KENDALL FREEMAN

Run-off portfolios and part VII transfers

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An insurance business transfer scheme (a **Part VII Transfer**) under the Financial Services and Markets Act 2000 (**FSMA**) will only be sanctioned by the Court if, amongst other things, the transferee has the necessary regulatory authorisations and permissions to take on the business being transferred to it. Confirmation of this will need to be supplied to the Court at the final hearing to sanction the scheme in the form of a certificate from the regulator of the transferee. This will be the Financial Services Authority (**FSA**) where the transferee is UK authorised.

The FSA is of the view that in order to be the recipient of an insurance portfolio in a Part VII Transfer, the transferee must have permission to **effect contracts** of insurance in addition to **carrying out contracts** of insurance. As an insurance company in run-off will not generally have permission to effect contracts of insurance, if it is proposing to acquire a run-off portfolio pursuant to a Part VII Transfer, it will need to seek a variation of Part IV permission from the FSA to include the effecting permission. The effecting permission is simply required to acquire the run-off business pursuant to the Part VII Transfer and unless the run-off company concerned is intending to acquire insurance portfolios in the future pursuant to other Part VII Transfers, for the reasons set out below, it will need to be removed once the contemplated transaction is sanctioned by the Court.

Unlike the legislation preceding the FSMA, the Insurance Companies Act 1982, it is possible for a transferee to apply for the effecting permission having previously cancelled or withdrawn it. If the FSA considers that there is a business case to support the Part VII Transfer, it will process the application for variation of Part IV permission expeditiously. The FSA expects a simple, well presented case might take between four and six weeks to process.

The requirement of the FSA for additional permission does seem to present a further hurdle to be overcome in an already bureaucratic and lengthy process, especially where liaison with EEA regulators is required. Although the FSA expects a simple, well presented application for variation of Part IV permission might take between four and six weeks to process, the full form and content of the application is ultimately a matter for direction by the FSA, who will determine the additional information and documentation required on a case by case basis. As a minimum, the transferee will be required to complete an application form for variation of Part IV permission.

The FSA is unable to provide us with a copy of the legal opinion on which it is relying in reaching the view that the effecting permission is required to take on a book of run-off business pursuant to a Part VII Transfer. It has, however, been indicated to us that the FSA regards a Part VII Transfer as a statutory novation where the transferee accepts the business being transferred as if it had originally underwritten it. The FSA appears to be applying common law principles applicable to a novation in a contractual context to one in a statutory context. It is far from clear that these principles would apply in a statutory context and particularly so where the statutory mechanism involved derives from EU law where such common law principles may have no relevance at all. There are therefore arguments that may be made to challenge the FSA approach which, in reality, would only need to be made if the FSA's requirement to have the additional permission presents an impediment to run-off companies seeking to acquire run off portfolios or otherwise impacts upon their competitive position.

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