A Guide to The Insurance Act 2015
Fair Presentation

KINGSBRIDGE
INSURANCE BROKERS

INTRODUCTION

Buyers of commercial insurance should be aware of the Insurance Act 2015 which will affect all renewal and new policy business insurance subject to the law of England, Scotland, Wales or Northern Ireland arranged or amended after 12 August 2016.

This is a change in law which updates the legal framework to be more appropriate for modern business requirements. The key new requirement that businesses need to be aware of is the Duty of Fair Presentation.

The law is being updated to make it simpler and easier for businesses to get claims paid by insurers and to assist insurers, brokers and customers to ensure that insurance contracts are fit for purpose.

In essence, businesses will get a fairer outcome in the event of a claim, but only if they demonstrate an adequate approach to disclosing information about their risk before the insurance is agreed. This will be in the form of the new Duty of Fair Presentation.

FAIR PRESENTATION IN BRIEF

The central requirement of Fair Presentation is to continue to share all material facts, accurately and in good faith. The duty is satisfied if either all material circumstances are disclosed by the business, or sufficient information is provided to put the insurer on notice to make further enquiries. The new duty introduces some new concepts, which, taken together mean that there will be more focus on the information gathering process not just the facts themselves.

FAIR PRESENTATION KEY POINTS

> All commercial insurance arranged or amended after 12 August 2016 will be affected.

> It builds on existing underwriting practices, but is more process focused than the duty of disclosure it replaces.

> It should not mean reinventing the wheel – building on existing practices and internal information processes is key to avoid unnecessary business disruption.

> Successful Fair Presentation is measured in relation to specific or individual businesses, not a standardised checklist – Kingsbridge is available to support you to map this out prior to renewal or new policy inceptions.

FAIR PRESENTATION: HOW IT FITS TOGETHER

Business knowledge which MUST be included → Senior Management knowledge + Insurance and risk team and/ or Broking team knowledge + Information revealed by a reasonable search

Nature of the presentation → Clear and accessible disclosure of material risk information

Insurer knowledge NOT required to be included → Insurer information accessible to the underwriter + Information an underwriter dealing with that type of business is expected to know + Common knowledge

FAIR PRESENTATION IN MORE DETAIL

Material accuracy and good faith

> The core requirements from businesses essentially remain unchanged – you need to take reasonable steps to ensure information provided when seeking insurance is accurate and complete to the best of your knowledge.
> The act also specifies examples of important details to include, such as special or unusual details of the business or existing areas of concern relating to the types of risk covered by the insurance.

Whose knowledge to include

> The relevant knowledge of senior management - defined as the key individuals who decide how the business is run and any other person who has relevant knowledge of the business.
> If the risk and insurance team (or individual buying the insurance) is separate to senior management then their knowledge must also be included.
> In addition your insurance broker's relevant knowledge should also be included.

Reasonable search

> Sufficient enquiries to build a picture of your risk must be conducted and material information arising from these must be included. This may include enquiries made of external parties such as managing agents, accountants, solicitors or your insurance broker.

Clear and accessible presentation

> The presentation of information should include adequate signposting and important points must be flagged.
> Sending volumes of data without supporting information is prohibited, ie, data dumping is not acceptable.

Insurer duties

> Information that an insurer should know does not need to be included in the presentation, but check with them before omitting any risk information.
> Insurers will make further enquiries if there are obvious omissions, questions or gaps to the information presented.

BE PREPARED - INSURERS' KEY EXPECTATIONS

Each Fair Presentation will be unique and specific to a business – what is reasonable for one business may not be reasonable for another. However insurers' expectations for customers are guided by the same principles. Key areas for consideration:

i. Audit trail of how risk information is put together

> Principal requirement is for you to have an audit trail of how the information was gathered. To demonstrate compliance you will need to be able to summarise and document the following:

- Who is consulted – internal staff and relevant external third parties
- What information is asked for
- How information is collated and checked

ii. Accurate and complete information

> The core information insurers will require for proposal forms or insurance submissions (such as claims information or asset value) will continue to lie at the core of a Fair Presentation and should be completed as accurately and fully as possible.

iii. Flag changes and differences

- In addition to answering our questions, you must flag 'special or unusual facts' about the risk. These will be unique to your business but examples could include:
  - Operational factors which make your business different from competitors or industry standards.
  - Recent or planned business developments such as new products and services, acquisitions, customers or contracts, which will affect your risk profile.
  - Known issues where you already have a concern about the potential for increased risk in future.
  - Changes in business operations, which might not be fully explained in the standard underwriting information such as business units with different working practices.
- For all changes it is important to describe the circumstances and what you think the risk impact could be.

iv. Well-structured information

- The presentation should include clear structuring and signposting of key information.
- For larger more complex businesses with extensive information sets, an executive summary and detailed contents page would be expected.

v. Ongoing notification of changes

- Having an ongoing process in place to monitor and flag fundamental changes to your risk during the period of the policy is important, as this could change your insurance needs.

vi. Key information sources

- It is critical to consider the range of people you need to consult within the business. This will naturally be specific to your business but could include:
  - Who counts as 'senior management' may differ by type of risk or specific policy. In addition to directors it is likely to include line management and also staff who control policies affecting risk or those with specific risk management responsibilities.
  - Relevant third parties who also hold information on your risk – like outsourced service providers (e.g. property managing agents, IT providers or facilities management) or the knowledge of your broker (e.g. survey reports, claims data or sector specific risk knowledge).
- For such enquiries you should record the information obtained, the list of consultees and the reasoning for their inclusion in the process.

vii. Build on existing processes

- Considerable effort is put into your disclosure already. Adapting to the new requirements should not mean creating a new process from scratch, measures to achieve compliance are:
  - Current processes can be enhanced by adding more detail, thinking through the list of individuals consulted and including supplementary explanatory notes where necessary.
  - Drawing on and adapting existing internal sources of information – such as board reporting, risk or contract registers – to build the more detailed information set that Fair Presentation requires.
  - Recording and explaining the current enquiries made.

REMEDIES

i. **Failing to Make a Fair Presentation of the Risk** - If a business fails to make such a disclosure, insurers' remedies must be proportionate (other than where non-disclosure is fraudulent or reckless), based on what the insurer would have done if it had received a fair presentation of the risk.

ii. **Remedy for breach of terms designed to reduce particular types or risk** - where an insured breaches a term of an insurance policy (whether it is a warranty, condition or similar) which is intended to reduce the risk of particular types of loss, the insurer cannot refuse to pay a claim if the insured shows that the breach did not increase the risk of the loss.

iii. **Remedy for fraud** - The option of avoidance – treating the policy as if it had never existed – has been removed. This means that the insurer is still on risk for claims made before the fraudulent act occurred. The insurer has the option to terminate the policy with effect from the date of the fraudulent act.

RESPONSIBILITIES OF KINGSBRIDGE

> Making clients and insurers aware of the different remedies (refer to Remedies section above) available in the event of an innocent, deliberate or reckless failure to make a fair presentation of the risk.

> Making clients aware of the requirement to represent the risk fairly to insurers through clear and accessible disclosures of the relevant information without material misrepresentation, including

> Disclosing any relevant information to the insurer known to the broker.