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Briefing note

International Regulatory Update

10 – 14 March 2014

IN THIS WEEK'S NEWS

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

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- Recent Clifford Chance Briefings: Solvency II Update; the US Foreign Corrupt Practices Act; and more. Follow this link to the briefings section.

CRR/CRD 4: EU Commission adopts Regulatory Technical Standards

The EU Commission has adopted a package of Regulatory Technical Standards (RTS) needed to implement provisions of the Capital Requirements Regulation and Directive (CRR/CRD 4). The nine RTS define the ways in which competent authorities and market participants must, amongst other things, handle disclosures linked to securitisation instruments, measure potential losses from derivative positions and counterparty failure, as well as specifying the types of instruments that can be used for paying bonuses.

In particular, the Commission has adopted RTS:

- determining proxy spread and limited smaller portfolios for credit valuation adjustment risk;
- specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk;
- specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration;
- for assessing the materiality of extensions and changes of the Internal Ratings Based Approach and the Advanced Measurement Approach;
- specifying the information that competent authorities of home and host Member States supply to one another;
- for the definition of market;
- defining non-delta risk of options in the standardised market risk approach;
- further defining material exposures and thresholds for internal approaches to specific risk in the trading book; and
- for determining what constitutes the close correspondence between the value of an institution's covered bonds and the value of the institution's assets.

The EU Parliament and the Council have one month to exercise their right of objection, with the possibility to extend this period for a further two months at their initiative. Following the expiry of this objection period, the RTS will be published in the Official Journal and will enter into force on the twentieth day following the date of their publication.

The Commission has also published tables showing the state of play on the large number of regulatory and implementing technical standards that are provided for in CRR and CRD 4. The tables indicate at which stage in the process of adoption each technical standard currently is (EBA, Commission, Parliament/Council, or publication in the Official Journal) and on what date the next step in the process is expected.

In addition, EU Commission Delegated Regulation No 241/2014 of 7 January 2014 supplementing the CRR with regard to regulatory technical standards for own funds requirements for institutions has been published in the Official Journal. The Delegated Regulation will enter into force on 3 April 2014.

EU Commission adopts Delegated Regulation on publication of supplements to prospectus

The EU Commission has adopted a Delegated Regulation supplementing the Prospectus Directive with regard to regulatory technical standards for publication of supplements to the prospectus. The Delegated Regulation specifies situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published.

The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal.

EMIR: EU Commission adopts Delegated Regulation on penalties imposed on trade repositories by ESMA

The EU Commission has adopted a Delegated Regulation supplementing the European Market Infrastructure Regulation (EMIR) which specifies the rules of procedure to be followed by the European Securities and Markets Authority (ESMA) in the exercise of its power to impose fines or periodic penalty payments on trade repositories, including rights of defence for trade repositories subject to a sanctioning procedure.

EU Parliament plenary session adopts Omnibus II

The EU Parliament's plenary session has adopted the Omnibus II Directive, which complements the Solvency II Directive and finalises the new framework for insurance regulation and supervision in the EU. The directive still needs to be formally adopted by the Council and published in the Official Journal.

The amendments introduced by Omnibus II include the provision of specific tasks for the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). They clarify the role of EIOPA in ensuring harmonised technical approaches on the calculation of technical provisions and capital requirements.

The Commission will now prepare the next stage of implementation of Solvency II, which will be the adoption of a Commission Delegated Act containing detailed implementing rules planned for Summer 2014. EIOPA is also working on a package of implementing technical standards to ensure the application of Solvency II on 1 January 2016.

EU Parliament sets out recommendations for review of European System of Financial Supervision

The EU Parliament's plenary session has adopted a resolution with recommendations to the EU Commission on the review of the European System of Financial Supervision (ESFS). Amongst other things, the Parliament recommends:

- requiring the Commission where it does not endorse the draft technical standards proposed by the European Supervisory Authorities (ESAs) to publish its reasons and fully evidenced cost-benefit analysis to justify the decision;
- enhancing the balance in the supervision of the three sectors by fostering the role of the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) in order to avoid banking-oriented regulation being adapted and applied to other sectors inappropriately;
- enhancing the investigatory powers of the ESAs and increasing their resources in order to directly monitor the appropriate implementation of rules derived from legal acts and the compliance with other decisions adopted under the EU legal framework;
- introducing direct supervision, including stress tests, by the ESAs of highly integrated pan European entities or activities, giving ESMA and EIOPA the power, the mandate and the resources to perform these activities and to monitor the consistency of the relevant recovery and resolution planning;
- giving the European Banking Authority (EBA) the power, the mandate and the resources to develop measures to identify new risks for consumers in the banking sector;
- strengthening the legal basis for the ESAs' work on consumer protection, by bringing legislation containing consumer protection measures into the ESAs' scope of action; and
- giving the ESAs a mandate and the power to set standards for national complaints handling and the collection of complaints data.

The Parliament has called on the Commission to submit legislative proposals for the revision of the ESFS by 1 July 2014.

EU Parliament votes on proposed new Anti-Money Laundering Directive

The EU Parliament's plenary session has voted on the proposed directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (AMLD).

Under the AMLD, as amended by MEPs, public central registers would list information on the ultimate beneficial owners of companies, foundations, holdings and trusts. EU Member States would have to make registers publicly available following prior identification of the person wishing to access the information through basic online registration.

The proposed rules would require banks, financial institutions, auditors, lawyers, accountants, tax advisors and real estate agents, among others, to be more vigilant about suspicious transactions made by their clients.

The amended AMLD provides for a risk-based approach, to enable Member States to better identify, understand and mitigate money laundering and terrorist financing risks. The Parliament also voted on the Transfer of Funds Regulation, which aims to improve the traceability of payers and payees and their assets.

The Parliament voted its first reading of the proposed legislation in order to consolidate the work done so far and hand it over to the next Parliament. This ensures that the MEPs newly elected in May 2014 can decide not to start from scratch, but instead build on work done during the current term when they begin negotiating the legislation with the EU Commission and the Council in the second half of 2014.

Payment services: ECON Committee publishes reports on PSD 2 and proposed regulation on interchange fees for card-based payment transactions

The EU Parliament's Economic and Monetary Affairs (ECON) Committee has published its reports on the proposed regulation on interchange fees for card-based payment transactions and on the proposal for a directive on payment services in the internal market (PSD 2).

Banking Union: ECOFIN Council calls for agreement on single resolution mechanism

The Economic and Financial Affairs (ECOFIN) Council has revised the mandate given to the Council Presidency for negotiations with the EU Parliament on the establishment of a single resolution board and a single fund for the resolution of banks.

The Council has called on the negotiators to reach agreement on the proposed single resolution mechanism (SRM) in time for the Parliament's plenary session on 14 to 17 April, in order to enable the proposed regulation to be adopted before the end of the Parliament's current legislature in May 2014.

In December 2013, the Council agreed on a general approach involving both a draft regulation on the SRM and a commitment to negotiate, by 1 March 2014, an intergovernmental agreement on the functioning of the single resolution fund. Work has since continued on two tracks, with seven political trilogues held with the Parliament on the proposed regulation and six meetings of an intergovernmental conference on the single resolution fund. The next trilogue is scheduled for 12 March.

Under the Council's general approach, the SRM would enter into force on 1 January 2015, whereas functions relating to the bail-in of shareholders and creditors and concerning resolution would apply from 1 January 2016. The SRM is intended to cover all Member States participating in the SSM, namely the euro-area countries and those non-eurozone countries that decide to join.

UCITS V: EU Council publishes final compromise text

The EU Council has published the final compromise text for the proposed directive amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities as regards depositary functions, remuneration policies and sanctions (UCITS V). The text reflects the provisional agreement reached by EU Parliament and Council negotiators on 25 February 2014.

The Permanent Representatives Committee is expected to approve the text shortly, and to indicate to the EU Parliament that, should the Parliament adopt the text at its first reading (subject, if necessary, to revision of that text by the legal linguists of both institutions), the Council would approve the text and UCITS V would be adopted in that wording.

Amongst other things, the proposed directive introduces specific provisions on the depositary's safekeeping and oversight duties, and defines the conditions in which safekeeping duties can be delegated to a sub-custodian. It sets out a list of entities that are eligible to act as UCITS depositaries, and clarifies the depositary's liability in the event of the loss of a financial instrument held in custody. It also includes provisions on redress.

As concerns remuneration, the proposed directive introduces a requirement for the UCITS management company to implement a policy that is consistent with sound risk management and complies with minimum principles. Fund managers would be required not to take investment risks beyond what is accepted by their UCITS investors. At least half of the variable part of their remuneration would be paid in the assets of their UCITS, unless the management of UCITS accounts for less than half of the total portfolio. Payment of at least a further 40% of this variable remuneration would be deferred for at least 3 years, to encourage managers to take a long-run view. On sanctions, it lists the main breaches to Directive 2009/65/EC and lays down the administrative sanctions and measures that the authorities should be empowered to apply.

Financial conglomerates: ESAs consult on convergence of supervisory practices relating to consistency of supervisory coordination arrangements

The Joint Committee of the European Supervisory Authorities (ESAs) has launched a public consultation on its draft guidelines on the convergence of practices aimed at ensuring consistency of supervisory coordination arrangements for financial conglomerates. The guidelines are intended to enhance the level playing field in the financial market and reduce administrative burdens for firms and supervisory authorities. Their objective is to clarify and enhance cooperation between national competent authorities on cross-border groups that have been identified as financial conglomerates.

The draft guidelines focus on how authorities should cooperate in order to achieve a supplementary level of supervision of financial conglomerates. This is intended to address loopholes in present legislation, as prescribed by the Financial Conglomerates Directive.

In particular, they cover:

- the mapping of the financial conglomerate structure and written agreements;
- the coordination of information exchange, supervisory planning and coordination of supervisory activities in emergency situations;
- the supervisory assessment of financial conglomerates; and
- other decision-making processes among the competent authorities.

Comments are due by 12 June 2014. The Joint Committee of the ESAs expects to publish the final guidelines in the second half of 2014.

CRR/CRD 4: EBA consults on draft technical standards on data waiver

The EBA has launched a consultation on draft Regulatory Technical Standards (RTS) on the conditions according to which competent authorities may grant institutions permission to use relevant data covering shorter time periods (data waiver permission) when estimating risk parameters.

When using the Internal-Ratings-Based approach (IRB) to estimate risk parameters such as the probability of default, the loss given default and the conversion factor, institutions may ask competent authorities to use shorter data series, namely data covering a period of minimum two years instead of the required five years.

The use of the waiver is a supervisory tool that may be used to encourage the migration of some institutions to the IRB approach, which is considered more risk-sensitive than the Standardised Approach. The proposed RTS specify the conditions to be met by institutions when asking authorities permission to apply this data waiver.

Comments are due by 7 June 2014.

IOSCO consults on prudential standards in securities sector

The International Organization of Securities Commissions (IOSCO) has published a consultation report which sets out a comparative analysis of the key prudential/capital frameworks for securities firms. The report seeks to highlight similarities, differences and gaps among the different frameworks. IOSCO's objective is to update its 1989 Report on Capital Adequacy Standards for Securities Firms based on the issues identified in the consultation report. The report's comparative analysis focuses on the net capital rule (NCR) approach, in particular the US approaches, and the Capital Requirements Directive (CRD), which is founded on the Basel Committee approach. While focusing on those two main prudential frameworks, the report also recognises relevant national variations.

Comments are due by 10 June 2014.

Bail-in: HM Treasury consults on three draft Orders required for implementation

HM Treasury has launched a consultation on three draft Orders required for the implementation of the bail-in powers introduced by the Financial Services (Banking Reform) Act 2013. In particular, they cover:

- the application of bail-in to building societies;
- the safeguards to protect certain financial arrangements from bail-in powers; and
- the mandatory compensation arrangements to ensure no creditor is left in a worse position following bail-in than they would have been in insolvency.

The consultation also seeks industry views on three other issues:

- a proposal to align the creditor hierarchy of banks and building societies through early transposition of the depositor preference provisions in the Bank Recovery and Resolution Directive (BRRD);
- a proposal to implement changes to the Financial Collateral Arrangements Directive (FCAD) as set out in the BRRD; and
- applying the bail-in tool to banking group companies.

Comments are due by 7 May 2014.

Bank of England consults on bonus clawback

The Bank of England has published a consultation paper (CP6/14) on proposals to require all firms authorised by the

Prudential Regulation Authority (PRA) to amend employment contracts to ensure bonus awards that have been vested can be clawed back from individuals where necessary. The Bank of England already has powers to require firms to stop payment of unvested bonuses, called malus.

The conditions in which vested remuneration would be clawed back under the proposals in CP6/14 are:

- there is reasonable evidence of employee misbehaviour or material error;
- the firm or the relevant business unit suffers a material downturn in its financial performance; or
- the firm or the relevant business unit suffers a material failure of risk management.

Consistent with the rules on malus, clawback should not be limited to employees directly culpable of malfeasance. For example, in cases involving a material failure of risk management or misconduct, firms should consider applying clawback to those employees who:

- could have been reasonably expected to be aware of the failure or misconduct at the time but failed to take adequate steps to promptly identify, assess, report, escalate or address it; or
- by virtue of their role or seniority could be deemed indirectly responsible or accountable for the failure or misconduct, including senior staff in charge of setting the firm's culture and strategy.

The proposed rules would come into force on 1 January 2015 and clawback could be applied to awards made before that date but which vest after that date, subject to a six year time limit due to the statute of limitations for contracts.

Comments are due by 13 May 2014.

PRA sets out strategy for 2014/15

The Prudential Regulation Authority (PRA) has published its statement of strategy for 2014/15, which sets out the following aims:

- to continue to implement the forward-looking, judgement-based regulatory regime;
- to continue to implement changes to domestic, European and international regulation, including the Financial Services (Banking Reform) Act 2013;
- to influence, devise and implement policy to advance structural reform in banking, resolution policy, the secondary competition objective, and other elements of post-crisis standard setting;
- to contribute towards delivering the Financial Policy Committee's macro-prudential objectives;
- to ensure the PRA has the right people to meet its statutory objectives; and
- to ensure the PRA has the right infrastructure and governance to meet its statutory objectives.

BaFin issues new circular on anti-money laundering requirements

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) (BaFin) has published a new circular on certain requirements under the German Anti-Money Laundering Act (Geldwäschegesetz).

In particular, the circular deals with the requirement under section 11 para 1 sentence 1 of the Anti-Money Laundering Act to report transactions if there are facts which give rise to the suspicion that the counterparty may conduct money laundering in connection with that transaction. The circular provides guidance on the level of certainty which is required to trigger this reporting obligation and on the internal organisational procedures which institutions subject to the Anti-Money Laundering Act are required to establish.

The circular was published on 5 March 2014 and became effective with immediate effect.

BaFin issues new explanatory note on its Ordinance on Remuneration Systems

BaFin has published an explanatory note which provides guidance on certain provisions of the Ordinance on the Supervisory Requirements for Institutions' Remuneration Systems (Institutsvergütungsverordnung).

The German Act on the implementation of the Capital Requirements Directive (CRD 4) amended the provisions on remuneration policies of credit institutions and investment firms contained in the German Banking Act (Kreditwesengesetz), effective from 1 January 2014. The Ordinance, which also became effective on 1 January 2014, contains further details on these new remuneration provisions.

BaFin publishes updated guidance note on deposit business

BaFin has published an updated version of its guidance note on deposit business (Merkblatt – Hinweise zum

Tatbestand des Einlagengeschäfts). The previous version was dated 4 August 2011.

Pursuant to section 1 para. 1a, sentence 2 no. 1 of the German Banking Act (Kreditwesengesetz), 'deposit business' (Einlagengeschäft) is defined as 'the acceptance of funds as deposits or of other unconditionally repayable funds from the public, unless the claim to repayment is securitised in the form of bearer or order bonds, irrespective of whether or not interest is paid (deposit business)'.

The guidance note provides guidance on each element of this definition and on certain exemptions from the scope of licensable deposit business.

Dutch Central Bank publishes supervisory strategy for 2014-2018

The Dutch Central Bank (DNB) has published its Supervisory Strategy 2014–2018, in which it sets out its views on financial supervision for the coming years. According to the DNB, a principal challenge will be that banks must continue to work for increased buffers and a stable funding profile. The report notes that the complexity of banks will be decreased, with more focus on recovery and resolution plans on bail-in principles. It further notes that life insurers will have to make every effort in order to reduce claim risks in connection with investment-linked policies, and that pension funds must improve their cost-efficiency. According to the DNB, many pension fund boards are under par as regards professionalism and expertise, especially on the subjects of asset management and risk management.

The DNB perceives four supervisory areas that will require additional focus for the next few years. The first is common European banking supervision, led by the ECB. Secondly, the DNB intends to emphasise building on its supervisory approach implemented in the past few years, which involves work on a new system for the disclosure, analysis and reporting of supervision data, which the DNB will use to conduct more thorough audits at institutions. Thirdly, the DNB plans to spearhead integrity supervision of financial institutions. In addition to its regular preventative supervision, the DNB will enhance its alertness to integrity incidents by providing more in-depth training to its supervisory staff and by combining and exchanging information more effectively, both internally and with others, such as public prosecutors and other supervisory authorities. Finally, the DNB intends to steer towards greater transparency on supervision.

HKMA issues circular on regulatory requirements governing sale of foreign exchange accumulators and non-leveraged RMB-linked deposits by authorised institutions

The Hong Kong Monetary Authority (HKMA) has issued a circular to authorised institutions to provide guidance and clarification on the regulatory requirements governing the sale of foreign exchange accumulators and non-leveraged renminbi (RMB)-linked deposits by authorised institutions. In particular, the circular provides guidance and clarification on the:

- framework for assessing customers' expected exposure to foreign exchange accumulators;
- treatment of foreign exchange accumulators for hedging purposes;
- sale of foreign exchange accumulators to corporate customers;
- classification of foreign exchange accumulators; and
- risk disclosure for roll-over and repeated placement of non-leveraged RMB-linked deposits.

The HKMA has advised authorised institutions to put in place adequate controls to ensure compliance with applicable regulatory requirements.

Bank of Korea and Bank Indonesia sign bilateral local currency swap arrangement

The Bank of Korea and the Bank Indonesia have signed an agreement to establish a bilateral local currency swap arrangement. The arrangement allows for the exchange of local currencies between the two central banks of up to KRW 10.7 trillion or IDR 115 trillion. The facility will be effective for a period of three years, and could be extended by mutual consent of both sides.

The arrangement is designed to promote bilateral trade and further strengthen financial cooperation for the economic development of the two countries. In particular, the arrangement is intended to ensure the settlement of trade in local currency between the two countries even in times of financial stress to support regional financial stability.

FSS to strengthen consumer protection in high-risk financial investment

As part of an effort to strengthen financial consumer protection, the Financial Supervisory Service (FSS) has announced that the prevention of financial products mis-selling will be its top priority in 2014. A study of banks' selling of financial investments showed that many investors chose investments with greater risk than they are willing to take. Accordingly, the FSS intends to improve the way high-risk investments are being promoted and effectively protect financial consumers by helping them choose investments appropriate for their risk tolerance level.

Firstly, the FSS will strengthen on-going monitoring, mystery shopping and on-site examinations of banks to prevent complaints related to mis-selling in a pre-emptive manner when the risk levels frequently exceed investors' risk tolerance, and the ratio of high-risk investments and high-risk appetite investors is significantly higher than the industry average.

Secondly, selling high-risk investments will need a prior approval of a branch manager, as well as a statement signed by an investor indicating that he/she has selected investments with higher risk than his risk tolerance and accepted the risks. In particular, banks will be encouraged to refrain from selling an investment product with a risk level much higher than their risk tolerance level.

In addition, the FSS has indicated that the investment profile questionnaire, a financial tool used to gauge an investor's risk tolerance category, will be revised for clarity in its questions and assessment criteria to better reflect investors' propensity for risk. Investor risk tolerance and asset classification categories and terminologies will also be revised for standardisation, minimising confusion to investors when making an investment decision.

MAS to regulate virtual currency intermediaries for money laundering and terrorist financing risks

The Monetary Authority of Singapore (MAS) has announced that it will regulate virtual currency intermediaries in Singapore to address potential money laundering and terrorist financing risks.

The MAS notes that, given their anonymous nature, virtual currency transactions are particularly vulnerable to money laundering and terrorist financing risks. To address this, the MAS will introduce regulations to require virtual currency intermediaries that buy, sell or facilitate the exchange of virtual currencies for real currencies to verify the identities of their customers and report suspicious transactions to the Suspicious Transaction Reporting Office. According to the MAS, the requirements will be similar to those imposed on money changers and remittance businesses who undertake cash transactions.

Singapore, like most jurisdictions, does not regulate virtual currencies per se, as they are not considered as securities or legal tender. The MAS' regulation of virtual currency intermediaries pertains specifically to the money laundering and terrorist financing risks they pose. It does not extend to the safety and soundness of virtual currency intermediaries nor the proper functioning of virtual currency transactions. The MAS has further indicated that investors in virtual currencies will not have the safeguards that investors in securities enjoy under the Securities and Futures Act and the Financial Advisers Act.

CFTC provides time-limited no-action relief to certain affiliated counterparties

The Commodity Futures Trading Commission (CFTC) has announced that its Divisions of Clearing and Risk (DCR) and Market Oversight (DMO) have provided time-limited no-action relief to certain affiliated counterparties for the clearing and trade execution requirements.

The DCR has issued a no-action letter (14-25) extending the time-limitation contained in the alternative compliance frameworks for the clearing requirement available to certain affiliated counterparties pursuant to CFTC regulation 50.52(b)(4)(ii)-(iii). In addition, the DMO has issued another no-action letter (14-26) providing time-limited no-action relief from the requirements of the trade execution requirement in Commodity Exchange Act (CEA) section 2(h)(8) to Eligible Affiliate Counterparties, as defined in CFTC regulation 50.52(a), that engage in swap transactions with one another that involve a swap subject to the trade execution requirement.

For the exemption from the clearing requirement, DCR's no-action letter (14-25) extends the 11 March 2014 date for Eligible Affiliate Counterparties that are otherwise eligible to use the alternative compliance frameworks until 31 December 2014.

In order to be eligible for this relief:

- the Eligible Affiliate Counterparties claiming the Inter-Affiliate Exemption otherwise satisfy all of the requirements of Commission regulation 50.52;
- a counterparty to the swap must not be located in a non-US jurisdiction in which the Commission has determined a comparable and comprehensive clearing requirement exists; and
- the Eligible Affiliate Counterparties electing the relief provided by this no-action letter shall promptly provide to the DCR, upon request, documentation regarding their compliance with any aspect of the no-action letter and Commission regulation 50.52.

RECENT CLIFFORD CHANCE BRIEFINGS

Solvency II Update – European Parliament Approves Omnibus II Directive

On 11 March 2014, by 560 votes to 113, the European Parliament approved the Omnibus II Directive. This is an important milestone on the path to Solvency II implementation and provides (after the agreement at the Trialogue meetings in November 2013) some further certainty around the timing and shape of the Solvency II regime.

This briefing provides an update on where we are now in the Solvency II implementation process and the anticipated next steps.

http://www.cliffordchance.com/briefings/2014/03/solvency_ii_update-europeanparliamentapprove.html

Why, whether, and when the FCPA matters in capital market transactions – The Asian perspective

Investment banks are increasingly concerned about corruption liability arising from issuers for which they structure and execute capital markets transactions. Underwriters in Asian transactions demand, as a precondition to a securities offering, that issuers certify their compliance with the US Foreign Corrupt Practices Act (FCPA). This is the case whether or not the transaction is registered with the US Securities and Exchange Commission (SEC) or if the underwriter acts as the initial purchaser in an exempt transaction. Their concern arises even if the Asian issuer is not subject to the FCPA's jurisdiction.

This briefing explains why, despite the above, the FCPA matters in these transactions.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/03/why_whether_and_whenthefcpamattersi.html

Recent Updates on the Civil Code Reform

Japan is in the process of carrying out its first comprehensive reform of contract law (and the relevant general rules) since the enactment of the Civil Code in 1896. As it covers a broad range of legal topics, the reform will affect many types of contracts such as share purchase agreements, construction contracts, loan agreements and general terms and conditions of transactions with consumers (e.g. terms of accounts). The reform will have a far-reaching impact on the Japanese legal and business community, from lawyers and in-house lawyers to business persons involved with contracts and legal matters.

This briefing provides an overview of the upcoming reform, outlining the envisaged timeline for those changes and highlighting some major areas which will be affected by the reform.

http://www.cliffordchance.com/briefings/2014/03/recent_updates_onthecivilcodereform.html

Alteco – Madrid court of appeal reverses first instance decision to block enforcement of share pledge by way of interim injunction

Alteco is a family owned investment vehicle which acquired a significant stake in the French company Gecina S.A. using a loan granted by a syndicate of lenders. The security package of the loan included a share pledge governed by the Luxembourg law implementing the European Financial Collateral Directive (47/2002), the custodian of the shares being an entity based in Luxembourg. On 3 March 2014, the Madrid court of appeal reversed the first instance decision to block enforcement of the share pledge by way of an interim injunction.

This briefing discusses the court of appeal's decision.

http://www.cliffordchance.com/publicationviews/publications/2014/03/alteco_madrid_courtofappealreversesfirs.html

Radical changes in the regime governing refinancing agreements aimed at avoiding insolvency proceedings

Royal Decree Law 4/2014, of 7 March, makes significant amendments to the Spanish Insolvency Law that affect refinancing transactions in particular. Most of the amendments come into force immediately.

This briefing discusses the amendments.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/03/radical_changes_intheregimegovernin.html

Delaware Court of Chancery provides guidance on standards of review and remedies applicable in controlling stockholder take-private transactions

A recent decision of the Delaware Chancery Court, 'In re Orchard Enterprises, Inc. Stockholder Litigation, C.A. No. 7840-VCL (Del. Ch. Feb. 28, 2014)', contains an extensive and helpful discussion of the law applicable to take-private transactions initiated by controlling stockholders.

Notably, the Court in Orchard followed recent Chancery Court decisions in holding that the business judgment standard of review potentially can apply to controlling stockholder take-private transactions, but only if several requirements are satisfied. If any of the requirements is not satisfied, the default standard applicable to controlling stockholder take-private transactions - the entire fairness standard - will apply instead. The Court's opinion provides guidance on the application of the entire fairness standard. The Court discussed the flexibility that is available to it in crafting remedies when a breach of fiduciary duty is found following a challenge to this type of transaction. The remedies available include 'quasi-appraisal damages' and also potentially greater 'rescissory damages.'

This briefing discusses this decision.

http://www.cliffordchance.com/briefings/2014/03/delaware_court_ofchanceryprovidesguidanceo.html

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