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**The Law Society of Hong Kong
Solicitors' Professional Indemnity
Qualifying Insurance Rules**

Fourth Draft

SOLICITORS' PROFESSIONAL INDEMNITY QUALIFYING INSURANCE RULES

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SOLICITORS' PROFESSIONAL INDEMNITY QUALIFYING INSURANCE RULES

Part 1

General

- 1.1 **Authority.** These Rules are made by the Council under section 73A of the Legal Practitioners Ordinance.
- 1.2 **Commencement.** These Rules come into force on [1st October 2005].
- 1.3 **Purpose.** These Rules:-
- (i) provide that the Existing Fund shall not provide indemnity as specified herein in respect of Indemnity Periods commencing on or after [1st October 2005];
 - (ii) provide for further contributions to be made towards any deficit or anticipated deficit in the Existing Fund to the extent it is required to continue to provide indemnity under these Rules;
 - (iii) require Solicitors carrying on Private Practice in Hong Kong to take out and maintain Qualifying Insurance with Qualifying Insurers with effect from [1st October 2005].
- 1.4 **Application.** These Rules will apply to any Indemnity Period beginning on or after [1st October] 2005 and, to the extent referred to in Rule 2.6, to any previous Indemnity Period.
- 1.5 **Citation.** These Rules may be cited as the Solicitors' Professional Indemnity Qualifying Insurance Rules.
- 1.6 **Definition of Terms.** In these Rules, unless the context otherwise requires:-

"Assigned Risk Pool" means the arrangements by which an Eligible Firm may obtain professional indemnity insurance against civil liability by means of an Assigned Risk Pool Policy on the terms set out in Parts 4 and 5 of these Rules.

Commentary: The Assigned Risk Pool is designed to ensure that professional indemnity insurance will be available to all Eligible Firms. However, it is important to note that premiums payable to the Assigned Risk Pool are expected to be high. Refer to Appendix 2 for the method of calculating the Assigned Risk Pool Premium.

"Assigned Risk Pool Manager" means the manager of the Assigned Risks Pool being the Society or any person from time to time appointed by the Society to carry out all or any particular functions of the Assigned Risk Pool Manager or the Society and any such person.¹

"Assigned Risk Pool Policy" means a contract of professional indemnity insurance issued by the Assigned Risk Pool Manager on behalf of Qualifying Insurers to an Eligible Firm in the Assigned Risk Pool including, where the context permits, a Policy provided to a Firm in Default.

Commentary: A copy of the standard-form Assigned Risk Pool Policy is available on the Law Society's website at <http://www.hklawsoc.org.hk>.

¹ Council/Consultants — Should the Law Society be the Assigned Risks Pool Manager?

"Assigned Risk Pool Premium" means the premium calculated in accordance with Part I of Appendix 2..

"Assigned Risk Pool Default Premium" means the premium calculated in accordance with Part II of Appendix 2..

"Assigned Risk Pool Run-off Premium" means the premium calculated in accordance with Part III of Appendix 2.

"Assigned Risk Pool Run-off Policy" means a contract of professional indemnity insurance issued by the Assigned Risk Pool Manager on behalf of Qualifying Insurers to a Run-off Firm in the Assigned Risk Pool.

"Authorised Insurer" means []²

Commentary: A Qualifying Insurer must be authorised to write new business on the date on which a Policy incepts, but the Policy will remain a Policy of Qualifying Insurance until it expires, even if the Qualifying Insurer then ceases to write, or be authorised to write, new insurance business.

"Company" has the meaning attributed to it in Rule 2 of the Solicitors (Professional Indemnity) Rules.

"Council" means the Council of the Society.

"Eligible Firm" means any Firm which is eligible to be in the Assigned Risk Pool, being any Firm other than:-

- (i) a Firm that has at any relevant time been in the Assigned Risk Pool for 24 or more of the preceding 60 months, without the prior written approval of the Council; or³
- (ii) a Firm in respect of which there is a determination by the Council subsisting at any relevant time to the effect that it is not an Eligible Firm by reason of its being treated as one single Firm with one or more other Firms already in, or that has already been in, the Assigned Risk Pool for the purposes of Rule 4.16 or Rule 4.17; or
- (iii) subject to Rule 4.14, a Firm that, at the end of any Indemnity Period to which these Rules apply, is in Policy Default; or
- (iv) a Firm which, at the time it applies to enter the Assigned Risk Pool, already has in place Qualifying Insurance outside the Assigned Risk Pool for the Indemnity Period in which that Firm requests cover through the Assigned Risk Pool to commence.

Commentary: Firms cannot remain insured through the Assigned Risk Pool indefinitely. For example, a Firm which is insured through the Assigned Risks Pool for the 2005/06, 2006/07 and 2007/08 Indemnity Periods will not be eligible to be insured through the Assigned Risks Pool for the 2008/09 Indemnity Period. Subject to any waiver granted by the Council under Rule 4.19, any Firm which no longer

² Council/Consultants - Should this include insurers approved by the Insurance Authority to conduct business in Hong Kong only or should it also include overseas insurers authorized in their respective jurisdictions? What are the criteria/qualifications of authorized insurers? How to ensure the creditworthiness of insurers?

fulfils the definition of an Eligible Firm is therefore required to obtain Qualifying Insurance from a Qualifying Insurer outside the Assigned Risk Pool, or to cease Practice.

In addition, a Firm is not eligible to join the Assigned Risk Pool if it has already in place Qualifying Insurance from a Qualifying Insurer outside the Assigned Risk Pool for the relevant Indemnity Period.

"Existing Fund" means the fund established and maintained under Rule 3 of the Solicitors (Professional Indemnity) Rules.

"Firm" means:-

- (i) any Partnership of two or more Solicitors (as constituted from time to time, whether before or during any relevant Indemnity Period); or
- (ii) any sole solicitor practitioner; or
- (iii) any solicitor corporation..

"Firm in Default" means a Firm that has failed to obtain Qualifying Insurance outside the Assigned Risk Pool and which is:-

- (i) an Eligible Firm carrying on Practice and which has failed to make an application in the manner prescribed by these Rules to be admitted into the Assigned Risk Pool before the start of any Indemnity Period to which these Rules apply or the commencement of a Practice whichever is the later; or
- (ii) a Firm which is not an Eligible Firm and which is carrying on a Practice without Qualifying Insurance outside the Assigned Risk Pool; or
- (iii) a Run-off Firm which has failed to make an application in the manner prescribed by these Rules to be issued with an Assigned Risk Pool Run-off Policy.

Commentary: A Firm in Default will be required to pay the Assigned Risk Pool Default Premium, and/or the Assigned Risk Pool Run-off Premium to the Assigned Risk Pool, and each Principal in that Firm will have committed a disciplinary offence by having breached these Rules. Refer to Part 5 for the provisions that apply to a Firm in Default.

"Indemnity Period" means a period commencing on 1st October in any year and expiring on 30th September in the following year, both days inclusive.

Commentary: Under the Qualifying Insurer's Agreement, each Policy is required to expire at the end of an Indemnity Period. It is envisaged that any change to these Rules or to the Minimum Terms and Conditions would take effect from the start of an Indemnity Period, so that at any one time, all policies in force comply with the same version of these Rules and the Minimum Terms and Conditions.

Qualifying Insurers are permitted under the Qualifying insurer's Agreement to issue a Policy covering more than one Indemnity Period, provided that the Policy expires at the end of a subsequent Indemnity Period, and provided that the terms of the Policy are amended if required to reflect any change in the Rules or the Minimum Terms and Conditions while the Policy is in force.

"Insolvency Event" means in relation to a Qualifying Insurer:-

- (i) the passing of an effective resolution for the winding up, insolvency, administration, reorganization, reconstruction or dissolution or the making of any court order in respect thereof;
- (ii) the appointment of a provisional liquidator, administrator, receiver, trustee, Official Receiver or similar officer for all or a substantial part of its businesses or assets other than a *bona fide* reorganization or reconstruction whilst it is solvent ; or
- (iii) the Insurance Authority's presentation of a petition under s. 44(1) of the Insurance Companies Ordinance; or
- (iv) the occurrence of any event analogous to any of the foregoing events in any jurisdiction outside Hong Kong.

"Minimum Terms and Conditions" means the minimum terms and conditions with which a Policy of Qualifying Insurance is required by these Rules to comply as set out in Appendix I.

Commentary: All Qualifying Insurers agree under the Qualifying Insurer's Agreement to issue Policies that comply with the Minimum Terms and Conditions. However, under Rule 3.3 it is the duty of each Firm and each Principal within that Firm to ensure that the Policy issued to it does comply with the Minimum Terms and Conditions. The standard form Assigned Risk Pool Policy does comply with the Minimum Terms and Conditions.

If a Firm takes out additional insurance over and above that provided under the Minimum Terms and Conditions, such "top-up" cover is outside the scope of these Rules, and does not have to be taken out with a Qualifying Insurer.

"Partnership" and **"Partner"** include an unincorporated Firm and a solicitor corporation and a Partner includes a partner in an unincorporated Firm and a director of a solicitor corporation.

"Period of Default" means in relation to a Firm in Default the period starting with the date when such Firm first became a Firm in Default and ending with the date when it ceased to be a Firm in Default.

"Policy" means a contract of professional indemnity insurance made between one or more Qualifying Insurers and a Firm including, where the context permits, an Assigned Risk Pool Policy and an Assigned Risk Pool Run-off Policy.

"Policy Default" means a failure by a Firm:-

- (i) to pay for more than 2 months after the due date for payment all or any part of the premium or any other sum due in respect of a Policy (including, without limitation, any payment due under Rule 5.8); or
- (ii) to pay for more than 2 months after the due date for payment all or any part of any Assigned Risk Pool Premium, any Assigned Risk Pool Default Premium, or any Assigned Risk Pool Run-off Premium, or any installment payable in relation thereto whether payable to the Assigned Risk Pool Manager or otherwise; or
- (iii) to reimburse within 2 months a Qualifying Insurer (including the Assigned Risk Pool Manager on behalf of Qualifying Insurers) in respect of any amount falling within a Firm's Policy Excess (as defined in the Minimum Terms and Conditions) which has been paid on-

an Insured's (as defined in the Minimum Terms and Conditions) behalf to a Claimant (as defined in the Minimum Terms and Conditions) by a Qualifying Insurer or by the Assigned Risks Pool Manager.

For the purposes of this definition, the "due date for payment" means, in respect of any Policy or any payment to be made under any Policy:-

- (a) the date on which such payment fell due under the terms of the Policy or any related agreement or arrangement; or
- (b) if the Firm was first required under these Rules to effect such a Policy prior to the date on which it did so, the date if earlier on which such payment would have fallen due had such Policy been effected by the Firm when it was first required to do so under these Rules..

Commentary: Principals are committing a disciplinary offence if their Firm is in Policy Default, whether as a result of failing to pay the premium when demanded or as a result of failing to take out a Policy when required to do so. In addition, their Firm will cease to be an Eligible Firm for the purpose of taking out or renewing an Assigned Risk Pool Policy.

"Practice" means the whole or such part of the Private Practice of a Firm as is carried on from one or more offices in Hong Kong.

Commentary: The Rules require Firms to take out policies which include cover in accordance with the Minimum Terms and Conditions for that part of their Practice carried on from offices located in Hong Kong. They do not apply to any part of the Practice of the Firm carried on from offices outside Hong Kong. However, the cover in relation to the Practice carried on from offices located in Hong Kong must extend to acts or omissions wherever in the world they occur, and would therefore include, for example, a Principal based in a Firm's Hong Kong office who travels to Shanghai to advise a client.⁴

"Principal" means where the Firm is or was:-

- (i) a sole practitioner - that practitioner and any person held out as a Partner of that practitioner;
- (ii) a Partnership - each Partner of that Firm and any person held out as a Partner; and
- (iii) a solicitor corporation - each director of that corporation and any person held out as a director and any person who:
 - (a) beneficially owns the whole or any part of a share in such corporation; or
 - (b) is the ultimate beneficial owner of the whole or any part of a share in such corporation.

"Private Practice" includes (without limitation) all the professional services provided by a Firm including (without limitation) acting as a personal representative, trustee, attorney, notary, or in

⁴ Council/Consultants - There is an issue on the scope of geographical cover and whether this will increase the insurance premium payable.

any other role in conjunction with a Practice, and includes services provided *pro bono publico*, but does not include:-

- (i) Practice carried on by a Solicitor in the course of employment with an employer other than a Firm;
- (iii) Practice consisting only of:
 - (a) providing professional services without remuneration for friends, relatives, or companies wholly owned by a Principal's family, or registered charities; or
 - (b) administering oaths and taking affidavits.

"Qualifying Insurance" means a Policy (including an Assigned Risk Pool Policy) underwritten by one or more Qualifying Insurers which provides indemnity against civil liability which includes the Minimum Terms and Conditions.

Commentary: This includes cover whilst a Firm is in Practice and Run-off Cover for a period of 6 years after it has ceased practice.

"Qualifying Insurer" means an Authorised Insurer which has entered into a Qualifying Insurer's Agreement with the Society which remains in force for the purposes of underwriting new business at the date on which the relevant contract of Qualifying Insurance is made.

Commentary: A list of all Qualifying Insurers appears on the Law Society's website, at <http://www.hklawsoc.org.hk> and is also available from the Law Society.

"Qualifying Insurer's Agreement" means an agreement in such terms as the Society may from time to time prescribe setting out the terms and conditions on which a Qualifying Insurer may provide professional indemnity insurance to Solicitors and others in Private Practice in Hong Kong but which shall in any event be consistent with the provisions of these Rules.

Commentary: A copy of the standard form agreement which each Qualifying Insurer is required to enter into, is available on request from the Society.

"Rules" means these Rules as from time to time modified or amended.

"Run-off Cover" means Qualifying Insurance in respect of civil liability of a Firm for a period of 6 years after it has ceased to practice or after any Successor Firm (as defined in clause 8.18 of the Minimum Terms and Conditions) which has in place Qualifying Insurance has ceased to practice, whichever is the later.

"Run-off Firm" means a Firm which has ceased to practice in circumstances where Run-off Cover is required to be provided by a Qualifying Insurer and where such insurance is not in place outside or within the Assigned Risk Pool.

"Society" means the Law Society of Hong Kong.

"Solicitor" means a person who has been admitted as a solicitor and whose name is on the roll (within the meaning of Section 5 of the Legal Practitioners Ordinance) and who practises as a solicitor whether or not he or she has in force a practising certificate as referred to in that Ordinance.

"Solicitors (Professional Indemnity) Rules" means[Note 1]

"Special Measures" means such measures as the Council may from time to time require with a view to reducing the risk of claims being made against a Firm in the future or with a view to enabling a Firm in the future to obtain Qualifying Insurance outside the Assigned Risk Pool.

1.7 Interpretation. In these Rules:-

- (i) Unless the context otherwise requires:
 - (a) the singular includes the plural, and *vice versa*;
 - (b) a reference to a person includes a body corporate, Partnerships, and other unincorporated associations or bodies of persons;
 - (c) a reference to a Rule is to a rule forming part of these Rules;
 - (d) a reference to an Appendix is to an appendix forming part of these Rules;
 - (e) a reference to a Part is to a part of these Rules.
- (ii) A reference to any statute, statutory provision, or regulation includes:
 - (a) any subsidiary legislation made under it; and
 - (b) any provision which it has superseded or re-enacted (with or without modification) or amended, and any provision superseding it or re-enacting it (with or without modification) or amending it either before, or at the date of the commencement of these Rules, or after the date of the commencement of these Rules.
- (iii) Headings are for ease of reference only and shall not affect the interpretation of these Rules.
- (iv) Explanatory notes and commentary shall be ignored in interpreting these Rules.
- (v) The Appendices to these Rules form part of these Rules.
- (vi) These Rules will be governed by and interpreted in accordance with Hong Kong law.

Part 2

Run-off of Existing Fund

- 2.1 Future Liability of Existing Fund.** The Existing Fund shall not provide indemnity in respect of any Claim (as defined in the Minimum Terms and Conditions) first made against a Firm or a Solicitor or arising from Circumstances (as defined in the Minimum Terms and Conditions) first notified to the Company after [1st October 2005].
- 2.2 Further Contributions to Existing Fund.** Subject to Rules 2.5 to 2.9, no contributions in respect of any Indemnity Period starting on or after [1st October 2005] shall be payable under Rule 4 and Schedule 1 of the Solicitors (Professional Indemnity) Rules.
- 2.3 Existing Rules to Continue.** Subject to Rules 2.1 and 2.2, the Solicitors (Professional Indemnity) Rules shall remain in force for the purposes of holding, managing and maintaining the Existing Fund and provision of indemnity as provided therein and, without prejudice to the generality of the

foregoing, rule 8 of the Solicitors (Professional Indemnity) Rules shall continue to apply.

- 2.4 **Review of Existing Fund.** The Council (in consultation with the Company) shall review the operation of the Existing Fund as soon as practicable after [1st October 2005] and the end of each subsequent Indemnity Period with a view to establishing whether there is a deficit or anticipated deficit in the Existing Fund as a result of any Claims first made against a Firm or Solicitor or arising from Circumstances first notified to the Company before [1st October 2005] (in Rules 2.5 to 2.7: "deficit").
- 2.5 **Further Contributions for Deficit.** In the event that the review required by Rule 2.4 establishes that there is a deficit, the Council shall take steps to ensure that the deficit is remedied within a reasonable time, by authorising the Company to demand further sums in accordance with Rules 2.6 to 2.9.
- 2.6 **Assessment of Relevant Indemnity Period.** The Council shall, at the conclusion of the review required by Rule 2.4, decide the period within which the deficit shall be remedied, and shall specify the Indemnity Period or Indemnity Periods, which shall not expire later than [30th September 2005], in respect of which calculations under Rule 2.7 shall be carried out.
- 2.7 **Calculation of Further Contributions.** The sums payable to remedy the deficit shall be calculated at the end of any specified Indemnity Period referred to in Rule 2.6 so as to be recoverable from each Principal who was in Private Practice in that specified Indemnity Period in the same [adjusted total] proportions as would have been recoverable had the provisions of paragraph 2(5) of Schedule 1 to the Solicitors (Professional Indemnity) Rules continued to apply.
- 2.8 **Duty to Supply Information.** Without prejudice to Rule 2.3, Principals shall be under a duty (on request) to supply to the Company the information required to enable the calculation under Rule 2.7 to be made but, in the absence of information for whatever reason, the Company shall carry out the calculation on assumptions that appear to it to be reasonable.
- 2.9 **Payment of Further Contributions.** The Company shall demand in writing from each Principal the sum calculated in accordance with Rule 2.7, and such Principal shall be bound to pay such sum to the Company within 30 days after the date of issue of such written demand. The Council may authorise the Company to demand payment of the sums in instalments rather than by a single sum.

Part 3

Qualifying Insurance Requirements

- 3.1 **Requirement for Qualifying Insurance for Firms in Practice.** A Firm is required to take out and maintain Qualifying Insurance under these Rules if it carries on a Practice during any Indemnity Period beginning on or after [1st October 2005], provided that a Solicitor shall not be required to take out and maintain Qualifying Insurance under these Rules in respect of work done as an Employee (as defined in the Minimum Terms and Conditions) or whilst otherwise directly engaged in the Practice of another Firm where that Firm is required by these Rules to take out and maintain Qualifying Insurance.

Commentary: Under these Rules, each Firm and each Principal of a Firm has a continuing obligation to ensure that it has Qualifying Insurance in place at all times with effect from [1st October 2005]. Refer to the definitions of Practice, amongst others, to establish whether a Firm falls within the scope of these Rules. A Firm should also check that any insurance that it takes out in order to comply with these Rules (as opposed to any 'top-up' cover) is taken out with a Qualifying Insurer. A list of

Qualifying Insurers appears on the Law Society's website, at <http://www.hklawsoc.org.hk> and is also available from the Law Society.

The insurance may take two forms:

- An insurance contract with one or more Qualifying Insurers on terms negotiated between the Firm and that insurer but which include the Minimum Terms and Conditions; or
- An insurance contract with all the Qualifying Insurers by way of an Assigned Risk Pool Policy on terms negotiated between the Law Society and those insurers which also include the Minimum Terms and Conditions.

Under the Minimum Terms and Conditions, the insurance must include Run-off Cover for a Firm's liabilities for 6 years after it has ceased Practice. If such cover does not exist for any reason, then the Firm must obtain either Qualifying Insurance re the Run-off Cover whether in the market or by way of an Assigned Risk Pool Run-off Policy.

Each Firm (including each Firm within a permitted group practice as defined by rule 3 of the Solicitors (Group Practice) Rules) which is carrying on a Practice is required to take out its own Policy of Qualifying Insurance. It is not possible for more than one Firm to be covered under a single Policy of Qualifying Insurance.

If a Firm cannot obtain a Policy from a Qualifying Insurer it should apply to join the Assigned Risks Pool in accordance with Part 3, if it is an Eligible Firm. If it is not an Eligible Firm, it must cease Practice.

Note that under the Minimum Terms and Conditions, a Policy, once taken out, cannot be cancelled before the end of an Indemnity Period unless:

- the Policy is an Assigned Risk Pool Policy and the Firm has replaced it with a Policy of Qualifying Insurance outside the Assigned Risk Pool; or
- the Firm merges with another Firm and a Policy of Qualifying Insurance is in place for the merged Firm; or
- the Qualifying Insurer which issues the Policy becomes the subject of an Insolvency Event, and the Firm has replaced the Policy with another Policy of Qualifying Insurance.

3.2 Requirement for Run-off Firms. A Run-off Firm is required to make an application in accordance with these Rules to be issued with an Assigned Risk Pool Run-off Policy.

Commentary: This Rule is intended to cover a situation where the Firm has ceased practice but does not have in place Run-off Cover. Eg if the Insurer has become insolvent or if the Firm is in breach of Rule 3.1.

3.3 Responsibility for Firms in Practice. It shall be the responsibility of a Firm carrying on a Practice and any person who is a Principal of a Firm which is carrying on a Practice during any Indemnity Period beginning on or after [1st October 2005] at all times to ensure:-

- (i) that the Firm has in place and maintains Qualifying Insurance outside the Assigned Risk Pool during any such Indemnity Period; or

- (ii) in the case of an Eligible Firm, that the Firm has applied to enter the Assigned Risk Pool in accordance with the procedure set out in Rule 4.4,

in either case before the start of any relevant Indemnity Period or the commencement of Practice, whichever is the later.

Commentary: Note that the duty to ensure that Qualifying Insurance is in place rests not just on the Firm as a whole, but also on every Principal within that Firm.

- 3.4 **Responsibility for Run-off Firms.** It shall be the responsibility of a Run-off Firm and any person who was a Principal of that Run-off Firm immediately prior to it becoming a Run-off Firm to ensure that the Run-off Firm has applied to enter the Assigned Risk Pool in accordance with the procedure set out in Rule 4.4, but the making of such an application shall not absolve any Firm or person from any breach of Rule 3.2.

Commentary: The intention is that a Firm must have cover at all times. Therefore, a Firm which has continued to practice without Qualifying Insurance immediately prior to closing down is required to apply for run-off cover through the Assigned Risk Pool, but may still face action for a breach of Rule 3.1 for practicing without Qualifying Insurance.

- 3.5 **Insolvency of Insurer.** If a Firm is carrying on a Practice which is being provided with Qualifying Insurance by a Qualifying Insurer (whether alone or together with other Qualifying Insurers) and that Qualifying Insurer is the subject of an Insolvency Event it shall, subject to any waiver under Rule 8.1 be the responsibility of the Firm and any person who is a Principal of the Firm to ensure:-

- (i) that the Firm has in place Qualifying Insurance with another Qualifying Insurer which must be arranged as soon as reasonably practicable and in any event within 4 weeks of such an Insolvency Event; or
- (ii) in the case of an Eligible Firm, that the Firm applies within that period of 4 weeks to enter the Assigned Risk Pool in accordance with the procedure set out in Rule 4.4.

Commentary: It is important to be aware that the arrangements for professional indemnity insurance put in place by the Society do not seek to protect Firms against the insolvency of a Qualifying Insurer. If an Insolvency Event occurs in respect of an Insurer, that Insurer will cease to be a Qualifying Insurer for the purposes of these Rules. This is because, in such circumstances, the Insurer may not be in a position to pay claims in full. Any Firm which has Qualifying Insurance with a Qualifying Insurer which is the subject of an Insolvency Event must obtain replacement cover as soon as possible, and in any event within 4 weeks of the Insolvency Event occurring. Having done so, a Firm should cancel the Policy with the insolvent Insurer and, if entitled to do so, seek a return of the premium relating to the balance of the Indemnity Period from the Insurer which has become the subject of the Insolvency Event.

- 3.6 **Monitoring.** The Council may require from a Firm or any Principal in a Firm carrying on, or reasonably believed by the Council to be carrying on, a Practice such information and evidence as it may reasonably require to satisfy itself that such a Firm has in place Qualifying Insurance.⁵

⁵ Does the Law Society want to make it a disciplinary offence if a firm fails to provide the information? If so, what is the sanction? Should there be a regular obligation to provide this information across the profession or is it on a request only basis?

Part 4

The Assigned Risk Pool

- 4.1 Certain existing Firms - Requirement to Apply.** Where a Firm carrying on a Practice does not have in place Qualifying Insurance outside the Assigned Risk Pool in respect of any Indemnity Period or part thereof to which these Rules apply it must, if an Eligible Firm, apply in accordance with the procedure set out in Rule 4.4 to enter the Assigned Risk Pool, subject to Rule 4.2, before the start of the relevant Indemnity Period.

Commentary: A Firm which for any reason does not have Qualifying Insurance in place should apply to the Assigned Risk Pool before the start of the relevant Indemnity Period if it is an Eligible Firm. Premiums payable to the Assigned Risk Pool are high, and Firms would therefore be prudent to seek quotations from Qualifying Insurers outside the Assigned Risk Pool well before the start of an Indemnity Period.

An Assigned Risk Pool Policy can be cancelled if it is replaced by a Policy with a Qualifying Insurer. A return premium may be payable to a Firm which cancels an Assigned Risk Pool Policy in these circumstances - refer to Appendix 2 for the basis on which the Assigned Risk Pool Premium and any return premium is calculated.

Firms should also be aware of the other consequences of being insured through the Assigned Risk Pool set out in this part of the Rules, including the need to comply with any Special Measures under Rule 4.3, and the limitations on eligibility set out in the definition of "Eligible Firm".

- 4.2 Certain new Firms - Requirement to Apply.** A Firm about to start carrying on a Practice which has not already obtained Qualifying Insurance outside the Assigned Risk Pool may, if an Eligible Firm, apply to enter the Assigned Risk Pool after the start of any relevant Indemnity Period. A Firm must not start carrying on a Practice without either having obtained Qualifying Insurance outside the Assigned Risk Pool or, alternatively, in the case of an Eligible Firm, without having applied in accordance with the procedure set out in Rule 4.4 to enter the Assigned Risk Pool.

Commentary: Any Firm wishing to start up a new Practice must obtain Qualifying Insurance, whether in the open market with a Qualifying Insurer or through the Assigned Risk Pool, before starting Practice. Subject to this requirement, a new Firm may start Practice at any time during an Indemnity Period.

- 4.3 Effect of Application.** By making an application to enter the Assigned Risk Pool the applicant agrees and is required to:-

- (i) pay the Assigned Risk Pool Premium in accordance with these Rules; and
- (ii) submit to such investigation and monitoring and to pay the Society's costs and expenses as referred to in Rule 4.11; and
- (iii) pay any costs and expenses incurred by the Assigned Risk Pool Manager as a result of any failure or delay by the Firm in complying with these Rules; and
- (iv) implement, at the expense of the Firm, any Special Measures.

Commentary: The Council may determine the range of Special Measures which may be applied to Firms within the Assigned Risk Pool. The inspectors of the Monitoring Accountant and/or the investigating officers of the Compliance Department [Note

2] may visit a Firm insured through the Assigned Risk Pool to carry out investigation and monitoring of the Firm. This is in order to determine what Special Measures are appropriate for that Firm, and to ensure that those measures are fully implemented. It should be noted that the costs of investigation and monitoring by the Compliance Directorate, costs and expenses incurred through any failure or delay by the Firm to comply, and the implementation of the Special Measures will be payable by the Firm concerned, in addition to paying the Assigned Risk Pool Premium.

4.4 Procedure. The procedure for entering the Assigned Risk Pool is as follows:-

- (i) the application for admission to the Assigned Risk Pool must be made to the Assigned Risk Pool Manager on the proposal form which is from time to time prescribed by the Council; and
- (ii) the applicant must state on the proposal form the date from which cover is sought which must not be a date earlier than the date on which the application is made for admission to the Assigned Risk Pool.

Commentary: The Assigned Risk Pool Premium is calculated in accordance with a formula set out in Appendix 2, and is linked to the gross fees of the Firm concerned. It is important to note that, under Rule 4.20, any material misrepresentation in an application will result in the Firm being treated in the same way as a Firm in Default, including being liable to pay the Assigned Risk Pool Default Premium.

4.5 Responsibility. It shall be the responsibility of a Firm and any person who is a Principal of a Firm at the time to ensure that the Firm's application has been made and to provide to the Assigned Risk Pool Manager all such information as the Assigned Risk Pool Manager may reasonably require in order to process the application.

Commentary: It is in the interests of the Firm and each of the Principals of that Firm to verify that the application to enter the Assigned Risk Pool has been received and that the Firm is insured. An application should be made before the start of an Indemnity Period. Failure to comply with the requirements of this Rule and Rules 4.6 – 4.8 will result in the Firm becoming a Firm in Default.

4.6 Responsibility to Follow Up Application. If no written acknowledgement of the Firm's application has been received from the Assigned Risk Pool Manager:-

- (i) within 30 days from the date when the application was made, or
- (ii) within such other period as is from time to time specified on the proposal form prescribed by the Council,

(in Rule 4.6 and Rule 4.7: "Relevant Period"), then it shall be the responsibility of the Firm and any person who is a Principal of the Firm to seek written confirmation that the Firm's application has been received by the Assigned Risk Pool Manager. If such written confirmation is not obtained within 7 days after the end of the Relevant Period, the application shall be deemed not to have been made, but without prejudice to Rule 4.7.

4.7 Further Application. An applicant whose first application is deemed under Rule 4.6 not to have been made must, within 7 days of the end of the Relevant Period, make a fresh application. The Firm and any person who is a Principal of the Firm must be in a position to prove to the reasonable satisfaction of the Society that the Firm's fresh application was delivered within those 7 days to the Assigned Risk Pool Manager at the address specified on the proposal form.

Provided the Firm's fresh application was so delivered, the application shall be treated as having been made at the date when the Firm's first application was made. A Firm that does not prove to the reasonable satisfaction of the Society that its fresh application was so delivered shall be deemed not to have made any application.

- 4.8 **Commencement of Cover.** Provided that an application or, if necessary, a fresh application, has been made in accordance with Rules 4.4 to 4.7, a Firm which is an Eligible Firm will be covered in the terms of the Assigned Risk Pool Policy to be issued to it from the start of the relevant Indemnity Period or, in the case of a Firm to which Rule 4.2 applies, the date specified in the application, until:-

- (i) the end of the relevant Indemnity Period; or
- (ii) the date on which the Firm obtains Qualifying Insurance outside the Assigned Risk Pool; or
- (iii) the date when the Firm ceases to be an Eligible Firm,

whichever is the earlier

Commentary: An Eligible Firm which should have applied to the Assigned Risk Pool before the start of an Indemnity Period but fails to do so will have breached these Rules by failing to take out a Policy from the start of the Indemnity Period. It may make a later application, but will be liable to pay the Assigned Risk Pool Default Premium for the Indemnity Period in question. Each Principal in an Eligible Firm which fails to make an application in time commits a disciplinary offence.

- 4.9 **Payment of Premium.** Any Firm in the Assigned Risk Pool must pay to the Assigned Risk Pool Manager the Assigned Risk Pool Premium within 30 days of such premium being notified to it by the Assigned Risk Pool Manager.

Commentary: It is a disciplinary offence to fail to pay the Assigned Risk Pool Premium (including the Assigned Risk Pool Run-off Premium) to the Assigned Risk Pool Manager within the required 30 day period.

- 4.10 **Issuance of Policy.** An Eligible Firm that has applied to enter the Assigned Risk Pool in accordance with the procedure set out in Rule 4.4 will be issued with an Assigned Risk Pool Policy by the Assigned Risk Pool Manager.

Commentary: A copy of the standard-form Assigned Risk Pool Policy is available on the Law Society's website at <http://www.hklawsoc.org.hk> and is also available from the Law Society.

- 4.11 **Monitoring by Society.** A Firm in the Assigned Risk Pool must, if and to the extent required by the Council, submit to investigation and monitoring by the Society and/or its agents:-

- (i) to determine the reasons why Qualifying Insurance outside the Assigned Risk Pool was not obtained;
- (ii) to ascertain what Special Measures should be taken by the Firm.

The Society's costs and expenses of such investigation and monitoring and of ascertaining what Special Measures should be taken and of monitoring them shall be met by the Firm. The amount of such costs and expenses shall be determined by the Society. A Firm may request a breakdown of the costs as determined by the Society and, where such a request is made, the Society shall

provide a breakdown subject to the costs of providing that breakdown being paid by the Firm. In the event of a dispute as to the costs determined by the Society, the matter shall be referred to the Standing Committee on Policy and Resources for determination whose decision shall be binding and final.

Commentary: The appointed inspectors of the Monitoring Accountant and/or the investigating officers of the Compliance Department [Note 3] may visit a Firm insured through the Assigned Risk Pool to carry out investigation and monitoring. This is in order to determine what Special Measures should be taken and are appropriate for that Firm, and to ensure that those measures are fully implemented. It should be noted that the costs and expenses of investigation and monitoring [by the Compliance Directorate] and the implementation of the Special Measures will be payable by the Firm concerned, in addition to paying the Assigned Risk Pool Premium.⁷

- 4.12 Leaving Assigned Risk Pool.** A Firm may leave the Assigned Risk Pool at any time after it has satisfied the Assigned Risk Pool Manager that the Firm has obtained Qualifying Insurance outside the Assigned Risk Pool at least until the expiry of the relevant Indemnity Period and given proper evidence thereof to the Assigned Risk Pool Manager.

Commentary: Refer to Appendix 2 to determine whether any return premium will be payable on leaving the Assigned Risk Pool.

- 4.13 Limited Right to Remain in Assigned Risk Pool.** Subject to Rule 4.18, a Firm may only remain in the Assigned Risk Pool so long as it is an Eligible Firm or if it becomes a Run-off Firm.

Commentary: Other than Run-off Firms, Firms cannot remain insured through the Assigned Risk Pool for more than 24 months in any 5 year period, and should therefore seek insurance in the open market with a Qualifying Insurer as soon as practicable. A Firm which is no longer an Eligible Firm (because, for example, it has already been insured through the Assigned Risk Pool for 24 months in the last 5 years) must either obtain Qualifying Insurance on the open market or cease carrying on Practice.

- 4.14 Firm in Policy Default not Eligible.** Subject to Rule 4.19, a Firm in Policy Default at the end of an Indemnity Period shall be deemed to be a Firm in Default for the purposes of Part 4 of these Rules and shall not be an Eligible Firm. This Rule shall not apply in any case where the Council is satisfied that there exists a genuine dispute between the Firm and a Qualifying Insurer or the Assigned Risk Pool Manager which makes it unreasonable for the Firm to be deemed to be a Firm in Default pending the resolution of that dispute.

Commentary: A Firm in Policy Default must remedy that default before the start of an Indemnity Period if it wishes to obtain insurance through the Assigned Risk Pool at any time during that Indemnity Period. Alternatively, it must either obtain Qualifying Insurance in the open market, or cease carrying on Practice. If a Firm believes that there is a genuine dispute which justifies that Firm not being deemed to be a Firm in Default, it should apply to the Society as soon as possible before the start of the next Indemnity Period.

- 4.15 Firms no longer Eligible.** A Firm that is no longer an Eligible Firm must either have Qualifying Insurance outside the Assigned Risk Pool or forthwith cease carrying on Practice.

- 4.16 Division of Firms.** Where the Practice of a Firm (in this Rule 4.16: "Original Firm") which has at

⁷ What is the sanction for failure to comply with Rule 4.11?

any time been in the Assigned Risk Pool is split between two or more Firms (in this Rule 4.16: "Successor Firms"), the Council may in its absolute discretion treat the Successor Firms or any of them and the Original Firm as being a single Firm for the purposes of determining whether the Successor Firms or any of them are or remain an Eligible Firm.

- 4.17 **Merger of Firms.** Where the Practice of a Firm (in this Rule 4.17: "Original Firm") which has at any time been in the Assigned Risk Pool is merged with, acquired, absorbed, or by any other means taken over by a Firm (in this Rule 4.17: "Successor Firm") the Council may in its absolute discretion treat the Successor Firm and the Original Firm as being a single Firm for the purposes of determining whether the Successor Firm is or remains an Eligible Firm.

Commentary: The purpose of Rules 4.16 and 4.17 is to ensure that the time limit on participation in the Assigned Risk Pool cannot be avoided by a division, merger or reconstitution of that Firm. A Firm which was not previously eligible to join the Assigned Risk Pool will not necessarily become an Eligible Firm by virtue of changes in the composition of a Firm. Firms which are unsure about their eligibility following any such change should consult the Law Society.

- 4.18 **Permission to Stay in Assigned Risk Pool.** The Council shall have power in any particular case or cases upon the application by the Firm made at least 3 months before it ceases to be an Eligible Firm to give prior written approval allowing a Firm to remain in or to re-enter the Assigned Risk Pool after any date when the Firm would otherwise cease to be an Eligible Firm and when such approval is given the Firm shall continue to be an Eligible Firm for so long as the Council may from time to time permit.

Commentary: It is envisaged that this power would be exercised only in exceptional circumstances. Any application to the Council seeking its exercise of this power should be made at least 3 months before the Firm in question would otherwise cease to be an Eligible Firm.

- 4.19 **Permission to Stay in Assigned Risk Pool – Firms in Policy Default.** The Council shall upon the application by the Firm in question made at least 3 months before it ceases to be an Eligible Firm have power in any particular case to permit a Firm to be admitted into or remain in or to re-enter the Assigned Risk Pool including (without limitation) a Firm in Policy Default on such terms and conditions as the Council may prescribe including (without limitation) the taking of steps by the Firm by a specified date or dates to remedy any Policy Default and when such power is exercised the Firm shall continue to be an Eligible Firm provided that it complies with any such terms and conditions.

Commentary: It is envisaged that this power would be exercised only in exceptional circumstances. Any application to the Council seeking its exercise of this power should be made at least 3 months before the Firm in question would otherwise cease to be an Eligible Firm.

- 4.20 **Effect of Misrepresentation.** Any material misrepresentation made in an application for admission to the Assigned Risk Pool shall, subject to any waiver under Rule 8.1, render the Firm a Firm in Default for the purposes of Part 5 of these Rules. The provisions of that Part shall accordingly apply to the Firm in the same manner as they would have applied if that Firm had not been admitted to the Assigned Risk Pool but the Firm shall not be entitled to the refund of any Assigned Risk Pool Premium paid to the Assigned Risk Pool Manager save that any amount so paid shall be credited against any sums payable by it under Part 5.

Commentary: Although an Assigned Risk Pool Policy, once issued, cannot be cancelled (unless and until a replacement Policy with a Qualifying Insurer is issued to that Firm), a Firm which makes a material misrepresentation in its application to be admitted to

the Assigned Risk Pool will be nevertheless treated in the same way as a Firm in Default.

Part 5

Firms in Default and Run-off Firms

5.1 Procurement of Default Cover. The Assigned Risk Pool Manager, on behalf of the Society, shall make arrangements with Qualifying Insurers to cover any Claim (as defined in the Minimum Terms and Conditions) against:-

- (i) a Firm in Default; and
- (ii) a Run-off Firm

including any Defence Costs (as defined in the Minimum Terms and Conditions) relating to a Claim, in like manner and to the like extent as the Claim and the Defence Costs would have been covered had that Firm during the Period of Default been in the Assigned Risk Pool and been issued with an Assigned Risk Pool Policy and/or, as the case may require, an Assigned Risk Pool Run-off Policy.

5.2 Recovery of Monies Paid re Firm in Default. Subject to Rule 5.7, the Society on behalf of Qualifying Insurers shall be entitled to recover from each and every Principal in the Firm in Default during the Period of Default all amounts paid in or towards the payment of a Claim and Defence Costs pursuant to Rule 5.1 together with interest thereon at Hongkong and Shanghai Banking Corporation base rate plus 3% from the date when such amounts were respectively paid. The Assigned Risk Pool Manager may and is hereby authorised to recover all sums due under this Rule on behalf of the Society.

Commentary: If a Firm fails to make an application to the Assigned Risk Pool, but carries on Practice without having obtained Qualifying Insurance, each Principal in that Firm will have committed a disciplinary offence. The same is true if a Run-off Firm fails to apply to be issued with an Assigned Risk Pool Run-off Policy. In each case, that Firm, and each Principal in that Firm, will also be liable under these Rules to:

- *reimburse to the Society in full the amount paid pursuant to Rule 5.1 in respect of any Claim (together with Defence Costs) made against the Firm and relating to the period when it did not have Qualifying Insurance in force) [Note 4]; and*
- *pay an amount under Rule 5.7 and 5.8 (where applicable) to the Society equivalent to the Assigned Risk Pool Default Premium calculated for the whole of the Period of Default.*

However, if a Firm in these circumstances is eligible under Rule 5.3 to be issued with an Assigned Risk Pool Policy, then, provided that it complies with Rule 5.3 and is issued with an Assigned Risk Pool Policy, the liability of the Firm and the Principals of that Firm will be limited, from that point on, to the Assigned Risk Pool default premium and the excess payable under the terms of the Assigned Risk Pool Policy.

5.3 Assigned Risk Pool Policy for Firms in Default. At any time during the Period of Default a Firm in Default shall be entitled to be admitted to the Assigned Risk Pool and to be issued with an Assigned Risk Pool Policy affording cover retrospectively from the commencement of the Period of Default and extending until the end of the then current Indemnity Period subject to the following

conditions:-

- (i) the Firm was an Eligible Firm at the commencement of the Period of Default;
- (ii) the Firm has made an application to join the Assigned Risk Pool in the manner provided by Rule 4.4(i) stating on the proposal form that it is a Firm in Default and giving the date of the commencement of the Period of Default from which retrospective cover is sought;
- (iii) the Firm discharges in full the Assigned Risk Pool Default Premium calculated for the whole of the Indemnity Period or Indemnity Periods for which cover is sought within 30 days of such premium being notified to it by the Assigned Risk Pool Manager or such longer period as the Council may allow;
- (iv) the Firm was at the commencement of the Indemnity Period current at the date of its application an Eligible Firm and would still have been entitled to remain in the Assigned Risk Pool had it entered the Assigned Risk Pool at the commencement of the Period of Default and remained in the Assigned Risk Pool throughout the Period of Default ignoring for these purposes its failure to pay the Assigned Risk Pool Premium or the Assigned Risk Pool Default Premium throughout this Period of Default; and
- (v) the Firm will be subject to and comply with Rules 4.3(ii) to (iv) and 4.11.

Commentary: If a Firm fails to make an application to the Assigned Risk Pool at the start of an Indemnity Period, and does not have any other Policy of Qualifying Insurance in force for that Indemnity Period, it may still be eligible to be issued with an Assigned Risk Pool Policy provided that it meets all of the requirements of Rule 5.3. However, each Principal of the Firm will have committed a disciplinary offence, and the Firm will be required to pay the Assigned Risk Pool Default Premium under any Assigned Risk Pool Policy issued.

5.4 Assigned Risk Pool Run-off Policies.

- (i) A Run-off Firm shall be entitled at any time following the date on which it first becomes a Run-off Firm to be admitted to the Assigned Risk Pool and to be issued with an Assigned Risk Pool Run-off Policy, subject to the following conditions:-
 - (a) the Run-off Firm has made an application to join the Assigned Risk Pool in manner provided by Rule 4.4 stating on the proposal form that it is a Run-off Firm and giving the date from which cover under an Assigned Risk Pool Run-off Policy is sought;
 - (b) the Firm discharges in full the Assigned Risk Pool Run-off Premium within 30 days of such premium being notified to it by the Assigned Risk Pool Manager or such longer period as the Council may allow; and
 - (c) the Firm will be subject to and comply with Rule 4.3(iii).

Commentary: A Run-off Firm will be eligible to be issued with an Assigned Risk Pool Run-off Policy if it meets all of the requirements of Rule 5.4(i). However, each Principal of the Firm will have committed a disciplinary offence for failing to make an application to the Assigned Risk Pool for Run-off Cover in accordance with Rule 3.2, and the Firm and each Principal of the Firm will be required to pay the Assigned Risk Pool Run-off Premium under any Assigned Risk Pool Run-off Policy issued.

- (ii) An Assigned Risk Pool Run-off Policy shall provide Run-off Cover to a Run-off Firm retrospectively from the date on which it became a Run-off Firm until the end of the day immediately prior to the sixth anniversary of:-
- (a) the start of the Indemnity Period in which it became a Run-off Firm; or
 - (b) if applicable, the start of the last Indemnity Period, prior to it becoming a Run-off Firm, in which it ceased to be an Eligible Firm and continued not to be an Eligible Firm until the date on which it became a Run-off Firm,

whichever is the earlier.

Commentary: Run-off Firms which are issued with an Assigned Risk Pool Run-off Policy obtain 6 years' Run-off Cover either from the start of the Indemnity Period in which their Practice ceased, or the date on which they ceased to be eligible to apply for an Assigned Risk Pool Policy while practicing uninsured.

- 5.5 **Extended Eligibility for Assigned Risk Pool.** For the purpose of satisfying the condition in Rule 5.3(iv), Rule 4.18 shall apply so as to enable the Council to extend the period during which the Firm is to be regarded as eligible to remain in the Assigned Risk Pool in like manner as though the Firm was at the commencement of the Indemnity Period referred to in that condition already in the Assigned Risk Pool.

Commentary: It is envisaged that this power would be exercised only in exceptional circumstances..

- 5.6 **Continued Eligibility for Assigned Risk Pool.** Any Firm that has been admitted to the Assigned Risk Pool under Rule 5.3 shall for the purposes of computing its continuing eligibility to remain in the Assigned Risk Pool be deemed to have been admitted to the Assigned Risk Pool as at the commencement of the Period of Default and to have remained continuously in the Assigned Risk Pool until the end of the Indemnity Period current at the date of its application.

- 5.7 **Limitation of Liability to Pay Excess.** Rule 5.2 shall not apply to a Firm which has under Rule 5.3 or 5.4 been admitted to the Assigned Risk Pool and which has been issued with an Assigned Risk Pool Policy or an Assigned Risk Pool Run-off Policy, the liability of the Firm being limited in those circumstances to the Excess payable under the terms of the Policy.

Commentary: If a Firm is eligible to be issued with an Assigned Risk Pool Policy under Rule 5.3 or an Assigned Risk Pool Run-off Policy under Rule 5.4 then, provided that it complies with the relevant requirements under Rule 5.3 and is issued with an Assigned Risk Pool Policy or an Assigned Risk Pool Run-off Policy, the Firm and the Principals of that Firm will only be required to pay to the Assigned Risk Pool Manager the relevant premium and the Excess in the event of any Claim.

- 5.8 **Liability for Default and Run-off Premium.**

- (i) A Firm in Default which is entitled to be admitted to the Assigned Risk Pool and to be issued with an Assigned Risk Pool Policy in accordance with Rule 5.3 but which does not make an application to join the Assigned Risk Pool shall, notwithstanding, be liable to pay to the Society an amount equivalent to the Assigned Risk Pool Default Premium calculated for the whole of the Period of Default.
- (ii) A Firm in Default which is entitled to be admitted to the Assigned Risk Pool and to be issued with an Assigned Risk Pool Run-off Policy in accordance with Rules 5.4 but which does not make an application to join the Assigned Risk Pool shall, notwithstanding, be

liable to pay to the Society an amount equivalent to the Assigned Risk Pool Run-off Premium calculated for the whole of the period equivalent to that which would be provided by an Assigned Risk Pool Run-off Policy in accordance with Rule 5.4(ii), or, if shorter and if it can be ascertained, the Period of Default.

- (iii) Any amount payable in accordance with Rules 5.8(i) or 5.8(ii) shall be determined by the Assigned Risk Pool Manager on the basis of such assumption as to the Firm's Gross Fees (as defined in the Minimum Terms and Conditions) and other matters as the Assigned Risk Pool Manager shall in its absolute discretion determine, and may be reviewed from time to time by the Assigned Risk Pool Manager in its absolute discretion on the basis of any further information provided to it [Note 5]. The Assigned Risk Pool Manager may and is hereby authorised to recover all sums due under Rules 5.8(i) or 5.8(ii) on behalf of the Society.
- (iv) For the avoidance of doubt, a Firm shall not be deemed to have been admitted to the Assigned Risk Pool or to be covered in accordance with Rule 5.1 solely by virtue of the fact that the Assigned Risk Pool Manager may conduct or settle any Claim made against that Firm under the terms of any agreement between the Society and any Qualifying Insurer.

Commentary: If a Firm fails to make an application to the Assigned Risk Pool, but carries on Practice without having obtained Qualifying Insurance, each Principal in that Firm will have committed a disciplinary offence. The same is true if a Run-off Firm fails to apply to be issued with an Assigned Risk Pool Run-off Policy. In each case, that Firm, and each Principal in that Firm, will also be liable under these Rules to:-

- *pay an amount to the Society equivalent to the Assigned Risk Pool default premium calculated for the whole of the Period of Default; and*
- *reimburse to the Society in full under Rule 5.2 the amount of any Claim (together with Defence Costs) made against the Firm and relating to the period when it did not have Qualifying Insurance in force. [Note 6]*

5.9 Reservation. The provisions Part 5 of the Rules are made without prejudice to the powers of the Council or the Society whether under the Legal Practitioners Ordinance or otherwise to bring disciplinary proceedings against any Firm that has failed to comply with these Rules or any person who is or was a Principal in such a Firm or to intervene in a Practice carried on by such a Firm.

Commentary Payment of the Assigned Risk Pool Default Premium and/or the Assigned Risk Pool Run-off Premium does not detract from the fact that the Firm in question, and each Principal of that Firm, has committed a breach of these Rules as a result of the Firm being a Firm in Default. If a Firm in Default is not an Eligible Firm, it must either obtain Qualifying Insurance in the open market, or cease carrying on Practice and make an application to the Assigned Risk Pool for Run-off Cover in accordance with Rule 3.2.

Part 6

Administration of the Assigned Risk Pool

6.1 Management. The Assigned Risk Pool shall be managed by the Assigned Risk Pool Manager.

Part 7

Disciplinary offences and reporting

- 7.1 Failure to implement Special Measures.** Without prejudice to any other disciplinary offence which may arise under these Rules, it shall be a disciplinary offence for any Firm or any person who is at the relevant time a Principal in a Firm to be in Policy Default, or to fail to implement any Special Measures to the satisfaction of the Society.

Commentary: Policy Default and Special Measures are defined in Part 1. Note that a Firm carrying on a Practice while in Policy Default will also not be an Eligible Firm for the purpose of seeking further cover through the Assigned Risk Pool.

- 7.2 Authorisation to release Information.** By making an application for Qualifying Insurance a Firm authorises any Qualifying Insurer to whom the application is made, including in the case of an application to enter the Assigned Risk Pool, the Assigned Risk Pool Manager, to bring to the attention of the Society:-

- (i) any failure on the part of the Firm to pay any sum, including an Assigned Risk Pool Premium or an Assigned Risk Pool Default Premium, on or before the date specified in these Rules or to reimburse any amount falling within a Policy excess which has been paid out by a Qualifying Insurer to a claimant;
- (ii) the fact that a Firm has become or is believed to have become a Run-off Firm;
- (iii) any suspected professional misconduct on the part of any Insured as defined in the Minimum Terms and Conditions; and
- (iii) any suspected dishonesty or fraud on the part of any Insured as defined in the Minimum Terms and Conditions. [Note 7]

- 7.3 Authorisation to release Information – Firms in Default.** Rule 7.2 shall apply in the case of a Firm in Default as if an application to enter the Assigned Risk Pool had been made by the Firm in Default so as to permit the Assigned Risk Pool Manager to bring to the attention of the Society any of the matters referred to in Rule 7.2.

Commentary: All Firms, whether they obtain their Qualifying Insurance on the open market or through the Assigned Risk Pool, or whether, having failed to obtain Qualifying Insurance, they are subject to the provisions of Part 4, are deemed to have consented to their Qualifying Insurer or the Assigned Risk Pool Manager bringing to the attention of the Society any of the matters referred to Rule 7.2 that may be applicable to the Firm. Any such information is subject to the confidentiality provisions of Rule 7.5.

- 7.4 Qualifying Insurer to Provide Information.** The Council may require any Qualifying Insurer or the Assigned Risk Pool Manager to bring to the attention of the Society any of the matters referred to in Rule 7.2 in any case where the Council reasonably believes there are matters which ought to be brought to the attention of the Society under Rules 7.2 or 7.3.

[Note 8]

- 7.5 Confidentiality.** In respect of any information that may be brought to the attention of the Society in accordance with Rules 7.2 to 7.4:-

- (i) the Society shall keep all such information confidential;
- (ii) the Society shall not (except where and to the extent required by law or in the proper

performance by the Society of its regulatory functions) at any time reveal any such information to any person other than a duly authorised employee of the Society or any of its subsidiaries; and

- (iii) any privilege attaching to such information shall not be regarded as having been waived whether by virtue of such information having been provided to the Society or otherwise.

- 7.6 **Disciplinary Proceedings.** The provisions of Rule 7.5 shall not prevent the Society making use of any information referred to in that Rule for the purpose of bringing disciplinary proceedings against any person, or from disclosing, where the Society in its absolute discretion considers it appropriate, such information as it may have regarding the identity of a Firm's Qualifying Insurer to any person asserting a Claim against that Firm.

Part 8

General powers of the Council

- 8.1 **Waiver.** The Council shall have power on such terms and conditions as it shall think fit to waive any Rule or part of any Rule in a particular case or cases including extending the time, either prospectively or retrospectively, for the doing of any act under any Rule.

- (i) Any application by any person for a waiver of any Rule or part of any Rule must be made in writing to the Society as soon as reasonably practicable, and in any event no later than 3 calendar months:-
 - (a) from the occurrence of any event or circumstances first giving rise to the obligation under the relevant Rule or part of any Rule; or
 - (b) 3 calendar months after the end of the Indemnity Period during which the obligation imposed by the relevant Rule or part of any Rule arose,in respect of which the waiver application is made, whichever is the earlier.
- (ii) Any appeal against any decision made by the Society in respect of any application for a waiver of any Rule or part of any Rule must be made in writing to the Society within 21 days from the date of the decision.
- (iii) An application for a waiver as contemplated by this Rule or the making of an appeal against any decision made by the Society in respect of such application shall not relieve any person from any obligation under these Rules pending the consideration of any such application or appeal.

Commentary: It is envisaged that the Rules will be waived only in exceptional circumstances. Anyone who wishes to apply for a waiver, or to appeal against an initial decision, must do so in accordance with the time limits set out in this Rule. Contact details appear at the end of the introductory commentary. Unless and until any waiver is granted, the person concerned must comply with the requirements of these Rules in full. The Council may attach such conditions as it thinks fit to any waiver, and may revoke any waiver that it has previously granted without notice.

- 8.2 **Minor Breaches.** The Council shall have power to treat any Firm as complying with any Rule or Rules notwithstanding that the Firm has failed to comply with a Rule or Rules where such non-compliance is regarded by the Council in a particular case or cases as being insignificant.

Commentary: The effect of this general power is that, for example, the Council may, in its discretion, approve the issuing of a practicing certificate to a person notwithstanding a technical and insignificant breach by that person or a Firm of any provision of these Rules.

- 8.3 For the purposes of the Legal Practitioners Ordinance (including, without limitation, Section 7 of that Ordinance), any person who is in breach of any Rule or part of any Rule shall be deemed, for so long as he remains in breach, not to be complying with these Rules.

Part 9

Accountants' reports

- 9 **Accountant's Statement.** Any accountant's report which a solicitor who is a Principal in a Practice is required to deliver under Section 8 of the Legal Practitioners Ordinance must contain a statement certifying (if it is the case) for the whole period covered by the report (excluding any part of that period falling before [1st October 2005]) either that the Firm has one or more certificates of Qualifying Insurance outside the Assigned Risk Pool or that the Firm has been issued with one or more policies by the Assigned Risks Pool Manager.

Commentary: Firms are required to provide evidence to their accountants that a Policy of Qualifying Insurance is in place. Each Qualifying Insurer is required under the Qualifying Insurer's Agreement to provide a certificate of Qualifying Insurance to each Firm within 20 working days of the start of the period covered by the Policy. Producing the relevant certificate(s) to the reporting accountant will satisfy the requirement of this Rule.

Part 10

Details of Qualifying Insurer

- 10 **Obligation to Provide Details to Claimants.** If a Claimant asserts a Claim against a Firm or any person insured under that Firm's Policy, and where such Claim relates to any matter within the scope of cover of the Minimum Terms and Conditions (whether or not such Claim would or may be upheld), the Firm and any person who is at the relevant time a Principal in that Firm shall be required, upon being so requested by that Claimant, by any person insured under that Firm's Policy, or by any other person with a legitimate interest, to provide to the Claimant and/or that person the following details in relation to that Firm's Policy:-

- (i) the name of the Qualifying Insurer(s) who issued the Policy; and
- (ii) the Policy number; and
- (iii) the address and contact details of the Qualifying Insurer(s) for the purpose of making a Claim under the Policy,

in each case in respect of the Policy which it is reasonably believed to be the relevant Policy to respond to the Claim.

Commentary: A Firm, and each Principal in that Firm, is required to provide details of that Firm's Policy of Qualifying Insurance to any person who asserts a Claim against anyone

insured under that Firm's Policy. Under Rule 7.6, the Law Society has the power to disclose information regarding a Firm's Qualifying Insurer where it considers it appropriate to do so.

Appendix I

Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors in Hong Kong

1 Scope of Cover

1.1 Civil Liability. The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with the Firm's Practice, provided that a Claim in respect of such liability:-

- (a) is first made against an Insured during the Period of Insurance; or
- (b) is made against an Insured during or after the Period of Insurance and arising from Circumstances first notified to the Insurer during the Period of Insurance.⁸

1.2 Defence Costs. The insurance must also indemnify the Insured against Defence Costs in relation to:-

- (a) any Claim referred to in clause 1.1, 1.4 or 1.6; or
- (b) any Circumstances first notified to the Insurer during the Period of Insurance; or
- (c) any investigation, inquiry or disciplinary proceeding during or after the Period of Insurance arising from any Claim referred to in clause 1.1, 1.4 or 1.6 or from Circumstances first notified to the Insurer during the Period of Insurance.⁹

1.3 The Insured.

For the purposes of the cover contemplated by clause 1.1, the Insured must include:-

- (a) the Firm; and
- (b) each service, administration, trustee or nominee company owned as at the date of occurrence of relevant Circumstances by the Firm and/or the Principals of the Firm; and
- (c) each Principal, each former Principal and each person who becomes a Principal during the Period of Insurance of the Firm or a company referred to in paragraph (b); and
- (d) each Employee, each former Employee and each person who becomes during the Period of Insurance an Employee of the Firm or a company referred to in paragraph (b); and
- (e) the estate or legal personal representative of any deceased or legally incapacitated person referred to in paragraph (c) or (d).

1.4 Prior Practice. The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with a Prior Practice, provided that a Claim in respect of such liability is first made against an Insured:-

Drafting Note-

⁸ Scope of geographical cover? Limited to Hong Kong?

⁹ Whether indemnity should be extended to cover disciplinary proceedings? Will it increase the insurance premium?

- (a) during the Period of Insurance; or
- (b) during or after the Period of Insurance and arising from Circumstances first notified to the Insurer during the Period of Insurance.

1.5 The Insured - Prior Practice. For the purposes of the cover contemplated by clause 1.4, the Insured must include [Note 9]:-

- (a) each Partnership which, or sole practitioner who, carried on the Prior Practice; and
- (b) each service, administration, trustee or nominee company owned as at the date of occurrence of relevant Circumstances by the Partnership which, or sole practitioner who, carried on the Prior Practice and/or the Principals of such Partnership; and
- (c) each Principal and former Principal of each Partnership referred to in paragraph (a) or company referred to in paragraph (b); and
- (d) each Employee and former Employee of the Partnership or sole practitioner referred to in paragraph (a) or company referred to in paragraph (b); and
- (e) the estate or legal personal representative of any deceased or legally incapacitated sole practitioner referred to in paragraph (a) or person referred to in paragraph (c) or (d).

1.6 Successor Practice. The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with a Successor Practice to the Firm's Practice (where succession is as a result of one or more separate mergers, acquisitions, absorptions or other transitions), provided that a Claim in respect of such liability is first made against an Insured:-

- (a) during the Period of Insurance; or
- (b) during or after the Period of Insurance and arising from Circumstances first notified to the Insurer during the Period of Insurance.

1.7 The Insured - Successor Practice. For the purposes of the cover contemplated by clause 1.6, the Insured must include [Note 10] -

- (a) each Partnership which, or sole practitioner who, carries on the Successor Practice during the Period of Insurance; and
- (b) each service, administration, trustee or nominee company owned as at the date of occurrence of relevant Circumstances by the Partnership which, or sole practitioner who, carries on the Successor Practice and/or the Principals of such Partnership; and
- (c) each Principal, each former Principal and each person who becomes during the Period of Insurance a Principal of any Partnership referred to in paragraph (a) or company referred to in paragraph (b); and
- (d) each Employee, each former Employee and each person who becomes during the Period of Insurance an Employee of the Partnership or sole practitioner referred to in paragraph (a) or company referred to in paragraph (b); and
- (e) the estate or legal personal representative of any deceased or legally incapacitated sole

practitioner referred to in paragraph (a) or person referred to in paragraph (c) or (d).

2 Limit of Insurance Cover

- 2.1 Any One Claim.** The Sum Insured for any one Claim (inclusive of Defence Costs) must be at least HK\$10 million. [see Note 11]
- 2.2 No Limit on Defence Costs.** Subject to clause 2.1, there must be no monetary limit on the cover for Defence Costs
- 2.3 No Other Limit.** The insurance must not limit the Insurer's liability to any monetary amount (whether by way of an aggregate limit or otherwise) except as contemplated by clauses 2.1 and 2.2.
- 2.4 One Claim.** The insurance may provide that all Claims against any one or more Insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one Claim for the purposes of the limits contemplated by clauses 2.1 and 2.2.

3 Excesses

- 3.1 The Excess.** The insurance may be subject to an Excess of such monetary amount and on such terms as the Insurer and the Firm agree. Subject to clause 3.4, the Excess may be 'self-insured' or partly or wholly insured without regard to these Minimum Terms and Conditions.
- 3.2 No Deductibles.** The insurance must provide that the Excess does not reduce the limit of the Insurer's liability contemplated by clause 2.1.
- 3.3 Excess Not to Apply to Defence Costs.** The Excess must not apply to Defence Costs.
- 3.4 Funding of the Excess.** The insurance must provide that, if an Insured fails to pay to a Claimant any amount which is within the Excess within 30 days of it becoming due for payment, the Claimant may give notice of the Insured's default to the Insurer, whereupon the Insurer is liable to remedy the default on the Insured's behalf. The insurance may provide that any amount paid by the Insurer to remedy such a default erodes the Sum Insured.
- 3.5 One Claim.** The insurance may provide for multiple Claims to be treated as one Claim for the purposes of an Excess contemplated by clause 3.1 on such terms as the Firm and the Insurer agree.

4 Special Conditions

- 4.1 No Avoidance or Repudiation.** The insurance must provide that the Insurer is not entitled to avoid or repudiate the insurance on any grounds whatsoever including, without limitation, non-disclosure or misrepresentation, whether fraudulent or not.
- 4.2 No Adjustment or Denial.** The insurance must provide that the Insurer is not entitled to reduce or deny its liability under the insurance on any grounds whatsoever including, without limitation, any breach of any term or condition of the insurance, except to the extent that one of the exclusions contemplated by clause 6 applies.
- 4.3 No Cancellation.** The insurance must provide that it cannot be cancelled other than if (and with effect from the date upon which):-
 - (a) the Firm's Practice is merged into a Successor Practice, provided that there is insurance complying with these Minimum Terms and Conditions in relation to that Successor

Practice; or

- (b) replacement insurance complying with these Minimum Terms and Conditions commences.

Cancellation must not affect the rights and obligations of the parties accrued under the insurance prior to the date of cancellation.

- 4.4 No Set-off.** The insurance must provide that any amount payable by the Insurer to indemnify an Insured against civil liability to a Claimant will be paid only to the Claimant, or at the Claimant's direction, and that the Insurer is not entitled to set-off against any such amount any payment due to it by any Insured including, without limitation, any payment of premium or to reimburse the Insurer.
- 4.5 No 'other insurance' Provision.** The insurance must not provide that the liability of the Insurer is reduced or excluded by reason of the existence or availability of any other insurance other than as contemplated by clause 6.2. For the avoidance of doubt, this requirement is not intended to affect any right of the Insurer to claim contribution from any other insurer which is also liable to indemnify any Insured.
- 4.6 No Retroactive Date.** The insurance must not exclude or limit the liability of the Insurer in respect of Claims arising from Circumstances which occurred prior to a specified date.
- 4.7 Successor Practice - 'double insurance'.** The insurance may provide that, if the Firm's Practice is succeeded during the Period of Insurance and, as a result, a situation of 'double insurance' exists between two or more insurers of the Successor Practice, contribution between insurers is to be determined in accordance with the relative numbers of Principals of the owners of the constituent practices immediately prior to succession.
- 4.8 Advancement of Defence Costs.** The insurance must provide that the Insurer will meet Defence Costs as and when they are incurred, including Defence Costs incurred on behalf of an Insured who is alleged to have committed or condoned dishonesty or a fraudulent act or omission, provided that the Insurer is not liable for Defence Costs incurred on behalf of that Insured after the earlier of:-
 - (a) that Insured admitting to the Insurer the commission or condoning of such dishonesty, act or omission; or
 - (b) a court or other judicial body finding that that Insured was in fact guilty of such dishonesty, act or omission.
- 4.9 Resolution of Disputes.** The insurance must provide that, if there is a dispute as to whether a practice is a Successor Practice for the purposes of clauses 1.4, 1.6 or 5.3, the Insured and the Insurer will take all reasonable steps (including, if appropriate, referring the dispute to arbitration) to resolve the dispute in conjunction with any related dispute between any other party which has insurance complying with these Minimum Terms and Conditions and that party's insurer.
- 4.10 Conduct of a Claim Pending Dispute Resolution.** The insurance must provide that, pending resolution of any coverage dispute and without prejudice to any issue in dispute, the Insurer will, if so directed by the Society, conduct any Claim, advance Defence Costs and, if appropriate, compromise and pay the Claim. The Society may in its absolute discretion make such a direction, but only if it is satisfied that:-
 - (a) the party requesting the direction has taken all reasonable steps to resolve the dispute with the other party/ies; and

- (b) there is a reasonable prospect that the coverage dispute will be resolved or determined in the Insured's favour; and
- (c) it is fair and equitable in all the circumstances for such direction to be given.

4.11 Minimum Terms and Conditions to Prevail. The insurance must provide that:-

- (a) the insurance is to be construed or rectified so as to comply with the requirements of these Minimum Terms and Conditions; and
- (b) any provision which is inconsistent with these Minimum Terms and Conditions is to be severed or rectified to comply.

4.12 Period of Insurance. The Period of Insurance must not expire prior to 30th September 2006 or, in respect of any Indemnity Period starting on or after 1st October 2006, the last day of that Indemnity Period.

5 Run-off Cover

5.1 Cessation of the Firm's Practice. The insurance must provide that, if the Firm's Practice ceases during or on expiry of the Period of Insurance and the Firm has not obtained succeeding insurance in compliance with these Minimum Terms, the insurance will provide Run-off Cover.

5.2 Scope of Run-off Cover. The Run-off Cover referred to in clause 5.1 must indemnify each Insured in accordance with clauses 1.1 to 1.8 (but subject to the limits, exclusions and conditions of the insurance which are in accordance with these Minimum Terms and Conditions) on the basis that the Period of Insurance extends for an additional 6 years (ending on the sixth anniversary of the date upon which, but for this requirement, it would have ended).

5.3 Succession. The insurance must provide that Run-off Cover is not activated if there is a Successor Practice to the ceased practice, provided that there is insurance complying with these Minimum Terms and Conditions in relation to that Successor Practice.

6 Exclusions

6.1 No Other Exclusions. The insurance must not exclude or limit the liability of the Insurer except to the extent that any Claim or related Defence Costs arise from the matters set out in this clause 6.

6.2 Prior Cover. Any Claim in respect of which the Insured is entitled to be indemnified under the Rules or under a professional indemnity insurance contract for a period earlier than the Period of Insurance, whether by reason of notification of Circumstances under the Rules or under the earlier contract or otherwise.

6.3 Death or Bodily Injury. Any liability of any Insured for causing or contributing to death or bodily injury, except that the insurance must nonetheless cover liability for psychological injury or emotional distress which arises from a breach of duty in the performance of (or failure to perform) legal work.

6.4 Property Damage. Any liability of any Insured for causing or contributing to damage to, or destruction or physical loss of, any property (other than property in the care, custody or control of any Insured in connection with the Firm's Practice and not occupied or used in the course of the Firm's Practice), except that the insurance must nonetheless cover liability for such damage, destruction or loss which arises from breach of duty in the performance of (or failure to perform)

legal work.

6.5 Partnership Disputes. Any actual or alleged breach of the Firm's Partnership or shareholder agreement or arrangements, including any equivalent agreement or arrangement where the Firm is a solicitor corporation or a company without a share capital

6.6 Employment Breaches, Discrimination, etc. Wrongful dismissal, repudiation or breach of an employment contract or arrangement, termination of a training contract, harassment, discrimination or like conduct in relation to any Partnership or shareholder agreement or arrangement or the equivalent where the Firm is a solicitor corporation or a company without a share capital, or in relation to any employment or training agreement or arrangement.

6.7 Debts and Trading Liabilities. Any:-

- (a) trading or personal debt of any Insured; or
- (b) breach by any Insured of the terms of any contract or arrangement for the supply to, or use by, any Insured of goods or services in the course of the Firm's Practice; or
- (c) guarantee, indemnity or undertaking by any particular Insured in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that Insured.

6.8 Fines, Penalties, etc. Any:-

- (a) fine or penalty; or
- (b) award of punitive, exemplary or like damages under the law of the United States of America or Canada, other than in respect of defamation; or
- (c) order or agreement to pay the costs of a complainant, regulator, investigator or prosecutor of any professional conduct complaint against, or investigation into the professional conduct of, any Insured.

6.9 Fraud or Dishonesty. The insurance may exclude liability of the Insurer to indemnify any particular person to the extent that any civil liability or related Defence Costs arise from dishonesty or a fraudulent act or omission committed or condoned by that person, except that:-

- (a) the insurance must nonetheless cover each other Insured; and
- (b) the insurance must provide that no dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company.

6.10 Directors' or Officers' Liability. The insurance may exclude liability of the Insurer to indemnify any natural person in their capacity as a director or officer of a body corporate (other than a service, administration, trustee or nominee company referred to in clauses 1.3(b), 1.5(b) or 1.7(b)). [Note 12] except that:-

- (a) the insurance must nonetheless cover any liability of that person which arises from a breach of duty in the performance of (or failure to perform) legal work; and
- (b) the insurance must nonetheless cover each other Insured against any vicarious or joint liability.

6.11 War and Terrorism, and Asbestos. The Insurance may exclude, by way of an exclusion or endorsement, liability of the Insurer to indemnify any Insured in respect of, or in any way in connection with:-

- (a) terrorism, war or other hostilities; and/or
- (b) asbestos, or any actual or alleged asbestos-related injury or damage involving the use, presence, existence, detection, removal, elimination or avoidance of asbestos or exposure to asbestos,

provided that any such exclusion or endorsement does not exclude or limit any liability of the Insurer to indemnify any Insured against civil liability or related Defence Costs arising from any actual or alleged breach of duty in the performance of (or failure to perform) legal work or failure to discharge or fulfill any duty incidental to the Firm's Practice or to the conduct of Private Legal Practice.

7 General Conditions

7.1 As Agreed. The insurance may contain such general conditions as are agreed between the Insurer and the Firm, but the insurance must provide that the special conditions required by clause 4 prevail to the extent of any inconsistency.

7.2 Reimbursement. The insurance may provide that each Insured who:-

- (a) committed; or
- (b) condoned (whether knowingly or recklessly):
 - (i) non-disclosure or misrepresentation; or
 - (ii) any breach of the terms or conditions of the insurance; or
 - (iii) dishonesty or any fraudulent act or omission,

will reimburse the Insurer to the extent that is just and equitable having regard to the prejudice caused to the Insurer's interests by such non-disclosure, misrepresentation, breach, dishonesty, act or omission, provided that no Insured shall be required to make any such reimbursement to the extent that any such breach of the terms or conditions of the insurance was in order to comply with any applicable rules or codes laid down from time to time by the Council of the Society.

The insurance must provide that no non-disclosure, misrepresentation, breach, dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company. The insurance must provide further that any right of reimbursement contemplated by this clause 7.2 against any person referred to in clauses 1.3(d), 1.5(d) or 1.7(d) (or against the estate or legal personal representative of any such person if they die or become legally incapacitated) is limited to the extent that is just and equitable having regard to the prejudice caused to the Insurer's interests by that person having committed or condoned (whether knowingly or recklessly) dishonesty or any fraudulent act or omission.

7.3 Reimbursement of Defence Costs. The insurance may provide that each Insured will reimburse the Insurer for Defence Costs advanced on that Insured's behalf which the Insurer is not ultimately liable to pay.

7.4 Reimbursement of the Excess. The insurance may provide for those persons who are at any time during the Period of Insurance Principals of the Firm to reimburse the Insurer for any Excess

paid by the Insurer on an Insured's behalf. The Sum Insured must be reinstated to the extent of reimbursement of any amount which eroded it as contemplated by clause 3.4.

- 7.5 Reimbursement of Moneys Paid Pending Dispute Resolution.** The insurance may provide that each Insured will reimburse the Insurer following resolution of any coverage dispute for any amount paid by the Insurer on that Insured's behalf which, on the basis of the resolution of the dispute, the Insurer is not ultimately liable to pay.
- 7.6 Withholding Assets or Entitlements.** The insurance may require the Firm to account to the Insurer for any asset or entitlement of any person who committed or condoned any dishonesty or fraudulent act or omission, provided that the Firm is legally entitled to withhold that asset or entitlement from that person.
- 7.7 Premium.** The premium may be calculated on such basis as the Insurer determines and the Firm accepts including, without limitation, a basis which recognises Claims history, categories of work performed by the Firm, numbers of Principals and Employees, revenue derived from the Firm's Practice and other risk factors determined by the Insurer.

8 Definitions

8.1 General. In these Minimum Terms and Conditions, unless the context otherwise requires:-

- (a) the singular includes the plural, and vice versa;
- (b) the male gender includes the female and neuter genders;
- (c) person includes a body corporate;
- (d) a reference to a partnership includes a solicitor corporation;
- (e) headings are merely descriptive and not an aid to interpretation;
- (f) words and expressions which begin with a capital letter in these Minimum Terms and Conditions have the meaning set out in this clause 8; and
- (g) words and expressions in these Minimum Terms and Conditions are to be construed consistently with the same or similar words or expressions in the Solicitors' Professional Indemnity Qualifying Insurance Rules.

8.2 'Circumstances'. Circumstances means an incident, occurrence, fact, matter, act and/or omission which may give rise to a Claim in respect of civil liability.

8.3 'Claim'. Claim means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages. For these purposes, an obligation on a Firm and/or any Insured to remedy a breach of the Solicitors' Accounts Rules (as amended from time to time), or any rules which replace the Solicitors' Accounts Rules in whole or in part, shall be treated as a Claim, and the obligation to remedy such breach shall be treated as a civil liability for the purposes of clause 1, whether or not any person makes a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages as a result of such breach.

8.4 'Claimant'. Claimant means a person or entity which has made or may make a Claim including a Claim for contribution or indemnity.

8.5 'Defence costs'. Defence Costs mean legal costs and disbursements and investigative and

related expenses reasonably and necessarily incurred with the consent of the Insurer in:-

- (a) defending any proceedings relating to a Claim; or
- (b) conducting any proceedings for indemnity, contribution or recovery relating to a Claim; or
- (c) investigating, reducing, avoiding or compromising any actual or potential Claim; or
- (d) acting for any Insured in connection with any investigation, inquiry or disciplinary proceeding.

Defence Costs do not include any internal or overhead expenses of the Firm or the Insurer or the cost of any Insured's time.

8.6 'Employee'. Employee means any person other than a Principal:-

- (a) employed or otherwise engaged in the Firm's Practice (including under a contract for services) including, without limitation, as a solicitor, lawyer, trainee solicitor or lawyer, consultant, associate, *locum tenens*, agent, office or clerical staff member or otherwise; or
- (b) seconded to work in the Firm's Practice; or
- (c) seconded by the Firm to work elsewhere.

Employee does not include any person who is engaged by the Firm under a contract for services in respect of any work where that person is required, whether under the Solicitors' Professional Indemnity Qualifying Insurance Rules or under the rules of any other professional body, to take out or to be insured under separate professional indemnity insurance in respect of that work.

8.7 'Excess'. The Excess means the first amount of a Claim which is not covered by the insurance.

8.8 'The Firm'. The Firm means:-

- (a) the Partnership (as constituted as at the commencement of the Period of Insurance) or solicitor corporation which, or sole practitioner who, contracted with the Insurer to provide this insurance; and
- (b) the Partnership referred to in paragraph (a) as constituted from time to time, or solicitor corporation which, or sole practitioner who, contracted with the Insurer to provide this insurance whether prior to or during the Period of Insurance.

8.9 'The Firm's Practice'. The Firm's Practice means:-

- (a) the legal practice carried on by the Firm as at the commencement of the Period of Insurance; and
- (b) the continuous legal practice preceding and succeeding the practice referred to in paragraph (a) (irrespective of changes in ownership of the practice or in the composition of any Partnership or solicitor corporation which owns or owned the practice).

8.10 'Insured'. Insured means each person and entity named or described as a person to whom the insurance extends and includes, without limitation, those referred to in clause 1.3 and, in relation to Prior and Successor Practices respectively, those referred to in clauses 1.5 and 1.7.

8.11 'The Insurer'. The Insurer means the underwriter of the insurance.

8.12 'Partnership' and Partner'. Partnership includes an unincorporated Firm and solicitor corporation, and Partner includes a partner in an unincorporated Firm and a director of a solicitor corporation [Note 13].

8.13 'Period of Insurance'. The Period of Insurance means the period for which the insurance operates.

8.14 'Principal'. Principal means, in relation to:-

- (a) a Partnership - each Partner of that firm and any person held out as a Partner;
- (b) a sole practitioner - that practitioner; and
- (c) a solicitor corporation - each director of that corporation [Note 14].

8.15 'Prior Practice'. Prior Practice means each practice to which the Firm's Practice is ultimately a Successor Practice by way of one or more mergers, acquisitions, absorptions or other transitions.

8.16 'Private Legal Practice'. Private Legal Practice means the provision of services in Private Practice as a solicitor including, without limitation:-

- (a) providing such services in Hong Kong, whether alone or with other lawyers in a Partnership permitted by rule 5(1) of the Solicitors' Practice Rules [see Note 15]; and
- (b) the provision of such services as a secondee of the Firm; and
- (c) any Insured acting as an executor, trustee, attorney, notary, insolvency practitioner or other personal appointment; and
- (d) the provision of such services by any Employee.

[Geographical scope of cover? Limited to Hong Kong?]

[Private Legal Practice does not include practising as an Employee of an employer other than a solicitor, a registered foreign lawyer or a Partnership permitted by rule 5(1) of the Solicitors' Practice Rules [see Note 16]

]

8.18 'Successor Practice'. Successor Practice means a practice identified in this definition as 'B', where:

- (a) 'A' is the practice to which B succeeds; and
- (b) 'A's owner' is the owner of A immediately prior to transition; and
- (c) 'B's owner' is the owner of B immediately following transition; and
- (d) 'transition' means merger, acquisition, absorption or other transition which results in A no longer being carried on as a discrete legal practice.

B is a Successor Practice to A where:

- (i) B is or was held out, expressly or by implication, by B's owner as being the

successor of A or as incorporating A, whether such holding out is contained in notepaper, business cards, form of electronic communications, publications, promotional material or otherwise, or is contained in any statement or declaration by B's owner to any regulatory or taxation authority; and/or

- (ii) (where A's owner was a sole practitioner and the transition occurred on or before 30th September 2005 - the sole practitioner is a Principal of B's owner; and/or
- (iii) (where A's owner was a sole practitioner and the transition occurred on or after 1st October 2005 - the sole practitioner is a Principal or Employee of B's owner; and/or
- (iv) (where A's owner was a Partnership) - the majority of the Principals of A's owner have become Principals of B's owner; and/or
- (v) (where A's owner was a Partnership and the majority of Principals of A's owner did not become Principals of the owner of another legal practice as a result of the transition) - one or more of the Principals of A's owner have become Principals of B's owner and -
 - (A) B is carried on under the same name as A or a name which substantially incorporates the name of A (or a substantial part of the name of A); and/or
 - (B) B is carried on from the same premises as A; and/or
 - (C) the owner of B acquired the goodwill and/or assets of A; and/or
 - (D) the owner of B assumed the liabilities of A; and/or
 - (E) the majority of staff employed by A's owner became employees of B's owner.

Notwithstanding the foregoing, B is not a Successor Practice to A under paragraph (ii), (iii), (iv) (v) or (vi) if another practice is or was held out by the owner of that other practice as the successor of A or as incorporating A, provided that there is insurance complying with these Minimum Terms and Conditions in relation to that other practice.

8.19 'Sum Insured'. Sum Insured means the limit of the Insurer's liability under the insurance.

Appendix 2 Rating schedule

Part I - Method for Calculation of the Assigned Risk Pool Premium

The annual Assigned Risk Pool Premium is calculated by identifying the fee band appropriate to the Gross Fees (as defined below) of the Firm. Where the Gross Fees are HK\$ or less, the Assigned Risk Pool Premium is calculated at a rate of [] of the fees declared. Where the Gross Fees of the Firm are HK\$ or more, the Assigned Risks Pool premium is the sum of:-

- the Maximum Premium for the previous Fee Band; plus
- the Marginal Rate on Fees applied to the amount of fees that exceed the ceiling of the previous Fee Band.

There is a minimum premium of HK\$ irrespective of the level of Gross Fees, or the period of time spent in the Assigned Risk Pool during an Indemnity Period.

Fee Bands (HK\$)	Marginal Rate on Fees (%)	Calculation of Maximum Premium for fee (HK\$) (Calculation of example premium)	Maximum Premium for Fee Band (HK\$)	Minimum Rate on Fee for Fee Band
1				
2				
3		To Be Negotiated With Insurers		
4				
5				
6				

Definition of Gross Fees

For the purposes of the Assigned Risks Pool rating, Gross Fees means:-

- (a) all professional fees, remuneration, commission and charges of any kind whatsoever which are rendered or received in connection with the practice of a solicitor, and
- (b) all income derived by any service, administrative or trustee company or trust in so far as its activities are carried out solely in connection with the practice of a solicitor but excluding;
 - (i) any company which accepts monies for investment other than as a trustee; and
 - (ii) any income derived by any company within paragraph (b) for services rendered to the

* In England, the premium for entering the Assigned Risk Pool is calculated at 25% of the gross fees of the firm.

practice or to any other company within paragraph (b) where and to the extent that such income is included in the gross fee income of the practice or of such other company as aforesaid.

Where the Firm has been in existence for less than 12 months, the Gross Fees for Assigned Risk Pool rating purposes shall be the Firm's best estimate of the Gross Fees likely to be received during its first 12 months of trading. However, where the expiry date of the Indemnity Period precedes the completion date of the first 12 months of trading, the Gross Fees for Assigned Risk Pool rating purposes shall be the Firm's best estimate of the Gross Fees likely to be received during the period commencing with the starting date of the Practice and ending with the expiry date of the Indemnity Period.

In the event that the estimated amount of Gross Fees differs from the actual amount of Gross Fees for the relevant period, the Assigned Risk Pool Premium shall be adjusted by reference to the actual amount of Gross Fees.

New Firms

In the case of a new Firm which commences Practice during the course of an Indemnity Period, the Assigned Risk Pool Premium payable by that Firm shall be reduced pro rata according to the number of days elapsed in the relevant Indemnity Period prior to that Firm commencing Practice.

Premium payment

The Assigned Risk Pool Premium shall be paid to the Assigned Risk Pool Manager within 30 days of such premium being notified to the Firm by the Assigned Risk Pool Manager.

Cancellation

Where a Firm enters the Assigned Risk Pool during any Indemnity Period, but subsequently arranges Qualifying Insurance outside the Assigned Risk Pool before the end of that Indemnity Period, a return premium shall become due to the Firm concerned. The return premium shall be calculated in accordance with the Short Period Scale shown below.

Short Period Scale

Cancellation effective in which calendar month of the indemnity period	Percentage of assigned risks pool premium to be returned
First calendar month	↑
Second or third calendar month	To be Negotiated
Fourth, fifth or sixth calendar month	With Insurers
Seventh, eighth or ninth calendar month	↓
Tenth, eleventh or twelfth calendar month	

However, there shall be no return premium due to the Firm in the event that any Claims, or Circumstances that may give rise to Claims, have been notified to the Assigned Risks Pool Manager during the Indemnity Period concerned. Furthermore, in the event that the Assigned Risk Pool Insurers are called upon to deal with a Claim that was first made against the Firm during the Indemnity Period concerned, but which Claim the Firm failed to notify to the Assigned Risk Pool Manager, the amount of the return premium shall be

repaid to the Assigned Risk Pool Manager. The Assigned Risk Pool Manager may set off any return premium due to the Firm against any part of the Assigned Risk Pool Premium which is due from that Firm but which remains unpaid.

Run-off premium

If a Firm ceases to carry on a Practice during the course of any Indemnity Period in circumstances where the Assigned Risk Pool is required to provide Run-off Cover in respect of that Firm under the terms of an Assigned Risk Pool Policy issued to that Firm, no return premium shall be payable to that Firm in respect of that Assigned Risk Pool Policy.

In addition, in such circumstances the Firm shall be required to pay to the Assigned Risk Pool an additional premium equal to 100 per cent of the full annual Assigned Risk Pool Premium (or, if applicable, the full annual Assigned Risk Pool Default Premium) payable by that Firm in respect of the last Indemnity Period in respect of which the Firm was liable to pay such premium. Such additional premium shall be payable to the Assigned Risk Pool Manager within 30 days of such premium being notified to the Firm by the Assigned Risk Pool Manager.

Excesses

The Self-Insured excess for each and every claim shall be calculated by multiplying the relevant number of Principals by HK\$....., subject to a maximum of HK\$..... each claim. The relevant number of Principals, is the number of Principals as at the inception date of the Policy..

Part II - Method for calculation of the Assigned Risk Pool Default Premium

The Assigned Risk Pool Default Premium shall be an amount equal to the Assigned Risk Pool Premium calculated in accordance with Part 1 above, plus an additional default charge of 20% of the amount concerned.

Part III - Method for calculation of the Assigned Risk Pool Run-off Premium. The Assigned Risk Pool Run-off Premium shall be an amount equal to $A + B - C$, where:-

A = The amount that would have been payable as the Assigned Risk Pool Default Premium calculated in accordance with Part 2 above in relation to each Indemnity Period in which the Firm has failed to obtain Qualifying Insurance prior to it becoming a Run-off Firm (including the Indemnity Period in which it ceased to practice)

B = A further amount equal to that which would have been payable as the Assigned Risk Pool Default Premium calculated in accordance with Part 2 above in relation to the Indemnity Period during which the Firm ceased to practice

C = Any sum due under Rule 5.8(ii)

Summary of the principal provisions of the

4th Draft of the QIS Rules

(Please note that the following is a summary of the principal provisions and the effect of those provisions of the 4th Draft of the QIS Rules and should only be used in conjunction with the 4th Draft as they may be subject to further change and modification. The draft Rules contain the full terms including the definitions used in this Summary and should be referred to for those definitions and wherever there is doubt as to the effect of the Rules.)

1. The intention of the Rules is that each Firm and each Principal of a Firm has a continuing obligation to ensure that it has Qualifying Insurance in place at all times with effect from the date set by the Council (presently 1st October 2005) from a list of Qualifying Insurers available from the Law Society.
2. The insurance may take two forms:
 - an insurance contract with one or more Qualifying Insurers on terms negotiated between the Firm and that insurer but which include the Minimum Terms and Conditions negotiated by the Law Society; or
 - an insurance contract with all the Qualifying Insurers by way of an Assigned Risk Pool Policy on terms negotiated between the Law Society and those insurers which also include the Minimum Terms and Conditions.
3. Under the Minimum Terms and Conditions, the insurance must include Run-off Cover for a Firm's liabilities for a minimum number of years (anticipated to be 6) after it has ceased Practice. If such cover does not exist for any reason, then the Firm must obtain either Qualifying Insurance re the Run-off Cover whether in the market or by way of an Assigned Risk Pool Run-off Policy.
4. Each Firm carrying on a Practice is required to take out its own Policy of Qualifying Insurance. It is not possible for more than one Firm to be covered under a single Policy of Qualifying Insurance.
5. If a Firm cannot obtain a Policy from a Qualifying Insurer it should apply to join the Assigned Risks Pool in accordance with the Rules, if it is an Eligible Firm. If it is not an Eligible Firm, it must cease Practice.

6. Under the Minimum Terms and Conditions, a Policy, once taken out, cannot be cancelled before the end of an Indemnity Period unless:
 - the Policy is an Assigned Risk Pool Policy and the Firm has replaced it with a Policy of Qualifying Insurance outside the Assigned Risk Pool; or
 - the Firm merges with another Firm and a Policy of Qualifying Insurance is in place for the merged Firm; or
 - the Qualifying Insurer which issues the Policy becomes the subject of an Insolvency Event, and the Firm has replaced the Policy with another Policy of Qualifying Insurance.
7. The arrangements for professional indemnity insurance put in place by the Society do not seek to protect Firms against the insolvency of a Qualifying Insurer. If an Insolvency Event occurs in respect of an Insurer, that Insurer will cease to be a Qualifying Insurer for the purposes of these Rules. This is because, in such circumstances, the Insurer may not be in a position to pay claims in full. Any Firm which has Qualifying Insurance with a Qualifying Insurer which is the subject of an Insolvency Event must obtain replacement cover as soon as possible, and in any event within 4 weeks of the Insolvency Event occurring by either obtaining Qualifying Insurance from another Qualifying Insurer or, if an Eligible Firm, by applying to enter the Assigned Risk Pool.
8. A Firm which for any reason does not have Qualifying Insurance in place should apply to the Assigned Risk Pool before the start of the relevant Indemnity Period if it is an Eligible Firm. Premiums payable to the Assigned Risk Pool are high.
9. Application for admission to the Assigned Risk Pool must be made to the Assigned Risk Pool Manager on the proposal form which is from time to time prescribed by the Council.
10. It is the Firm's responsibility to ensure that its application has been made and to provide to the Assigned Risk Pool Manager all such information as the Assigned Risk Pool Manager may reasonably require in order to process the application. Where a Firm does not receive acknowledgment of its application within 30 days it is obliged to seek confirmation that it has been received by the Assigned Risk Pool Manager.
11. An Assigned Risk Pool Policy can be cancelled if it is replaced by a Policy with a Qualifying Insurer.
12. Firms should also be aware that there are other consequences of being insured through the Assigned Risk Pool, including the need to comply with any Special Measures and the limitations on eligibility set out in the definition of "Eligible Firm".

13. The Council may determine the range of Special Measures which may be applied to Firms within the Assigned Risk Pool. Firms may be subject to investigation and monitoring in order to determine what Special Measures are appropriate for that Firm, and to ensure that those measures are fully implemented. The costs of investigation and monitoring, the costs and expenses incurred through any failure or delay by the Firm to comply and the implementation of the Special Measures are intended to be payable by the Firm concerned, in addition to paying the Assigned Risk Pool Premium. The amount of such costs and expenses will be determined by the Society. A Firm may request a breakdown of the costs as determined by the Society and, where such a request is made, the Society must provide a breakdown subject to the costs of providing that breakdown being paid by the Firm. In the event of a dispute as to the costs determined by the Society, the matter shall be referred to the Standing Committee on Policy and Resources for determination. The Standing Committee's decision is intended to be binding and final.
14. Except in an exceptional case, a Firm may only remain in the Assigned Risk Pool so long as it is an Eligible Firm or if it becomes a Run-off Firm. Firms, other than Run-off Firms, cannot remain insured through the Assigned Risk Pool for more than 24 months in any 5 year period, and should therefore seek insurance in the open market with a Qualifying Insurer as soon as practicable. A Firm which is no longer an Eligible Firm (because, for example, it has already been insured through the Assigned Risk Pool for 24 months in the last 5 years) must either obtain Qualifying Insurance on the open market or cease carrying on Practice.
15. The Assigned Risk Pool Manager, on behalf of the Society, shall make arrangements with Qualifying Insurers to cover any Claim against a Firm in Default and a Run-off Firm, including any Defence Costs relating to a Claim, in like manner and to the like extent as the Claim and the Defence Costs would have been covered had that Firm during the Period of Default been in the Assigned Risk Pool and been issued with an Assigned Risk Pool Policy and/or, as the case may require, an Assigned Risk Pool Run-off Policy.
16. If a Firm fails to make an application to the Assigned Risk Pool at the start of an Indemnity Period, and does not have any other Policy of Qualifying Insurance in force for that Indemnity Period, it may still be eligible to be issued with an Assigned Risk Pool Policy provided that it meets all of the requirements of Rule 5.3. However, each Principal of the Firm will have committed a disciplinary offence, and the Firm will be required to pay the Assigned Risk Pool Default Premium under any Assigned Risk Pool Policy issued.

17. If a Firm fails to make an application to the Assigned Risk Pool, but carries on Practice without having obtained Qualifying Insurance, each Principal in that Firm will have committed a disciplinary offence. The same is true if a Run-off Firm fails to apply to be issued with an Assigned Risk Pool Run-off Policy. In each case, that Firm, and each Principal in that Firm, will also be liable under these Rules to:-
- pay an amount to the Society equivalent to the Assigned Risk Pool default premium calculated for the whole of the Period of Default; and
 - reimburse to the Society in full the amount of any Claim (together with Defence Costs) made against the Firm and relating to the period when it did not have Qualifying Insurance in force.
18. The Assigned Risk Pool is intended to be managed by the Assigned Risk Pool Manager who under the Rules is given authorisation to release information to the Society relating to certain matters including suspected professional misconduct and fraud.
19. Provision is made for the Society to waive any Rule but it is expected that waiver will only be granted in exceptional circumstances. The Rules set out the procedure and time limits in which an application for waiver can be made. The Council may attach such conditions as it thinks fit to any waiver, and may revoke any waiver that it has previously granted without notice. Unless and until any waiver is granted, the person concerned must comply with the requirements of these Rules in full.
20. Appendix 1 to the Rules sets out the Minimum Terms which any Qualifying Insurance Policy must contain.
21. Appendix 2 sets out the method for calculating the Assigned Risk Pool Premium, Assigned Risk Default Premium and Assigned Risk Run-Off Premium.

Dated 12th May 2005