New York
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Davis Polk

Davis Polk & Wardwell LLP
Izumi Garden Tower 33F
6-1, Roppongi 1-chome
Minato-ku, Tokyo 106-6033

(03) 5561 4421 tel
(03) 5561 4425 fax

MEMORANDUM

Date: February 2010

To: Interested Persons

Re: Form F-4 Registration of Japanese Business Combinations with the U.S. SEC under the U.S. Securities Act

Introduction

The topics of "F-4" registration and the "10% Rule" have attracted a great deal of attention recently, being covered by several memoranda in a leading Japanese financial publication.[1] Japanese companies are frequently surprised that a business combination entered into solely among Japanese companies might need to be registered with the U.S. Securities and Exchange Commission (the "**SEC**") before the transaction can be approved by target shareholders. As is often the case with hot topics like this, questions and confusion abound. This memorandum has been prepared to help answer many of these questions, clear up some of the confusion and to explain the F-4 registration process and its consequence for Japanese companies.

Before getting into too much detail, we would like to address a few fundamental questions.

- ***What types of transactions most often implicate "F-4" and the "10% Rule"?*** Business combinations structured as a merger or similar share-for-share exchange involving Japanese listed companies.

- ***What is "F-4"?*** F-4 is a form which may be used by a Japanese company or other foreign private issuer[2] to register with the SEC securities to be issued in a business combination under the U.S. Securities Act of 1933, as amended (the "**Securities Act**").

[1] *See, e.g.*, Nihon Keizai Shimbun, "Large Business Combinations: Any Legal Problems?" (July 27, 2009, pg. 14), "Submission of Financial Statements to the SEC: The 10% U.S. Shareholder Rule" (Mar. 13, 2009, pg. 14), "The Problem of Too Much Regulation by the U.S. Securities Act" (May 21, 2009, pg. 17).

[2] The term "**foreign private issuer**" means any foreign issuer, other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) more than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) the majority of the executive officers or directors are United States citizens or residents, or more than 50 percent of the assets of the issuer are located in the United States, or the business of the issuer is administered principally in the United States. (Rule 405 under the Securities Act.)

- ***What is the "10% Rule"?*** The 10% Rule generally refers to an exemption from SEC registration for mergers and similar share-for-share exchange transactions provided by Rule 802 under the Securities Act. The core issue as to the availability of this exemption is whether there are 10% or fewer U.S. beneficial owners of target's shares.

From these explanations, we hope it is apparent that this memorandum is not relevant for cash-only tender offers or acquisitions of private companies, and that we only intend to discuss U.S. legal issues arising in connection with Japanese merger-type transactions.

To make this memorandum accessible to a broader audience, we generally attempt to introduce fundamentals before elaborating on more complicated topics. We expect most Japanese companies that are registered with the SEC are already acquainted with most SEC rules and regulations that pertain to SEC registration. Readers already familiar with such rules and regulations may find parts of this memorandum to be somewhat basic. However, U.S. securities laws are vast and complicated, and we think sufficiently unfamiliar to most readers that we will assume little or no such familiarity.

In this memorandum we generally focus on requirements applicable to Japanese foreign private issuers that are not registered with the SEC, prefer not to be registered and do so only if necessary to execute a business combination. Japanese business combinations may involve an offer by one or more companies of their shares in exchange for shares of one or more other companies. In this memorandum, we refer to each company offering its shares as an "**acquiror**" and each company whose shares are being acquired as a "**target**". Because registration obligations ordinarily apply to the acquiror, we also refer to the acquiror as the "**registrant**" depending on the context.

In Part I, we explain the key sources of U.S. federal securities laws and how they operate to regulate even domestic-only business combinations. In Part II, we explain registration basics, timing and process. In Part III, we present the disclosure requirements of Form F-4. In Part IV, we describe certain actions that need to be taken in connection with preparation of Form F-4. In Part V, we discuss selected requirements which do not directly relate to the preparation of Form F-4, but which will be applicable once an entity becomes registrant. And, in Part VI, we explain certain requirements that continue after registration.

Part I. Background

In this section, we introduce the key sources of U.S. federal securities laws and how they operate to regulate business combinations, especially Japanese business combination transactions.

Key Sources of U.S. Federal Securities Laws

The Securities Act, the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), and the U.S. Sarbanes-Oxley Act of 2002 ("**SOX**") are key sources of U.S. federal securities laws. The Securities Act, which regulates offers and sales of securities, and the Exchange Act, which governs secondary market trading, were enacted to address inadequacies in U.S. securities market regulation in the wake of the stock market crash of 1929 and the Great Depression that ensued. SOX was enacted by the United States Congress to address inadequacies brought to light after the Enron scandal in 2001.

The SEC was established by the Exchange Act as an independent agency of the U.S. government to regulate U.S. securities markets and enforce U.S. federal securities laws. The SEC promulgates rules to effect and guidance to interpret the Securities Act, the Exchange Act and SOX.

Regulation of Business Combinations

Section 5 of the Securities Act requires registration with the SEC of any offer or sale of a security – unless an exemption is available. Rule 145(a) under the Securities Act extends the terms "offer" and "sale" to include mergers and other transactions involving the "exchange of securities" , if shareholders vote to approve the exchange or the transaction otherwise involves an investment decision, for example, the decision to exercise appraisal rights.

Section 5 does not specifically exclude offers or sales of securities conducted outside of the United States by non-U.S. companies. However, the SEC lacks authority under Section 5 to regulate such offers or sales unless such offers or sales have a requisite connection to the United States. This requisite connection to the United States is present if the transaction involves the use of "U.S. jurisdictional means" , a concept we explain later. For reasons we describe below, the use of U.S. jurisdictional means is unavoidable for most Japanese merger and similar share-for-share exchange transactions among Japanese listed companies, and these transactions are thus generally subject to Section 5.

On the other hand, business combinations that are structured as cash-for-stock transactions, or the functional equivalent, are generally not subject to SEC registration under Section 5. This is because Section 5 regulates "offers" and "sales" of securities, not cash purchases of securities.

Transactions Potentially Subject to Registration

The following Japanese business combinations involve an exchange of securities and are potentially subject to SEC registration. In this memorandum, we refer to these transactions as "**share exchange transactions**". The following list introduces typical share exchange transaction structures that are potentially subject to SEC registration:

- *Merger (Kyūshū Gappei)*: one company is merged into another company; the surviving company's shares are offered to the non-surviving company's shareholders;

- *Consolidation-Type Merger (Shinsetsu Gappei)*: two or more companies merge into a newly formed company; the shares of the newly formed company are offered to shareholders of the non-surviving companies;

- *Joint Share Transfer (Kyōdō Kabushiki Iten)*: two or more companies (the "**incorporators**") jointly form a new holding company to acquire all their shares; the holding company shares are offered to the incorporators' shareholders;

- *Independent Share Transfer (Tandoku Kabushiki Iten)*: one company (an "**incorporator**") forms a new holding company to acquire all of its shares; the holding company shares are offered to the incorporator's shareholders; and

- *Going-Private Share Exchange (Kabushiki Kōkan)*: a company acquires all the shares of another company in a "going-private" share exchange; the acquiror's shares are offered to target shareholders.

In this memorandum, each of the surviving company in a merger, the non-surviving company in a consolidation-type merger, the newly formed holding company and the incorporators in a joint or independent share transfer and the acquiror in a going-private share exchange is referred to as an "**acquiror**", and each of the non-surviving company or companies in a merger, the incorporators in a joint or independent share transfer and the target in a going-private share exchange is referred to as a "**target**". In the case of a consolidation-type merger and a joint or independent share transfer, each of the non-surviving company and the incorporators is considered to be both an acquiror and a target.

Transactions Generally Not Subject to Registration

The following Japanese business combinations are structured as cash for stock transactions, or the functional equivalent, and are generally not subject to SEC registration under Section 5. In this memorandum, we refer to these transactions as "**cash transactions**". The following list introduces the typical cash transaction structures and the general basis for concluding that the transactions are not subject to SEC registration:

- *Cash Tender Offer (Kinsen wo Taika to Suru Kōkai Kaitsuke)*: a tender offer of cash for shares of another company, does not involve an "offer" or "sale" of a security under Section 5;

- *Share Exchange or Merger for Cash (Kinsen wo Taika to Suru Soshiki Saihen Torihiki)*: a share exchange or a merger in which shares of another company are converted into cash, does not involve an "offer" or "sale" of a security under Section 5;

- *Going-Private Transaction Using Redeemable Shares (Zenbu Shutoku Jōkōtsuki Shurui Kabushiki wo Mochiita Kanzen Kogaishaka Torihiki)*: a multi-step recapitalization, sometimes referred to as the "redeemable shares method", in which (i) each share of a subsidiary is converted into redeemable shares, (ii) the subsidiary then redeems each redeemable share in exchange for a smaller number of shares of a new class, (iii) the exchange ratio is established such that minority shareholders receive only fractional new shares and (iv) all fractional new shares are converted into cash, does not involve an "offer" or "sale" of a security under Section 5 and in any event will not require SEC registration if conducted properly[3]; and

Although cash transactions generally do not need to be registered with the SEC, they are still generally subject to U.S. securities laws. For example, U.S. federal and state antifraud laws which prohibit manipulation, fraud and misleading statements or omissions in connection with the purchase or sale of any security, will still apply. In addition, cash transactions may also be subject to U.S. tender offer and other rules.

[3] Redemption recapitalizations, if they are deemed to involve the sale of a security, may be eligible for an exemption under Section 3(a)(9) of the Securities Act.

Use of U.S. Jurisdictional Means Generally Unavoidable

If a share exchange transaction can be effected without employing U.S. jurisdictional means, the registration requirements of the Securities Act will not apply. However, U.S. jurisdictional means is interpreted very broadly and will generally be impossible to avoid. It may include, for example:

- mailing a notice of meeting and a form of proxy to the agents in Japan acting as standing proxies *(jonin dairi nin)* if the agents are required or expected to forward the materials to beneficial holders resident in the United States;
- making transaction-related documentation available, electronically or physically, in the United States, including by posting the documentation on a company's website;
- directing communications with respect to a transaction into the United States;
- permitting the participation of U.S. securities analysts or reporters in telephone conferences, meetings or other similar events relating to the transaction; or
- permitting votes or consents to be mailed from the United States.

Additionally, even if none of these actions are taken, the SEC is likely to conclude that U.S. jurisdictional means have been used if the voting power held by U.S. shareholders or if their participation is necessary for the success of a transaction. Moreover, the SEC has indicated that it intends to closely scrutinize certain transactions that purport to avoid the use of U.S. jurisdictional means.[4]

Virtually all Japanese listed companies have beneficial shareholders who are resident in the United States. If the shares of a Japanese listed company are sought in a share exchange transaction, the use of U.S. jurisdictional means may be unavoidable. We are advised by Japanese counsel that U.S. shareholders of Japanese listed companies cannot be excluded as a group from share exchange transactions due to basic Japanese corporate law principles of shareholder equality, which prevent disparate treatment of shareholders. We understand that equal treatment is required even when compliance is costly or burdensome.

The Rule 802 Exemption

Rule 802 under the Securities Act provides a potential exemption from the registration requirements of the Securities Act for certain share exchange transactions by foreign private issuers.[5] This memorandum does not discuss the application of Rule 802 at any great length ,but please refer to our memorandum regarding Rule 802 ("Rule 802 and Application of U.S. Securities Laws to Japanese Business Combination Transactions") for further detail. For purposes of our memorandum, we will note only that Rule 802:

- is likely to be the only available exemption from SEC registration for a merger or other similar share-for-share exchange transaction involving Japanese listed companies; and

[4] *Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Securities Act Release No. 8957, pg. 110 (Sept. 19, 2008).

[5] See the definition of "foreign private issuer" in footnote 2 above.

- as a threshold matter, will not be available if U.S. beneficial shareholders hold more than 10% of the outstanding shares sought in the transaction.[6]

In other jurisdictions, parties often consider procedural alternatives that exempt business combination transactions from SEC registration. These include structuring a transaction to exclude participation by U.S. holders in the share exchange and establishing procedures to cash them out rather than issue shares to them. As mentioned above, we understand this alternative will generally not be available for share exchange transactions because of the Japanese legal principles requiring equal treatment of shareholders. Another method is to implement procedures to limit the number and type of participating U.S. holders so that the transaction qualifies as a private placement under Section 4(2) of the Securities Act. However, a private placement exemption will generally not be available for a share exchange transaction conducted to acquire the shares of a Japanese listed company.

Part II. SEC Registration Basics, Timing and Process

If the Rule 802 exemption is not available, then the share exchange transaction will generally need to be registered with the SEC, unless it is properly delayed, cancelled or restructured. If a share exchange transaction must be registered with the SEC, the consequences are significant. The registrant will become subject to what is perhaps the most comprehensive, stringent and proactively monitored corporate disclosure regime in the world. And, all of that disclosure must be in English. Before the transaction can even be submitted to target shareholders for approval, the registrant will need to ensure that its English language disclosure standards and practices are in line with applicable U.S. standards. As a foreign private issuer, the registrant will not need to meet all the same the disclosure standards of U.S. public companies – the SEC allows foreign private issuers to comply with a more limited set of rules. However, the standards will still need to generally be in line with disclosure by other Japanese companies registered with the SEC.

Although few Japanese companies will be happy to learn that they need to register their proposed business combination, we note that there are benefits from SEC registration. For example, registration will allow the registrant to: (i) list on a U.S. exchange; (ii) use its shares as acquisition consideration; (iii) expand its financing options; (iv) increase investor interest in its securities; and (v) likely improve its name recognition and reputation. Of course, if none of these provides a compelling reason to maintain such registration, Japanese registrants will be significantly more happy to learn that with proper planning, they may deregister in a little more than a year after registration.

Registration Basics

If SEC registration is required, each acquiror in the share exchange transaction will be required to file the Form F-4 to register the transaction and will thereby become an SEC registrant. As mentioned above, there can be more than one registrant in a share exchange transaction – for example, in a joint share transfer transaction where there are technically three. For the sake of simplicity, we will generally refer to the acquiror and the target in the singular.

[6] We note that it may also be possible to structure a transaction in a manner such that Rule 802 will be available.

Under the Securities Act, no public "offer" of a security may be made in the United States unless a registration statement relating to that security has been publicly filed with the SEC. In addition, no public "sale" of any security in the United States may be made unless:

- the registration statement has become effective; and
- a prospectus accompanies or precedes confirmation of the sale (or the prospectus is filed with the SEC before the confirmation is sent and the buyer is notified of this).

The basis for liability in connection with a "sale" of a security offered in connection with a registered business combination is the disclosure provided to the shareholders of the target at the time the sale is made. According to SEC staff, a "sale" of a security offered in connection with a registered business combination occurs at the time of the shareholders meeting pursuant to which shareholders of the target vote to approve the transaction.[7]

Disclosure of Material Information

The U.S. securities laws are based on a principle of full and fair disclosure and do not involve a review of the merits of a business combination or of the securities being issued. The underlying premise of the U.S. securities laws is that investors should receive all material information necessary for them to make an informed investment decision and to sustain secondary market trading. This premise applies to an acquiror conducting a share exchange transaction to be registered on Form F-4 and to its ongoing SEC reporting obligations thereafter.

The information which must be disclosed in a Form F-4 registration statement is set out below under the caption "Preparing the Disclosure Required by Form F-4" below. The SEC has, by regulation, guidance and the publication of various registration and reporting forms, set forth in detail some of the information it considers to be material. In addition, Form F-4 contains a number of information disclosure requirements that must be satisfied, even if not material. The registrant must also disclose any other information, whether or not detailed in the form, that is material in order to ensure that statements made are not misleading or that material information is not omitted.

Under the U.S. securities law regime, liability may arise from a misstatement of a material fact or an omission of a material fact required to be stated in order to make the statements made, in the light of the circumstances under which they were made, not misleading. The focus, therefore, in preparing the Form F-4 registration statement is to ensure that the document is materially accurate and not materially misleading.

According to U.S. court cases, an omitted or misstated fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision to purchase the shares.[8] Companies and their advisers often rely on several rules of thumb to make this grand principle of materiality more concrete. Depending upon the nature of the fact, they ask themselves whether disclosure of the information would affect the price of the shares, or whether an event should be disclosed because that event would affect net income or total assets. A 5% rule of thumb is often used for analysis, but, as the SEC staff has warned, it

[7] Informal oral guidance from the SEC staff to the authors.

[8] Basic v. Levinson, 485 U.S. 224, 231 (1988).

should not be relied upon as a "substitute for a full analysis of all relevant considerations."[9] In certain circumstances, even facts that would have a very small numerical impact on the financial statements might be considered material.

Liability for Material Misstatements or Omissions

The Securities Act provides that if a registration statement contains a misstatement or omission of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, the following persons may be liable to purchasers of the securities:

- the registrant;
- each director or person performing similar functions of the registrant at the time the registration statement was filed;
- each other person who signed the registration statement (*i.e.*, the principal executive, financial and accounting officers of the registrant, and the registrant's authorized representative in the United States);
- every person who, with his or her consent, is named in the registration statement as being or about to become a director;
- persons deemed to control the registrant by virtue of their ownership of the registrant's securities or otherwise; and
- each accountant and each other expert who certified any part of the registration statement.

As discussed below, each of these persons, except the registrant, has defenses which, in broad terms, are based on that person having, after making a reasonable investigation, no reasonable grounds to believe that the Form F-4 registration statement contained any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. This defense is commonly referred to as the "due diligence" defense.

Defenses to Liability and the Due Diligence Investigation

The potential liability of a registrant and its officers and directors should be considered when registering a share exchange transaction on Form F-4. Registrant directors and certain others who may participate in the registration process have a due diligence defense against material misstatements or omissions. This defense can be established if the defendant is able to demonstrate that it made a reasonable investigation as to the adequacy of the disclosure in the Form F-4. The reasonableness of the investigation will be judged by U.S. standards. There are different standards of reasonableness for "expertized" and "non-expertized" materials in a Form F-4 registration statement. Expertized material is stated in a registration statement to be given on the authority of an expert, and includes the audited financial statements.

[9] SEC Staff Accounting Bulletin: No. 99 – Materiality, Release No. SAB 99 (Aug. 12, 1999).

- For "non-expertized" material, the defense requires the defendant to affirmatively believe that the information was correct, and also have reason to have believed, after "reasonable investigation," that the information was correct.

- For "expertized" material, the defense requires that the defendant have no reason to believe that the information was incorrect.

Timing and Process

In this section, we present several important timing issues that should be considered in connection with registration on Form F-4. Typically, the preparation of a Form F-4 registration statement by a first-time SEC registrant begins a year or more prior to the anticipated Form F-4 filing date. The Form F-4 will need to be filed and go effective before the convocation notice to target shareholders for the approval of the transaction can be disseminated. As we describe in more detail below, the preparation of financial statements and related disclosure frequently is the most time-consuming aspect of SEC registration, and the item most likely to drive the structure of the overall timetable. The acquiror will need to consult with its accountants as to the time it will take to prepare all SEC-compliant financial statements.

Announcement Date

The initial public announcement of a share exchange transaction, which includes the announcement of an agreement in principle (*kihon goi*) in connection with the transaction, will present one of the first timing issues. The announcement could be considered an "offer" of securities under Section 5 of the Securities Act which would require registration with the SEC unless an exemption is available. Normally, at this early stage in the process, the Form F-4 registration statement is not ready to be filed. The transaction announcement and other public communications relating to the transaction need to be made in a manner that is not considered an “offer” of securities in violation of Section 5 of the Securities Act. Rule 425 under the Securities Act provides a safe harbor for such announcements and other communications made in connection with a business combination that will be registered with the SEC. To utilize Rule 425, the parties need to submit the announcement and other communications relating to the transaction in English to the SEC, generally on the date of publication. The submission will need to be transmitted electronically via EDGAR, the SEC's electronic data gathering and retrieval system – which is comparable to EDINET in Japan. Lead time is normally needed in order to prepare English language translations of these communications, to convert document files to the EDGAR format and to obtain from the SEC necessary codes to make EDGAR submissions. We generally suggest that filings under Rule 425 continue through the closing of the transaction. However, the industry practice varies and many companies only make Rule 425 filings through the shareholders’ meeting. It is typical to have numerous Rule 425 filings in a single transaction.

Financial Statements and Other Financial Information

Ordinarily, the time needed to prepare and audit the financial statements required by Form F-4 will drive the schedule because if the parties do not already prepare the necessary financial statements, this process can take up to a year or more. Assuming the acquiror and the target are of comparable size in terms of financial condition and results of operations, which we do for purposes of this discussion, they will generally need to prepare the same level of disclosure, including with respect to financial statements. Each party will need to prepare at least two years of consolidated annual financial statements in accordance with:

- International Financial Reporting Standards as adopted by the International Accounting Standards Board ("**IFRS**");

- U.S. generally accepted accounting principles ("**U.S. GAAP**"); or

- Japanese generally accepted accounting principals, but accompanied by an appropriate reconciliation to U.S. GAAP.

The registrant's annual financial statements included in the Form F-4 will also need to be audited in accordance with U.S. Public Company Accounting Oversight Board ("**PCAOB**") standards. Currently, Japanese SEC registrants generally report in U.S. GAAP (the second option), though we are aware of a number of Japanese companies that are already considering the advantages of reporting to the SEC in IFRS. The SEC review process that we discuss below can generally not begin until the requisite audits have been completed.

In addition to annual financial statements of the parties, other financial statements and information will need to be prepared as required for purposes of Form F-4. For example:

- *Pro Forma Information. Pro forma* financial information showing the pro forma effects of the proposed transaction is required; and

- *Separate Third-party Financial Statements*. Separate third-party financial statements may be required in connection with certain acquisitions and equity method investees. If required, these financial statements may need to be prepared in accordance with IFRS or U.S. GAAP or be accompanied by a reconciliation to U.S. GAAP and audited in accordance with PCAOB standards. Third-party financial statements may be required:

    - *For Acquired Businesses.* For certain recently acquired businesses and businesses to be acquired, if: (i) the party's consolidated investment in and advances to the entity exceed 20% of the party's consolidated assets; or (ii) the party's consolidated share of assets of the entity exceeds 20% of the party's consolidated assets; or (iii) the party's consolidated equity in the income from the entity exceeds 20% of the party's consolidated income.

    - *For Equity Method Investees*. For certain equity method investees, if (i) the party's consolidated investments in and advances to the investee exceed 20% of the party's consolidated assets, or (ii) the party's consolidated equity in the income from the entity exceeds 20% the party's consolidated income.

- *Industry Guide Information.* Industry guide information is required if the party operates in certain industries – for example, banking, casualty insurance, oil and gas and mining.

We understand that Japanese companies will be permitted to begin reporting on a voluntary basis in accordance with IFRS in the near future. Issuers that report in accordance with IFRS will have a significantly easier time preparing the financial disclosure required by Form F-4. However, the SEC requirements to include annual financial statements audited in accordance with PCAOB standards and the other financial statements and information described above will likely continue to prove troublesome, even for IFRS reporting companies.

SEC Review Process

Before the Form F-4 can be declared effective, the SEC will require time to review and comment on the document. Companies preparing their initial registration statement on Form F-4 ordinarily provide the SEC this opportunity by submitting a draft of the registration statement confidentially three to four months prior to the intended effective date. Generally, the confidential submission cannot occur until the audit of the annual financial statements has been completed and the Form F-4 registration statement is otherwise substantially complete.

Once submitted confidentially to the SEC's Division of Corporation Finance, the Form F-4 registration statement is assigned to a particular SEC branch, which handles filings within the registrant's industry segment. The registration statement is reviewed by examiners with responsibility for the non-financial statement portion (the law examiner) and financial statements (the accounting examiner). Typically, after approximately one month, the law examiner will contact the registrant or its U.S. counsel to advise that the staff's comment letter is available. The comment letter will require changes to the disclosure or request supplemental information so the SEC staff can assess the adequacy of disclosure or positions taken on certain accounting issues. Typically, it takes two to three weeks to respond to the initial comments, followed by the SEC's subsequent review for another two weeks (sometimes longer), after which additional comments will likely be provided and responded to by the acquiror within a week after that. Further filings and review may follow. These periods will vary widely depending upon the issues, the company and the availability of the appropriate members of management to help address the comments. Because most foreign companies not already registered with the SEC take advantage of the SEC's confidential submission option, the official public filing, which is made electronically via EDGAR, is typically made only after all SEC comments are resolved.

The Form F-4 will need to be filed and be declared effective before the convocation notice, and the prospectus included in the Form F-4 can be disseminated to target shareholders for the approval of the transaction. The registrant will need to submit a formal request to the SEC asking that its registration statement on Form F-4 be declared effective.

It is possible, albeit very unlikely, that the SEC will decide not to review the Form F-4 after the initial confidential submission.

Nine-Month Rule

The SEC has a number of rules on the age of audited financial statement. The one which can affect the Form F-4 preparation schedule is the "Nine-Month Rule," because if applicable it will require that additional consolidated financial statements for interim periods be prepared and included in the Form F-4. The application of the rule requires such additional financial statements if the target shareholders' meeting called to approve the transaction occurs more than nine months after the end of the last audited fiscal year. For registrants with a March 31 fiscal year-end, the nine-month rule will ordinarily apply if the target shareholders' meeting occurs between January 1 and the middle of June (when new fiscal year-end consolidated financial statements generally become available).

The nine-month rule requires the interim financial statements to be prepared in accordance with the applicable SEC standard (*i.e.*, IFRS or U.S. GAAP or accompanied by an appropriate reconciliation to U.S. GAAP), cover at least the first six months of the financial year and be

accompanied by comparative statements. The interim financial statements do not need to be audited or reviewed, although the SEC recommends that the statements be reviewed by auditors.

Part III. Preparing the Disclosure Required by Form F-4

Next, we discuss the requirements for preparing and filing Form F-4 from a disclosure perspective.

The Form F-4 registration statement will consist of the following three parts:

- **Cover page**: This is a single page at the beginning of the filing. It contains information that will assist the staff of the SEC in handling the registration statement. This page is filed with the SEC but is not included in the information sent to shareholders of the target (*i.e.*, the prospectus described below).

- **Prospectus**: This document is the core of the registration statement, and contains most of the disclosures and financial information in the filing. This document is included as part of the Form F-4 registration statement, and is also sent separately as a stand-alone document to U.S. shareholders of the parties.

- **Part II**: This part of the registration statement includes information with respect to indemnification, and undertakings by the registrant, the signature pages of the registration statement, exhibits and any financial statement schedules. Part II is filed with the SEC but is not included in the information sent to shareholders (*i.e.*, the prospectus described above). Of the exhibits required to be filed with Form F-4 pursuant to Part II, material contracts are perhaps the most sensitive.

A summary of selected information which must be disclosed in a Form F-4 registration statement is set out below. In **Appendix A**, we also list and provide a brief description of the items typically found in a Form F-4 table of contents. The following discussion is presented with reference primarily to the registrant. However, as mentioned above, assuming the acquiror and target are of comparable size in terms of financial condition and results of operations, they will generally need to prepare disclosure at a comparable level.

Risk Factors

The prospectus must prominently disclose risk factors that are specific to the registrant or its industry and that make the proposed transaction speculative or one of high risk, in a section headed “Risk Factors.” The risk factors should focus on the potential “downside” of the proposed transaction, particularly from the perspective of the target shareholders. They should not duplicate detailed discussions found elsewhere in the prospectus. The SEC encourages issuers to list the risk factors in the order of their priority. The risk factors in an Form F-4 registration statement are similar to the risk factors that Japanese companies include in their annual reports (*i.e., yuka shoken hokokusho*), though the Form F-4 risk factors will include risks specific to the transaction and may describe some of the risks in more detail.

The SEC has been known to request that companies in certain fields (such as banking) disclose additional information related to specific risks, such as risks related to commerce with countries subject to international sanctions. For this and other reasons, it is useful for the registrant to

consider risks that have been disclosed by other companies in similar industries. Risks that could apply to any issuer or any offering should not be presented.

Transaction Background

The customary format of a prospectus in a Form F-4 contains several sections discussing the transaction. After the cover page and insider cover page, the prospectus typically leads with a "questions and answers" section about the proposed transaction and voting procedures for the extraordinary meetings of target shareholders. This question and answer section is designed to clearly and briefly answer the main questions that target shareholders are expected to have in connection with the proposed transaction. A summary section follows the questions and answers section. This section provides a summary of the information in the prospectus and usually contains cross-references to fuller discussions located elsewhere in the prospectus.

The next section contains information about the target shareholders' meeting that is being called to approve the transaction. This section should include a description of dissenters' rights of appraisal, the record date, how votes are submitted and counted, the vote required for approval of the transaction and similar information. If proxies, consents or authorizations will be solicited from the target shareholders, information about the persons making the solicitation and the revocability of the proxy is required.

The section after that describes the proposed transaction. It should include a chronology of contacts between the acquiror and the target concerning the transaction or related proposed transactions, describing each meeting between the parties. For each meeting, it should describe the major questions raised, the points discussed, the conclusions reached and the reasons that the parties continued to believe that the proposed transaction was warranted from a business perspective. This section needs to include a statement of the accounting treatment of the transaction, as well as a summary of any fairness opinion received by financial advisers to the target board of directors, including the financial analysis underlying the opinion, if such fairness opinion is referred to in the prospectus.

If not already described in the preceding section, then there is typically a separate section describing the terms of the merger agreement. This section will often include a summary of the structure of the transaction, representations, warranties and covenants of the parties, conditions to closing, the timing of closing and agreements by the parties with respect to termination and post-closing actions.

Business

Form F-4 requires a description of both the acquiror's and the target's business. These business presentations are typically provided in separate sections. The purpose of the business presentation is to provide information about the parties' business operations, the products they make or the services they provide and factors that affect their businesses. The business discussions should provide information regarding the adequacy and suitability of the companies' properties, plants and equipment, as well as their plans for increases or decreases in such capacity.

In this section, the parties are required to provide historical and basic factual information about themselves. This includes their legal and commercial names, their date of incorporation, their

address and telephone number, the important historical events in their development and an indication of recent mergers and acquisitions activity.

The parties must also include a description of their respective operations and principal activities, stating the main categories of products sold or services performed for the last three years. They must describe the principal markets (geographically and by product) in which they participate, and whether their businesses are seasonal. Summary information about raw materials, marketing channels, patents, contracts and manufacturing processes must be provided, if material.

The parties must also substantiate any claims regarding their competitive positions. If government regulations materially affect the parties' businesses, the regulations must be described. If the parties are members of corporate groups, the groups must be described along with the parties' positions within the groups. The parties must also list their subsidiaries, real estate and certain tangible fixed assets. They must also describe any material plans for expansion and their participation in any material litigation, including government proceedings.

Management's Discussion and Analysis of Financial Condition and Results of Operations

Form F-4 requires disclosure of management's discussion and analysis of financial condition and results of operations ("**MD&A**") for both the acquiror and the target, assuming financial statements for the target are included in the registration statement. These MD&A presentations are typically provided in separate sections for each company. The purpose of the MD&A presentation is to provide information that is necessary for an investor to understand the parties' financial condition, changes in financial condition and results of operations. The MD&A should not simply be a recitation of the parties' financial statements in narrative form. Rather, the disclosure requirements are intended to satisfy three principal objectives[10]:

- to provide a narrative explanation of a parties' financial statements that enables investors to see the parties through the eyes of management;
- to enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and
- to provide information about the quality of, and potential variability of, a parties' earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.

This section is often one that receives the most extensive SEC comments, and while, in principle, similar concepts exist in other jurisdictions, its actual application in the United States is often perceived as stricter by many companies.

The MD&A presentation is typically divided into several subsections, as described below.

[10] Securities and Exchange Commission, Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities and Exchange Commission, Securities Act Release No. 8350 (December 29, 2003)

Overview

The MD&A section typically begins with an overview of factors affecting the results of financial operations. These factors will differ widely but may include, for example, a description of the general economic environment, the global markets for the parties' products, major regulatory issues, changes to the parties' strategy, exchange rate fluctuations and other similar factors or trends which have generally affected the parties' results of operations during the periods discussed and are expected to have a continuing affect. This section typically also includes a discussion of the drivers of the business – the most important operating, market and other factors that affect the company's results of operations.

Critical Accounting Policies

Next is a description of critical accounting policies. If (i) an accounting estimate requires the issuer to make assumptions about highly uncertain matters; and (ii) the estimate is among several different estimates that could reasonably have used; and (iii) changes in the estimate would have a material impact on the issuer's financial presentation, then the issuer should disclose in this subsection:

- the estimate;
- why the issuer could have chosen in the current period other estimates that would have had a materially different impact on its financial presentation; and
- the sensitivity of reported results to changes in the estimate.

Results of Operations

A subsection on results of operations typically follows the description of critical accounting policies. This subsection should describe significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which such income was affected, particularly when compared with the prior period. Ideally, this discussion should correlate closely with the discussion in the MD&A Overview of factors driving results of operations. Financial results by segments must also be discussed.

Liquidity and Capital Resources

Form F-4 requires a description of the parties' liquidity and capital resources, including sources of liquidity and otherwise providing a clear picture of the issuer's ability to generate cash and to meet existing and known or reasonably likely future cash requirements.

Trend Information

Form F-4 also requires the parties to disclose any known trend, demand, commitment, event or uncertainty that, assuming it happens, is reasonably likely to have a material effect, unless the trend, demand, commitment, event or uncertainty is unlikely to happen.

Off-Balance Sheet Arrangements

The parties will be required to disclose, any material off-balance sheet arrangements. An off-balance sheet arrangement includes any arrangement under which a company incurs a risk of loss in the event of a deterioration of assets or other adverse developments of a special purpose vehicle or any other entity that is not consolidated by the company. Under this requirement, which arose under SOX, each party is required to disclose those off-balance sheet arrangements that have, or are reasonably likely to have, a current or future material effect on its business, including financial condition, results of operations or liquidity.

Contractual Obligations

Each party will also be required to disclose contractual obligations in tabular format. The required information about financial obligations under contracts should be provided as of the latest fiscal year end balance sheet date with respect to the party's known contractual obligations and commercial commitments.

Quantitative and Qualitative Disclosures about Market Risk

In addition, each party will need to provide certain quantitative and qualitative disclosures about market risk. Risks to be discussed in this subsection include interest rate risk, foreign currency risk, commodity price risk (if relevant) and other relevant financial market risks, such as equity price risk. The parties can present the quantitative disclosure in tabular format, through sensitivity analysis or through value-at-risk disclosure.

Material Contracts

As mentioned above, Part II of Form F-4 requires each acquiror to file as an exhibit (and thereby publicly disclose) any material contract to which it is a party that was not made in the ordinary course of business. Naturally, it is possible that no single contract or group of related contracts will be so material that filing is required. If a material contract needs to be filed, it may be possible to redact certain limited information, such as competitively sensitive pricing information, from the contract before it is filed with the SEC.

Part IV. Actions Relating to the Preparation of Form F-4

We next discuss requirements for preparing and filing Form F-4 that involve actions that need to be taken, outside of preparing the required disclosure, in order to file Form F-4.

PCAOB Audits

As mentioned above, the parties to a business combination that needs to be registered on Form F-4 will need to prepare and include in the registration statement at least two years of SEC-compliant annual consolidated financial statements. The registrant must, and the target often will, arrange to have those financial statements audited in accordance with PCAOB auditing standards. In order for an auditor to qualify under SEC standards for this purpose, it must be independent of the issuer. For this reason, auditor independence will need to be evaluated initially and procedures will need to be implemented to ensure independence is maintained thereafter.

Under the relevant rules, for an auditor to be independent of an issuer:

- **Audit Committee Pre-Approval of Audit and Non-Audit Services.** The issuer's audit committee (or board of statutory auditors) must pre-approve audit and non-audit services to be provided by an issuer's outside auditors;

- **Prohibited Non-Audit Services.** The issuer may not receive certain non-audit services by an issuer's outside auditor, such as information technology consulting and appraisal services;

- **Auditor Communications with Audit Committees.** The auditor must make certain communications to an issuer's audit committee (or board of statutory auditors) regarding critical accounting policies and other matters prior to the filing of an audit report with the SEC;

- **Audit Partner Rotation.** Certain audit partners must be rotated periodically;

- **Cooling-Off Periods.** There must be at least a one-year cooling-off period before a former partner, principal, shareholder or professional employee of an accounting firm involved in the audit of an issuer may be employed by the issuer in a financial reporting oversight role; and

- **Compensation.** Audit partners may not earn or receive compensation based on their procuring non-audit services from an audit client.

The auditor independence requirements apply not only to the audit firm signing the audit opinion, but also to its affiliates and other firms involved in the audit. The auditor must be independent not only of the issuer, but of all consolidated subsidiaries of the issuer.

Disclosure Controls and Procedures

The parties to a business combination that needs to be registered on Form F-4 must establish effective disclosure controls and procedures and conclude that there are no material weaknesses in internal controls, which are a subset of disclosure controls and procedures. The parties will already have detailed internal processes that they already use for their Japanese annual report. These processes will need to be supplemented with additional procedures, as necessary to comply with SEC requirements.

SEC-registered companies must, with the participation of the executive officers, establish disclosure controls and procedures designed to ensure that information required to be disclosed is recorded, processed, summarized and reported, within the time periods specified in the SEC's rules. The SEC recommends that companies form a disclosure committee consisting of senior officers to assist in the disclosure controls and procedures process. The CEO and CFO should be closely involved in the process. The CEO and CFO will be subject to liability as Signers[11] of the Form F-4 and should accordingly be as comfortable with the content of Form F-4 as they will

[11] The following persons will be required to sign the Form F-4 registration statement: (i) the registrant's principal executive officer or officers, (ii) the registrant's principal financial officer, (iii) the registrant's controller or principal accounting officer, (iv) at least a majority of the registrant's board of directors and (v) the registrant's representative in the United States.

be when they sign disclosure certificates in connection with the registrant's annual reports on Form 20-F.

In connection with each annual report on Form 20-F, the CEO and CFO will be required to certify as to:

- the accuracy and compliance of the financial statements and other information in the form;
- the adequacy of disclosure controls and procedures;
- any changes in internal controls; and
- disclosure to auditors and the board of corporate auditors of any internal controls weaknesses and any fraud committed by certain persons.

U.S. Federal and State Anti-Fraud Laws

The registrant and its officers and directors should be aware of the potential liability for, and must take appropriate steps to ensure there are no, material misstatements and omissions made in connection with the disclosure that will be included in the Form F-4.

Analysis of Issues Under Other Laws

Here are a few other actions that generally need to be taken in order to file Form F-4. A significant portion of these action items are typically administered by U.S. counsel but may nevertheless involve a great deal of client input and cooperation.

Investment Company Act of 1940

U.S. counsel will need to evaluate the registrant under the Investment Company Act, giving effect to the proposed transaction. Under the Investment Company Act, an investment company is not permitted to offer its securities in the United States if it is not registered under the Act. However, foreign private issuers are unable to register under the Act. If the registrant is an investment company, it may not be possible to complete the transaction as proposed. Under the Investment Company Act, an "investment company" can be a company that is mainly in the business of investing in securities and loans, or whose securities and loans assets otherwise exceed 40% of its total assets. The determination of whether the registrant is an investment company can be difficult and complex, requiring an analysis of the registrant's, and often its subsidiaries', assets and sources of income.

Passive Foreign Investment Company ("PFIC")

U.S. counsel will need to confirm whether the registrant is a PFIC. If the registrant is or may be a PFIC, disclosure to that effect will need to be included in the Form F-4. Under U.S. federal income tax law, a U.S. person who owns stock of a foreign corporation which is a PFIC will be subject to special rules generally designed to eliminate the benefit of the deferral of U.S. federal income tax that results from investing in a foreign corporation that does not distribute all of its earnings currently. These rules may adversely affect the tax treatment to U.S. persons of

dividends paid by a foreign corporation and of sales and exchanges of the stock of the foreign corporations. Generally, a foreign corporation is a PFIC if either;

- 75% or more of its gross income in any taxable year is "passive" income, such as dividends and interest; or

- the average percentage of assets (by value) held by such corporation during the taxable year which produce "passive" income is at least 50%.

HSR Act

U.S. counsel will need to analyze the sales and assets of the parties to determine whether the transaction is subject to the pre-merger filing and waiting period requirements of the U.S. Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("**HSR Act**"). Acquisitions of foreign issuers are generally exempt from the HSR Act unless the foreign issuer has U.S. sales or assets during the most recent fiscal year exceeding a specified level, currently $63.4 million.

Office of Foreign Assets Control ("OFAC")

U.S. counsel will need to consider with the parties the level of transactions, if any, with countries that are the target of U.S. sanctions administered by the OFAC. If significant, some level of disclosure about these transactions may be required to be included in the Form F-4.

Regulation M

Regulation M prohibits certain bids for or purchases of securities by participants in a distribution of such securities during an applicable restricted period. In connection with a Japanese business combination being registered on Form F-4 a "distribution" could be deemed to occur, particularly if the parties or anyone acting on their behalf engages in "special selling efforts" or "special selling methods" in soliciting votes in favor of the transaction. However, each transaction must generally be considered by U.S. counsel on a case-by-case basis. If there is a "distribution," the restricted period for a Japanese business combination being registered on Form F-4 would likely be considered to begin on the day before mailing the convocation notice and to end upon the approval (or disapproval) of the transaction at the target's shareholders' meeting.

Section 12(g)

Section 12(g) of the Exchange Act may require a foreign private issuer to file with the SEC an Exchange Act registration statement regarding a class of its equity securities. For a foreign private issuer registering a business combination on Form F-4, such a filing will be required if, as of the last day of the issuer's most recent fiscal year:

- the number of the issuer's worldwide record shareholders is 500 or more;

- the number of the issuer's U.S. beneficial shareholders is 300 or more; and

- its assets are greater than US$10 million.

U.S. counsel will need to consider with the registrant whether there were 300 or more U.S. beneficial holders of the registrant's shares as of the most recent fiscal year-end. If so, an

Exchange Act registration statement may need to be filed along with the Form F-4. Generally, such a requirement would not be expected to adversely affect the transaction schedule or to significantly alter the applicable disclosure and other requirements.

State Securities Laws

A business combination being registered on Form F-4 may also be subject to registration or filing requirements under the securities laws of one or more states in the United States. Many states exempt mergers from the application of their securities laws. In other states, a notice of filing may be required if there are shareholders resident in that state. U.S. counsel will need to consider the applicability of state securities laws for each state in which the target's shareholders reside.

Part V. Preparing To Be Compliant with Soon-To-Be-Applicable Laws

Next we discuss other selected requirements that arise under SOX and other U.S. laws which do not directly relate to the preparation of Form F-4, but which will be applicable once an entity becomes an SEC reporting company. Registrants will generally need to implement special internal procedures in order to address these requirements. Moreover, the registrant, and its directors, executive officers and other members of management will have responsibilities, and be subject to liabilities, specified in or arising from these requirements.

Requirements Arising under SOX

The following requirements all arise under SOX. We note that many of the auditor independence requirements and requirements relating to the controls and procedures described above also arise under SOX.

Document Retention Policy

To avoid liability for document destruction, SEC registrants need to incorporate a document retention policy into their compliance procedures. SOX contains prohibitions on document alteration or destruction if conducted with intent to impede certain investigations or proceedings. These prohibitions will apply to a registrant and its personnel even before the Form F-4 registration statement is filed. For example, the prohibition potentially applies to destruction of a document relevant to a disclosure issue raised by SEC staff during the comment period.

Whistleblower Procedures

To avoid liability for mistreatment of whistleblowers, SEC registrants on Form F-4 or otherwise need to implement special whistleblower procedures. SOX contains provisions with respect to "whistleblowers" – employees and others who alert management or the authorities to potential wrongdoing by an issuer. Under SOX, any investigation of a complaint by a registrant must comply with Section 806 of SOX. That Section states that "no publicly traded company, or any officer, employee, contractor, subcontractor, or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee."

Evaluate Loans to Management

SOX generally forbids SEC registrants from extending to or arranging credit for their directors and executive officers. The registrant will need to restructure any prohibited loans to management before the registration statement on Form F-4 is filed publicly with the SEC. It will also be necessary to establish procedures or otherwise ensure that no additional prohibited loans to management are made.

Code of Ethics

Starting from the first annual report on Form 20-F, an SEC registrant is required by rules adopted pursuant to SOX to report in each annual report it files with the SEC whether it has adopted a code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the registrant has not done so, it must explain why not.

Attorney Conduct Rules

SEC registrants need to be aware of and should implement procedures for advising in-house attorneys of these rules and for handling reporting matters with its in-house and outside counsel. SEC rules adopted pursuant to SOX regulate the conduct of attorneys who advise on federal securities law matters. The rules impose so-called “up the ladder” reporting requirements on attorneys who are subject to the rules. The up-the-ladder reporting requirements are imposed on an attorney if he has evidence of a material violation of securities laws, material breach of fiduciary duty or similar violation. Any such evidence must be reported to the registrant’s chief legal officer or a qualified legal compliance committee. If the registrant has not established a qualified legal compliance committee, the attorney may be required to report such evidence further up the ladder to the board of directors if an appropriate response is not received from the chief legal officer within a reasonable time.

Non-GAAP Financial Measures

Regulation G and Item 10(e) of Regulation S-K set forth the SEC’s rules regarding use of non-GAAP financial measures in SEC filings and in other oral and written public disclosures by SEC-registered issuers. Registrants will need to conform their disclosure practices to Regulation G and Item 10(e) of Regulation S-K in connection with registration on Form F-4. The term “GAAP,” as used in Regulation G and Item 10(e) of Regulation S-K, should generally be interpreted to mean U.S. GAAP, if the registrant reports in U.S. GAAP, and IFRS, if the registrant reports in IFRS. The term “non-GAAP financial measure” does not simply mean any financial measure which is not GAAP. The definition is more limited. The term is defined as a numerical measure of a company’s historical or future financial performance, financial position or cash flows that either excludes or includes amounts that would otherwise be included or excluded in the most comparable GAAP measure, such as “core earnings” and EBITDA. Financial measures required to be disclosed by U.S. GAAP or IFRS, as the case may be, SEC rules, or the rules or regulations of Japan or other Japanese governmental authorities, such as measures of required capital or reserves, are excluded from the definition of “non-GAAP financial measure.”

Financial Expert

A foreign company is required to disclose in its annual report on Form 20-F whether its board of corporate auditors or audit committee includes at least one "financial expert" (meeting certain standards specified under SEC rules). If a financial expert is included, the company must disclose the financial expert's name and whether the financial expert is independent, as such term is defined in the listing standards applicable to the company. A new SEC registrant which does not list its securities on a U.S. securities exchange may choose a definition of "financial expert" under the standards of any U.S. national securities exchange or U.S. national securities association. If the foreign company does not have such a financial expert serving on its board of corporate auditors or audit committee, it must state so and explain why. Because it might take time for a registrant to change the composition of its board of corporate auditors or audit committee, we suggest that the registrant consider well before the Form F-4 is declared effective:

- whether it already has such an expert on its board, and if not,
- the potential implications of such disclosure in its Form 20-F.

Requirements Arising under Other U.S. Laws

The following requirements presented all arise from laws other than SOX.

Insider Trading and Selective Disclosure

SEC registrants need to implement internal procedures to prevent violations of insider trading and selective disclosure rules. It is a violation of the U.S. securities laws for any person to buy or sell securities if he or she is in possession of material non-public information. Furthermore, it is illegal for any person in possession of material non-public information to provide other people with such information or recommend that they buy or sell securities, a practice known as "tipping."

- ***Insider Trading.*** Because officers and directors generally have non-public information relating to a company's financial results before they are released, it is generally not advisable for officers and directors to purchase or sell company securities shortly before the release of financial results lest they be seen as participating in insider trading. Most foreign SEC registrants have already adopted a trading or blackout policy for officers and directors in order to help protect themselves and their officers, directors, and other employees from potential lawsuits or investigations of potential insider trading laws in their home jurisdictions.
- ***Selective Disclosure.*** To avoid liability for insider trading, appropriate personnel of the registrant should be informed of U.S. restrictions on selective disclosure, and, as necessary, change the way they interact with the investment community. U.S. securities laws include Regulation FD, which specifically prohibits the selective disclosure of material non-public information. Although foreign private issuers are exempt from the provisions of Regulation FD, federal anti-fraud laws have been interpreted to impose similar obligations. We suggest foreign SEC registrants consider complying with Regulation FD as a best practice.

Foreign Corrupt Practices Act ("FCPA")

The FCPA applies to any company with securities registered under the Exchange Act or which is subject to the periodic reporting requirements of the Exchange Act. Accordingly, this law will apply to a foreign company that registers a business combination on Form F-4. The FCPA makes it unlawful for such a company or any of its officers, directors, employees, or agents to use any means or any instrumentality of interstate commerce in the United States in furtherance of an offer or payment of money or anything of value to certain foreign officials for the purpose of:

- influencing a decision of such person, or inducing the person to use influence with other officials;

- in order to secure an improper business advantage for the company or another company or person.

The FCPA also requires that SEC registrants maintain accurate books and records and a system of internal accounting controls sufficient to provide reasonable assurance that accountability for their assets is maintained and accurate financial statements can be prepared. Penalties, fines and imprisonment can be imposed in the event of violations.

Forward-Looking Statements

Companies can gain protection from U.S. liability in their annual and interim reports, press releases, and other documents by taking advantage of a "safe harbor" for forward-looking statements. Any time that an SEC registrant makes a forward-looking statement, such as a financial forecast, in a press release, report to shareholders or other publicly disclosed document, cautionary language should be included in the document. The cautionary language should identify important factors that could cause actual results to differ materially from those in the forward-looking statements. The language should be specifically tailored to the particular forward-looking statements. General boilerplate warnings are not sufficient. Even oral forward-looking statements may benefit from the forward-looking statement safe harbor under the U.S. securities laws, so long as such statements:

- are accompanied by a statement that actual results could differ materially from those suggested by the forward-looking statements, and

- additional information about the factors that could lead to such differences is contained in a readily available and specifically identified written document.

An SEC registrant should implement mechanisms to help establish the availability of the safe harbor for forward-looking statements in its SEC filings, press releases and other publicly disclosed documents.

Current Reporting on Form 6-K

While the Exchange Act and regulations thereunder require an SEC-registered foreign private issuer to file annual reports on Form 20-F, they do not specify interim reporting requirements, other than the obligation to make "current" reports on Form 6-K. The general principle reflected in Form 6-K is that a foreign company registered with the SEC should furnish to the SEC material

information in English that the company makes public in its home market, that is, information that has been:

- made public pursuant to the law of the company's home country;
- filed with a stock exchange and has been made public by that exchange; or
- distributed to its security holders.

Annual Reports on Form 20-F

A foreign company with a class of securities registered under the Securities Act or the Exchange Act is required to prepare and file with the SEC an annual report each year, typically on Form 20-F. The purpose of the form under the SEC's disclosure system is to annually update information previously filed with the SEC. The information, including financial information, required to be included in the annual report on Form 20-F is very similar to that provided by the registrant in its Form F-4. The SEC registrant will need to implement procedures necessary to obtain the CEO and CFO certificates on disclosure and internal controls required to be filed along with the annual report on Form 20-F.

Currently, an annual report on Form 20-F must be filed within six months after the end of each fiscal year. For all fiscal years ending after December 15, 2011, this Form 20-F deadline will be accelerated to four months after fiscal year-end. In addition to providing substantive information, SEC rules will require companies that file financial statements prepared in accordance with U.S. GAAP or IFRS to provide all such financial statements for periods ending after June 15, 2011 in an interactive data format called XBRL. Certain large accelerated filers are required to address this requirement in their annual reports for fiscal years ending after June 15, 2009. The rules contain a transition period which allows issuers to begin filing the interactive data financial statements in their first annual report on Form 20-F rather than in their initial registration statement.

Part VI. Requirements Thereafter

Following registration, the registrant will be subject to a number of ongoing requirements, such as the need to file annual reports on Form 20-F, to begin making current reports on Form 6-K and to comply with now-applicable U.S. laws. These requirements will continue until the registrant deregisters from the SEC. If deregistration is not consummated in a timely manner, the requirements of Section 404 of SOX ("**SOX 404**") will need to be addressed. SOX 404 generally requires a management certification and an independent audit report of the adequacy of internal controls over financial reporting to be included in annual reports on Form 20-F. Although the SEC and the PCAOB have sought to reduce the costs of compliance with SOX 404, it is still one of the most controversial and expensive requirements of SOX. Due to an accommodation granted by the SEC to foreign private issuers, the SOX 404 requirements are not applicable for a registrant's first annual report on Form 20-F. As a result, with proper planning, the registrant will generally be able to deregister a little over a year after SEC registration and avoid the requirements of SOX 404.

However, if deregistration is not consummated in a timely manner, the requirements of SOX 404 will need to be addressed. In such cases, compliance with SOX 404 must be achieved by the

end of the fiscal period covered by the registrant's second annual report on Form 20-F. As a practical matter, this means that the necessary processes will need to be implemented well in advance of that time.

Closing

Registration on Form F-4 can be daunting and the process can be complicated. However, the path is well trodden – over a thousand foreign issuers have already registered with the SEC. While the initial undertaking can be considerable, the burden of maintaining SEC registration will generally be greatly reduced, and likely be even less significant for Japanese registrants who choose to begin reporting exclusively in IFRS. Moreover, it appears that the gap between the requirements under SOX 404 and comparable requirements under Japanese law may be closing. Please contact the authors for additional information on any of the topics covered in this memorandum or any other topics relating to U.S. securities law.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Theodore A. Paradise
phone: 03-5561-4430
e-mail: theodore.paradise@davispolk.com

Michael T. Dunn
phone: 03-5561-4430
e-mail: michael.dunn@davispolk.com

Hiroshi Sugiyama
phone: 03-5561-4564
e-mail: hiroshi.sugiyama@davispolk.com

Appendix A

Items Typically Found in a Form F-4
Table of Contents

In this appendix, we list and provide a brief description of the items typically found in the table of contents of a Form F-4 that is filed to register securities issued in connection with a Japanese business combination. Assuming the acquiror and the target are of comparable size in terms of financial condition and results of operations, which we do for purposes of this discussion, they will generally need to prepare the same level of disclosure.

Section	Required Disclosure
Registration Statement Cover Page	Information to assist the SEC staff in handling the registration statement. Though filed with the SEC, this cover page is not sent to shareholders.
Prospectus Cover Page	Registrant's name, the title and amount of securities offered, the share exchange ratio, the date and similar basic facts about the transaction.
Prospectus Inside Cover Page	Table of contents and instructions on how to request a copy of any information incorporated by reference into the prospectus.
References to Additional Information	This describes how the target's shareholders may be able to obtain additional information in connection with the transaction.
Forward-Looking Statements	Cautionary language that identifies important factors that could cause actual results to differ materially from those in the forward-looking statements.
Questions and Answers About the Transaction	Very basic information explaining the transaction and the voting procedures for target's shareholders in a plain English, question-and-answer format.
Summary	A summary of the information in the prospectus, with cross-references to fuller discussions elsewhere in the prospectus.
Risk Factors	A discussion of the most significant factors that make the transaction speculative or risky from the perspective of target's shareholders.
Selected Financial Data	A presentation of selected financial data of acquiror and target.
Unaudited Pro Forma Condensed Consolidated Financial Information	A presentation of pro forma condensed combined financial information showing the effects of the transaction.
Selected Historical and Pro Forma Per Share Data	A presentation of selected historical and pro forma per share data.

Section	Required Disclosure
Market Price and Dividend Information	A tabular comparison of the historical market value of the securities of acquiror and target.
Exchange Rates	A chart of the historical exchange rates between the Japanese yen and U.S. dollar, assuming acquiror and target report their financial statements in yen.
General Meeting of Target Shareholders	Specific information concerning the target shareholders' meeting, the vote and the appraisal rights of dissenters.
The Transaction	A description of any contracts or arrangements between acquiror and target, including a chronology of meetings regarding the transaction with the topics discussed, the parties' reasons for engaging in the transaction and a summary of any third-party fairness opinion.
The Transaction Agreement	A summary of the terms of the transaction agreement.
Business Goals and Strategies of Registrant	A presentation of business goals and strategies of the registrant for conducting the acquisition.
Business of Acquiror	The purpose of the business presentation is to provide information about acquiror's business operations, the products it makes or the services it provides and the factors that affect its business.
Business of Target	The purpose of the business presentation is to provide information about target's business operations, the products it makes or the services it provides and the factors that affect its business.
Acquiror's Management's Discussion and Analysis of Financial Condition and Results of Operations	Information that is necessary for an investor to understand from management's perspective acquiror's financial condition, changes in financial condition, results of operations and factors that may affect future results.
Target's Management's Discussion and Analysis of Financial Condition and Results of Operations	Information that is necessary for an investor to understand from management's perspective target's financial condition, changes in financial condition, results of operations and factors that may affect future results.
Directors and Management of Registrant Following the Transaction	A description of the name, experience and job description, as well as other information, with respect to registrant's directors, managers and key employees following the transaction.
Major Shareholders	A list of record holders of 5% or more of the shares of acquiror and target.

Section	Required Disclosure
Description of Registrant's Common Stock	Information regarding the number of issued shares, authorized and unissued shares, options outstanding, rights of shareholders and similar information.
Exchange Controls	A description of Japanese regulations which may affect the importing or exporting of capital, or the remittance of dividends to nonresident holders of the registrant's securities.
Comparison of Shareholders' Rights	An explanation of any material differences between the rights of acquiror's shareholders and of target's shareholders.
Taxation	Information regarding taxes to which U.S. shareholders may be subject, including information about tax withholding and applicable tax treaties.
Experts	A list of experts providing information used in the prospectus. If any of the experts (auditors or, in some cases, the financial advisers) are to be compensated on a contingent basis, owns a material number of shares in the company or has an economic interest in the company or in the transaction, this needs to be disclosed.
Legal Matters	The lawyers on the transaction are named here. If any of them are to be compensated on a contingent basis, owns a material number of shares in the company or has an economic interest in the company or in the transaction, this needs to be disclosed.
Where You Can Find More Information	This describes how and where registrant files and how shareholders can obtain reports and other information of the registrant.
Enforceability of Civil Liabilities	A description of potential limitations on the application of civil liability provisions of U.S. federal securities laws to the registrant and its directors.
Index to Financial Statements	A list of the financial statements required to be included in the registration statement, which is then followed by those financial statements.
Appendices	A list of the appendices required to be included in the registration statement.
Exhibits	A list of the exhibits required to be included in the registration statement.