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## UK – Financial Services Act 2012 receives Royal Assent

The Financial Services Act 2012 (the “**Act**”) received Royal Assent on 19 December 2012. The Act, which will come into force on 1 April 2013, will deliver the long-awaited reform of financial regulation in the UK, replacing the old tripartite system. Among other things, the Act:

- gives the Bank of England responsibility for protecting and enhancing financial stability, bringing together macro and micro prudential regulation;
- introduces the Financial Policy Committee; and
- abolishes the FSA and replaces it with the twin peaks structure of the Prudential Regulation Authority and the Financial Conduct Authority.

Draft secondary legislation under the Act, including regulations setting out how regulated activities will be divided between the new authorities, is expected in the new year.

## UK – Lloyd’s update

### Three year plan

Lloyd’s has published its three year plan for 2013-2015 (the “**Plan**”), which sets out the first steps needed to deliver Lloyd’s longer term strategy, Vision 2025. The Plan focuses on reinforcing the position of Lloyd’s as the global centre for specialist insurance and reinsurance, with key aspects of the Plan including:

- increasing the proportion of Lloyd’s business that originates in developing economies;
- achieving greater diversity of capital and talent;
- maintaining focus on market oversight; and
- preserving underwriting discipline.

### Solvency II progress

At a recent briefing, Lloyd’s announced that it considers the planned implementation date for Solvency II of 1 January 2014 to be “*completely unrealistic*”. However, it also announced that its internal model for Solvency II is now fully operational and has been approved by the FSA for use from 2013 onwards. This is contrary to the position of many UK insurers, with two thirds being reported to have cut back their programmes to implement Solvency II in light of continuing delays in Europe.

## UK – Equality Act 2010 (Amendment) Regulations 2012 come into force

In order to align UK law with a change to European Union law arising from the March 2011 judgment of the Court of Justice of the European Union in the *Test-Achats* case, the Equality Act 2010 (Amendment) Regulations 2012 (the “**Regulations**”) came into force on 21 December 2012. The Regulations amend the Equality Act 2010 by removing an exemption formerly provided for by the EU Gender Directive (2004/114/EC), with the effect that providers of insurance and related financial services may not discriminate on grounds of sex when it comes to the pricing of products and the benefits that are offered to consumers.

## Europe – EIOPA financial stability report

On 14 December 2012, the European Insurance and Occupational Pensions Authority (“**EIOPA**”) published its financial stability report for the second half of 2012 (the “**Report**”). The Report concerns the financial stability of the insurance, reinsurance and occupational pension fund sectors in the EEA and concludes that these sectors could face a “*significantly negative outlook over the medium term due to macroeconomic uncertainties and the fragile state of financial markets*”.

For the insurance sector, the Report notes that premium growth has been observed overall, although with wide variations between companies, and the profitability of companies remains relatively stable. It also notes that Solvency I capital ratios are still at comfortable levels but that this should not give rise to complacency as Solvency I is not market or credit risk sensitive and so does not give the full picture.

For the reinsurance sector, profitability is expected to remain under pressure due to excess capacity in the market and reduced demand resulting from the weak global macroeconomic environment. Losses arising from Hurricane Sandy are yet to be quantified but are expected to have a significant impact in the market.

For the pensions sector, EIOPA’s key concerns are funding shortages and the increased longevity of pensioners.

## Europe – EIOPA comments on IMD2 proposal

During a speech given by Gabriel Bernardino (chairman of the European Insurance and Occupational Pensions Authority (“**EIOPA**”)) at EIOPA’s second annual consumer strategy day, it was indicated that EIOPA welcomes the European Commission’s proposal to introduce a revised Insurance Mediation Directive (“**IMD2**”) in order to improve the retail insurance markets and promote a more level playing field. Mr. Bernardino made the following supplementary comments:

- it is important that IMD2 creates a regulatory regime for the retail insurance market that can be supervised effectively at national and European levels, bearing in mind the wide variety of existing structures at a national level for supervising insurance intermediaries;
- while the professionalism of intermediaries should be reinforced, IMD2 should respect proportionality and give full consideration to existing market specificities such as a diverse range of distribution channels at national level and any related costs and benefits;
- the existing insurance mediation directive could be significantly improved by the introduction of:
  - a separate article on conflicts of interest,
  - a general “duty of care”, and
  - a general duty to act honestly, fairly and professionally in the best interests of clients (which should take into account the specificities of the intermediary distribution channel); and
- intermediaries should be required to systematically identify and manage conflicts of interest, with disclosure of remuneration being required in the same manner as for insurance undertakings.

## US – NAIC releases draft “NAIC Process for Developing and Maintaining the List of Qualified Jurisdictions” for certified non-US reinsurers

The NAIC released its draft on the “NAIC Process for Developing and Maintaining the List of Qualified Jurisdictions” (the “**Draft**”) at the Fall 2012 Reinsurance Task Force Meeting at the beginning of December.

This NAIC Process will set forth how non-US jurisdictions will be evaluated to create and maintain a list of “Qualified Jurisdictions” for certified reinsurers to become eligible for reduced reinsurance collateral under the revised NAIC Models on Credit For Reinsurance (#785 & #786). The Models provide that a list of Qualified Jurisdictions will be created through the NAIC committee process; although the authority to approve a certified reinsurer is left to the state in which an unauthorized reinsurer is seeking certification, individual states must consider this NAIC list when approving jurisdictions.

The NAIC Reinsurance Task Force has exposed this Draft for a 45 day comment period closing on 16 January 2013. Some of the highlights from the Draft are as follows.

Bermuda, Germany, Switzerland and the United Kingdom will be the initial jurisdictions evaluated, which are the jurisdictions that were approved by the states of Florida and New York under their reinsurance collateral reform prior to the adoption of the revised credit for reinsurance models. Subsequent priority jurisdictions will be on the basis of objective factors, including but not limited to ceded premium volume and reinsurance capacity issues raised by the states. Priority will also be given to requests from states and from those jurisdictions specifically requesting an evaluation by the NAIC.

The procedure for evaluation of non-US jurisdictions will involve the NAIC requesting a self-evaluation report by the non-US jurisdiction selected, which must be accompanied by an independent counsel’s opinion. There will also be an on-site evaluation. Once approved, a Qualified Jurisdiction will be subject to a full re-evaluation every five years.

The NAIC and the states will communicate and coordinate with the Federal Insurance Office, the US Trade Representative and other relevant US federal authorities with respect to the evaluation of the reinsurance supervisory systems of non-US jurisdictions.

As the Draft itself points out, the creation of this list does not constitute a delegation of regulatory authority to the NAIC. The regulatory authority to recognize a Qualified Jurisdiction resides solely with each state and the NAIC List of Qualified Jurisdictions is not binding on the states. The states must consider the NAIC list, and if a state approves a jurisdiction not on this list, the state must provide thoroughly documented justification for approving the jurisdiction.

## US – EU-US insurance regulators publish objectives and initiatives for the next five years

Following the publication of a report comparing the insurance supervisory and regulatory regimes in the EU and the US, in December 2012 the Steering Committee of the EU-US Dialogue Project published a protocol setting out common objectives and initiatives it has agreed for the next five years. The objectives and initiatives set out in the protocol are divided into the seven topic areas addressed in the report.

### 1. *Professional secrecy/confidentiality*

Objective: to promote the free flow of information between EU and US supervisors under conditions of professional secrecy by removing barriers to the exchange of information.

Initiatives include:

- encouraging the use of memoranda of understanding as confidence-building measures and to formalise frameworks for information sharing across jurisdictions, including: (i) investigating and pursuing the possibility of a multinational memorandum of understanding to be entered into by all US states and EU member states; and (ii) encouraging all members to join the International Association of Insurance Supervisors multinational memorandum of understanding; and
- exploring the ability to make existing US state law and processes regarding professional secrecy/confidentiality more explicit regarding exchanges of information with non-US supervisory authorities.

### 2. *Group supervision*

Objective: to establish a robust regime for group supervision, including: (i) a clear designation of tasks, responsibilities and authority amongst supervisors; (ii) a holistic approach to determining the solvency and financial condition of the group; (iii) greater co-operation and co-ordination amongst supervisory authorities within colleges; and (iv) efficient enforcement measures that allow for effective supervision of groups.

Initiatives include:

- improving supervision by: (i) sharing best practices/experiences of co-operation and co-ordination amongst supervisory authorities; (ii) promoting effective college procedures to maximise the benefit to participating supervisors; and (iii) discussing supervisory expectations with regard to governance and achieving a common list of indispensable elements; and
- improving solvency supervision by: (i) promoting harmonisation of the Own Risk and Solvency Assessment and establishing a template suitable for use by both EU and US groups; and (ii) working towards achieving greater comparability between groups in relation to an overall group solvency assessment.

### *3. Solvency and capital requirements*

Objective: to further develop an approach to valuation which more accurately reflects the risk profile of companies, is sufficiently sensitive to changes in that risk profile and which has capital requirements that are fully risk based and are based on a clear and transparent calibration.

Initiatives include:

- identifying categories and subcategories of risks to prioritise further work;
- establishing a transparent calibration including a time horizon on a risk by risk basis;
- working towards a consistent approach to solvency; and
- examining the interaction of solvency and capital requirements with other supervisory tools such as financial analysis.

### *4. Reinsurance and collateral requirements*

Objective: to achieve a consistent approach within each jurisdiction and examine the further reduction and possible removal of collateral requirements in both jurisdictions in order to ensure a risk-based determination for all reinsurers in relation to credit for reinsurance.

Initiatives include:

- EU: providing an analysis of the possibility of concluding a bilateral agreement with the US under Article 50 of the Reinsurance Directive and analysing how the agreements envisaged under the Reinsurance Directive differ from the articles on Commission decisions on equivalence in the Solvency II Directive; and
- US: outlining what possibilities exist for revising the current Model laws on credit for reinsurance (for foreign and domestic reinsurers) and outlining the status of the Model laws in the eleven states that have currently passed them and any differences between those laws.

### *5. Supervisory reporting, data collection and analysis*

Objective: to pursue greater co-ordination of the monitoring of the solvency and financial condition of solo entities and groups through analysing supervisory reporting.

Initiatives include:

- examining and learning from the other jurisdiction's experience (the EU to examine the NAIC experience of centralised database, the US to examine the EU experience of group reporting); and
- mutual exploration of greater consistency and compatibility in group reporting and analysis, including exchange of best practices and exploring possibilities to exchange data.

#### *6. Peer reviews*

Objective: to ensure the consistent application of prudential requirements and commitment to supervisory best practices through different peer review processes that ensure an independent view of the jurisdiction being examined.

Initiatives include:

- establishing a network of supervisors for key colleges to facilitate learning and sharing of experiences;
- the EU implementing a sound process to oversee the supervisory activities carried out by competent national authorities; and
- the US considering whether to include supervision of colleges in the accreditation programme.

#### *7. Independent third party review and supervisory on-site examinations*

Objective: to ensure consistency and effectiveness in the supervision of solo entities and groups.

Initiatives include:

- investigating the possibility of common principles to promote greater consistency and effectiveness in risk-based and targeted supervision;
- ongoing EU-US dialogue to enhance understanding and consistency;
- promoting enhanced co-operation through collaborating in developing supervisory plans and streamlining supervisory processes to avoid duplication;
- considering opportunities for effective collaboration in the supervision of transatlantic groups; and
- the US to investigate ideas and approaches to the potential requirement of an internal audit function.

A detailed project plan is to be developed in early 2013 and to be updated periodically as the objectives and initiatives are pursued over the next five years.

### **Global – Italy signs up to multinational memorandum of understanding**

The insurance supervisor of Italy has recently become a signatory 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 brings the total number of signatories to 33 (an increase from 21 a year ago), representing over 51% of worldwide premium value.



## Hong Kong – Complying with the Personal Data (Privacy) Ordinance in the insurance industry

Last month, the Privacy Commissioner for Personal Data (“PCPD”) issued a Guidance Note on the Proper Handling of Customers’ Personal Data for the Insurance Industry (the “Guidance Note”). The Guidance Note is intended to assist insurers and insurance intermediaries in complying with the requirements under the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”) by providing practical guidelines and tips. For our full legal update on this topic, please click [here](#).

## China – SAFE issues circulars to regulate Forex controls over foreign invested partnerships and direct investments

### Overview

On 19 November 2012, the State Administration of Foreign Exchange (“SAFE”) issued two new circulars: (i) Circular on Relevant Issues Regarding Administration of Foreign Exchange for Foreign Invested Partnership (Circular 58); and (ii) Circular on Further Adjustments to Measures for the Administration of Foreign Exchange for Direct Investment (Circular 59). These circulars, both of which came into effect on 17 December 2012, were issued in order to standardise and simplify foreign exchange (“Forex”) related administrative approvals, and to downscale pre-approvals for routine operations.

### Main impact of Circular 58

Since the promulgation of the Measures for the Administration of the Establishment of Partnerships in China by Foreign Enterprises and Individuals in November 2009, foreign invested partnerships (“FIPs”) have become a new investment alternative for foreign investors in addition to wholly foreign-owned enterprises and Sino-foreign joint ventures. Until the issuance of Circular 58, however, there had been no systematic regulation addressing the Forex matters in connection with FIPs. Circular 58 applies to wholly foreign-invested partnerships and Sino-foreign partnerships.

### *Initial Forex registration and subsequent filings*

An FIP must register with the local SAFE office within 30 days of the issuance of its business license. Circular 58 expressly states that the branches of an FIP are not required to undergo additional Forex registration.

If there are changes to any of the key information that an FIP has registered with the Administration of Industry and Commerce (“AIC”), the FIP must, within 30 days of the change of registration at the AIC, file the change(s) to that information with the local SAFE office to update its Forex registration.

### *Capital contribution confirmation*

FIPs must complete the capital contribution confirmation registration with the local SAFE after the payment of capital contributions by foreign partners. Only after completion of the confirmation registration can the FIPs convert the funds contributed by the foreign partners into RMB, or transfer those funds to other accounts in China.

Moreover, the foreign partners can only remit funds obtained from the liquidation, capital decrease, partnership interest transfer or profit distribution out of China, or use such proceeds for further investment in China, after completing the capital contribution confirmation procedures.

#### *Partnership interest transfers*

If a domestic partner in an FIP purchases partnership interests from a foreign partner, the domestic partner must first file the change of registration with the local SAFE office and then carry out the foreign currency conversion and remit the purchase price at the bank where the domestic partner is located.

If the foreign partner purchases partnership interests from the domestic partner, the FIP must file the change of registration at the local SAFE office. The transferring domestic partner must open a special asset realisation account to receive payment from the foreign partner.

#### **Main Impact of Circular 59**

##### *Changes for Foreign Investors*

Circular 59 abolishes the requirements to obtain SAFE's approval to open:

- a pre-establishment expense account;
- a Forex capital account;
- an asset realization account; and
- a margin account.

Approval is no longer required for foreign investors to make further investments in China using profits, proceeds from equity transfer, capital reduction and liquidation, and certain other funds obtained in China.

Circular 59 also simplifies the Forex registration procedures in connection with a foreign investor's payment of a purchase price to Chinese shareholders for equity acquisitions. Prior to the issuance of Circular 59, SAFE registration was required to provide evidence that the foreign investor had fully paid the purchase price. Circular 59 distinguishes between cash and non-cash considerations. If the consideration is entirely in cash, SAFE's system automatically completes the confirmation and registration of the receipt of the purchase price. If part or all of the consideration is non-cash, the target company must register with SAFE to confirm the foreign investor's completion of payment.

##### *Changes for foreign-invested enterprises (“FIEs”)*

For FIEs, SAFE approvals are no longer needed for the following activities:

- to increase the registered capital by using reserves and undistributed profits which belong to the foreign investors;
- to convert the registered foreign debt of the FIEs (including the accrued interests) into registered capital; and
- to repatriate proceeds from capital reduction, liquidation or realised investments to its foreign shareholders.

### *Changes for foreign-invested holding companies (“**Holding Cos**”)*

Circular 59 removes the need for SAFE approvals for:

- Holding Cos to wire money for re-investments in China; and
- Holding Cos’ invested entities to wire Forex profits and dividends to Holding Cos within China.

Forex registration with SAFE is no longer required when the Holding Cos inject capital into their re-invested entities in China. If the re-invested entity is a joint venture between the Holding Cos and other foreign investors, the capital contribution by the foreign investors still needs to be registered with SAFE.

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