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FSB Response to the Consultation on Professional Indemnity Insurance and Defining Tax Advice

FSB welcomes the opportunity to respond to this consultation on the mandating of Professional Indemnity Insurance (PII) for unregulated tax advisers.
The Federation of Small Businesses (FSB) is the UK's leading business organisation. Established over 40 years ago to help our members succeed in business, we are a non-profit making and non-party political organisation that's led by our members, for our members. Our mission is to help smaller businesses achieve their ambitions. As experts in business, we offer our members a wide range of vital business services, including legal advice, financial expertise, access to finance, support, and a powerful voice in government. FSB is the UK's leading business campaigner, focused on delivering change which supports smaller businesses to grow and succeed. Our lobbying arm starts with the work of our team in Westminster, which focuses on UK and English policy issues. Further to this, our expert teams in Glasgow, Cardiff and Belfast work with governments, elected members and decision-makers in Scotland, Wales and Northern Ireland.

<u>Consultation Questions</u>

General questions
Q1: In your opinion, do you agree that introducing a requirement for anyone providing tax advice to have professional indemnity insurance satisfies the policy aims of improving trust in the tax advice market, by targeting poor behaviour and allowing taxpayers greater redress when things go wrong?

FSB believes that the introduction of this requirement will satisfy this policy aim. This amendment will create a level playing field in the market and will give small business and individual taxpayers better protection. FSB broadly agrees that this will provide a minimum standard by which tax agents may engage with accounting and tax advice professionals. Agents will now be able to request evidence of the fulfilment of this requirement to support internal due diligence. Equally, where enforcement proceedings are underway, for instance by HMRC against business or individual tax advisers, reference should be made to whether the business has PII.

Q2: If the government introduces the requirement for professional indemnity insurance, what further steps would you recommend?

FSB recommends that insurance companies be required to provide a summary of the tax adviser’s PII policy, which can then be shown to clients to instil confidence in them that they are protected in the event that something goes wrong. This summary document should include information such as the type of work the policy covers and whether the adviser is a member of a professional body or holds additional qualifications, as well as the auxiliary protections which this confers upon the client.

As this is such a major change, we suggest there is a transition period where 1) the insurance industry is able to create the products and availability required; 2) tax advisors are encouraged, through an awareness-raising campaign, to explore and choose PII products that suit them; and 3) that the users of tax advisors are encouraged to learn about their advisor having PII, and is able to ask them if it is already in place and to what limits. Those who already have insurance due to their membership of one of the professional bodies should be able to demonstrate and celebrate that they have this already.

Q3: Are there any alternative options you would recommend?

FSB proposes that PII should be mandatory for all tax advisers, with no minimum levels of cover. This approach benefits both the client and tax adviser as the consumer seldom has the necessary insight into the market which is needed to make an informed choice regarding which tax adviser to approach. PII also acts as a form of financial protection for the business or independent tax adviser, in the event of negligence. However, it is worth noting that the mandating of PII for tax advisers could result in some advisers being driven out of the market because they are unable to purchase PII. For instance, solicitors firms must have PII before they can operate. Anecdotal evidence has shown that several solicitors firms have been driven to close because they could not obtain affordable insurance.

Independent tax advisers are more vulnerable to this given that they are often called “unregulated”; while they are regulated to a degree, they are often not members of professional bodies and so have not got easy access to a predetermined PII product and cover. In general, the insurance market has hardened over the last couple of years, as such, costs of premiums have risen drastically. Therefore, the mandatory requirement to have PII should only be maintained provided that there is adequate supply of insurance cover available in the market. If the insurance market hardens too far, then the mandatory nature would need to be reconsidered, otherwise costs would be driven up for advisers and clients, and tax advice services may become inadvertently unaffordable to some.

Q4: Apart from the costs and potential effects outlined above, are there any other costs you foresee for advisers?

Historically, tax advisers have been able to escape the cost of PII and so may not be financially prepared to pay them. The hardening of the PII market will likely also add to these costs. There are then the costs of complying with the underlying requirements of PII cover, which often necessitate an amendment of business practices. This also places a greater regulatory burden upon these businesses. Government should implement these proposals with as little financial and regulatory burden, upon small independent tax advisers, as possible.

Questions for tax advisers

Q5. What are your experiences of obtaining professional indemnity insurance or of the market for professional indemnity insurance?

FSB members currently report a variety of sources by which PII can be obtained, often at reasonable prices. However, the hardening of the PII market may mean that policyholders struggle at renewal. Members have noted that the cost of cover which is calculated on the basis of business turnover in previous years and a summary of the tax adviser's offerings, is re-evaluated at too late a stage. Once PII is mandated, small firms may fear being tied to excessive premiums over a number of years. Insurers should consider introducing half-way or quarterly evaluations of PII polices as the market continues to harden. Members also noted that advisers are often expected to become members of professional bodies and obtain further qualifications in the areas which they service. Members note that premiums are positively impacted where these safeguards are in place, however many of these impose significant cost implications.

Q6. If you are a tax adviser who practices without insurance, why is this?

Anecdotal evidence from FSB members showed that tax advisers operate without insurance for a number of reasons. Historically, tax advisers were never required to have professional indemnity insurance and many have not experienced any difficulties without it. The principal reason given for this approach is that PII imposes additional costs upon the tax adviser which it would rather not expend. One adviser member remarked that the firm preferred to "keep things simple", a sentiment which was echoed across the board.

FSB is keen to maintain a competitive market in tax advice offered, and this has historically been underpinned by a choice of advisors that may have joined a professional body, and those that have not. PII insurance for all does narrow that gap. The Competition and Markets Authority should be asked to review the sector after such a major change.

Confirmation of a tax advisor's PII status is not always easy to find, and customers may not be aware that it is worth checking. The mandatory PII approach helps to ensure that everyone has this.

Questions for the insurance industry

Where answers have been provided, FSB has sought to answer these questions based on evidence from members who operate within the insurance industry.

Q7. What factors do you take into account when pricing professional indemnity insurance?

FSB evidence shows that these factors will vary from insurer to insurer. Tax adviser members outlined the factors which they believe impact the cost of their PII. These were turnover of the business in the previous year and client services, both of which must be provided towards yearly renewal. Added to these were membership of professional bodies and qualifications in the adviser's areas of service. Advisers proposed that insurers should implement a training programme for tax advisers, which should allow for more competitive prices of PII. It will also ensure that insurers are transparent and consistent.

Q8. What are your views on the government's proposals for making information on promoters public? How would having more information about promoters of tax avoidance help you in making decisions about pricing or offering insurance?

FSB members noted that insurers will welcome any information available which will help them to better assess the risk. It is important that advisers are not stigmatised by the Government for providing advice which is entirely within the law. If Government wants to cut down on tax loopholes then the proper solution is to ensure the law is amended to close those loopholes. We do not think it is appropriate for there to be negative consequences, for example increased insurance premiums, for advisers who are lawfully advising their clients on the full range of options available to them.
Q9: In your opinion, does the insurance market have the appetite and capacity to manage the new requirement?

FSB members suggested that insurers are broadly supportive of these proposals. However, there were calls for a clear announcement from the insurance industry concerning the availability of PII and whether this will lead to disproportionately high premiums for independent tax advisers vis-à-vis those advisers who have always been required to hold such cover.

Questions for people who use tax advisers

Q10. What checks do you carry out when you engage a tax adviser? Do you check whether they are insured?

According to FSB evidence, small firms seldom check whether a tax adviser is insured for PII. Where businesses do ask, this is usually driven by health and safety concerns. FSB proposes that small businesses are encouraged to conduct these checks as part of the routine review of a firm's health and safety and employment insurance.

Q11. Do you have any experience of making claims or complaints against a tax adviser for bad advice that you would be happy to share with us?

N/A

Questions for everyone

Q12. Do you think there are any lessons on how complaints are handled in similar industries that we can learn to help improve redress?

FSB members proposed that lessons could be learned from the health and safety industry, where businesses actively seek evidence of PII and as such complaints are reviewed effectively.

Q13. What is the minimum level of cover you recommend, and why?

The minimum level of cover will depend on the cost of the services provided by the independent tax adviser. FSB proposes that a minimum level of PII should not be imposed as this might drive up the cost of PII. Alternatively, advisers should be required to hold “adequate cover”. The relevant test of “adequacy” should be determined by individual advisers and should be proportionate to the risk of the services which they provide. Other factors for determining what constitutes “adequate cover” might include the size of the business. Further, explaining the key elements of the PII policy to the consumer will also allow them to determine whether the cover is indeed adequate.

Q14. What activities should it be mandatory to cover, and why?

FSB members suggested this should vary according to the adviser’s insurance policy which should specify the type of work which is being carried out for the client’s benefit. Run-off cover, which allows for claims to be made against the insurer after it ceases trading, should be protected to allow freedom for the customer to move between insurers where necessary.

Q15. Should the government set mandatory minimum or maximum levels of:
- cover
- run-off cover
- excess

FSB members proposed that each advisory profile, firm and insurance policy should be able to be considered on a case-by-case basis. Therefore, Government should not impose mandatory levels across any of these

Q16. What levels should these be?
See above.

Q17. Should the government specify what advice must be covered by the policy? What advice do you think should be covered?

FSB members suggested that Government should not specify what advice must be covered to allow for some flexibility between advisers.

Q18. Are there any other insurance requirements the government should require?

FSB members would welcome greater clarification regarding the process of moving PII from one insurer to the next. Members remarked that some small businesses have felt trapped with one provider for years. As noted earlier in this response, commercial consumers seldom have the insight into industry that is required to choose a tax adviser. This can lead to uncompetitive prices in the market.

Q19. Who should be required to hold the insurance? Should it be the firm, the principal, everyone who is acting as a tax adviser?

PII should be held by everyone who is acting as a tax adviser within an unregulated firm. This may not require individual cover for each employee, the firm’s PII cover might extend to employees where the policy dictates it. The same applies to directors and partners, in the case of sole traders and limited companies. Any alternative would merely replicate current circumstances where clients are unsure of the competency of less experienced advisers.

Q20. What impact do you think setting minimum mandatory levels of cover would have on: - the market including availability of insurance – affordability

FSB members acknowledge that a low minimum level will mean that cover is more affordable. As such, FSB supports mandatory cover, but opposes the introduction of a mandatory minimum level of cover. For small practices, the cost of minimum mandatory levels could well exceed the reasonable amount needed, and premiums could be prohibitive and disproportionate to turnover.

Definitions

Q21. We intend to model the definition of who the requirement will apply to on one of the definitions currently extant in legislation. What a) benefits and b) issues are there with using the Dishonest Tax Agent definition or the Money Laundering Regulations definition? Do you have a preference or alternative and why?

FSB acknowledges the recent broadening of the definition of ‘Tax Adviser’, under the Money Laundering Regulations, to include the provision of assistance or material aid. As such, anyone who assists with the provision of tax advice should be caught by the requirement. Similarly, the definition of ‘dishonesty’ under the Dishonest Tax Agent definition is very broad and will likely capture several behaviours. FSB would propose the introduction of a non-exhaustive list of examples. Ensuring that all those who may fall under both definitions have the appropriate cover is likely to have significant cost implications. Both definitions are equally appropriate. It is also important to distinguish between the use of the terms ‘tax adviser’ and ‘tax agent’ in general commercial verbiage. Several tax agents do not consider themselves to be tax advisers, despite being caught by the proposed definitions. As such, FSB suggests that reference be made to this in HMRC guidance, for the benefit of all those who fall under the wider umbrella of “tax adviser” for the purpose of the requirement for mandatory PII.

Q22. What activities do you think should be excluded from the requirement for compulsory professional indemnity insurance and why?

N/A

Q23. Would there be any benefit in having different minimum requirements for different activities?

No.

Q24. What benefits or issues would there be in considering the financial services regulatory distinction between advice and guidance for tax advice?

In order to satisfy the spirit of the proposed reforms, which is to protect vulnerable consumers by mandating PII, a distinction should not be made between advice and guidance. This is because in most circumstances, consumers will attribute similar, if not identical weight to both.

Q25. What benefits or difficulties do you foresee with the inclusion of a provision around UK taxation in the definition?

N/A

Q26. Do you agree with the 3 elements of enforcement?

In general, FSB members agree with the three elements of enforcement: transparency, checks and sanctions.

Q27. What are your views on the enforcement options described above?

Despite agreeing with the principles, FSB members remarked that a system of policing could increase the burden and costs for those tax advisers who are currently covered. The requirement of professional indemnity insurance should be inbuilt in the Departments' usual data gathering exercises used for filing VAT, self-assessment and VAT. This evidence should be provided as part of the application process. Further information might also be requested during the process or as part of a periodic check of documents. Members also proposed the introduction of a facility by which members of the public might report non-compliance.

Q28. Do you agree that advisers who already hold professional indemnity insurance as it is required by their professional or regulatory body should automatically satisfy the new requirement? How could we check?

Yes.

Q29. The government's ambition is for HMRC to share information about the adviser with the client digitally. What are your views of this?

FSB members agreed with this approach and suggested a summary page from the PII provider. Members noted that many clients are not digitally savvy and choose to engage an independent tax adviser for this reason. To ensure that this facility is accessible to all, hardcopy facilities should be available.

Q30. What effects do you foresee of introducing the requirement for everyone at the same time?

Lessons can be learned from past rollouts of regulatory requirements. Smaller firms are seldom aware of the introduction of new requirements, so the onus is upon Government to ensure that both independent tax advisers and clients are apprised of these changes.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague Damilola Ojuri, Senior Policy Advisor, on 0207 592 8127 or at Damilola.Ojuri@fsb.org.uk.

Yours sincerely,

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