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By email to piicyber@sra.org.uk

24 May 2021

Dear Sir/Madam,

Response of the CLLS Professional Rules and Regulation Committee to the SRA Professional Indemnity Insurance (*PII*) – Cyber Cover Consultation

1. Introduction

The City of London Law Society (**CLLS**) represents City lawyers through individual and corporate membership, including some of the largest international law firms in the world. The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees. This response has been prepared by the CLLS Professional Rules and Regulation Committee. For further information see the notes at the end of this letter.

The CLLS has read the SRA consultation paper on Cyber Cover (the **CP**) with interest. We set out our comments in two sections below – first our general comments on the proposal and then some further observations. As our comments do not entirely correspond to the questions asked, we have not submitted our response via the online form.

2. General comments on the proposal

We agree with the reasoning behind the SRA's proposed amendments to the minimum terms and conditions (**MTCs**).

As the SRA argues, a purpose of mandatory insurance for regulated firms and sole practitioners should be to support consumer protection. By ensuring that individual firms or practitioners have adequate and appropriate insurance cover that meets certain specified terms and conditions, the SRA ensures that clients are protected should an unexpected event cause them loss. This, in turn, has the effect of protecting public confidence and the reputation of the profession as a whole.

We understand the concerns regarding liability for 'silent cyber' that have caused the International Underwriters Association (**IUA**) to mandate an endorsement for PII policies (**Endorsement**), but we do not think that the Endorsement strikes the right balance between excluding matters that might properly be covered by other (such as cyber) insurance and matters that should be properly covered by PII as currently drafted. Particularly paragraph 3 of the Endorsement reads as follows (our underlining):

This contract excludes any loss, damage, liability, claim, costs, expense, fines, penalties, mitigation costs or any other amount directly caused by, directly resulting from or directly arising out of:

*a) a **Cyber Act**; or*

*b) any partial or total unavailability or failure of any **Computer System***

*provided the **Computer System** is owned or controlled by the insured or any other party acting on behalf of the insured in either case; or*

c) the receipt or transmission of malware, malicious code or similar by the insured or any other party acting on behalf of the insured

We believe that the underlined words could have the effect of preventing a firm from making a claim under its PII for matters that would ordinarily be regarded as falling within the category of civil liability as defined in the SRA's consultation document. For example, suppose that a firm is working on a complex and time critical commercial transaction when it suffers a total loss of its document management and email systems. The costs to the firm of employing experts and temporary services to remedy the situation and/or buying new replacement hardware would be appropriately excluded under both the Endorsement and the SRA proposal. The firm might choose to purchase separate cyber cover to cover these first party losses.

However, what would be the position if the loss of that firm's systems caused a client to miss out on its commercial opportunity? As drafted, it would be unclear whether a claim against the firm for losses sustained by the client would be covered in the absence of there being some form of intervening act on the part of the firm. In such circumstances, the firm might find that it was not indemnified in relation to matters that it (and its client)

would expect to be covered by its PII. We think that the SRA's proposal addresses these concerns.

3. Further observations

We have a number of further observations:

- The SRA states that it does not believe that the amendments will lead to greater premium costs for firms. We would like to think that is correct given that the SRA's proposal strikes what we believe to be an appropriate balance between covering matters properly falling within professional indemnity cover and excluding those that might be covered by, for example, a separate cyber policy. However, in practice, we wonder whether asking insurers to write policies that differ from the Endorsement may still lead to a repricing for risk or to more insurers either exiting the market or seeking to impose other constraints on cover, both of which have the potential to impact premium costs. This is particularly the case given the likely impact of the pandemic on insurers. We think the SRA should exercise caution in making assumptions about pricing given the volatile environment and would be very interested to understand the analysis the SRA has carried out in this area to support its view.
- We believe that the SRA definition of '*Core Infrastructure*' should include all public utilities as well as the specifically listed suppliers of technology services. A successful attack on the electricity grid would be just as disabling as an attack on the telephone system. (We also think the second use of 'provided' in the draft definition is redundant).
- The Endorsement is specific that any cover for the costs of reconstituting or recovering documents owned or controlled by the insured does not extend to the same steps in relation to data. The Endorsement then goes on to include a definition of 'data'. We think that exclusion is an understandable approach on the part of insurers (albeit that firms would rather not have to agree it) because those costs are commonly included within the ambit of a cyber policy. The SRA draft does not deal with data specifically, we presume because cover for such costs is not specifically required under the MTCs in the absence of there being an associated civil liability. However, the SRA might wish to include some express wording on this point.
- We note the SRA's inclusion of specific wording regarding the obligation to indemnify in relation to a failure of automated technology. We are not sure that this additional provision is needed given the width of the write back already applying to (a)-(e) by reason of (i)-(iii), but we support its inclusion and the general principle that firms should expect to be covered by their PII policies where they use or misuse computer technology in the service of clients. As machine learning and other forms of artificial intelligence become increasingly standard tools and legal services digitise, it is vital that insurance cover adapts to properly address the services provided to clients.

If you would find it helpful to discuss any of these comments, then we would be happy to do so. Please contact me by email at jonathan.kembery@freshfields.com in the first instance.

Yours faithfully,

Jonathan Kembery
Chair
Professional Rules and Regulation Committee, City of London Law Society

About the CLLS

The City of London Law Society (CLLS) represents approximately 17,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a wide range of consultations and comments on issues of importance to its members through its 18 specialist Committees. The CLLS is registered in the EU Transparency Register under the number 24418535037-82.

Details of the work of the CLLS Professional Rules and Regulation Committee can be found here:

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=150&Itemid=469