabled who, for personal reasons, cannot undertake regular work in larger practices” and that imposing a requirement could be discriminatory and could also lead to those firms leaving the regulated sector. Respondent B stated that there was no lack of integrity or failure to put clients’ interests foremost if these types of practice provided services at a lower cost but without run-off cover because the client would make a decision based on cost and risk. Respondent B stated that their clients either named them on their own PII or had no concerns about PII cover and did not expect PII cover after the attorney had ceased to practise. Respondent B also considered that the requirement would be unenforceable because they would no longer be on the register after their practice closed.

IPReg response

27. We welcome the support from CITMA, CIPA and the LSCP for our proposal. It is also very helpful that PAMIA has provided information about the cost of its run-off cover, particularly because it provides primary layer insurance for so much of the market. We do not have any intention of amending the minimum terms and conditions for PII to incorporate run-off cover. We accept that it is for an insurer to decide whether to offer cover based on its assessment of risk and have therefore incorporated PAMIA’s suggested drafting into the proposed rule.
28. In response to Respondent A, it is common for other professions (including other types of lawyer) to require run-off cover if there is no successor practice. The standard period of cover is six years, but PAMIA has confirmed that it is open to attorneys to extend that period and we have included in guidance that the duration of potential liabilities should be taken into consideration when attorneys decide whether to take out a further policy. We do not intend to change any requirements for run-off cover that is already in place.
29. In response to Respondent B, we consider that PII and run-off cover provide essential protection for consumers. In addition, they also provide protection for attorneys – if there is no PII/run-off cover in place, attorneys may be personally liable for meeting claims. Our new CRM system shows that of 128 active sole trader attorneys, the vast majority (102) have their PII with PAMIA.⁴ We recognise that some small practices may find that run-off cover takes a significant proportion of their income and that these are more likely to be sole traders and we note Respondent B’s comments on clients’ views of PII and run-off cover. We do not currently have diversity data that would enable us to carry out an impact assessment of this proposed rule change. However, we know that sole traders are a small percentage of

⁴ Figures correct on 28 November 2019.

our total registrants. IPReg regulates 235 entities, 2317 active individual patent and/or trade mark attorneys in private practice and 128 active sole traders. We also know that since the new process for considering applications for removal from the register(s) was introduced in December 2018, only 1 of the 39 individual attorneys who were granted voluntary removal was a sole trader.

30. We recognise that run-off cover may be a barrier to exit for some sole traders. However, we do not consider that it would be consistent with our statutory duty to protect and promote the interests of consumers⁵ to put at risk the clients of some types of attorneys/firms by allowing them to exit the market without run-off cover in place. In terms of the enforceability of any requirement, we expect attorneys/firms to comply with all their regulatory obligations. If we do not have proof of run-off cover, we can suspend the attorney/firm but keep them on the register until we receive proof; we can also take disciplinary action for non-compliance. If an attorney dies, our experience is that their estate's executors are normally cooperative in ensuring continuing compliance with regulatory obligations – not least because failure to take out run-off cover could put the estate's assets at risk if there is a claim.

Question 2: - *What are your views on introducing a requirement to provide this sort of information about PII to clients? Do you think that the information should be provided in the client care letter, website or on demand (or a combination of these)?*

31. CITMA responded that providing information to clients about PII should be a recommendation of best practice in guidance. It would support a requirement that information must be provided to a client or former client on request. CITMA also suggested that it would support a rule that required information about run-off cover to be provided to clients where liabilities are still present.
32. CIPA also responded that providing information to clients about PII should be a recommendation of best practice in guidance. CIPA supports including in the regulatory arrangements that information should be provided on request and a requirement to provide information about run-off cover to clients when a business is being wound up.
33. PAMIA does not object to attorneys being required to identify their primary layer insurer but considers that publishing the information on a website would result in confidential information being made public. It said that any obligation should therefore be to provide the information on demand and the information should be limited to the identity of the primary layer insurer and should not require information about the level of cover to be revealed. It provided drafting to put this into effect which we have included in the revised Rule. PAMIA agrees with the observation in the consultation document that if the obligation were to include PII information in client care letters this would create an obligation to provide updates when an insurer changed.
34. The LSCP considers that it would be helpful to provide clients with information about PII and that this should be in a prominent section of the website and on demand.
35. Of the individual attorneys who responded to the specific question:
- Respondent A considered that the suggestion was a bad idea because PII provides

⁵ LSA section 1(1)(d)

cover for the attorney and not the client and there is no reason for clients to know who provides PII cover providing they can be assured that such cover exists (by virtue of the attorney being regulated). Respondent A considered that the proposal could lead to “confusing and difficult” situations because a client might try to claim direct from a PII provider for disputes that were not PII-related (such as billing). Respondent A recognised that a client could be disadvantaged if an attorney did not report a possible claim to their insurer and suggested that IPReg should require attorneys not just to have PII but to comply with its terms;

- Respondent B agreed that it would be improper for information about PII to be withheld and that information should be provided to a client on demand. However, Respondent B could not see any reason for IPReg to interfere in business decisions taken by clients because those decisions include consideration of PII status. Respondent B stated that not all practices issue client care letters to every client or have a website and therefore considers that the only practical requirement would be to provide the information on request.

IPReg response

36. We have considered carefully whether it would be sufficient to include in guidance that information about PII should be provided to clients on request. We regard PII and run-off cover as key protections for clients of regulated attorneys/firms. It therefore seems reasonable that clients should be able to get information about a firm’s insurer easily - whether as part of the process of comparing providers before instructing them, while a matter is being dealt with or on market exit. However, introducing a requirement to include the information on client-facing communications including websites could introduce additional costs for attorneys/firms. If attorneys/firms see a commercial advantage in providing information in that way then they can do so.
37. We welcome the suggestion from CITMA and CIPA that there should be a requirement to notify clients and former clients about run-off cover before an attorney/firm ceases to trade.
38. As to the suggestion that we should introduce a rule to require attorneys/firms to comply with the terms of their PII, we do not consider that would be a proportionate response – we expect all regulated persons to comply with their regulatory and statutory obligations.
39. In terms of IPReg’s regulatory arrangements, we consider that it would be proportionate and targeted to:
 - Introduce a requirement on attorneys/firms to provide information about their primary layer PII insurer on request. Although the consultation proposed that the information should be provided “promptly”, to avoid disagreement about what this means, we have specified that the information must be provided within 5 working days of receiving a request; and
 - Introduce a requirement on attorneys/firms to provide information to all clients and former clients about run-off cover when an attorney/firm ceases to trade so that the clients have a record in case they need to make a claim at a later date. Although the consultation did not specify a timescale, to avoid confusion about when this should be done we consider that a timescale of one month from when the policy is taken out will provide attorneys/firms with sufficient time to do this as part of their

practice closure process;

Question 3: - *What are your views on introducing an explicit requirement to provide information about PII to IPReg on request?*

40. CITMA considered that this would be a reasonable requirement and supported the proposed drafting. It considered that such a rule would mirror the process on the new CRM system whereby information about PII will have to be provided before any practising fees can be paid.
41. CIPA also considered that this would be reasonable and should be included in regulatory arrangements. It considered that the requirement would be best achieved through the registration and re-registration process before the payment of fees.
42. PAMIA had no objection to introducing this requirement.
43. The LSCP believes that information about PII should be provided to IPReg on request and should be included in its regulatory arrangements.
44. Of the individual attorneys who responded to the specific question:
 - Respondent A supported the proposal and considered that it would be confirmation of current practice, providing the information required was limited to name of the policy holder, the insurance company, the policy number and whether the policy complied with IPReg's minimum requirements;
 - Respondent B considered that the current approach of obtaining information during the annual renewal process was adequate. Respondent B suggested that IPReg should seek automated renewal confirmation from all participating insurers or by contacting registrants at PII renewal time (rather than at the annual renewal of registration).

IPReg response

45. IPReg's new CRM system will not permit an attorney/firm to pay their practising fee until they have provided (amongst other things) up to date information about their PII. However, for attorneys/firms who do not provide this information (and will therefore go through the suspension/disciplinary process) it is important for IPReg to have the explicit power to request evidence in order for it to establish whether there may have been a breach of its regulatory arrangements and for it to specify a date by which the information must be provided. In addition, because the registration year (which is a calendar year) differs from the PAMIA policy year (which is 1 July to 30 June) it is important for IPReg to be able to obtain information about PII if it has concerns about whether a policy has been renewed.
46. In terms of the suggestion by Respondent B that we should seek automated confirmation of renewal from insurers, it is important to recognise that compliance – and the provision of information about compliance - with regulatory arrangements is the responsibility of the registrant.

Question 4: *Do you have any comments on the proposed drafting?*

47. No respondents commented on the proposed drafting other than as set out above.

Other matters

48. In addition to responses to the specific consultation questions:

- Respondent A considered that IPReg should focus its resources on “much needed” education of less experienced attorneys on “the basics of professional conduct” rather than putting burdens on experienced practitioners who operate small and less profitable practices;

IPReg response: we do not consider that the cost of run-off cover should be seen as a burden but as an essential consumer protection provided by regulated attorneys/firms. We have set entry standards for the profession and have developed an [accreditation handbook](#) for education providers. We expect firms that employ attorneys to ensure that they are aware of their regulatory obligations.

- A trade mark attorney (“**Respondent C**”) made reference to the Solicitors’ Regulation Authority (“**SRA**”) [announcement](#) in October 2019 that the Solicitors Indemnity Fund (“**SIF**”) would stop providing any run-off cover after 30 September 2020. Respondent C considered that this meant that run-off cover is a matter for an individual practitioner and was no longer an appropriate matter for regulation.

IPReg response: the SRA’s announcement explains that the SIF currently provides run-off cover for firms without a successor practice that ceased trading on or before 31 August 2000. It also provides post six-year run-off cover for firms that ceased trading after that date without a successor practice. The SRA’s minimum terms and conditions for PII include a requirement for six-years run off cover (and a premium is charged by insurers for it). The changes set out by the SRA therefore only apply to run-off cover after the initial six-year period of cover has ended. IPReg’s proposal is explicitly to require an initial six-year period of cover.

- A patent attorney (“**Respondent D**”) raised a number of queries about whether run-off cover operated on a claims made or on an event occurring basis. Following correspondence with the IPReg CEO, Respondent D accepted that it operates on a claims made basis;
- A patent and trade mark attorney (“**Respondent E**”) tweeted that there are not enough insurers to provide a competitive market for “this retirement prevention initiative”. CITMA has concerns about the limited number of participating insurers and the fact that a number of them are underwritten by the same underwriter. CITMA urged IPReg to ensure that there is “suitable competition” and no barriers to obtaining appropriate PII as a result of the small number of insurers and the limited circumstances under which some of them are prepared to provide cover.

IPReg response: there are currently four participating insurers. We understand that PAMIA provides the primary layer of insurance for the vast majority of attorneys/firms. PAMIA has confirmed in its response that the cost of its run-off cover is twice the most recent annual premium and that in most cases this is a small

percentage of fee income. We consider that the cost of run-off cover for most attorneys/firms will therefore be affordable and that the risk to consumers of an attorney/firm not having the cover in place outweighs that cost. We will continue to work with our insurance adviser to respond to expressions of interest about becoming a participating insurer. However, we recognise that this needs to be a commercially attractive proposition and that a dominant incumbent (at least at the primary layer of insurance) may reduce the attractiveness of the market for potential new entrants.

Details of proposed changes

49. The proposed changes are to Rule 17 of the Rules of Conduct. These are shown in tracked changes; the highlighted sections are changes that differ from the proposals in the consultation.
50. For completeness we set out below the changes that we intend to make to our Guidance to Rule 17. However, our understanding is that the LSB does not need to approve changes to Guidance.

Rule 17 – Professional Indemnity

Without prejudice to any obligation contained in the Special Rules of Professional Conduct applicable to Litigation Practitioners, each registered person must ensure that its Professional Indemnity Insurance (PII) is commensurate with the risks at large arising from the extent and size of their practice, with due regard to Rule 4 (Competence).

In relation to that ~~professional indemnity insurance~~ PII, each registered person ~~or his firm~~⁶ in private practice must take out and maintain a policy with a participating insurer.

~~Each registered person in private practice must~~ ~~apply for~~ ~~take out and,~~ ~~if offered terms,~~ ~~take out and maintain for at least 6 years,~~ a PII run-off policy with a participating insurer in the event that their practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator.

~~When a registered person has taken out a PII run-off policy, information about the insurer (including their contact details) must be provided in writing to current and former clients as soon as possible and no later than one month after the policy has been taken out.~~

~~Information~~ ~~about the identity of an attorney or firm's~~ ~~a registered person's primary layer PII insurer~~ ~~must be provided~~ ~~within 5 working days of receiving a request.~~ Any limitation of liability for negligence must be clearly drawn to the attention of a client and be understood and accepted by him.

~~Information about a registered person's PII (including run-off cover) must be provided to IPReg~~ ~~en~~ ~~within the timescale specified by IPReg~~ ~~request.~~

Every registered person in private practice must ensure that all monies held by them for or on behalf of their clients and other persons are at all times protected by compensation arrangements to compensate for losses or hardship suffered by such persons in consequence of fraud or dishonesty or fraudulent or dishonest failure to account.

⁶ Drafting note - the term "his firm" has been deleted because the definition of "registered person" in the Rules of Conduct already includes "a body (corporate or unincorporated)" that is on the register(s).

Clean version of amended Rule 17 – Professional Indemnity

Without prejudice to any obligation contained in the Special Rules of Professional Conduct applicable to Litigation Practitioners, each registered person must ensure that its Professional Indemnity Insurance (PII) is commensurate with the risks at large arising from the extent and size of their practice, with due regard to Rule 4 (Competence).

In relation to that PII, each registered person in private practice must take out and maintain a policy with a participating insurer.

Each registered person in private practice must apply for and, if offered terms, take out and maintain for at least 6 years, a PII run-off policy with a participating insurer in the event that their practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator.

When a registered person has taken out a PII run-off policy, information about the insurer (including their contact details) must be provided in writing to current and former clients as soon as possible and no later than one month after the policy has been taken out.

Information about the identity of a registered person's primary layer PII insurer must be provided within 5 working days of receiving a request. Any limitation of liability for negligence must be clearly drawn to the attention of a client and be understood and accepted by him.

Information about a registered person's PII (including run-off cover) must be provided to IPReg within the timescale specified by IPReg.

Every registered person in private practice must ensure that all monies held by them for or on behalf of their clients and other persons are at all times protected by compensation arrangements to compensate for losses or hardship suffered by such persons in consequence of fraud or dishonesty or fraudulent or dishonest failure to account.

Guidance

17.1 It would be expected that Professional Indemnity Insurance of at least £1 million would be required for all registered persons and their firms, unless demonstrably, their practice does not warrant a sum that high.

17.2 We consider that it is best practice for attorneys in private practice and sole traders to make information about PII available on their websites. This should include the name and contact details of the primary layer insurer. There is no need to disclose information about the limit of cover, the level of any excess or any other insurers.

17.217.3 When a PII run-off policy is coming to an end, you should consider whether you need to take out a further run-off policy. In making a decision, you should take into consideration how long your potential liabilities are likely to continue for.

17.317.4 The following insurers are participating insurers:

PAMIA Limited

Allianz Global Corporate & Specialty SE

China Re Syndicate 2088 via Catlin Underwriting Agency Limited

Royal & Sun Alliance Insurance plc

[Wimsure Underwriting Limited on behalf of underwriters at Lloyds](#)

These insurers have entered into a commitment with IPReg to insure on, at least, minimum terms, which is a critical element of IPReg's compensation arrangements. Participating insurers will confirm this on request.

Regulatory Objectives

51. IPReg considers that its proposals are compatible with the regulatory objectives set out in the Act.

Protecting and promoting the public interest

52. We consider that it is in the public interest for consumers to be confident that when they use a regulated provider there is adequate PII in place. This extends beyond when a practice closes and the proposed requirement to notify current and former clients about run-off cover once it is in place ensures that if a client needs to make a claim, they will have information available to them.

Supporting the constitutional principle of the rule of law

53. We do not consider that this regulatory objective is relevant to this proposal.

Improving access to justice

54. Some respondents expressed concern that having an explicit requirement for run-off cover could lead to small firms and sole traders closing and that this could result in reducing access to justice. We consider that this possibility needs to be balanced against the risk that if run-off cover is not in place, a consumer who needed to make a claim would potentially be denied access to justice (i.e. the right to recompense for mistakes made). We also consider that, as a principle, the requirement to have PII and, by extension, run-off cover enhances access to justice because consumers can have more confidence in using regulated legal services.

Protecting and promoting the interests of consumers

55. Having run-off cover in place – and providing information about it to current and former clients - is a key consumer protection measure. Providing information promptly to consumers about PII when they request it will ensure that if they consider that they might have a claim they have some information about how to make that claim. It may also help to inform their decision who to instruct.

Promoting competition in the provision of legal services

56. An explicit requirement for run-off cover is likely to be neutral in terms of its impact on this regulatory objective (since a firm will be exiting the market once the policy is in place). However, a general requirement for run-off cover across the market may help to increase consumer confidence and thereby support competition. In addition, making the requirement explicit should help to support a level playing field between competitors by ensuring that firms cannot argue that they do not need to have run-off cover in place to exit the market.

Increase the public's understanding of a citizen's legal rights and duties

57. We do not consider that this regulatory objective is relevant to this proposal.

Promoting and maintaining adherence to the professional principles

58. We consider that the proposals support the professional principles and in particular:
- Acting with integrity;
 - Acting in the best interests of clients.

Better Regulation Principles

59. IPReg considers that this proposal is consistent with the better regulation principles.

Proportionate

60. The proposal is a proportionate response to the risk faced by consumers if a firm or attorney exits the market without appropriate run off cover being in place. The cost of run-off cover from PAMIA (which provides a significant proportion of the primary layer of insurance in the market) is twice the most recent annual premium. Although some smaller firms and sole traders might consider that this is expensive, the cost to their former clients (and potentially to themselves) if they do not have cover in place is likely to be significantly more than the premium.

Accountable

61. The proposal has been developed through a full consultation process and we received responses from individual attorneys and firms as well as CIPA, CITMA, the LSCP and the leading primary layer insurer in the market. IPReg's full consideration of the responses is set out in this application.

Consistent

62. A specific requirement to take out a run-off policy is consistent with our current (and historic) approach where we seek to explain to attorneys/firms the risks that they and their former clients face if they do not have run-off cover in place. The requirement will apply to all attorneys/firms in private practice.

Targeted

63. Run-off cover is targeted at those attorneys/firms in private practice that are exiting the market and protects their former clients. The minimum duration of a policy is six years. We have included in guidance advice on factors to consider when deciding whether to renew the policy.

Transparent

64. Having a requirement for run-off cover on the face of IPReg's regulatory arrangements improves transparency about what is required in terms of PII when an attorney/firm exits the market.

Impact on other regulators

66. This proposal has no direct impact on other regulators.

Implementation timetable and operational readiness

67. If this application is granted, IPReg will be ready to implement the changes immediately upon receipt of the Legal Services Board's decision. We consider that it is important to be able to implement the change during the 2020 annual re-registration process (which has now started) so that attorneys/firms that apply to be removed from the register during that process can be clear about the need for run-off cover. Looking further ahead, we will work with CIPA and CITMA to raise awareness of the importance of run-off cover.

ANNEX A

Consultation: run-off cover

Introduction

1. This consultation proposes to make explicit on the face of IPReg's regulatory arrangements the requirement to put in place professional indemnity insurance run-off cover when a firm closes (if there is no successor practice that has assumed all its liabilities) to ensure that former clients of the firm remain protected by PII. The consultation also asks whether there should be a requirement for firms to make information about their PII insurer available to clients and, if so, the best way of doing this. It also proposes to make explicit the requirement to provide IPReg with information about PII on request.
2. **This consultation closes on Wednesday 9 October 2019 at 5pm.**

The current regulatory framework

3. IPReg's [Rules of Conduct](#) require all those it regulates to have in place professional indemnity insurance (PII) that is commensurate with the risks arising from the extent and size of their practice, having due regard to the requirement only to undertake work within their expertise or competence.¹ IPReg-regulated firms and individuals can only take out a PII policy with "participating insurers" that have agreed to provide cover that meets our [minimum terms and conditions](#) (MTCs). This is to ensure that there is a basic standard of consumer protection in place across all regulated firms and attorneys.
4. The MTCs allow a participating insurer to require the insured attorney or firm to notify it of any claim or notice of intention to make a claim and of any circumstances that may give rise to a claim. The insurer can refuse to indemnify the attorney or firm (or may reduce the sum payable) if this is not done.²
5. The Rules of Conduct also require, amongst other things, that those we regulate act with integrity at all times and put their clients' interests foremost.³
6. IPReg has taken out an insurance policy that provides for discretionary payments of up to £25,000 to compensate certain categories of clients for losses or hardship suffered as a result of fraud or other dishonesty (including failure to account for money) if those losses are not covered or required to be covered by PII.⁴
7. The Rules of Conduct also require information that IPReg requests from attorneys or firms to be submitted in a timely manner.⁵ Information about PII is required as part of the annual re-registration process.

¹ [Rules of Conduct](#): Rule 17 and Rule 4

² MTCs: Section 8 – Notification

³ Rules of Conduct: Rule 5

⁴ [Registered Bodies Regulations 2015](#): Regulation 19 and Annex B

⁵ Rules of Conduct: Rule 19

Discussion

Run-off cover

8. PII works on a “claims made” basis. This means that when an issue comes to light that may lead to an insurance claim, it is the insurer who is providing cover on the date the claim is made that would pay the claim (this may not be the insurer who was providing cover when the event occurred). In many areas of law including intellectual property, issues may not come to light until some time after the event occurred; this may be after a practice has stopped trading.
9. IPReg therefore considers that it is consistent with the requirement in its Rules of Conduct to act with integrity and to put clients’ interests foremost for those it regulates to continue to have insurance cover in place after their practice has closed. If all the clients of the practice that has closed have been taken on by another regulated firm (a ‘successor practice’) it is likely that its PII will cover any claims. However, if there is no successor practice then a “run-off” policy must be taken out to ensure that former clients remain protected by PII.
10. The requirement to take out a run-off policy is not currently explicitly stated in our Rules of Conduct. Our experience is that, although most attorneys do take out run-off cover when they close their practice, some do not. If a run-off policy has not been taken out, there is no insurance in place if a former client makes a claim. Although it would be open to the former client to pursue the matter through the courts, we consider it would be targeted and proportionate to amend our Rules of Conduct to make explicit the requirement to take out run-off cover. We understand that in most cases, the additional cost to take out run-off cover is relatively small.

Question 1: What are your views on including in the Rules of Conduct an explicit requirement to take out run-off cover in the event that a practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator?

Provision of information to clients about PII

11. IPReg’s recently published [Guidance](#) on improving information for consumers and small businesses suggested that it would be helpful to consumers to have an explanation of the protection that a regulated firm or attorney’s PII provides. We are aware of at least one firm that provides information on its website about who its insurer is.⁶ We consider that it is good practice to make this information available. However, we are aware of some instances where clients have requested information from an attorney or firm about who their insurer is (because they want to make a claim) and the attorney or firm has refused to provide the information. This could put the client at a significant disadvantage if the attorney or firm does not report to their insurer the fact that the client wants to make a

⁶ We understand that most firms include information about insurance in their terms of business and/or engagement letter, but it is not clear whether this includes details about their insurer.

claim because under the MTCs the insurer can deny the claim or reduce the amount it pays (see paragraph 4).

12. We are therefore considering whether we should also introduce a requirement to provide information about who provides an attorney or firm's PII cover. This could be in a client care letter, on a website or on request. In considering which of these would best achieve the outcome that clients are aware of who their attorney's insurer is, we have reviewed [research](#) into client care letters. This shows, amongst other things, that although client care letters at the beginning of a legal process are welcomed by consumers, they are often perceived as difficult to read, the information in them is not always what consumers consider a priority and information in lengthy documents can often be missed. A further issue would be that if the insurer changes, notifying all clients (and former clients) of the change could be a significant task. Introducing a requirement to make information about the PII insurer available on request would ensure that up to date information is provided. However, it would be much more difficult for IPReg to monitor compliance. We therefore consider that if we are going to introduce this requirement it should be to require information on an attorney or firm's website. In the event that the attorney or firm does not have a website it would have to be made available on request.

Question 2: What are your views on introducing a requirement to provide this sort of information about PII to clients? Do you think that the information should be provided in the client care letter, website or on demand (or a combination of these)?

Provision of information to IPReg about PII

13. When attorneys and firms complete the annual return, they have to provide details of their PII policy to IPReg. Our experience is that although most attorneys do provide this information, a significant number either do not provide it or provide out of date information (e.g. a previous year's policy number). This results in considerable work chasing for the correct information. We therefore consider that it would be targeted and consistent to amend our Rules of Conduct to make explicit that this information must be provided on request to IPReg.

Question 3: What are your views on introducing an explicit requirement to provide information about PII to IPReg on request?

14. The draft text of the proposed changes is at Annex A.

Question 4: Do you have any comments on the proposed drafting?

Annex A – proposed changes are shown tracked

Rule 17 – Professional Indemnity

Without prejudice to any obligation contained in the Special Rules of Professional Conduct applicable to Litigation Practitioners and [New Rule #] on pro bono advice, each registered person must ensure that its Professional Indemnity Insurance (PII) is commensurate with the risks at large arising from the extent and size of their practice, with due regard to Rule 4 (Competence).

In relation to that ~~professional indemnity insurance~~ PII, each registered person ~~or his firm~~² in private practice must take out and maintain a policy with a participating insurer.

Each registered person in private practice must take out and maintain a PII run-off policy with a participating insurer in the event that their practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator.

Information about an attorney or firm’s PII must be provided in [client care letters], [and/or] [on the attorney or firm’s website] [and/or] [on demand]. Any limitation of liability for negligence must be clearly drawn to the attention of a client and be understood and accepted by him.

Information about a registered person’s PII (including run-off cover) must be provided to IPReg on request.

Every registered person in private practice must ensure that all monies held by them for or on behalf of their clients and other persons are at all times protected by compensation arrangements to compensate for losses or hardship suffered by such persons in consequence of fraud or dishonesty or fraudulent or dishonest failure to account.

Guidance

17.1 *It would be expected that Professional Indemnity Insurance of at least £1 million would be required for all registered persons and their firms, unless demonstrably, their practice does not warrant a sum that high.*

17.2 *The following insurers are participating insurers:*

PAMIA Limited

Allianz Global Corporate & Specialty SE

⁷ Drafting note - the term “his firm” has been deleted because the definition of “registered person” in the Rules of Conduct already includes “a body (corporate or unincorporated)” that is on the register(s).

China Re Syndicate 2088 via Catlin Underwriting Agency

Limited Royal & Sun Alliance Insurance plc

~~Wimsure Underwriting Limited on behalf of underwriters at Lloyds~~

These insurers have entered into a commitment with IPReg to insure on, at least, minimum terms, which is a critical element of IPReg's compensation arrangements. Participating insurers will confirm this on request.