EXPLANATORY MEMORANDUM TO

THE COMPENSATION (CLAIMS MANAGEMENT SERVICES) (AMENDMENT) REGULATIONS 2008
No. Draft

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

   This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

2.1 The Compensation (Claims Management Services) (Amendment) Regulations 2008 (the Regulations) set out the requirement for authorised providers of regulated claims management services to obtain professional indemnity insurance if they represent clients in the personal injury sector.

2.2 The Regulations also extend the enforcement powers of the Regulator to take possession of written or electronic documents pursuant to a search warrant.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative background**

4.1 Part 2 of the Compensation Act 2006 (the Act) establishes the regulatory framework for claims management services, enabling the Regulator to authorise persons to provide regulated claims management services and to regulate the conduct of authorised persons. Providing a 'regulated claims management service' is an offence under the Act unless the person who provides the service is authorised under the Act to do so, or is exempt from the obligation to become authorised. The Regulator also has powers to investigate complaints against authorised persons, where an authorised person has or is suspected to have breached the terms and conditions of authorisation and the activities of authorised persons. The Compensation (Claims Management Services) Regulations 2006 (the 2006 Regulations) set out in detail the regulatory arrangements including the obligation to hold professional indemnity insurance (Regulation 21).

4.2 These Regulations are made under the power in sections 8(8) and 9 and the Schedule to the Act.

5. **Extent**

5.1 The Regulations apply to England and Wales.

6. **European Convention on Human Rights**

6.1 The Parliamentary Under-Secretary of State for Justice has made the following statement regarding Human Rights:

   In my view the provisions of the Compensation (Claims Management Services) (Amendment) Regulations 2008 are compatible with the Convention rights.

7. Policy Background

7.1 The Compensation Act provides a flexible framework for the regulation of claims management services to tackle poor practice and provide additional safeguards for the public against rogue companies. Statutory regulation was introduced following concerns and evidence that claims management companies were using aggressive marketing techniques; encouraging frivolous claims resulting in the perception of a compensation culture; misleading consumers about funding options and providing poor quality advice. Secondary legislation defines the scope of regulation including the regulated sectors, regulated activities and exemptions. Regulation covers services in relation to claims in the following sectors:

- Personal injury;
- Criminal injuries compensation;
- Industrial Injuries Disablement Benefit;
- Employment
- Housing Disrepair
- Financial products and services

7.2 Regulated services are defined as:

- advertising for, or otherwise seeking out (for example, by canvassing or direct marketing), persons who may have a cause of action;
- advising a claimant or potential claimant in relation to his claim or cause of action;
- referring details of a claim or claimant, or a cause of action or potential claimant, to another person, including a person having the right to conduct litigation, but not where this is not undertaken for or in expectation of a fee, gain or reward;
- investigating, or commissioning the investigation of, the circumstances, merits or foundation of a claim, with a view to the use of the results in pursuing the claim;
- representation of a claimant (whether in writing or orally, and regardless of the tribunal, body or person to or before which or whom the representation is made

7.3 The Ministry of Justice has the responsibility for directly regulating the claims management sector. A non-statutory Regulatory Consultative Group established by the Department ensures key stakeholder involvement in the development and operation of the regulatory regime[1].

Professional Indemnity Insurance

7.4 The requirement to hold professional indemnity insurance may be directed as a condition to be satisfied for authorisation under the Act (Regulation 12(5)(d) of the 2006 Regulations).

7.5 During 2007, the Department consulted specifically on the likely cost and impact on businesses before imposing the professional indemnity requirement. Meetings were also held with key stakeholders at all stages of consultation, including insurers and insurance brokers. The draft requirement was developed in consultation with the Regulatory Consultative Group.

[1] The group comprises representatives of the Claims Standards Council, Association of Personal Injury Lawyers, Law Society, Association of British Insurers, FSA, Office of Fair Trading, Citizens Advice, Which?, MASS, Forum of Insurance Lawyers, Advertising Standards Authority, Trades Union Congress, the Legal Expense Insurers Group, British Insurance Brokers Association, the Association of Independent Financial Advisers and the Financial Ombudsman Service.

7.6 PI insurance is designed to protect businesses from the consequences of a legal action by a third party. Such protection adds modestly to the protection that an individual customer of the business might have by helping a business meet claims against it. Responses to the consultation and research carried out by the Department indicated that additional protection afforded to the consumer varied depending on the type of regulated claims management service provided and the sector in which it was offered. The consultation showed that risk to the consumer that a professional indemnity insurance requirement might mitigate is the highest in cases where intermediaries represent clients in settlement negotiations in personal injury cases without the need for formal litigation.

7.7 The requirement to impose professional indemnity insurance to claims management businesses that represent clients in the personal injury sector balances appropriate consumer protection with a proportionate impact on businesses. The Regulations introduce minimum terms to encourage insurers to provide professional indemnity policies, which include a minimum level of indemnity, a maximum level of excess and legal defence costs. Discussions with insurers and insurance brokers have shown that many insurers will provide cover exceeding the minimum terms.

7.8 The definition of 'Zone A' in the Regulations is used by the Financial Services Authority to define the extent of the countries where insurance for PII can be obtained. Having a wider field of potential insurers encourages competition and ensures compliance with European legislation, in particular the Insurance Mediation Directive. The Regulations refer to the list produced by the International Monetary Fund (IMF)[2] because the organisation determines which countries are considered 'Zone A' by virtue of concluding special lending arrangements with the IMF in relation to the general arrangements to borrow. Guidance will be issued on the claims management website, expanding on this source, to assist authorised businesses in locating insurers. The Regulator will, however, be publishing a list of those countries that have rescheduled their external sovereign debt and are excepted from Zone A for a period of five years. It is likely that there will be very few, if any, countries on this list. There are currently 40 countries which qualify as 'Zone A', with four UK dependencies also specified in the regulations[3].

7.9 The Department will review the professional indemnity requirement after one year its implementation to assess its impact, whether it should be extended to other regulated sectors, reduced in scope or left unchanged.

Seizure powers

7.10 Part 9 of the 2006 Regulations set out the Regulator's investigation powers and the circumstances in which those powers are exercisable. The amendments to the Act made by the Legal Services Act 2007 (Schedule 19, paragraphs 6(2)(b) and 11(6)) extend the investigation powers of the Regulator to include the power to make regulations to allow possession to be taken of written or electronic records found pursuant to a search warrant for the purposes of taking copies. These amendments are to be brought into force by commencement order in June 2008. The amendments to Part 9 the 2006 Regulations are to come into force on 1st August 2008. The Regulator already has the power to obtain search warrants to enter and search premises, and copy material found on the premises. However, this does not include a power to take possession of written or electronic records for copying.

[2] http://www.imf.org/external/np/exr/facts/gabnab.htm
[3] 'Zone A' countries include all EEA member states, as well as USA, Canada, Australia and New Zealand. The four dependencies in the regulations are the Channel Islands, Gibraltar, Bermuda and the Isle of Man.

7.11 The power to take possession of written and electronic records may be required when a large amount of relevant records are found during a search of premises. The power will enable officers to take possession of the records for the purpose of photocopying which will be more convenient than scrutinising and copying the records at the search site and will reduce the amount of time that officers may need to remain on the premises. The records should be copied as soon as possible and then returned to the person who originally had possession and control of them. The exercise of the power to take possession of written or electronic records will be subject to the relevant Codes of Practice issued by the Home Secretary under the Police and Criminal Evidence Act 1984.

8. Impact

8.1 An Impact Assessment has not been produced for this statutory instrument. A full Regulatory Impact Assessment (RIA) for claims management regulation was published to accompany the Compensation Bill 2006 and is available at www.dca.gov.uk/legist/compensation.pdf.

8.2 The Department commissioned an assessment of the impact of the proposed requirement by an independent insurance expert, Andrew Fryer. This considered the likely impact of the requirement on the public, the insurance market and on claims management businesses. The report was published alongside the consultation response and is available at http://www.claimsregulation.gov.uk/__wysiwyg/UploadedFiles/File/coveringlettersummaryofresponsesfryerreport2.pdf. It was assessed that the insurance market is in a competitive phase and that a minimum requirement as proposed would best meet the needs of the public and the claims management sector. The Zone A definition ensures there is a wide field from which claims businesses can obtain PII. This will also encourage competition so costs are reasonable and proportionate.

9. Contact

9.1 Margaret Haig at the Ministry of Justice can answer any queries regarding the instrument.
Tel: 020 7210 8792

Email: Margaret.Haig@justice.gsi.gov.uk