Securities Finance 2020

Contributing editor
Andrew Pitts

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2004
Seventeenth edition
ISBN 978-1-83862-400-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Securities Finance 2020

Contributing editor
Andrew Pitts
Cravath, Swaine & Moore LLP

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Securities Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath, Swaine & Moore, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
March 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview 3
Mark Greene, Andrew Pitts and George Stephanakis
Cravath, Swaine & Moore LLP

Austria 6
Christoph Moser and Angelika Fischer
Weber & Co

Germany 15
Dr Andreas Fillmann
Squire Patton Boggs

Japan 30
Motoki Saito
Nagashima Ohno & Tsunematsu

Luxembourg 36
Denis Van den Bulke
Vandenbulke

Monaco 46
Olivier Marquet and Anne-Fleur Wagler
CMS

Norway 49
Bjarne Rogdaberg
Schjødt

Qatar 55
Matthew Heaton and Frank Lucente
Al Tamimi & Company

South Africa 59
David Yuill, Ezra Davids and Ryan Wessels
Bowmans

United Kingdom 68
Jim Ho and Ferdisha Snagg
Cleary Gottlieb Steen & Hamilton LLP

United States 77
Mark Greene, Andrew Pitts and George Stephanakis
Cravath, Swaine & Moore LLP

Japan

Motoki Saito
Nagashima Ohno & Tsunematsu

LEGAL AND REGULATORY FRAMEWORK

Laws and regulations

1 What are the relevant statutes and regulations governing securities offerings?

The directly relevant legislation on securities offerings is the Financial Instruments and Exchange Act (FIEA) and the Enforcement Order and related Cabinet Orders thereunder.

Regulator

2 Which regulatory authority is primarily responsible for the administration of those rules?

The Financial Services Agency (FSA) is primarily responsible for the administration of these rules, and delegates its powers under Japanese law to each local finance bureau of the Ministry of Finance for the registration of disclosure documents, including the Securities Registration Statement; and to the Securities and Exchange Surveillance Commission for inspections of securities companies, daily market surveillance and investigations of criminal offences. The FSA has issued guidelines concerning corporate disclosure and certain other matters for the interpretation of the FIEA and related regulations.

PUBLIC OFFERINGS

Mandatory filings

3 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Offerings (whether primary or secondary) of securities may not be made without filing a Securities Registration Statement (SRS) with the competent local finance bureau, unless exempted from the registration requirements under the Financial Instruments and Exchange Act (FIEA). The FIEA contains two broad classifications of securities: clause I securities and clause II securities. Clause I securities include, among others, equity shares of companies, corporate bonds, government bonds and units of investment trusts or investment corporations. Clause II securities include, among others, beneficiary interests in trusts and collective investment schemes (as defined in the FIEA). Exemptions to registration requirements are different among these two classifications of securities.

Offerings of certain securities such as equity securities of Japanese companies or non-Japanese corporations may be made simultaneously with the listing of such equity securities on one or more stock exchanges in Japan, provided that the equity securities of non-Japanese corporate issuers listed on a stock exchange outside Japan may be 'publicly offered without listing' (POWL) in Japan. The securities offered by POWL are subject to ongoing disclosure requirements even though they are not listed.

An SRS shall contain, in a prescribed form, information concerning the securities offered (terms of securities and offering) and the issuer (including a description of its business, affiliated companies, officers and employees, assets, shareholdings, stated capital and financial statements) or, in the case of certain securities such as those relating to investment trusts and securitisation, the investment structure (including a description of the investment structure, investment policy and underlying assets, if any). Non-Japanese corporate issuers are also required to incorporate in the SRS an outline of the legal system and certain other information of its home jurisdiction. Presentation of financial statements made in accordance with certain overseas generally accepted accounting principles may be recognised, in which case material differences from Japanese generally accepted accounting principles for such financial statements should be described in the SRS. Before the amendments to the relevant Cabinet order, which took effect on 1 October 2012, an SRS of a non-Japanese corporate issuer must contain financial statements for the most recent five years, among which the most recent two years' financial statements must be audited by a chartered accountant. However, after the amendments to the Cabinet order, an SRS of a non-Japanese corporate issuer may contain three years' financial statements (all of which must be audited by a certified public accountant) instead of the five years' financial statements. The information required for the SRS is generally not different for debt and equity or primary and secondary offerings except for the information concerning the securities offered.

An issuer that has complied with certain conditions including the continuous disclosure obligation in Japan for one year or more may utilise the shelf registration under the FIEA, in which case the issuer may incorporate its continuously disclosed documents in the SRS by reference. A registered prospectus with content that is substantially the same as the SRS must be delivered to investors at or prior to the sale of the securities registered pursuant to the SRS, except for certain limited cases.

Review of filings

4 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

According to the usual practice, an issuer submits a draft Securities Registration Statement (SRS) to the local finance bureau for review or otherwise consults the local finance bureau in advance (normally two to four weeks before the filing date). No fee is payable for registration of the SRS. A non-Japanese issuer is required to appoint a Japanese resident as its attorney-in-fact to file an SRS. A certain procedure is required to prepare for filing for the first time through the Electronic

Disclosure for Investors' NETwork (EDINET), which is an electronic filing system similar to EDGAR in the United States.

Once the SRS is filed and becomes available for public inspection, solicitation can commence, but no binding contract of purchase of securities can be made unless and until the registration under the SRS becomes effective and the prospectus corresponding to the SRS, including the amendment, has been delivered to the investors. The SRS becomes effective on the 16th calendar day from the date of filing, in principle, or on the eighth day in the case of shelf registration. If the SRS is amended during such waiting period, another waiting period shall start from the date of such amendment. However, that waiting period may be shortened to make the registration effective in accordance with the Financial Instruments and Exchange Act and relevant guidelines.

Under the amendments to the disclosure guidelines issued by the Financial Services Agency, which took effect on 27 August 2014, the waiting period for certain well-known seasoned issuers (that have complied with the continuous disclosure obligation in Japan for one year or more, and both market capitalisation and annual trading volume of which shares are ¥100 billion or more) was lifted, and the SRS shall become immediately effective upon the filing of the SRS with respect to the shares listed in Japan or rights offering for such listed shares on the condition that dilution of the total outstanding shares as a result of the issuance of such shares is 20 per cent or less.

Publicity restrictions

5 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Publicity under certain circumstances could fall within pre-filing solicitation (gun-jumping) or a selling effort that triggers a violation of the Financial Instruments and Exchange Act. There was no safe-harbour rule applicable to publication that could be considered as solicitation of certain securities that would otherwise be subject to public offering rules. In general, any acts that attract the interest of investors on certain securities and promote them to purchase or acquire those securities may be considered to be a 'solicitation', which is subject to public offering rules. However, under the amendments to the disclosure guidelines issued by the Financial Services Agency, which took effect on 27 August 2014, the scope of publicity restrictions is clarified to some extent by giving several examples of acts that do not constitute 'solicitation'. Under the amended guidelines, a pre-hearing from professional investors or principal shareholders with some conditions (such as a confidentiality agreement), distribution of corporate information at least one month before the filing of the Securities Registration Statement (SRS) without reference to the offering, periodic publication of corporate information in the ordinary course of business without reference to the offering, and certain other acts are prescribed as those examples that do not constitute solicitation.

Underwriters are also, in principle, subject to the same restrictions on pre-filing solicitation and selling efforts. The Japan Securities Dealers Association has issued a guideline to its member securities companies as to the contents of a research report, establishment of an appropriate and reasonable internal review system and ensuring the independence of analysts. The amended disclosure guidelines, which took effect on 27 August 2014, also clarified an example where securities firms are allowed to issue research reports in the ordinary course of business on the condition that the securities firms have established an ethics screen to isolate their researchers from any unpublished information regarding pre-filing solicitation or selling efforts of certain securities.

Secondary offerings

6 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There is no major difference between primary and secondary offerings under the public offering rules of the Financial Instruments and Exchange Act except that the secondary offering of securities that have been already subject to continuous disclosure requirements is exempted from the filing of the Securities Registration Statement (SRS), in which case the delivery of a prospectus and the filing of a securities notification is required if the secondary offering of equity securities is conducted by insiders of the issuer (including the issuer, its subsidiaries, their directors and officers, shareholders holding 10 per cent or more of total voting rights of the issuer (principal shareholders)), securities firms that acquired such securities from the insiders for resale or underwriters of such securities having a standby commitment. Holders of shares have no pre-emptive rights in the case of listed Japanese companies.

The selling shareholder in a secondary public offering is jointly and severally liable with the issuer, directors, corporate auditors, certified public accountants and underwriters in the case of a material misstatement or omission in the SRS or the prospectus prepared by the issuer, unless the selling shareholder proves that it did not know, with due care having been taken, about such material misstatement or omission.

Settlement

7 What is the typical settlement process for sales of securities in a public offering?

The legislation to introduce paperless securities, the Act Concerning Book-Entry Transfer of Corporate Debt Securities and Stocks, etc, came into force in January 2009. Shares of Japanese corporations listed on any securities exchange in Japan automatically became paperless at that time.

At present, the transfer of equity securities of Japanese listed corporations or certain corporate bonds is effectuated by the proceedings under the book-entry transfer system operated by Japan Securities Depository Center Inc. In the case of bonds, the issuer shall choose at the time of issuance whether the bonds will be treated under the book-entry transfer system.

Settlement of the sale of securities subject to the book-entry transfer system in a public offering is achieved under the book-entry system and any investor who wishes to purchase the securities so offered must maintain a trading account to own the securities at account management institutions under the system, such as securities firms or banks. The securities offered will be recorded in the account of the investor on the designated delivery date after the investor has paid the purchase price through the relevant bank.

PRIVATE PLACINGS

Specific regulation

8 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Under the Financial Instruments and Exchange Act (FIEA), a private placement of clause I securities for a primary offering must satisfy the following requirements:

- the number of offerees in Japan is fewer than 50 (small number placement);
- offerees are limited to qualified institutional investors (QIIs) as designated under the FIEA (QII limited placement); or

- offerees are limited to professional investors as designated under the FIEA (professional investors limited placement).

Certain requirements to ensure the transfer restriction must also be met to avail the private placement exemption as described in the three points above. In addition, certain information prescribed by the FIEA and relevant orders thereunder, as well as those required by the stock exchange in which the securities are or will be traded, must be provided to the investors or publicly announced prior to the commencement of the offering.

The professional investors limited placement was introduced by an amendment of the FIEA and relevant orders thereunder in 2008. This amendment aimed at creating a new securities market targeting professional investors.

None of the exemptions above is available to an offering of equity securities issued by a reporting company when the ongoing reporting obligation is triggered in relation to the same type of (underlying) shares. In addition, the small number placement or QII limited placement is not available for the same type of securities offered by way of the professional investors limited placement.

The number of offerees of the same kind of securities (as defined in a Cabinet order) offered within six months before the existing offering must be aggregated for the calculation of the number of offerees in a small number placement (integration rules). However, the number of QIIs is disregarded when certain selling restrictions are complied with in respect of those QIIs. An offering of options to subscribe or acquire shares of the issuing company only to directors, corporate auditors, officers and employees of the issuing company or its direct wholly owned subsidiaries may be made without filing a Securities Registration Statement (SRS) when certain conditions are met, even if such offering does not constitute a private placement. The Enforcement Order and related Cabinet orders under the FIEA were amended on 6 April 2011, and the exemption described above is now expanded to an offering of options to directors, corporate auditors, officers and employees of a second-tier subsidiary (ie, an entity that is directly and wholly owned by a direct wholly owned subsidiary) of the issuer, and these options are excluded from the integration rules described above.

The Enforcement Order and related Cabinet orders under the FIEA were further amended on 1 July 2019, and the exemption described above is now expanded to an offering of 'restricted stock' that satisfies certain conditions to directors, corporate auditors, officers and employees of a second-tier subsidiary (ie, an entity that is directly and wholly owned by a direct wholly owned subsidiary) of the issuer, and these stocks are excluded from the integration rules described above.

Before the amendments to the FIEA, which took effect on 1 April 2010 (the 2010 FIEA amendment), a secondary offering constituted a private placement unless the number of offerees of securities with uniform terms (such as selling price and closing date) was 50 or more. Under the 2010 FIEA amendment, a private placement of clause I securities for a secondary offering must satisfy the requirements of the small number placement, QII limited placement or professional investors limited placement. The respective requirements for each category are mostly the same as those for a primary offering described above except that the integration rules in a small number placement shall apply to offerees for a period of one month and that the total number of holders of the securities may not exceed 1,000 as a result of the small number placement of non-Japanese securities.

In addition, the following secondary offering transactions, among others, are exempted from the requirements for public offering:

- sale of securities through the market;
- sale of securities listed in Japan between securities firms or professional investors under certain conditions (eg, block trade);
- sale by non-Japanese securities firms to securities firms in Japan or QIIs or sale by securities firms or QIIs to other securities firms for resale of non-Japanese securities not subject to the transfer restriction of private placement;
- sale of securities not subject to the transfer restriction of private placements held by a seller other than insiders of the issuer (including the issuer, its subsidiaries, its principal shareholders and their directors and officers) or securities firms;
- sale of securities not subject to the transfer restriction between the insiders described in (4); and
- sale of securities to the issuer or for resale to the issuer.

Further, for a public offering, with a total value of less than ¥100 million (the value of the offering of the same type of securities made within one year before the existing offering must be aggregated for the calculation of such total value of the offering), no SRS needs to be filed. Instead, a simplified form of securities notification must be filed before the commencement of the offering (there is no waiting period for such procedure).

Under the 2010 FIEA amendment, for a secondary offering by securities firms of securities issued abroad or issued in Japan but with respect to which no solicitations were made in Japan (non-Japanese securities), no SRS needs to be filed even if such offering does not constitute a private placement, if the following conditions (non-Japanese securities secondary offering), among other conditions, are met:

- information on the sale price of such non-Japanese securities is easily available in Japan through the internet or other methods;
- such non-Japanese securities are listed on a designated non-Japanese exchange or continuously traded overseas, as the case may be; and
- the issuer's information (in Japanese or English) is publicly announced pursuant to regulations of non-Japanese exchange or applicable non-Japanese law, as the case may be, and easily available through the internet or other methods.

In the case of clause II securities, the primary or secondary offering of clause II securities constitutes a public offering when more than 50 per cent of the capital or assets of the collective investment schemes issuing such clause II securities will be invested in securities and the number of purchasers, not offerees, as a result of such offering will be 500 or more, whether they are QIIs or not.

Investor information

9 What information must be made available to potential investors in connection with a private placing of securities?

In the case of a private placement of securities, a document must be delivered to each investor at or prior to the time of sale stating certain items prescribed by the Financial Instruments and Exchange Act (FIEA) and relevant Cabinet orders. In general, such items include the disclaimer that no Securities Registration Statement has been filed for the placement, and the applicable transfer restriction, conditions or restriction of the rights as required under the FIEA on the relevant securities, unless the total amount of the placement (including private placements made within one month before the existing placement) is less than ¥100 million or disclosure as to the securities placed has already been made. This requirement is not applicable to a small number placement of shares. In respect of the professional investors limited placement, certain information about the securities as well as issuer information must be publicly announced upon or prior to the commencement of the placement. Securities firms that conduct a non-Japanese securities secondary offering must provide to the potential investors or publicly announce certain information about the securities and the issuer

upon or prior to the commencement of the placement subject to certain exceptions. Those securities firms are continuously required to provide or publicly announce certain information upon their customers' request or the occurrence of certain material facts subject to certain exceptions.

There is no other specific requirement under the FIEA on the information to be provided to potential investors in connection with a private placement.

Transfer of placed securities

10 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are transfer restrictions on the securities acquired in a private placement to the effect that the securities offered in a qualified institutional investor (QII) limited placement or a professional investors limited placement can only be transferred to QIIs or professional investors, as the case may be, and the securities offered in a small number placement must not be transferred to another, other than as a whole (unless the total number of bond certificates in the placement is less than 50 and cannot be further divided). Shares offered in a small number placement or clause II securities are not subject to any transfer restriction. Similar restrictions are applicable to private placements in a secondary offering under the 2010 Financial Instruments and Exchange Act (FIEA) amendment.

There was no mechanism to enhance the liquidity of securities sold in a private placement. However, upon the recent amendment to the FIEA, which aimed to create securities exchanges solely for professional investors, securities placed in a professional investors limited placement can be traded on such exchanges. At present, the Tokyo Stock Exchange operates the Tokyo Pro Market for professional investors in equity securities and the Tokyo Pro-bond Market for professional investors in debt securities.

OFFSHORE OFFERINGS

Specific regulation

11 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

There are no specific rules applied to offerings of securities outside Japan when the solicitation of the offer is made outside Japan, irrespective of the home jurisdiction of the issuer. Timely disclosure to the market or the filing of an extraordinary report required by the ongoing disclosure requirements in respect of such offering may be required if the issuer is a listed company or a reporting company in Japan, as the case may be.

PARTICULAR FINANCINGS

Offerings of other securities

12 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Exchangeable or convertible securities, warrants or depositary shares are, in general, treated as securities under the Financial Instruments and Exchange Act (FIEA) and identical regulation on the offering of securities shall apply.

For the offering of convertible securities or options to acquire or subscribe for shares, a small number placement is not available when the issuer is subject to an ongoing reporting obligation in relation to the underlying shares. Any additional payment required for the exercise of rights under the securities shall be aggregated for the calculation of the threshold offering value to be exempted from the Securities Registration Statement (SRS) filing.

To facilitate and promote the use of a rights offering as an alternative to a public offering of listed shares, the Cabinet order under the FIEA was amended with effect from 23 April 2010. Before the amendment, an SRS had to be filed, in principle, at least 26 calendar days before the record date for the rights offering. However, after the amendment, in the case of rights offering by way of an allotment of listed options to existing shareholders without contribution, the SRS becomes effective on the 16th calendar day from the date of filing, in principle, or on the eighth day with respect to shelf registration, as with a usual public offering. Further, under the amendments to the FIEA that took effect on 1 April 2012, where the options to be allotted to existing shareholders are or will be listed on a stock exchange, and certain information, including the fact that an SRS has been filed, is published in a newspaper, the issuer is not required to deliver prospectuses to prospective purchasers.

UNDERWRITING ARRANGEMENTS

Types of arrangement

13 What types of underwriting arrangements are commonly used?

'Firm commitment' underwriting is commonly used, in which underwriters usually agree to jointly and severally purchase securities from the issuer for resale to the public at a specified public offering price. The lead manager organises and manages an underwriting syndicate, and executes with the issuer an underwriting agreement on behalf of the syndicate.

Typical provisions

14 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

A typical underwriting agreement requires the issuer to indemnify the underwriters for any liability they may incur under the Financial Instruments and Exchange Act because of the Securities Registration Statement or a prospectus containing material misstatements or omissions.

A force majeure clause usually not only specifies force majeure events such as financial, political or economic crises, war or other national disasters, and government restrictions on the securities market in general, but also has a catch-all clause to cover any material adverse event on the offering and distribution of securities or dealings therein in the secondary market.

Commission and fees are, in general, payable upon a successful closing in the usual form of the underwriting agreement.

Greenshoes and overallotments are common. The amount of the greenshoes and overallotments must not exceed 15 per cent of the total number of shares to be offered in Japan under the regulations of the Japan Securities Dealers Association.

Other regulations

15 What additional regulations apply to underwriting arrangements?

An underwriter of securities is required to be registered under the Financial Instruments and Exchange Act (FIEA). The FIEA classifies financial businesses into four categories, and an underwriter of securities is required to be registered for the first-type financial instruments business, which requires the most stringent financial, personnel or internal

governance conditions as well as other matters. All financial institutions engaging in underwriting business are members of, and are subject to the rules of, the Japan Securities Dealers Association.

ONGOING REPORTING OBLIGATIONS

Applicability of the obligation

16 | In which instances does an issuer of securities become subject to ongoing reporting obligations?

A company becomes subject to ongoing reporting obligations if:

- its securities are listed on any stock exchange or registered with any over-the-counter market in Japan (other than the market limited to professional investors);
- it has filed or should have filed a Securities Registration Statement in relation to an offering of securities; or
- the number of holders of securities was 1,000 or more (in the case of equity shares) or 500 or more (in the case of collective investment schemes) at the end of certain designated fiscal years (this is applicable only to certain securities including equity shares or collective investment schemes and can be avoided under certain conditions).

Ongoing reporting obligations may be exempted upon approval by the local finance bureau when the company goes into liquidation proceedings, suspends its business for a considerable period or, in relation to the second condition above, the number of holders of securities becomes less than 25 at the time of filing the application for such approval or the end of the immediately preceding fiscal year or the number of holders of shares (which include shares and similar securities of non-Japanese issuers under the amendments to the relevant Cabinet order, which took effect on 26 August 2013) has been less than 300 at each end of the fiscal year for the past five years.

An issuer of securities offered by way of the professional investors limited placement must periodically provide certain information regarding its business to the investors or publicly announce them.

Information to be disclosed

17 | What information is a reporting company required to make available to the public?

The reporting company must file an annual securities report with the local finance bureau within three months (or six months in the case of non-Japanese corporations) of the end of each fiscal year. The information to be included in the securities report is basically identical to the issuer information for the Securities Registration Statement (SRS). The reporting company must also file a semi-annual report for the initial six-month period within three months of the end of such period, or quarterly reports described below.

Issuers of shares listed on any securities exchange in Japan (other than the market limited to professional investors), in general, are required to file quarterly reports within 45 days of the end of each quarterly fiscal period, except in certain limited cases. Such issuers must also file a certificate by representative directors and the chief financial officer, if any, confirming the lack of untrue statements in the annual or quarterly report and a report regarding the internal control system for financial reporting or other information to be disclosed together with the annual securities report. The reporting company must also file an extraordinary report without delay upon the occurrence of a material event, such as an overseas offering of its securities, a change of its parent company or major shareholders, the company's decision to implement a merger, a share-for-share exchange or a corporate split, or a disaster or litigation having a material effect on the company.

A non-Japanese corporation, if it has satisfied certain conditions, is able to file a disclosure document in English disclosed in accordance with the regulations in a non-Japanese jurisdiction instead of a securities report, when filed with a summary thereof and other supplementary documents in Japanese. This English language disclosure was not available for the purpose of the SRS, but, under the amendments to the Financial Instruments and Exchange Act that took effect on 1 April 2012, instead of filing an SRS in Japanese, a non-Japanese corporation, if it has satisfied certain conditions, is able to file a disclosure document concerning the issuer in English disclosed in accordance with the regulations in a non-Japanese jurisdiction, when filed with a summary thereof and other supplementary documents in Japanese as well as information concerning the securities (ie, the terms of securities and offering) in Japanese.

ANTI-MANIPULATION RULES

Prohibitions

18 | What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Financial Instruments and Exchange Act (FIEA) lists prohibited manipulative acts such as the sale of listed securities or trading derivatives in disguise and conspiracy with others to match orders, with an intent to mislead the market, or a series of manipulative transactions, the intentional dissemination of false or misleading statements, with an intent to induce market transactions. Those who violate these prohibitions owe civil liability to indemnify losses to the participant in the manipulated market, and may also be subject to criminal proceedings and forfeiture of the benefit from such acts, as well as an administrative surcharge. The FIEA recently broadened and strengthened the criminal sanction and administrative surcharges in relation to manipulative transactions.

PRICE STABILISATION

Permitted stabilisation measures

19 | What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Stabilisation activities are only permitted for the purpose of the facilitation of a public offering and are only permitted in stock exchanges when conducted in accordance with the Financial Instruments and Exchange Act (FIEA). The FIEA and the relevant orders prescribe the manner and conditions of permitted stabilisation activities. Stabilisation must be carried out by the underwriters of the relevant offering and other certain prescribed persons, the list of which is required to be submitted to the relevant securities exchanges. The fact that the stabilisation is contemplated must be stated in the relevant prospectus. The period for which the activities are permitted is, in general, after the date of pricing and up to the end of the subscription period. The price at which the stabilisation transaction can be carried out is also regulated by the FIEA and relevant ordinance.

LIABILITIES AND ENFORCEMENT

Bases of liability

20 | What are the most common bases of liability for a securities transaction?

The issuer, directors, executive officers, corporate auditors, certified public accountants, underwriters and selling shareholders (if any) are jointly and severally liable to any person who purchases securities when there is a material misstatement or omission in a Securities Registration

Statement (SRS) or registered prospectus. The issuer is strictly liable for material misstatements or omissions, but the others can avoid liability by proving that they did not know, after due care, of such misstatements or omissions. The Financial Instruments and Exchange Act shifts the burden of proof to the defendants for culpability as above and, in the case of the issuer, for the amount of damages caused by a misstatement or omission with a provision presuming such amount. Similar liability as with a registered prospectus is imposed on such use of any offering materials other than the prospectus.

21 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

In addition to civil liability, an issuer who filed an SRS with material misstatements or omissions may be subject to criminal proceedings (and, on conviction, imprisonment for up to 10 years or a fine of up to ¥10 million, or both, together with a fine of up to ¥700 million in the case of a company) and an administrative surcharge. Violations of other regulations under the Financial Instruments and Exchange Act, such as failing to file the SRS when required, selling securities within the waiting period or without delivering a registered prospectus, and regulation on fraudulent market transactions and stabilisation transactions, may also be subject to criminal proceedings and an administrative surcharge.

The underwriters would also be subject to administrative sanctions, such as the suspension of the whole or part of their business, should they act in violation of securities regulations.

UPDATE AND TRENDS

Proposed changes

22 Are there current proposals to change the regulatory or statutory framework governing securities transactions?

In November 2019, a bill to amend the Foreign Exchange and Foreign Trade Act (FEFTA) was passed to tighten regulations on inbound equity investment.

Under the FEFTA currently in effect, if a foreign investor, which is a defined term under the FEFTA, acquires shares of a Japanese corporation meeting certain criteria (ie, one listed on a stock exchange in Japan and engaging in certain designated business (restricted business)), and the foreign investor directly or indirectly holds 10 per cent or more of the issued shares of the relevant corporation as a result of that acquisition, in combination with any existing holdings, that constitutes an inward direct investment, and the foreign investor is required to file prior notification of the acquisition with the Minister of Finance and any other competent ministers. If this prior notification is filed, the proposed acquisition may not be consummated until 30 days after the date of filing, although this period may be shortened or extended at the discretion of the Ministry of Finance. 'Restricted business' includes business relating to national security, public policy and public safety, and, following the amendment of August 2019, business relating to the manufacture of devices and components related to information processing, the production of software related to information processing, and telecommunications services.

The November 2019 amendment includes the lowering of the threshold for the above-mentioned prior notification from 10 per cent to 1 per cent; changes to the definition of 'foreign investor' in the case of an acquisition by a partnership; expansion of the definition of 'inward direct investment' to include certain actions having material impact on the management of the company; and introduction of exemptions to the above-mentioned prior notification requirement for investment by a foreign investor that is deemed to pose no risk to national security. The details of the amendment will be set forth in Cabinet orders and have not yet been announced.

NAGASHIMA OHNO & TSUNEMATSU

Motoki Saito
motoki_saito@noandt.com

JP Tower
2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan
Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
www.noandt.com/en/index.html

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-400-2