



# LMA GDPR Update

25th May 2018

A close-up photograph of several business professionals in dark suits shaking hands. The focus is on the hands and forearms, with the faces of the individuals blurred in the background. The lighting is bright, creating a professional and collaborative atmosphere.

CLYDE&Co

# LMA Market model wording update

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# Market model agreements

- ❑ 4 market model agreements we have amended:
  - ❑ Binding Authority Agreement and guidance
  - ❑ Consortium Agreement and guidance
  - ❑ Third Party Administrator Agreement
  - ❑ Terms of Business Agreement (Risk transfer and non risk transfer)  
(this is not being covered today)
- ❑ 5 wordings amended:
  - ❑ LMA9151 Data Protection Short Form Notice (Layer 1)
  - ❑ LMA9152 Data Protection Consent Form Wordings (Proposal stage)
  - ❑ LMA9153 Data Protection Consent Form Wordings (Claims stage)
  - ❑ LMA9154 Data Protection Clause for commercial lines policies (no consent)
  - ❑ LMA9155 Data Protection Clause for commercial lines policies (with consent)

# Model Wording

- Layer 1 Short Form Core Uses Information Notice
- Consent form wordings x 2 arranging stage:
  - Consent from the data subject
  - Confirmation that the insured has obtained consent from the data subject
- Consent form wordings x 2 claims stage:
  - Consent from the data subject
  - Confirmation that the provider of personal data has obtained consent from the data subject
- Policy wording x 2 for commercial lines:
  - Consent
  - No consent

# Considerations in drafting the model wording

- The data subject
- Requirements under GDPR
- Consistency of language and approach with the market model agreements
- Jurisdictions where the UK Data Protection Act 2018 will not apply (i.e. consent would be required as the UK insurance derogation would not be applicable)
- Co-operation in the market
- Input from wordings groups and the LMA

# Information Notices- GDPR

- ❑ Where personal data is obtained directly from the data subject, the following information must be supplied:
  - ❑ Identity and contact details of the controller and where applicable, the controller's representative and the data protection officer;
  - ❑ Purpose of the processing and the legal basis for processing;
  - ❑ Where applicable, the legitimate interests of the controller or third party;
  - ❑ The recipients or categories of recipients of the personal data, if any;
  - ❑ Details of transfers to third country and safeguards;
  - ❑ Retention period or criteria used to determine the retention period;
  - ❑ The existence of each data subject's rights;
  - ❑ The right to withdraw consent at any time;
  - ❑ The right to lodge a complaint with a supervisory authority;
  - ❑ Whether the provision of personal data is part of a statutory or contractual requirement;
  - ❑ The existence of automated decision making, including profiling and information about how decisions are made, the significance and consequences

# LMA9151: Data Protection Short Form Notice

## Your personal information notice

### *Who we are*

We are the Lloyd's underwriter(s) identified in the contract of insurance and/or in the certificate of insurance.

### *The basics*

We collect and use relevant information about you to provide you with your insurance cover or the insurance cover that benefits you and to meet our legal obligations.

This information includes details such as your name, address and contact details and any other information that we collect about you in connection with the insurance cover from which you benefit. This information may include more sensitive details such as information about your health and any criminal convictions you may have.

In certain circumstances, we may need your consent to process certain categories of information about you (including sensitive details such as information about your health and any criminal convictions you may have). Where we need your consent, we will ask you for it separately. You do not have to give your consent and you may withdraw your consent at any time. However, if you do not give your consent, or you withdraw your consent, this may affect our ability to provide the insurance cover from which you benefit and may prevent us from providing cover for you or handling your claims.

# LMA9151: Short Form Notice Continued...

The way insurance works means that your information may be shared with, and used by, a number of third parties in the insurance sector for example, insurers, agents or brokers, reinsurers, loss adjusters, sub-contractors, regulators, law enforcement agencies, fraud and crime prevention and detection agencies and compulsory insurance databases. We will only disclose your personal information in connection with the insurance cover that we provide and to the extent required or permitted by law.

## ***Other people's details you provide to us***

Where you provide us or your agent or broker with details about other people, you must provide this notice to them.

## ***Want more details?***

For more information about how we use your personal information please see our full privacy notice(s), which is/are available online on our website(s) or in other formats on request.

## ***Contacting us and your rights***

You have rights in relation to the information we hold about you, including the right to access your information. If you wish to exercise your rights, discuss how we use your information or request a copy of our full privacy notice(s), please contact us, or the agent or broker that arranged your insurance who will provide you with our contact details at:

**[Include agent/broker contact details]**

**{NOTE: where there is only one underwriter or this Notice is to be included in a binding authority certificate, consider inserting the details of the underwriter(s) as appropriate}**



# LMA9152/9153 Data Protection Consent Form Wordings (Proposal Stage and Claim Stage)

## *Your personal information*

We {define as appropriate} need your consent to use the sensitive details about you set out below in connection with your [insurance cover/claim]

You do not have to give your consent and you may withdraw your consent at any time. However, if you do not give your consent, or you withdraw your consent, this may affect our ability to provide the insurance cover from which you benefit and may prevent us from providing cover for you or handling your claims/[this may prevent us from handling or otherwise affect our ability to handle your claim].

**Do you consent to the use of data and information about your racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic or biometric data, health, sex life or sexual orientation or criminal convictions {delete/amend as appropriate} in connection with your [insurance cover/claim]?** Yes / No

# LMA9152/9153 Data Protection Consent Form Wordings (Proposal Stage and Claim Stage)

## *Other people's details you provide to us*

Where you provide us with details about other people, we also need their consent to use the sensitive details about them set out below in connection with **[your insurance cover/this claim]**. We need you to make sure that you have obtained their consent before you provide those details to us.

**Have you obtained the consent of each other person whose information you will provide to us in connection with your insurance cover to the use of data and information about their racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic or biometric data, health, sex life or sexual orientation or criminal convictions **{delete/amend as appropriate}** in connection with **[your insurance cover/this claim]**? Yes / No**

# LMA9154 Policy Wording- Commercial Lines

## Personal information

Your insurance cover includes cover for individuals who are either insureds or beneficiaries under the policy (***individual insureds***). We (the Lloyd's underwriter(s) identified in the contract of insurance) {define as appropriate} and other insurance market participants collect and use relevant information about individual insureds to provide you with your insurance cover and to meet our legal obligations.

This information includes individual insured's details such as their name, address and contact details and any other information that we collect about them in connection with your insurance cover. This information may include more sensitive details such as information about their health and criminal convictions.

We will process individual insureds' details, as well as any other personal information you provide to us in respect of your insurance cover, in accordance with our privacy notice(s) and applicable data protection laws.

# LMA9154: Policy Wording – Commercial Lines

## ***Information notices***

To enable us to use individual insureds' details in accordance with applicable data protection laws, we need you to provide those individuals with certain information about how we will use their details in connection with your insurance cover.

You agree to provide to each individual insured our short form information notice, which we have provided to you in connection with your insurance cover, on or before the date that the individual becomes an individual insured under your insurance cover or, if earlier, the date that you first provide information about the individual to us.

## ***Minimisation and notification***

We are committed to using only the personal information we need to provide you with your insurance cover. To help us achieve this, you should only provide to us information about individual insureds that we ask for from time to time.

# LMA Guidance

- ❑ The LMA has produced guidance on how to use the model wordings/clauses
- ❑ Please note that now the Data Protection Act 2018 has received royal assent, the insurance derogation will be applicable
- ❑ Consider where consent will be required or not and if you are able to rely on the insurance derogation
- ❑ Put in place an appropriate Part 4 Policy to cover the requirement to have an appropriate policy document in place in relation to the processing of personal data in reliance on the insurance derogation which explains your procedures for securing compliance with the GDPR in reliance on the condition in question, and explains your policies as regarding the retention and erasure of the data
- ❑ The LMA is working with Lloyds New York in order to produce a short form information notice which covers both jurisdictions
- ❑ The LMA is working with Lloyds to produce a draft explanatory memorandum which can be used by Managing Agents to communicate with other insurance market participants outside of the EU setting out their obligations under GDPR

**400**

Partners

**2000**

Legal professionals

**3600**

Total staff

**50+**

Offices\* worldwide

\* Includes associated offices

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## LMA – Guidance Update

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# The LMA GDPR Guide

Response to calls for specific guidance



Signposts relevant guidance



Actions to take



Things to stop



Relevant examples

Issued May 2018 – but will be updated from time to time



# The GDPR and DPA 2018

- Two pieces of legislation that sit side by side
- Both in force from today
- GDPR sets out general requirements but allows Member States to derogate in certain areas
- DPA 2018 is how the UK has done this, e.g.:
  - Criminal offences
  - ICO enforcement powers
  - Processing in the substantial public interest
  - Processing of criminal convictions data

# Data controller v data processor

- Clear data controllers
- Clear data processors
- Lots of grey in the middle – each relationship should be considered on a case by case basis
- Help:
  - ICO Guidance
  - LMA Guidance

# ICO Guidance

## Decision making powers:

- to collect the personal data in the first place and the legal basis for doing so;
- which items of personal data to collect, i.e. the content of the data;
- the purpose or purposes the data is to be used for;
- which individuals to collect data about;
- whether to disclose the data, and if so, who to;
- whether subject access and other individuals' rights apply; or
- how long to retain the data or whether to make non-routine amendments

## Professional service providers:

- work under a range of professional obligations which oblige them to take responsibility for the personal data they process.
- engaged specifically for their professional opinion, and cannot be instructed to change that opinion or the content of the advice that they provide.

## Data Controller

Broker

A broker is likely to make at least one of the decisions set out in the *ICO* Guidance above. In addition, it has its own professional and regulatory responsibilities.

## Data Processor

IT provider

Whilst an IT provider may be engaged for its technical IT expertise, it is unlikely to have authority to use data for its own purposes.

## Grey areas



A good example of this is will be a third party administrator or "TPA":

- In some cases a TPA may be operating under very strict instructions and will have no discretion as to how *personal data* is *processed* (e.g. providing First Notification of Loss services only). They would likely be *data processors*.
- In other cases a TPA may have a wide scope of claims settlement authority. They may be given authority to instruct experts, approach witnesses and collect any and all *personal data* considered necessary to investigate and settle the claim appropriately. They would only revert to the insurer for instructions in limited circumstances. They would likely be *data controllers*.

# Jurisdictional reach

The **GDPR** applies to **data controllers** and **data processors** that are:

- (1) established in the **EU**;
- (2) not established in the **EU** but who offer goods or services to **data subjects** in the **EU**; or
- (1) not established in the **EU** but monitor behaviour of **data subjects** in the **EU** as far as that behaviour occurs in the **EU**.

"Monitoring" the behaviour of **data subjects** in the **EU** includes tracking **data subjects** in the **EU** on the Internet for profiling purposes or analysing or predicting preferences, behaviours and attitudes (if the behaviour takes place in the **EU**).

# Examples

Insurer based in the <b>EU</b> processing personal data about policyholders inside the <b>EU</b> .	GDPR will apply.
Lloyd's Managing Agent based in the <b>EU</b> processing personal data received on bordereau from its US Coverholder.	GDPR will apply.
Coverholder based outside the <b>EU</b> servicing <b>EU</b> based policyholders.	GDPR will apply.  EU representative is likely to be required.
US Coverholder processing personal data of US policyholders.	GDPR <u>will not</u> apply to the Coverholder.  However, the GDPR will apply to the Lloyd's Managing Agent. The Lloyd's Managing Agent may need the Coverholder's assistance to meet its own obligations. For example, the Lloyd's Managing Agent may need the Coverholder to pass on its GDPR compliant fair processing notice.

- Resistance from coverholders/TPAs who are not caught by the GDPR themselves
- LMA explanatory note being prepared
- Remember Standard Contractual Clauses may be needed

# The new insurance purposes ground

Part 2, Schedule 1 (Special category data)

- 20 (1) This condition is met if the processing –
- (a) is necessary for an insurance purpose,
  - (b) is of personal data revealing racial or ethnic origin, religious or philosophical beliefs or trade union membership, genetic data or data concerning health, and
  - (c) is necessary for reasons of substantial public interest,
- subject to sub-paragraphs (2) and (3).



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subject to sub-paragraphs (2) and (3).

# The new insurance purposes ground

“insurance purpose” means—

- (a) advising on, arranging, underwriting or administering an insurance contract,
- (b) administering a claim under an insurance contract, or
- (c) exercising a right, or complying with an obligation, arising in connection with an insurance contract, including a right or obligation arising under an enactment or rule of law.

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# The new insurance purposes ground

Matters of substantial public interest:

- Availability of insurance
- Risk-based pricing
- Ability to detect and investigate fraudulent claims
- Efficient administration and payment of insurance claims

# Criminal convictions data

Paragraph 36 & 37, Part 3, Schedule 1 - what this means...

This condition is met if the processing—

(a) is necessary for an insurance purpose,

~~(b) is of personal data revealing racial or ethnic origin, religious or philosophical beliefs or trade union membership, genetic data or data concerning health, and~~

is of personal data relating to criminal convictions and offences or related security measures including personal data relating to –

(i) the alleged commission of offences by the data subject; or

(ii) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.

~~(c) is necessary for reasons of substantial public interest,~~

subject to sub-paragraphs (2) and (3).

## Remember...

- Requirement to have an internal policy document in place
- Limited to “necessary” activities. If using special category data for other purposes, consent is still likely to be the most relevant ground
- UK Data Protection Bill only – consider European operations

# Ongoing journey

- For most, implementation work remains in flight
- Changes need to be embedded
- DPA 2018 to be considered
- Cultural changes
- Dust to settle – more ICO guidance to come





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