



## Professional indemnity insurance guidance note

**Issued: June 2018**

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## 1 Introduction

- 1.1 The Jersey Financial Services Commission (**JFSC**) has established requirements for persons registered under the Financial Services (Jersey) Law 1998 (**FSJL**) in respect of Professional Indemnity Insurance (**PII**).
- 1.2 These requirements are set out in each respective Code of Practice (together, **Codes**) published by the JFSC for the investment business, trust company business, general insurance mediation business and fund services business sectors.

## 2 Scope of this guidance

- 2.1 This guidance note provides comments on the following matters:
  - 2.1.1 PII policy limitations
  - 2.1.2 Obtaining PII cover
  - 2.1.3 Assessment, by the Board, of the adequacy of a Registered Person's PII cover
  - 2.1.4 Registered Persons covered by Group PII arrangements
  - 2.1.5 Policies and procedures relating to PII
  - 2.1.6 Retroactive dates
  - 2.1.7 Characteristics of an excess
  - 2.1.8 Registered Persons carrying on more than one financial service business
  - 2.1.9 PII variances
  - 2.1.10 Transitional circumstances

## 3 PII policy limitations

- 3.1 The JFSC is aware that insurers apply a number of exclusions and/or limitations to PII policies. The JFSC does not require notification of exclusions and limitations that are typically included within standard market wordings. The JFSC considers that such exclusions and limitations shall include, but shall not be limited to, the following:

Employer's Liability	Bodily injury
Property damage	Product's/Public liability (including Property owner's liability, motor vehicle liability etc.)
War/Terrorism	Asbestos/Toxic mould
Pollution	Radioactive/Nuclear contamination
Date recognition	Contractual liability
Fines/Penalties	Known circumstances

- 3.2 Where insurers seek to impose certain exclusions on a Registered Person's PII policy, the Registered Person should, where possible, negotiate with insurers to ensure that cover remains adequate, and commensurate with its business activities. The JFSC recognises that in such instances this may result in an increased premium being paid, however it is incumbent upon the Registered Person to take relevant measures to ensure that cover remains adequate.

- 3.3 If there are exclusions or limitations (excluding those listed above) that are specific to the Registered Person's business these must be drawn to the JFSC's attention, in line with the requirements of the Codes.
- 3.4 Of particular importance are any limitations imposed by the insurer which relate to historical or current activities undertaken by the Registered Person. Furthermore, the Registered Person must also notify the JFSC in the event that it commences an activity which is explicitly written out of its insurance cover. This is supplemental to the Registered Person's notification obligations in respect of the introduction of new business activities.
- 3.5 Where a material exclusion is added to a policy, the Registered Person should take measures to mitigate the risk of potential claims relating to the excluded activity, for example by retaining additional liquid resources over and above the minimum as required by the Codes, and/or making notifications under its existing policy.
- 3.6 Where PII policy documents contain terminology which is not specific to the Jersey regulatory framework, such as reference to the FCA rather than the JFSC, the Registered Person should obtain written confirmation from its broker/insurer that cover is valid for activities being undertaken in Jersey, and where possible arrange for policy wording to be appropriately amended.

## 4 Obtaining PII cover

- 4.1 The majority of Registered Persons will obtain PII via the services of an insurance broker. Such brokers should have the necessary expertise with regards to PII for financial services providers and should be licensed to carry out insurance broking services in Jersey or be supervised by a relevant supervisory authority as defined in the FSJL.
- 4.2 An essential part of obtaining or renewing adequate PII cover is the completion of a proposal form or equivalent. Failure to provide accurate information during the PII negotiation process can ultimately result in insurers avoiding their liability under the policy. Registered Persons should therefore ensure that completed proposal forms are carefully reviewed prior to final submission. Accordingly, it is important that Registered Persons commence the negotiation/renewal process in a timely fashion.
- 4.3 PII policy documents should be closely scrutinised by the Registered Person to ensure that the language contained therein is appropriate for the activities being undertaken by the Registered Person and that cover is provided for any claims for loss or damages arising as a result of acts or omissions of the Registered Person and/or those acting on its behalf.
- 4.4 Where the Registered Person is a Relevant Financial Services Business<sup>i</sup> and undertakes activities that may be subject to Eligible Complaints<sup>ii</sup> referred to the Financial Services Ombudsman it is incumbent upon the Board of the Registered Person to effectively consider and document that appropriate insurance arrangements are in place to mitigate potential claims.
- 4.5 It may be the case that appropriate insurance exists within existing policies held by the Registered Person, however, the Board should obtain written confirmation from the Registered Person's insurer/broker where there is ambiguity.

4.6 In the event that a Registered Person is unable to obtain cover in line with the requirements of the Codes, or the Registered Person's policy is cancelled, the Registered Person is required by the Codes to notify the JFSC of this as soon as reasonably practicable.

## 5 Board to assess the adequacy of PII arrangements

5.1 It is imperative that the Board fully understands the scope of the PII cover applicable to the Registered Person and periodically assesses the continuing adequacy of such, especially in light of any changes to the Registered Person's business model.

5.2 Whilst a broker owes a duty of care to its client, it is ultimately the responsibility of the Board of the Registered Person to make PII arrangements which are commensurate with its business activities and in compliance with the requirements of the applicable Codes.

5.3 The Codes set out prescribed minimum limits of indemnity which should be maintained by Registered Persons.

5.4 Whilst it is the Board's responsibility to ensure that such minimum requirements are met, the Board of the Registered Person should also satisfy itself that the limit of indemnity which is in place is adequate for its business model, and in certain circumstances this may result in additional cover being required.

5.5 Cyber-crime is becoming more and more prevalent, and as well as establishing robust protections to guard itself against cyber-attacks, a Registered Person should also be mindful of whether or not the scope of PII cover sufficiently provides for losses or damages incurred from the loss of data/fraudulent activity related to a cyber-crime. Consideration may need to be given by Registered Persons to the taking out of specific cyber-crime related insurance which is separate to their PII arrangements.

5.6 Should the Board be in any doubt as to the scope and adequacy of the Registered Person's PII cover, it should immediately seek to clarify matters with its broker/insurer.

## 6 PII variances

6.1 A Registered Person may request the JFSC to vary requirements established by the Codes where strict adherence to the Codes would produce an anomalous result. Registered Persons that are required to comply with the requirements of more than one set of Codes may fall into this category.

6.2 Requests for a variance of the PII requirements of any Codes should be made in writing to the JFSC, addressed to the relevant supervision manager or team.

6.3 Examples of areas where the JFSC may consider granting variances from the PII requirements of the Codes include:

6.3.1 **Where the Codes specify the maximum excess per claim, which may be included on a PII policy:** where a variance of this nature is granted the JFSC generally requires additional funds to be held through an adjustment to either the Adjusted Net Liquid Assets calculation or the solvency calculation, as applicable. The value of the additional funds to be held is generally three times the amount by which the PII policy excess exceeds the maximum permitted by the relevant Codes.

6.3.2 **Ability to self-insure:** the Codes require that a Registered Person maintains PII cover. Ordinarily, PII cover will be purchased from an insurer, however the JFSC will consider requests from Registered Persons wishing to enter into self-insurance arrangements. Any such request should include detailed information as to how the Registered Person intends to structure and finance its self-insurance arrangements.

6.4 Where explicit variances exist within Codes of Practice and the JFSC has consented to the Registered Person employing such variances, the Registered Person is responsible for considering the adequacy of cover in light of the circumstances of their particular business and should document as well as review these considerations at least annually.

## 7 Registered Persons covered by group PII arrangements

7.1 A considerable number of Registered Persons in Jersey are covered by group PII arrangements. Where such arrangements exist, the Board of the Registered Person should undertake, and document, an assessment of the adequacy of the cover for the Registered Person, and where a number of entities are covered by the policy, the Board should satisfy itself that the limit of indemnity is sufficient, and that each entity covered has access to the minimum level of indemnity (including any permissible excess or deductible) specified in the relevant Codes.

7.2 In the event that the Registered Person is not specifically named within the policy document, the Board should obtain written assurance that the group policy does indeed extend cover to the Registered Person.

7.3 Where a Registered Person's PII arrangements are via those of a group policy, a notification should be made to the JFSC if the JFSC has not previously been notified.

## 8 Policies and procedures relating to PII

8.1 The Codes set out the requirement for Registered Persons to have adequate procedures in place to ensure compliance with all terms and conditions of its PII policy.

8.2 As well as setting out how the Registered Person will adhere to the requirements of the PII policy, Registered Persons should also have and maintain documented policies and procedures in respect of, but not limited to:

- 8.2.1 Obtaining and renewing PII cover, including the completion and review of the proposal document by the Board
- 8.2.2 The making of notifications to insurers and the JFSC in accordance with the requirements of the PII policy, and the Codes of Practice
- 8.2.3 Periodic assessment by the Board of the adequacy of the Registered Person's PII arrangements.

8.3 The JFSC considers it good practice for the Board of the Registered Person to delegate, to an individual director, the responsibility for reviewing the level of cover, assessing its adequacy in light of the entity's business activities, and reporting back to the Board.

## 9 Retroactive dates

9.1 A retroactive date is a date before which an insurer is unwilling to provide cover. Whilst most PII policies do not include a retroactive date these may be found where a Registered Person

changes its insurer or a Registered Person undergoes a significant structural change, such as a merger or acquisition (either of a Registered Person or of a book of business).

- 9.2 As a Registered Person is required to maintain adequate insurance cover at all times and PII policies operate on a “claims-made” basis, any retroactive date may have the effect of leaving the Registered Person without adequate cover, and therefore in breach of the Codes, which may not be acceptable.
- 9.3 Consequently, where a Registered Person has a retroactive date in its PII policy, this must be notified to the JFSC, together with an explanation as to why it has been applied by the insurer, and to what extent it affects the PII cover in place for the Registered Person.
- 9.4 Particular attention should be paid to retroactive dates applied to PII arrangements which are put in place following a merger or acquisition involving a Registered Person.

## 10 Characteristics of an excess

- 10.1 Where a PII policy is subject to an excess or deductible, and the Codes establish a minimum limit of indemnity, the Codes state that **“any excess (or deductible) per claim on the policy should not reduce the limit of indemnity payable under the policy”**. The following examples provide practical examples of the intention of this requirement:

### Example 1: in compliance with the requirements of the Codes

A Registered Person has an:

- › indemnity limit of £1,000,000;
- › excess of £50,000
- › claim of £1,100,000

The PII policy pays £1,000,000 and is not reduced by the application of the £50,000 policy excess.

### Example 2: not in compliance with the Codes

A Registered Person has an:

- › indemnity limit of £1,000,000;
- › excess (deductible) of £50,000
- › claim of £1,100,000

The PII policy pays £950,000 as the £50,000 excess (or deductible) has been applied to the claim payment.

## 11 Registered Person carrying on more than one financial services business

- 11.1 Where a Registered Person carries on more than one type of financial service business, it is for the Board of the Registered Person to determine the scope of its PII cover, including the limit of indemnity and excess, by considering the requirements of all relevant Codes.

## 12 Transitional circumstances

12.1 Where the Registered Person is made aware of, or identifies, a requirement to amend its PII cover, including ascertaining assurances in respect of exclusions or elements of group cover, it must document actions taken to mitigate the effects of these circumstances until full compliance with the Codes is achieved. The documentation of such actions does not relieve the requirement to amend cover or ascertain assurances, however, this will support the demonstration of adequate procedures to ensure compliance with PII requirements.

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<sup>i</sup> As defined at Article 9 of the Financial Services Ombudsman (Jersey) Law 2014 (FSOJL).

<sup>ii</sup> As defined at Article 7 of the FSOJL.