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UK – Update on the Transition to the New Regulatory Regime

The UK regulatory regime is currently in a transition process towards a twin peaks model, in which the Financial Services Authority ("**FSA**") will be replaced by the Prudential Regulation Authority ("**PRA**") and the Financial Conduct Authority ("**FCA**"). According to a speech given by Lord Turner, the FSA Chairman, at the FSA Annual Public Meeting on 3 July 2012, the FSA estimates that the transfer to the new regime will occur in April 2013, with the FSA and the Bank of England aiming to be ready from 1 March 2013. However, the timetable is dependent on the passage of the Financial Services Bill (the "**Bill**") through Parliament and the time required to produce subsequent secondary legislation.

FSA Handbook split

As part of the change from a single regulatory to a twin peaks model, it will be necessary for the FSA Handbook to be split into two parts. On 1 June 2012, the FSA published a guide to its plans for forming two new Handbooks, one for the PRA and one for the FCA. As well as the minor changes, such as replacing references to the FSA with references to the relevant new regulator, the new Handbooks will include substantive changes to reflect the existence of two regulators with differing roles and powers. The FSA has said it will consult on these more substantive changes prior to the PRA and the FCA acquiring their legal powers.

The new Handbooks are expected to be published in draft form in early 2013, along with material on how to interpret them where this is not covered in the Handbooks themselves. Until the new regulators acquire their legal powers, the FSA will continue to make changes to its Handbook (which will remain in force until then) in the usual way. Once the PRA and the FCA acquire their legal powers, they will each amend their own Handbooks in accordance with the provisions of the Bill, which will require co-operation between the two bodies as well as external consultation.

Relationship with the FSCS

One aspect of the transition to the new regime which has previously not been clear is the way in which the PRA and FCA will interact with the Financial Services Compensation Scheme ("**FSCS**"). To deal with this concern, on 26 June 2012, the FSA published two draft memoranda of understanding, one between the PRA and the FSCS and the other between the FCA and the FSCS. These memoranda set out the respective roles of the FSCS and the new regulators, the oversight of the FSCS under the new regime, how information sharing will be dealt with, FSCS funding, and the reporting obligations of the FSCS to the new regulators.

Europe – Solvency II update

Timings

On 3 July 2012, despite recent reports of member states asking to have the Solvency II dates pushed back even further, the European Parliament adopted the directive amending the transposition and implementation dates of Solvency II, changing the transposition date for Member States to 30 June 2013 and the implementation date for firms to 1 January 2014. (The text of this directive was published on 29 August 2012 and can be found here.) This removes the concern that regulators and insurers may need to comply with Solvency II by 1 November 2012 but increases the pressure to have Omnibus II key terms settled.

However, trialogue talks between the European Parliament, the European Commission and the European Council held on 12 July 2012 have reportedly failed to reach agreement on Solvency II issues, which could lead to further delay in the passing of Omnibus II. This follows the amendment of the proposed date for the European Parliament to consider Omnibus II in a plenary session to 20 November 2012, announced in late August 2012.

FSA consultation paper

On 11 July 2012, the FSA published a consultation paper (CP12/13) on Solvency II. This sets out proposed rules and guidance on areas that either were not covered or were only partially covered in the previous consultation paper (CP11/22), including how Solvency II may apply to the Lloyd's market, the FSA's policy for separate disclosure of capital add-ons, and proposed changes to existing Handbook rules governing with-profits and unit linked business.

Responses are invited by 11 October 2012, after which the FSA intends to collate the feedback from all its Solvency II consultations thus far and aims to publish a Policy Statement in late 2012 or early 2013. The precise timing will depend upon a review of feedback received against the level 2 proposals once they are finalised in Europe and on the legislative timetable for UK regulatory reform and the Handbook. The FSA has noted that, once Omnibus II is adopted and the level 2 proposals are finalised, further consultations may be required.

The FSA's IMAP

On 24 July 2012, Julian Adams, Director of Insurance at the FSA, sent a letter to firms in the Internal Model Approval Process (**"IMAP"**), which provides an update on Solvency II, gives further feedback from reviews carried out to date, and includes a projected timetable for activity through to the end of 2012.

The letter indicates that the FSA has started receiving submissions from firms in pre-application and that, where the quality of the submissions is sufficient, the FSA expects to be able to form a preliminary view within six months. It adds that, from the time of submissions, firms are expected to apply a formal change process to their models in order to deal with any required alterations. The letter also describes the FSA's intention to collect data from firms to inform its assessment of their internal models.

In addition, the letter notifies firms that the FSA expects to hold its next Solvency II conference before the end of the year.

EIOPA reports

On 10 July 2012, the European Insurance and Occupational Pensions Authority ("**EIOPA**") published its final report on the Reporting and Disclosure Requirements in response to comments received on the Solvency II consultation papers (no. 11/009 and 11/011). The report relaxed some of the burdens insurers had been concerned with respect to Solvency II. The most notable change was with the financial stability information reporting requirement. The threshold to provide financial stability information has increased from 6 billion to 12 billion Euros and the requirement to report technical provisions by line of business for groups has been removed, easing smaller insurers' reporting burdens. EIOPA also noted that quarterly and annual

reporting may result in the same information being reported twice and have thus introduced a split in information between quarterly and annual reporting to avoid needless repetition. A final point to mention is that profit and loss information will now be reported on a semi-annual basis instead of on a quarterly basis.

EIOPA's final report on Guidelines on Own Risk and Solvency Assessment ("**ORSA**") was released on 12 July 2012. Several key points were raised by respondents to the consultation paper (no. 11/008), to which EIOPA has given material responses. One issue involved proportionality and materiality, as respondents have found a lack of detail on where and how these principles are to apply in practice. EIOPA's response was that "*Undertakings are expected to have the necessary competence and expertise to find fit-for-purpose solutions for the practical challenges they face*". Another issue questioned the roles and responsibilities of the Administrative, Management and Supervisory Body ("**AMSB**") in ORSA. It has been confirmed that the AMSB is to require a level of expertise to provide "sound and prudent" management of the undertaking and maintain an active role in deciding what actions to take should a critical risk materialise. Respondents have asked EIOPA to have a simplified projection of the forward-looking perspective. Having acknowledged that the requirement to quantify overall solvency needs for each separate year of the ORSA projection period may have been too prescriptive, EIOPA has replaced the existing relevant guideline to have a more appropriate projection of a multi-year tendency and development perspective.

Third country equivalence

On 14 June 2012, EIOPA published a paper on third country equivalence measures for countries that either have a risk-based regime similar to Solvency II or are committed to moving towards such a risk-based regime over a specified period. Although the European Commission will decide which countries should benefit from the proposed transitional regime, EIOPA will provide a technical contribution to assist in the decision-making. As at the date of the paper, Australia, Chile, China, Hong Kong, Israel, Mexico, Singapore and South Africa had expressed an interest in the transitional regime and had therefore received information requests from EIOPA to enable it to carry out an analysis of the differences between Solvency II and the regimes of the relevant jurisdictions.

Europe – IMD II publication

The long-anticipated draft directive to amend and replace the Insurance Mediation Directive (**"IMD"**), known as IMD II, was published by the European Commission on 3 July 2012. The directive, likely to be adopted during 2013 with the new regime expected to enter into force in 2015, aims to improve the regulation of the retail insurance market by strengthening policyholder protection and ensuring a level playing field between all parties involved in selling insurance products.

IMD II is intended to do the following:

- extend the scope of the IMD to all parties who sell insurance products, including those who sell directly to customers and those who sell insurance products on an ancillary basis, such as car rental companies;

- address conflicts of interest more effectively, by introducing mandatory disclosure of remuneration by intermediaries;
- apply improved requirements for sales to life insurance products with investment elements;
- permit mutual recognition of professional knowledge and ability;
- introduce special information requirements where products are bundled together; and
- provide guidelines to Member States for the purposes of ensuring effective, proportionate and dissuasive administrative sanctions and measures.

Like the IMD, IMD II will be a minimum harmonisation directive, but the minimum standards will be significantly higher than those under the IMD.

US – Credit for Reinsurance Reform

Since the adoption of the amendments to the National Association of Insurance Commissioners ("NAIC") Credit for Reinsurance Model Law (#785) and Credit for Reinsurance Model Regulation (#786) at the NAIC's 2011 Fall Meeting, additional states have continued to make legislative and regulatory changes to conform their credit for reinsurance laws and regulations to the NAIC's amended models. Although NAIC model laws and regulations do not become effective in any given state unless and until they are incorporated through the legislation or regulation adoption process, conforming to the NAIC's credit for reinsurance models is essential for a state to maintain NAIC accreditation.

Set forth below is a chart listing the states that have amended their credit for reinsurance laws to-date. The chart identifies certain key areas in which these states' laws and regulations are different regarding reduced collateral for "certified" reinsurers from the NAIC's models, which were described in prior Mayer Brown Global Corporate Insurance & Regulatory Bulletins. As identified with a (*) below, five additional states have amended their credit for reinsurance laws to conform to the NAIC's amended credit for reinsurance model law and regulation over the course of the summer. (As noted below, the legislation in California has not yet been signed by the governor as of the date of this article.)

State	Key Differences from NAIC Models regarding Certified Reinsurers	Other Comments
California (*)	Credit for reinsurance or deduction from liability for cessions to a "certified" reinsurer may be disallowed "upon a finding by the commissioner that the application of the literal provisions of this section does not accomplish its intent, or either the financial condition of the reinsurer or the collateral or other security provided by the reinsurer does not, in substance, satisfy the credit for reinsurance requirements". The section regarding certified reinsurers will expire on 1 January 2016 unless extended by legislation.	Passed by both houses of the legislature and is expected to be signed by the governor.

Connecticut (*)	The law will be effective 1 October 2012, but unlike the NAIC model it does not specifically limit collateral reduction provisions to reinsurance agreements entered into after the effective date.	
Delaware (*)		
Florida	Only applies to property and casualty.	
Georgia	The law became effective on 1 July 2012, but unlike the NAIC model it does not specifically limit collateral reduction provisions to reinsurance agreements entered into after the effective date.	
Indiana	The law became effective on 1 July 2012, but unlike the NAIC model it does not specifically limit collateral reduction provisions to reinsurance agreements entered into after the effective date.	
Louisiana (*)	No credit for reinsurance will be permitted unless the reinsurer (or its affiliate) has been doing business in its country of domicile for at least three years (although this requirement may be waived by the commissioner by rule or regulation).	
New Jersey	The reduced collateral provisions for life reinsurance agreements will not become effective until the earlier of twenty-four months from the effective date of the law (20 June 2011) or the implementation of principle-based reserving standards by the NAIC.	
New York	The reduced collateral provisions only apply to reinsurance agreements entered into or renewed on or after 1 January 2011.	
Pennsylvania (*)	Unlike the NAIC models, the Pennsylvania legislation does not set forth the risk-based collateral requirements under which a "certified" reinsurer will be able to post less than 100% collateral, but such requirements will likely be incorporated into the regulations to be promulgated. Pennsylvania legislation also does not include the NAIC model law's provisions regarding concentration risk, which require a ceding insurer to notify its domiciliary regulator if reinsurance recoverable from or cessions to a single reinsurer or affiliated group of reinsurers exceed certain levels.	

Virginia	Under the proposed regulations, the reduced collateral provisions will apply to new and renewal reinsurance transactions entered into after 31 December 2012 and credit for reinsurance agreements in force on 1 July 2012 or commencing within six months thereafter will be governed by the requirements for credit for reinsurance in effect prior to the new law.	Following up on the passage of the amended credit for reinsurance law, on 5 July 2012 the Bureau of Insurance of the Virginia State Corporation Commission issued proposed new regulations and amendments to existing regulations regarding credit for reinsurance, which are based on the NAIC model regulation. Comments on the proposals were due by 13August 2012.

Legislation has also been introduced in Illinois and Missouri to amend those states' credit for reinsurance laws to conform to the amended NAIC credit for reinsurance models. We expect additional states to consider similar amendments to their laws and regulations in the near future.

US –NAIC Update: Summer National Meeting

The National Association of Insurance Commissioners (the "NAIC") held its Summer 2012 National Meeting (the "Summer Meeting") from 10-14 August 2012 in Atlanta, Georgia. The following are selected highlights from the Summer Meeting.

Captive insurance companies

The Captives & Special Purpose Vehicle Use Subgroup of the Financial Condition (E) Committee (the "Captives Subgroup") was established to study the use of captives and special purpose vehicles ("SPVs") by insurers and to recommend regulatory changes as appropriate. Following a series of teleconferences, members of the Captives Subgroup prepared a draft white paper Captives and Special Purpose Vehicles, and the meeting of the subgroup at the Summer Meeting was primarily devoted to a discussion of that draft white paper.

The draft white paper provides an overview of the existing regulation and use of captives and special purpose vehicles. The focus is on captives and SPVs that reinsure their affiliates' obligations under insurance policies issued by them (often as a way of dealing with Regulation XXX and AXXX reserve requirements) – rather than traditional, pure captives or risk retention groups that are used by businesses to self-insure their own risks. The white paper reflects a concern by some members of the Captive Subgroup about the lack of consistent requirements for the use of captives and SPVs, particularly with respect to financial reporting and capital requirements.

The Captives Subgroup's recommendations in the draft white paper include:

- pursuing alternative accounting treatment of XXX and AXXX reserves to eliminate the need for separate transactions outside of the commercial insurer;

- developing NAIC guidance to assist states in reviewing captives transactions, including minimum analysis to be performed as well as ongoing monitoring of the ceding insurer, the captive and the holding company, with such guidance possibly to be added to NAIC accreditation standards to ensure uniformity and consistency among states with respect to regulation and oversight of captives transactions;
- encouraging states to adopt the NAIC's Special Purpose Reinsurance Vehicle Model Act (#789) and possibly re-evaluating and updating the model;
- supporting the International Association of Insurance Supervisors' Guidance Paper on the Regulation and Supervision of Captive Insurers, which advocates regulating as commercial insurers any insurer or reinsurer owned or common controlled captives or SPVs that are not self-insurance;
- considering ways to limit the variability in qualified letters of credit or any other security that may not provide the intended protections provided in the NAIC Credit for Reinsurance Model Law;
- enhancing disclosure in ceding company financial statements regarding the impact of captives and SPV transactions on the financial position of the ceding insurer; and
- increasing the ability of a state or other functional regulator of a group to obtain additional information from the captive regulator on a confidential basis to understand the details of captive and SPV transactions.

The white paper is expected to be released formally for comments in the next few weeks and is likely to undergo further revisions. The Captives Subgroup hopes to adopt the white paper including the recommendations and send it to the Financial Condition (E) Committee by year end.

Own Risk Solvency Assessment

The establishment of an Own Risk Solvency Assessment ("ORSA") requirement is a key component of risk management under the NAIC Solvency Modernization Initiative. The purpose of ORSA is to ensure that a company develops a risk management policy that identifies the types and amounts of its material risk and also monitors and manages such risk. Preserving the confidentiality of information and documents gathered and disclosed during the ORSA process has been an important issue throughout the development of the ORSA requirement.

At the Summer Meeting, the Group Solvency Issues (E) Working Group discussed and adopted changes to the proposed Risk Management and Own Risk And Solvency Assessment Model Act (the "Proposed Model Act") to strengthen its confidentiality provisions. Under the Proposed Model Act, in order to carry out a commissioner's regulatory duties, a commissioner may share ORSA-related materials and information with the NAIC or third-party consultants but only if there is a written agreement regarding the sharing and use of such information. In accordance with the new revisions to the Proposed Model Act, the agreement governing the sharing and use of ORSA-related information must provide that the recipient agrees in writing to maintain the confidentiality and privileged status of the materials, documents and information received and has verified in writing the legal authority to maintain confidentiality. The revisions to the Proposed Model Act will prohibit the

NAIC or third-party consultants from storing such data after the underlying analysis is completed. The Proposed Model Act will next be considered during a joint Group Solvency Issues (E) Working Group and Financial Condition (E) Committee conference call scheduled for 6 September 2012.

The ORSA (E) Subgroup (the "ORSA Subgroup") also met during the Summer Meeting. The ORSA Subgroup adopted the ORSA Guidance Manual without making any additional revisions but left open the possibility for revisions that may be offered by state regulators and interested parties at a future date. In connection with the Feedback Pilot Project, the ORSA Subgroup reviewed ORSA reports received from thirteen volunteer insurance groups. As a result of the pilot project, the ORSA Subgroup will take the following steps: draft revisions to the ORSA Guidance Manual; draft recommendations to the Financial (E) Committee related to ORSA implementation; provide general feedback to the insurance industry regarding specific items indentified in the review; and draft referrals to the Financial Analysis Handbook (E) Working Group and the Financial Examiner's Handbook (E) Technical Group regarding guidance for analysis and examination of the ORSA Summary Report, analyst and examiner coordination and multi-state coordination expectations.

Reinsurance task force

At the Summer Meeting, the NAIC's Reinsurance Task Force ("RTF") continued its consideration of matters relating to states' implementation of the NAIC's amended credit for reinsurance model law and regulation that were adopted last year as well as other developments. The RTF's Qualified Jurisdiction Drafting Group is developing criteria and processes for identifying non-US jurisdictions as "qualified jurisdictions" under the NAIC's amended model law and regulation and will determine jurisdictions to be reviewed initially along with an implementation timeline. The RTF's Reinsurance Financial Analysis Working Group will provide advice and assistance to states in reviewing reinsurance collateral reduction applications as well as monitoring the financial condition of reinsurers; this working group expects to circulate a procedures manual later this year. Finally, the RTF has formed another new subgroup to consider a referral from the Financial Analysis (E) Working Group regarding quota share reinsurance agreements (specifically whether certain quota share reinsurance agreements transfer sufficient risk – especially if they contain features such as loss corridors, loss caps and sliding scale commissions).

Lender-placed insurance

The NAIC's Property and Casualty Insurance (C) Committee and Market Regulation and Consumer Affairs (D) Committee held a public hearing on 9 August 2012 regarding the use of lender-placed insurance and the effect on consumers. Lender-placed (sometimes called "force-placed") insurance is insurance placed by a bank or mortgage servicer on a property when the owner/borrower's insurance may have lapsed or is insufficient. If a borrower fails to maintain adequate insurance as required under the terms of the mortgage, the lender typically is entitled to purchase insurance for the property and charge the premiums to the borrower. In addition to the NAIC's hearing, regulators in states such as California, Florida, New York and Texas have recently held public hearings and have otherwise been reviewing lender-placed insurance, with particular reference to the premiums charged for such

coverage and the financial arrangements between the insurers and lenders. Separately, the federal Consumer Financial Protection Bureau is considering rules regarding lender-placed insurance including rules about when and how lenders must notify borrowers that lender-place insurance will be placed.

US – Amendments to California's Insurance Holding Company System Regulatory Act

California's SB 1448, which was passed by both houses of the Legislature and is expected to be signed by the governor, would conform California's Insurance Holding Company System Regulatory Act to the amended National Association of Insurance Commissioners ("NAIC") Insurance Holding Company System Regulatory Act (Model 440) and Regulation (Model 450) adopted by the NAIC in December 2010. The amendments would provide the Insurance Commissioner with greater authority to evaluate the risks that non-insurance entities pose to an insurer within the holding company system. Some of the key amendments include provisions that would:

- require the ultimate controlling person of every insurer subject to registration to file an annual enterprise risk report;
- authorize the Insurance Commissioner to hold a public hearing after a Form A is filed (the person filing the Form A would be allowed to present evidence and to offer written and oral arguments);
- require any controlling person of a domestic insurer seeking to divest its controlling interest in the domestic insurer to file a notice of divestiture at least 30 days prior to the cessation of control; and
- authorize the Insurance Commissioner to participate in a supervisory college for any domestic insurer that is part of an insurance holding company system with international operations in order to determine compliance with the relevant provisions of the law.

California will become the tenth state to have adopted the amended NAIC Insurance Holding Company System Regulatory Act and Regulation. The nine states that have already adopted the amended NAIC Insurance Holding Company System Regulatory Act and Regulation are: Connecticut, Indiana, Kentucky, Louisiana, Nebraska, Pennsylvania, Rhode Island, Texas, and West Virginia.

US – CFTC and SEC Final Rules Distinguishing Insurance from Swaps

On 13 August 2012, the US Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") published in the Federal Register their joint final rules (the "Rules") regarding the further definition of swap, security-based swap, and security-based swap agreement; mixed swaps; and security-based swap agreement recordkeeping pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Rules are of particular import because of their impact on other rulemakings, both as defined terms and as a condition precedent to the effectiveness of those rules. For details on Insurance versus Swaps under the final swap definition rules, please see our full article here.

Global – Insurance Brokers Face Storm Clouds over US Sanctions

Insurance brokers worldwide are subject to increasing scrutiny by the US Office of Foreign Assets Control, Department of the Treasury ("**OFAC**"), which administers the wide range of US sanctions programs. OFAC is the principal enforcement agency responsible for the US sanctions applicable to such countries as Cuba, Iran, North Korea, Sudan and Syria, as well as applicable to hundreds of entities and individuals designated as Specially Designated Nationals, as a result of their association with sanctioned countries or their involvement in civil destabilization, narcotics trafficking, terrorism and other sanctioned activities.

In recent years, OFAC has paid growing attention to parties, whether in the US or abroad, that induce or cause US parties to violate US sanctions laws. For example, hundreds of millions of dollars in penalties have been assessed on foreign financial institutions that have failed to disclose to their US counterparties (e.g., confirming banks) that particular funds transfers were related to Cuba, Iran or other countries or parties subject to sanctions. ABN Amro and Lloyds Bank are among the notable financial institutions that have been penalized when it was found that they omitted from SWIFT messages or other transactional documentation the information that would have disclosed to US financial institutions that transactions violated US sanctions.

Now this same OFAC focus is being directed at insurance brokers, including brokers based outside the US. OFAC officials have indicated informally that they are engaged in a far-reaching investigation of the insurance and reinsurance industries, with particular attention to the extent to which brokers have disclosed (or failed to disclose) to insurers and reinsurers any information that would have indicated that sanctioned parties might be covered by or benefit from insurance or reinsurance policies. Violations of sanctions laws could occur where claims payments were made that benefited a sanctioned party, or where treaties were entered into that covered sanctioned party losses. Where a broker was aware that coverage might be extended to sanctioned parties (e.g., a sanctioned country airline) or that a claim arose from a sanctioned party loss, and where the broker failed to inform the insurer or reinsurer of that information, the broker could find itself subject to OFAC penalties. OFAC may seek to penalize foreign brokers on the grounds that they caused US insurers or reinsurers to violate the sanctions laws.

Given both the globalization of sanctions laws in the US, Europe and elsewhere and the very substantial penalties that can be imposed, brokers should consider whether to adopt sanctions compliance policies and procedures. In particular, documenting the timely disclosure that a broker has made to an insurer or reinsurer about possible sanctioned party coverage or claims would be advisable. Brokers should brace themselves for possible OFAC inquiries, before the storm clouds clear.

Global – Canada, Isle of Man, Luxembourg and Poland sign up to Multinational Memorandum of Understanding

The insurance supervisors of Canada, the Isle of Man, Luxembourg and Poland have recently become signatories to the International Association of Insurance Supervisors multinational memorandum of understanding, which is a global framework for co-operation and information exchange between insurance supervisors. This bring the total number of signatories to 30, representing approximately 45% of worldwide premium value.

China – CIRC Relaxes Restrictions on Permitted Investments by Insurance Companies

The China Insurance Regulatory Commission (CIRC) issued the Circular on Issues relating to Investment of Insurance Funds in Equity and Real Estate (the 2012 Circular) on 16 July 2012 and has issued two other rules, all of which facilitate a more diversified range of investment options for insurance companies.

The 2012 Circular amends certain provisions of the Interim Measures on Investment of Insurance Funds in Equity (Equity Regulations) and the Interim Measures on Investment of Insurance Funds in Real Estate (Real Estate Regulations), promulgated by CIRC in 2010. For the full article, please click here. For more background information, please refer to our previous Legal Update: CIRC Permits Insurance Companies to Diversify Their Investments into Private Equity and Real Estate Sectors.

Hong Kong – Personal Data (Privacy) (Amendment) Ordinance

The Personal Data (Privacy) (Amendment) Ordinance 2012 (Amendment Ordinance) was gazetted on 6 July 2012 and sets out some important changes relating to the use of personal data for direct marketing, the provision of personal data to another for use in direct marketing, disclosure of personal data obtained without consent, and the regulation of data processors. The Amendment Ordinance also empowers the Privacy Commissioner to provide various forms of legal assistance to a person claiming compensation for breach of data privacy. The majority of the new provisions will come into effect on 1 October 2012, although the requirements relating to direct marketing and the legal assistance scheme will take effect later (to enable the Privacy Commissioner to issue guidance notes for corporate data users to prepare for the transition).

Under the Amendment Ordinance, a data user will be required to inform an individual of its intention to use his data for direct marketing, provide a communication channel free of charge to allow the individual to give consent (which includes an indication of no objection) to the intended use, and refrain from using his data for direct marketing until consent has been received. It remains uncertain at this stage whether silence or no response amounts to "an indication of no objection". The individual will also need to be provided with information of the kids of data to be used for direct marketing and the classes of marketing subjects (i.e. the kinds of services and products which may be marketed).

If a data user wishes to provide personal data to another for direct marketing, or to sell data to a third party, the data user must inform an individual of his intention, and specify whether the data is being provided to the third party "for gain". The data user must then refrain from providing his data to another person until the individual's consent or indication of no objection has been received.

The changes introduced by the Amendment Ordinance will affect insurance companies' ability to market their products to customers through direct marketing, and to engage in cross-marketing activities with other entities (whether a group entity or an external third party). Certain grandfathering arrangements are available and, where possible, are likely to be invoked by insurers prior to the relevant provisions of the Amendment Ordinance coming into effect. In anticipation of the upcoming changes, insurers are encouraged to review and update their internal policies regarding the use of personal data for marketing and cross-marketing.

For further details, see our Legal Update dated 26 July 2012 here.

Bermuda – Is the UK Takeover Code bound for Bermuda?

It is almost a year since four major changes to the UK Takeover Code (the "Code") were implemented, notably the general prohibition on break fees and other deal protections, the requirement to identify potential bidders, the automatic 28 day "put up or shut up" period and enhanced disclosure in offer documentation.

These changes were largely driven by a sense that, in the aftermath of the highly publicised takeover of Cadbury by Kraft, the balance was too much in favour of a potential bidder. Whilst those changes have a direct impact on those quoted insurance companies that fall within the jurisdiction of the Code a number of insurance groups have, over the years, redomiciled to overseas jurisdictions such as Bermuda.

Perhaps as a result of recent takeover activity in the sector, this has not escaped the attention of the UK Takeover Panel (the **"Panel"**). There is no suggestion that in moving to Bermuda or elsewhere companies were seeking to take advantage of falling outside the jurisdiction of the Code – quite the contrary, as those companies sought to replicate certain of the fundamental principles of the Code into their bye-laws.

The scope of the Code's jurisdiction is currently the subject of a Panel consultation paper. The most common application is where the target has its registered office in the UK[1] and its securities admitted to trading on the main market of the London Stock Exchange. Currently, it is less clear if the Code applies under the second limb – that is where the target is registered in the UK and its securities are **not** admitted to trading on the main market of the London Stock Exchange and instead, for example, on the AIM market. In such a case, as to whether the Code applies depends on whether the target company is considered by the Panel to have its place of central management and control in the UK. This requirement is currently referred to as the "residency test". The main argument in favour of removing the residency test is to provide greater clarity and certainty as to when a target company is subject to the Code. The principal argument against removing the residency test has related to the

1 For the purposes of this article "UK" includes the Channel Islands and the Isle of Man.

ability of the Panel to enforce the rules of the Code and to monitor their compliance where the offeree company does not have a sufficient nexus with the UK.

The removal of the residency test may not have a significant effect on quoted insurance companies. What is perhaps of much greater interest to those quoted insurance groups is the fact that the Panel has in the consultation paper noted concerns that overseas companies which have their securities admitted to trading on the London Stock Exchange's main market are not currently subject to the Code and has specifically identified Bermuda as an example of where companies have redomiciled. The Panel states that it intends to investigate whether it might be feasible and proportionate for some measure of Code protection to be extended to shareholders in such companies while acknowledging that it is mindful of a number of potential difficulties in relation to the regulation of such offers particularly as to compatibility of the Code with local laws and the Panel's ability to enforce the Code.

Such an extension of the Code's jurisdiction would represent a significant departure from the current state of play and throws up a number of questions, not least whether the Panel would have the necessary resources to police a greater number of companies. It would also take the jurisdiction of the Code in a direction of travel well beyond that set out in the underlying EU Takeovers Directive. In addition, would the Panel limit its jurisdiction to offers in relation to companies that had redomiciled having formerly fallen within the jurisdiction of the Code or would it extend to **all** overseas companies with a listing on the main market of the London Stock Exchange?

The impact would be felt far beyond the insurance market but, going forward, a group's board may take into account the application of the Code in addition to insurance regulatory and other factors in determining optimal group structure.

See Also

You may be interested in a recent Legal Update from our Intellectual Property practice: Cloud Computing – Article 29 Working Party Guidance on EU Privacy and Security concerns.

If you have any query in connection with anything in this Bulletin, please do not hesitate to get in touch with your usual Mayer Brown contact or one of the contacts referred to below.

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