Linklaters

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New UK financial services regulatory structure

From 2 April 2013, the Financial Services Authority ("**FSA**") will formally be split into the Financial Conduct Authority ("**FCA**") and the Prudential Regulatory Authority. Please click here for a detailed summary of the changes and how they will affect insurers.

For more information, please contact Tim Scott +44 207 456 2547.

Regulatory developments affecting the UK retirement savings and income markets

Auto-enrolment into defined contribution ("**DC**") workplace pensions schemes will drive ever greater funds into the retirement savings market and, over time, into the retirement income market. At the same time, improving longevity and sustained low interest rates are increasing the costs of providing retirement income products (i.e., pensions and annuities).

The retirement savings and income markets will come under scrutiny this year, as both the Office of Fair Trading ("**OFT**") and the FSA launch reviews. In parallel, the Association of British Insurers ("**ABI**") has issued a new Code of Conduct on Retirement Choices (the "**Code**") and the European Insurance and Occupational Pensions Authority ("**EIOPA**") has published a report on the information provided to DC scheme members.

FSA/FCA review

In January, the FSA launched a thematic review into the effect on consumers of failing to "shop around" for an annuity when they retire. The underlying concern appears to be that most retirees convert lump sums accumulated with insurers into annuities provided by the same insurer (or group), with only a minority shopping around and exercising the "open market option". For some, this may result in lower annuities than would otherwise be available, whether through more competitive pricing elsewhere or the availability of enhanced annuities for those with lower life expectancies.

Whilst the FSA does not regulate prices or product design as such, it does regulate sales and distribution practices. Accordingly, it will be looking to see whether there is a case for requiring further disclosure or other measures to encourage greater shopping around.

This review will be inherited by the FCA from April, and the findings are likely to be released in the second half of 2013.

OFT review

The OFT's review was also launched in January. It will focus on whether there is sufficient competition between DC pension providers to keep fees low and transparent. The specific areas of enquiry suggest a concern that auto-enrolment will bring a flood of small and potentially unsophisticated employers and members into the market, who may lack the skills or motivation to monitor the market and make changes as appropriate.

The OFT's report is due to be published in August 2013.

ABI code of conduct

The ABI released the Code at the end of February. All ABI members should implement the Code by 1 March 2014 or earlier. The Code is not intended to override existing contractual arrangements. Accordingly, if pension scheme trustees are contractually obliged to communicate with customers and/or manage the conversion of savings into retirement income, insurers will not be expected to override or supplement that.

Broadly, the Code requires insurers to communicate with their customers two to five years before their retirement dates in order to give them information about the different options they have and to encourage them actively to make a choice amongst those options. As part of this, member firms will need to highlight prominently the potential benefits of shopping around and seeking independent advice. The CEOs of member firms are also expected to confirm annually to the ABI that their firm has complied with the Code and appropriate actions have been taken to correct any shortcomings.

EIOPA report

Also in January, EIOPA released a report entitled Good Practices on Information Provision for DC Schemes (EIOPA-BoS-13/010) ("**Report**"). The basic concern behind the Report is that consumers tend to be ill-equipped to make rational decisions about retirement savings. As we increasingly move toward a system in which consumers are responsible for the investment risk associated with their own pension pots, EIOPA wants consumers to be given clearer, more targeted information to encourage them to monitor and manage those pots in order to achieve a reasonable retirement income. For instance, EIOPA would favour short, simple illustrations of what a given pension pot and rate of savings will provide in current spending-power terms.

The Report will ultimately feed into EIOPA's advice to the European Commission on the ongoing review of the IORPs (Institution for Occupational Retirement Provision) Directive. It will be interesting to see if the current UK disclosure regime will be revisited again in consequence.

For more information, please contact Tim Scott +44 207 456 2547 or Rosalind Knowles +44 207 456 3710.

Case note: FSA v Digital Satellite Warranty Cover

On 13 February 2013, the Supreme Court released its judgment in *Digital Satellite Warranty Cover Ltd and another v The Financial Services Authority* [2013] UKSC 7 in which the Court concluded that extended warranties amounted to contracts of insurance. Please click here for a detailed note on the decision.

For more information, please contact Tim Scott +44 207 456 2547.

International Takaful Summit 2013

A delegation from Linklaters attended the seventh annual International Takaful Summit in Cairo on 18-19 February 2013. Takaful is a form of insurance that is Shari'ah-compliant and is enjoying strong growth in South-East Asia, the Middle East and Africa. Click here for an overview of Takaful.

The market is mainly served by specialist Takaful operators, however a number of mainstream insurers and reinsurers have also entered the market. Many of these firms were represented at the Summit in Cairo.

One of the key themes of the Summit was the future growth of Takaful, which is likely to come from two sources. First, Takaful is expected to develop alongside the burgeoning Islamic capital market in Sukuk (being, the Islamic equivalent of bonds) and second, Takaful is thought to be marketable to non-Muslims as a form of ethical insurance. Any such growth will need to be supported by corresponding growth in reinsurance/reTakaful capacity and in the Shari'ah-compliant asset management industry. There are encouraging signs of growth on each of these fronts, particularly in those jurisdictions that have a Takaful-specific regulatory regime (such as Malaysia).

The Linklaters' delegation was led by Sheikh Bilal Khan, who joined Linklaters as a Shari'ah Scholar and lawyer in September 2012. Sheikh Bilal was recently honoured as Religious Advocate of the Year at the inaugural British Muslim Awards. He was joined in Cairo by Victoria Sander (Partner) and Tim Scott (Counsel).

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Equitable relief against appropriation of financial collateral

Many insurance and reinsurance arrangements are collateralised to protect against counterparty credit risk and, where under English law, structured so as to qualify as financial collateral arrangements ("**FCAs**"). FCAs were implemented in the UK to give effect to the Financial Collateral Directive 2002/47/EC which was adopted to harmonise and simplify the process of taking and enforcing security over financial collateral across the European Union.

Qualifying as an FCA has numerous benefits including a more flexible (and speedy) enforcement regime. An FCA enables the collateral taker to appropriate the collateral itself on enforcement, whereas if collateral is not structured as an FCA, appropriation is not permitted. Instead enforcement would typically take place by a receiver selling the collateralised assets and applying the proceeds of sale against the secured obligation.

However, the effectiveness of this right of appropriation has been raised in a recent Privy Council case. This case (*Cukurova v Alfa Telecom Turkey* [2013] UKPC 2) suggests that a Court may grant equitable relief preventing the collateralised assets from being forfeited by the collateral provider and appropriated by the collateral taker.

The facts of the case are unusual, and appropriation under an FCA remains in most situations an effective remedy. Although the unusual factors in this case may limit its practical application, it creates uncertainly over the use of appropriation (particularly where the collateral in question are shares in a private company).

For more detail, see client briefing from February 2013 on the implications of Cukurova here.

The full Privy Council judgment in Cukurova can be found here.

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India – Legal Developments

SEBI issues regulations on investment advisors

On 16 August 2012, the Securities and Exchange Board of India ("**SEBI**") had approved the SEBI (Investment Advisers) Regulations, 2012 which regulates entities engaged in the business of providing investment advice. These Regulations were notified on 21 January 2013 as the SEBI (Investment Advisers) Regulations, 2013 and will come into force on the 90th day from the date of the notification.

The key features of the Regulations are summarised as follows:

> no person shall act as or hold himself out as an investment adviser unless registered with the SEBI. Any person currently acting as an investment adviser is required to apply for a certificate of registration within six months from the commencement of the Regulations;

> the Regulations provide certain exemptions from the registration requirement, e.g., insurance agents or brokers providing investment advice solely in relation to insurance products and registered with the Insurance Regulatory and Development Authority;

> the Regulations set out the eligibility criteria and qualifications for obtaining registration; and

> the Regulations also set out the business conduct requirements of investment advisers, including the requirement to (a) assess the ability of the client to take risk, (b) ensure suitability of the investment to the risk profile of the client, (c) make proper disclosures to a potential client regarding its business, terms and conditions of its services and other relevant information, and (d) maintain proper records.

The Banking Laws (Amendment) Act 2012

In January 2013, the Banking Laws (Amendment) Bill, 2012 received presidential assent and was notified as the Banking Laws (Amendment Act) Act, 2012. The Amendment Act amends the Banking Regulation Act, 1949, the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, the Banking Companies (Acquisition and Transfer of Undertakings) Act 1980 and also makes consequential amendments to certain other enactments including the Indian Stamp Act 1899 and the Indian Contract Act 1972.

The Amendment Act is expected to pave the way for new banking licences by giving the Reserve Bank of India ("**RBI**") greater regulatory power over the banking sector before it issues new licences to various private players.

The amendments introduced by the Amendment Act can be broadly categorised into two heads: (i) those intended to attract private sector investment and build investor confidence; and (ii) those intended to strengthen the RBI's regulatory powers over banks.

Please click here for further details.

For further information, please contact Umesh Kumar +85 22842 4894 or Stephen Fletcher +85 22901 5028.

Singapore – Legal Developments

MAS consults on changes to qualitative requirements on investments

On 23 January 2013, the Monetary Authority of Singapore ("**MAS**") issued a consultation paper which sets out its proposals relating to changes to qualitative requirements on the investments of insurers.

The MAS imposes both quantitative and qualitative regulatory requirements on the investments of insurers. The quantitative requirements relate to the risks arising from the investments, for example, mismatch, concentration, market and credit risks, and its corresponding capital charges required in the calculation of solvency under the Risk-Based Capital framework. The qualitative requirements include those relating to the governance of the asset management process and the permissible use of derivatives.

The key proposals in the consultation paper are summarised as follows:

> the MAS proposes to extend the requirements in MAS Notice 317, which currently only apply to direct life insurers, to apply to direct general insurers and reinsurers, including the need for an investment policy and investment committee; and

> the MAS proposes to extend the existing qualitative requirements which apply to the investment activities of solo insurers to the investment activities of insurance groups.

Enterprise Risk Management requirements

On 23 January 2013, the MAS issued a consultation paper proposing a set of Enterprise Risk Management ("**ERM**") requirements which apply to insurers.

The proposed ERM requirements expand MAS' expectations on how insurers identify and manage interdependencies between key risks and how these should be translated into strategic management actions and capital planning.

The key requirements proposed in the consultation paper include:

> establishing an ERM framework which provides for the identification and quantification of risks under a sufficiently wide range of outcomes;

> establishing and maintaining a risk tolerance statement which sets out its overall quantitative and qualitative risk tolerance limits;

> reviewing the ERM framework at least every quarter;

> undertaking risk and solvency assessments ("**ORSA**"), at least annually, to assess the adequacy of its risk management, as well as its current, and projected future, solvency position;

> identifying likely causes that may result in business failure through the use of reverse stress testing and taking the necessary actions to manage this risk; and

> Tier 1 insurers to submit its latest ORSA report, together with the minutes of the board's deliberation and approval of the report, to the MAS on an annual basis.

For further information, please contact Umesh Kumar +85 22842 4894 or Stephen Fletcher +85 22901 5028.

China – Legal Developments

CIRC consults on draft rule allowing insurance parent companies and holding companies to issue subordinated debt

On 22 January 2013, the China Insurance Regulatory Commission ("**CIRC**") released a consultation draft of amendments to the Measures for the Administration of Subordinated Debt of Insurance Companies, enabling insurance parent companies and holding companies to issue subordinated debt. This consultation paper is to address the funding needs of insurance companies in China. Currently only domestic insurance companies, joint venture insurance companies and wholly foreign-owned insurance companies (each of which must have an operating insurance business) may issue subordinated debt.

CIRC formally allows insurance asset management companies to launch asset management products

The CIRC released the Circular on the Pilot Scheme of Insurance Asset Management Companies Conducting Asset Management Product Business (the "**Circular**") on 4 February 2013, allowing insurance asset management companies ("**IAMCs**") to conduct asset management business in the PRC through launching investment products on a pilot basis. As of now, three

IAMCs (being PICC, Taikang and Taiping) have successfully filed their investment products with the CIRC. The release of the Circular indicates that the CIRC is gradually allowing the conversion of IAMCs from pure insurance asset management companies to comprehensive asset management platforms.

For further information, please contact Umesh Kumar +85 22842 4894 or Stephen Fletcher +85 22901 5028.

Linklaters

Recent Deals

Our recent deal experience in the sector (details of which we are able to disclose) include:

> advising Goldman Sachs International, Morgan Stanley Securities Limited and UBS Limited (as Bookrunners and Underwriters) on The Royal Bank of Scotland Group plc's £507 million sell-down of shares in Direct Line Insurance Group plc;

> advising Groupama SA on the sale of a 51% stake in The Bollington Group (Holdings) Limited to Talbot Deane Investments Limited, a management buy out vehicle;

> advising Amlin plc (acting through its Dutch subsidiary) on its purchase of the marine insurance business of RaetsMarine with activities in the Netherlands, UK, France and Singapore; and

> acting for the arranger and dealers in connection with establishing the AIA Group Limited US 2 billion Medium Term Note Programme and the issuance of US $500 million notes thereunder.

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