FSA of Japan provides clarification regarding the application of tender offer rules

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Speedread

At the end of March 2010, the Financial Services Agency of Japan published its views (in Q&A format with additional commentaries) on the application of the tender offer rules contained in the Financial Instruments and Exchange Law (FIEL) to shares, call options and certain other securities (relevant securities). The views expressed by the FSA apply equally to acquisitions or offers of relevant securities , by or to, non-Japanese entities, as well as Japanese entities. This article sets out the key points from the FSA.

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The key points from the FSA are set out below.

M&A

Generally, there is no need to purchase by tender offer where either a company or a shareholder of such company receives relevant securities as a result of the entrance by the company into a merger, share exchange or other organisational-change type M&A transaction.

However, transfers relevant securities that are made in the course of an M&A transaction but which effectively constitute a negotiated sale and purchase of the relevant securities (for example, a company split under which relevant securities in a third company are the only transferred assets) are subject to the tender offer rules.

Exercise of options

Generally, the tender offer rules apply to the transfer of relevant securities under the exercise of a call or put option (the purchase of a call option itself is also subject to the tender offer rules but the sale of a put option is not). Though the FSA has stated that the tender rules "generally" apply in such situations, it has not clarified the circumstances in which they do not apply.

Indirect holdings of relevant securities

The tender offer rules will apply to the purchase of relevant securities in a company (even if not listed) which holds relevant securities in the target company, when both:

By taking into account the substance of the intermediate holding company and factors relating to substantial control, the purchase of the relevant securities is substantially the same as a purchase of relevant securities in the target company.

Other existing shareholders in the target company have not been provided with an opportunity to sell the relevant securities.

Redemption of partnership interests in kind

The making of distributions in kind of relevant securities that constitute partnership assets on dissolution of the partnership is not subject to the tender offer rules as long as the decision to distribute the relevant securities is not taken by the partner who receives them, but by the managing partner.

However, such a distribution will be subject to the tender offer rules where either:

The partner who accepts the distribution does so voluntarily (for example, after negotiation with the managing partner).

The partnership agreement originally provided that the partnership may acquire the relevant securities and distribute them to each partner.

The same treatment applies to the redemption of relevant securities in kind when a company dissolves.

Taking security interests in relevant securities

Granting of security interests. Taking security interests in relevant securities is generally not subject to the tender offer rules; provided that both:

In the case of an assignment for security, the assignee is in substance merely the holder of a security interest and not an ownership interest (for example, in the applicable book-entry system the assignee is described as a "special shareholder" on the assignment).

The granting of the security interest is not made to circumvent the tender offer rules.

Enforcement of (already granted) security interests. Enforcement of security interests by way of effecting:

Transfer of the ownership from the grantor to the security interest holder is not subject to the tender offer rules.

A sale of the ownership from the security interest grantor to a third party is subject to the rules.

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