Davis Polk

CLIENT MEMORANDUM

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

May 2020

Introduction

Over the past decade, a significant number of domestic business combinations in Japan have required registration with the U.S. Securities and Exchange Commission (the "**SEC**") on Form F-4 before they could be approved by target shareholders. This memorandum has been prepared to help explain the Form F-4 registration process and its consequence for Japanese companies.

- *What types of transactions most often require an "F-4"?* Business combinations structured as a merger or similar share-for-share exchange involving listed companies in Japan.[1]
- *What is an "F-4"?* Form F-4 is a form of registration statement that may be used by a Japanese company or other foreign private issuer ("**FPI**")[2] to register with the SEC securities to be issued in a business combination under the Securities Act. For a Japanese company that has not previously registered its securities with the SEC, the information required to be disclosed in the registration process is similar to that required if such company were to conduct an initial public offering (IPO) in the United States.
- *What is the "10% test"?* The "10% test" is shorthand for a test of the availability of an exemption from SEC registration for mergers and similar share-for-share exchange transactions provided by Rule 802 under the Securities Act. To qualify for this exemption, U.S. beneficial owners must hold 10% or fewer of the target's shares.

In this memorandum, we generally focus on requirements applicable to Japanese FPIs that are not currently SEC-reporting companies and that would file a registration statement with the SEC only if necessary to do so in connection with 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 such company offering its shares as an "**acquiror**" and each such company whose shares are being acquired as a "**target**". Because registration obligations ordinarily apply to the acquiror, we may also refer to the acquiror in this memorandum 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 business combinations between non-U.S. companies. 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.

---

[1] This memorandum is not relevant for cash-only tender offers or acquisitions of private companies and only addresses U.S. legal issues arising in connection with Japanese share-for-share transactions. Please see Davis Polk memoranda on these and other topics at **https://www.davispolk.com/tokyo** under "Related Insights".

[2] A "foreign private issuer" is 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 U.S. residents; and (ii) (x) the majority of the executive officers or directors are U.S. citizens or residents, (y) more than 50 percent of the assets of the issuer are located in the United States, or (z) the business of the issuer is administered principally in the United States. See Rule 405 under the U.S. Securities Act of 1933, as amended (the "**Securities Act**"), and Rule 3b-4 under the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**").

Davis Polk

Contents

I. Background

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

A. Key Sources of U.S. Federal Securities Laws

The Securities Act and the Exchange Act are the key sources of U.S. federal securities laws. The Securities Act regulates offers and sales of securities and the Exchange Act governs secondary market trading and the periodic reporting obligations of public companies. 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, and promulgates rules to effect and guidance to interpret the Securities Act, the Exchange Act and other U.S. federal securities laws. Another relevant law discussed in more detail below is the U.S. Sarbanes-Oxley Act of 2002 ("**SOX**").

B. 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.[3]

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 the 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". For reasons we describe below, the use of such U.S. jurisdictional means is unavoidable for most Japanese merger and similar share-for-share exchange transactions among listed companies in Japan, and these transactions are thus generally subject to Section 5.

On the other hand, business combinations that are structured as a cash-for-stock transaction (such as a cash tender offer) are generally not subject to SEC registration under Section 5. This is because Section 5 regulates "offers" and "sales" of securities, not offers of cash for securities.

1. 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;

[3] For example, the decision to tender shares in a tender offer, vote shares in favor of a merger, or exercise appraisal rights (*hantai kabunushi kaitori seikyū ken*).

- *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's 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's shares are offered to the incorporator's shareholders;
- *Share Exchange (kabushiki kōkan)*: a company acquires all the shares of another company in a share exchange; the acquiror's shares are offered to target shareholders; and
- *Stock Distribution Spin-Off (supinofu)*[4]: a parent company distributes to its shareholders 100% of the outstanding shares of either an existing subsidiary (*kabushiki bunpai ni yoru supinofu*) or a newly-carved out business (*bunkatsu gata bunkatsu ni yoru supinofu*)[5].

In this memorandum:

- each of the following is an "acquiror":
  - the surviving company in a merger;
  - the non-surviving companies in a consolidation-type merger;
  - the newly formed holding company and the incorporators or incorporator in a joint or independent share transfer; and
  - the acquiror in a share exchange.
- each of the following is a "target":
  - 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.
- In the case of a consolidation-type merger and a joint or independent share transfer, each of the non-surviving company or companies and the incorporator or incorporators is considered to be both an acquiror and a target.

2. Transactions Generally Not Subject to Registration

The following Japanese business combinations are structured as cash-for-stock transactions and are generally not subject to SEC registration under Section 5.[6] In this memorandum, we refer to these transactions as "**cash transactions**". The following list introduces the typical cash transaction

[4] Our understanding is that adverse tax consequences under Japanese law had historically made spin-off transactions structured as a combination of a demerger (*kaisha bunkatsu*) and distribution of shares as a dividend in kind (*genbutsu haitō*) impracticable. However, following tax reform enacted in Japan in March 2017 that allowed a parent company and its shareholders to avoid such negative tax consequences if the spin-off transaction satisfies certain requirements, we are aware of Japanese companies that have taken advantage of this transaction structure.

[5] In general, if the spin-off transaction is considered a “sale” of securities by a parent company, the distribution of the spun-off subsidiary’s securities must be registered with the SEC or otherwise be eligible for an exemption from registration requirements under the Securities Act. The SEC staff has, however, issued guidance that such a transaction would not be considered to be a sale of securities if it satisfies certain conditions, including a condition that the parent company provides “adequate information” about the spin-off and the new spun-off entity to its shareholders and to the trading markets. Davis Polk has advised Japanese companies conducting spin-off transactions on compliance with this SEC guidance and can provide more information on this topic upon request.

[6] Although cash transactions generally do not need to be registered with the SEC, they are still generally subject to U.S. securities laws if the target company has U.S. resident shareholders.

structures and the general basis for concluding that the transactions are not subject to SEC registration:

- *Cash Tender Offer (kinsen taika no kōkai kaitsuke)*: a tender offer of cash[7] 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 taika no 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". We understand that this method is used less frequently since the introduction of the mandatory squeeze-out described below;
- *Mandatory Squeeze-Out*:[8] as the second step of a two-step cash tender offer, a shareholder holding at least 90%[9] of the total voting rights of a target (either directly or through one or more wholly owned subsidiaries) is granted a conditional call option by operation of law as a "Special Controlling Shareholder" and, upon notification to and approval from the board of directors of the target company, forces a cash acquisition of the remaining shares held by minority shareholders; does not involve an "offer" or "sale" of a security under Section 5; and
- *Reverse Stock Split*: under Rule 145(a)(1) under the Securities Act, a reverse stock split where public shareholders receive only cash for fractional shares generally will not constitute an "offer" or "sale" of securities.

3. 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 (using any U.S. means of communications, banking systems, etc.) is interpreted very broadly and will generally be impossible to avoid.

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 their

[7] Our understanding is that adverse tax consequences under Japanese law have historically made Japanese business combinations structured as a stock tender offer (*jisha kabu taika no kōkai kaitsuke*) impracticable. However, following a 2015 amendment to the Japanese Companies Act (*kaisha hō*) that introduced mandatory squeeze-outs by stockholders holding at least 90% of the total voting rights and amendments effective July 2018 to the Japanese Act on Strengthening Industrial Competitiveness (*sangyō kyōsōryoku kyōka hō*) that allow an acquirer to avoid such negative tax consequences upon receipt of prior approval for a reorganization plan from the Ministry of Economy, Trade and Industry, we understand there has been discussion within the Japanese legal community on the possible benefits of structuring Japanese business combinations as a stock tender offer. Moreover, some commentators have suggested that a stock tender offer with such approval may not be subject to SEC registration on Form F-4 if U.S. shareholders are excluded from such offer. However, we understand such discussions to be hypothetical at this time, as there has not yet actually been an example of such a transaction under the amended rules.

[8] Introduced pursuant to amendments of the Companies Act of Japan effective May 2015.

[9] Further amendments to the Companies Act of Japan effective July 2019 have provided another approach under which a shareholder (or group of shareholders forming a consortium) owning as little as 66 2/3% of the outstanding voting rights in a target company may be able to implement a squeeze-out of minority shareholders, subject to additional conditions requiring that (i) a single acquiror own at least 50% of the outstanding voting rights, (ii) the acquiror obtain approval from the applicable ministry of a business restructuring plan demonstrating the transaction will result in improvements to the acquiror's business over the ensuring three to five years and (iii) the acquiror provide the applicable ministry with a report indicating the consideration offered to minority shareholders is fair from a financial point of view.

participation is necessary for the success of a transaction. The SEC has indicated that it will closely scrutinize transactions that purport to avoid the use of U.S. jurisdictional means.[10]

Virtually all listed companies in Japan have beneficial shareholders who are resident in the United States. If the shares of a listed company in Japan 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 listed companies in Japan 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.[11]

C. 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 FPIs. For purposes of this 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 listed companies in Japan; and
- as a threshold matter, will not be available if U.S. beneficial shareholders hold more than 10% of the outstanding shares of the target company.[12]

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(a)(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 listed company in Japan.

II. SEC Registration Basics, Timing and Process

If the Rule 802 exemption is not available, the share exchange transaction will generally need to be registered with the SEC. Due to this registration requirement, 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 an FPI, the registrant will not need to meet all the same the disclosure standards of non-FPIs, including U.S.-based public companies, because the SEC allows FPIs to comply with a more limited set of rules.

---

[10] *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) (available at **https://www.sec.gov/rules/final/2008/33-8957.pdf**).

[11] We understand that in the context of a rights offering, while there is at least one example of a Japanese company limiting participation of U.S. shareholders in the rights offering to those that were reasonably believed to be "qualified institutional buyers" so as to avoid SEC registration, this approach has not become widespread nor has it been tested in the context of a share exchange transaction.

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

However, the disclosure will still need to generally be in line with that of other Japanese companies registered with the SEC.[13]

While SEC registration is costly and requires significant time and attention from a Japanese company's management, there are potential benefits from SEC registration, including allowing the registrant to: list on a U.S. stock exchange; use its shares as acquisition consideration in subsequent share exchange transactions; expand its financing options; increase investor interest in its securities; and potentially improve its name recognition and reputation in the United States. If none of these provides a compelling reason to maintain such registration, Japanese registrants will be comforted to learn that with proper planning, they may deregister in a little more than a year after registration.[14]

A. Registration Basics

If SEC registration is required, each acquiror[15] in the share exchange transaction will be required to file a Form F-4 to register the transaction and will thereby become an SEC registrant.

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:

- such 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.[16]

1. Disclosure of Material Information

The U.S. securities laws are based on a principle of full and fair disclosure. The underlying premise 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 the disclosure

---

[13] SEC guidance provides that FPIs that meet the requirements for "emerging growth companies" ("**EGCs**") under the Jumpstart Our Business Startups Act (the "**JOBS Act**") are also eligible to benefit from accommodations for EGCs under the JOBS Act. However, we expect that most Japanese FPIs considering share exchange transactions would not meet the initial requirement under the JOBS Act that an EGC must have "total annual gross revenue" for its most recently completed fiscal year of less than $1.07 billion (this threshold is subject to inflation-based adjustments). ("Total annual gross revenues" means total revenues as presented on the income statement presentation under U.S. generally accepted accounting principles ("**U.S. GAAP**") (or International Financial Reporting Standards as adopted by the International Accounting Standards Board ("**IFRS**"), if used as the basis of reporting by an FPI). If the financial statements of an FPI are presented in a currency other than U.S. dollars, total annual gross revenues for purposes of this test should be calculated in U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year. The current figure was adjusted from $1 billion in March 2017 and is subject to adjustments for inflation by the SEC every five years.)

[14] Prior to deregistration, a registrant must have continued its reporting obligations under the Exchange Act for at least 12 months and have filed at least one annual report on Form 20-F. There are additional requirements regarding average daily trading volume/numbers of U.S. shareholders and restrictions on additional registered public offerings in the prior 12 months that could impact the availability of deregistration. See the discussion of deregistration in Part VI, *infra* note 35, for additional information.

[15] As mentioned above, there can be more than one registrant in a share exchange transaction. For example, in a joint share transfer transaction (*kyōdō kabushiki iten*) involving two incorporators, there are technically three registrants. For the sake of simplicity, we will generally refer to the acquiror and the target in the singular.

[16] Based on informal oral guidance from the SEC staff to Davis Polk attorneys.

expected of an acquiror conducting a share exchange transaction to be registered on Form F-4 and to such acquiror's ongoing SEC reporting obligations thereafter.

The information which must be disclosed in a Form F-4 registration statement is set out 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 or incorporates by reference a number of information disclosure requirements that must be satisfied, even if such information is not material to investors. The registrant must also disclose any other information, whether or not prescribed by the form, that is necessary in order to ensure that statements included therein 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 complete.

There is no "bright-line" test for materiality under the U.S. federal securities laws, and whether information is material often depends on the particular facts and circumstances. According to the U.S. Supreme Court, a fact is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision.[17] Companies and their advisors often rely on several rules of thumb to make this principle of materiality more concrete. Depending upon the nature of the fact, they may ask themselves whether disclosure of the information would affect the price of the relevant security, or whether an event should be disclosed because that event would affect the company's net income or total assets. A 5% rule of thumb is often used for preliminary analysis, but the SEC staff has strongly warned that such numerical thresholds should not be relied upon as a "substitute for a full analysis of all relevant considerations". In certain circumstances, even facts that would have a very small numerical impact on the financial statements might be considered material.[18]

2. Liability for Material Misstatements or Omissions

The Securities Act provides that the following persons may be liable to purchasers of the securities for material misstatements or omissions in a registration statement:

- the registrant;
- each director or person performing similar functions of the registrant at the time the registration statement was filed;

[17] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The court held further that a fact is material if there is "a substantial likelihood that the…fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available". Note this does not require that the misstated or omitted fact would result in the investor changing an investment decision, but that there is a substantial likelihood that proper disclosure would have assumed actual significance in the deliberations of a reasonable investor. In addition, in *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988), the court held that materiality with respect to contingent or speculative events will depend on a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of company activity.

[18] *See* SEC Staff Accounting Bulletin: No. 99 – Materiality, Release No. SAB 99 (Aug. 12, 1999). Examples provided by the SEC of circumstances where a quantitatively small misstatement or omission could still be material include if it arises from an item capable of precise measurement or from an estimate with a low degree of precision involved; masks a change in earnings or other trends; hides a failure to meet analyst expectations; changes a loss into income (or vice versa); concerns a segment or portion of a business identified as playing a significant role in operations or profitability; affects compliance with regulatory requirements or loan or other contractual requirements; has the effect of increasing management compensation; or involves concealment of an unlawful transaction.

- 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.

3. Defenses to Liability and the Due Diligence Investigation

When registering a share exchange transaction on Form F-4, the persons listed above (other than the registrant itself) who may participate in the registration process have a "due diligence" defense against material misstatements or omissions that 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 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.

- 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.

B. 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 six to nine months 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 in accordance with U.S. GAAP or IFRS is frequently 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.

1. Initial Public Announcement and other Preliminary Communications

The initial public announcement of a share exchange transaction, which includes the announcement of an agreement in principle (*kihon gōi*) in connection with the transaction, will present one of the first timing issues. The announcement, even if the final structure, the exchange ratio and other terms of the transaction have not yet been decided, could be considered an "offer" of securities under Section 5 of the Securities Act that 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. As such, 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 preliminary announcements and other written communications (such as press releases, press conference materials, investor or employee presentations and responses to questions from the investment community) 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 written communications relating to the transaction in English to the SEC on the date of publication and such communications must bear a specific legend. "Written communications" are construed broadly and can include, for example, audio or video recordings that are repeatedly used or accessible on the parties' websites. 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 obtain from the SEC necessary codes to make EDGAR submissions (for the first filing), to prepare English language translations of these communications and to convert document files to the EDGAR format. Filings under Rule 425 should continue at least through the shareholders' meeting. It is typical to have numerous Rule 425 filings in a single transaction.

2. Financial Statements and Other Financial Information

As mentioned above, the time needed to prepare and audit the financial statements required by Form F-4 will often drive the schedule because if the parties do not already prepare the necessary IFRS or U.S. GAAP financial statements, the process of preparing such financial statements for the first time can take up to a year or more. Assuming for the purposes of this discussion that the acquiror and the target are of comparable size in terms of financial condition and results of operations, 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[19] in accordance with either (i) IFRS, (ii) U.S. GAAP or (iii) Japanese generally accepted accounting principles 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. Historically, many Japanese SEC registrants have reported in U.S. GAAP, though a number of Japanese companies now report to the SEC in IFRS. The SEC review process that we discuss below generally cannot begin until the requisite audits have been completed.

In addition to annual financial statements of the parties, pro forma financial information showing the pro forma effects of the proposed transaction is required.[20]

Issuers that already prepare their financial statements in accordance with IFRS will have a significantly easier time satisfying the financial disclosure requirements of 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.

3. SEC Review Process

Before the Form F-4 can be declared effective, the SEC may 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 (although annual and interim financial data that a

[19] In May 2019, the SEC proposed amendments to financial disclosure requirements relating to acquisitions and dispositions of businesses, which could change some of the requirements discussed herein. The SEC is soliciting public comment on the proposal and, as of the date of this memorandum, the amendments have yet to take effect. See the Davis Polk memorandum, "**SEC Proposes to Simplify Financial Disclosure for Acquisitions and Dispositions**" (May 7, 2019) for more information.

[20] Other financial statements and information may need to be prepared for purposes of Form F-4, including separate third-party financial statements for certain recently acquired businesses and businesses to be acquired or certain equity method investees or industry guide information if a party operates in certain industries (e.g., banking, casualty insurance, oil and gas and mining).

registrant reasonably believes will not be required at the time the registrant files publicly may be omitted).

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 SEC staff at such branch will send the registrant or its U.S. counsel the staff's comment letter approximately 30 days after the initial confidential submission. The comment letter will require changes to the disclosure or request supplemental information so that the SEC staff can assess the adequacy of the existing 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 may be provided and responded to by the registrant 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 FPIs 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.[21]

There have been a limited number of share exchange transactions involving Japanese issuers in which the SEC decided that review of the Form F-4 was unnecessary after the initial confidential submission. However, it is impossible to predict whether the SEC staff will decline to review a particular transaction, and for planning purposes we recommend that parties assume that their registration statement will be reviewed by the SEC staff.

The Form F-4 will need to be filed and 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.

4. Nine-Month Rule

The SEC has a number of rules on the age of audited financial statements. 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 rule requires such additional financial statements if the date of effectiveness of the registration statement occurs more than nine months after the end of the last audited fiscal year.[22] 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 the most recent annual 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[23] of the fiscal 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.

---

[21] Though the draft registration submission is made confidentially, registrants should be aware that when the SEC completes a filing review it makes its comment letters and company responses to those comment letters public on the SEC's EDGAR system no earlier than 20 business days after it has declared a registration statement effective.

[22] For practical purposes, since the registration statement needs to remain effective until the time of the shareholders meeting pursuant to which shareholders of the target vote to approve the transaction, to avoid the need to file an amended registration statement that contains updated financial information, in a share exchange transaction the date should be measured from the date of that meeting.

[23] If the registrant has at that point published interim financial information covering a more current period than the first six months, that more current interim financial information must be included instead.

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 SEC staff 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 target.
- **Part II**: This part of the registration statement includes information with respect to indemnification, 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 prospectus sent to shareholders. Of the exhibits required to be filed with Form F-4 pursuant to Part II, material contracts are perhaps the most sensitive. See the "- Material Contracts" discussion below.

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, if 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.

A. 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 a Form F-4 registration statement are similar to the risk factors that Japanese companies include in their annual reports (*i.e., yūka shōken hōkokusho*), though the Form F-4 risk factors will likely describe the relevant risks in more detail and also will include risks specific to the transaction.

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. The SEC discourages registrants from disclosing risks that could apply to any issuer or any offering.

B. 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 begins with a "questions and answers" section about the proposed transaction and voting procedures for the meeting 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 "Risk Factors" section discussed above

comes after the summary, which is followed by sections providing selected financial data and information on trading markets and dividends.

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 contact of material significance between the parties. For each such contact, 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 the target board of directors from a financial advisor, including the financial analysis underlying the opinion, if such fairness opinion is referred to in the prospectus.[24]

If not already described in the preceding section, 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.

C. Business

Form F-4 requires a description of both the acquiror's and the target's businesses. 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, including:

- 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;
- historical and basic factual information about themselves, including 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;
- a description of their respective operations and principal activities, stating the main categories of products sold or services performed for the last three years;
- a description of 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, if material;
- a substantiation of any claims regarding their competitive positions;
- a description of any government regulations that materially affect the parties' businesses;

[24] To the extent that any such fairness opinion relies on internal financial projections provided to such financial advisor, the SEC will likely comment to request disclosure of those projections as well. As a result, the common practice is to make such disclosures as an initial matter.

- if the parties are members of corporate groups, a description of such groups along with the parties' positions within the groups;
- a list of their subsidiaries, real estate and certain tangible fixed assets;
- a description of any material plans for expansion; and
- a description of their participation in any material litigation, including government proceedings.

D. 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 is to provide information that is necessary for an investor to understand a company's financial condition and results of operations. The MD&A should not simply be a recitation of information found in the company's financial statements. Rather, the disclosure requirements are intended to satisfy three principal objectives:

- to provide a narrative explanation and analysis of certain aspects of a company's financial statements that enables investors to see the parties through the eyes of the company's 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, the company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.[25]

While, in principle, similar concepts exist in other jurisdictions, the 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.

1. Overview

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

2. 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; (ii) the estimate is among several different

[25] 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) (available at **https://www.sec.gov/rules/interp/33-8350.htm**).

estimates that could reasonably have used; and (iii) changes in the estimate would have a material impact on the company's financial presentation, then the company should disclose in this subsection:

- the estimate;
- why the company 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.

3. 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 company'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.

4. Liquidity and Capital Resources

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

5. Trend Information

Form F-4 also requires the parties to disclose any known trend, demand, commitment, event or uncertainty that, assuming it occurs, is reasonably likely to have a material effect on the company's financial condition, results of operations or liquidity, unless the trend, demand, commitment, event or uncertainty is unlikely to occur.

6. 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, 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.

7. 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.

8. 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.

E. 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, including every such contract (i) to be performed in whole or in part at or after the filing of the registration statement and (ii) entered into in the two years prior to the date of the registration statement. It is possible that no single contract or group of related contracts will be so material and therefore that no contracts need to be filed. In addition, if a material contract needs to be filed, it is possible to file a redacted version of the contract provided the redacted information is not material and would be competitively harmful if publicly disclosed.[26]

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

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

A. 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.

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.

B. 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 respective Japanese annual reports. 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

[26] Rules adopted by the SEC in April 2019 primarily located in Regulation S-K Item 601(b) allow a registrant to file such redacted versions, provided the registrant identifies where information has been omitted from a filed exhibit, where previously a registrant needed to submit a request for confidential treatment to the SEC in advance. Note that the SEC has stated it will still review registrant filings for compliance, and the rules provide that the SEC may request supplementary information or require that the registrant amend the filing.

process and be comfortable[27] with the content of the registration statement as they will each be subject to liability as signers[28] of the Form F-4.

C. 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 the absence of, material misstatements and omissions made in connection with the disclosure that will be included in the Form F-4.

D. Analysis of Issues under Other Laws

The following additional actions that generally need to be taken in order to file a Form F-4 are typically handled by U.S. counsel, but may nevertheless require a great deal of client input and cooperation.

1. 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, FPIs are unable to register under the Investment Company 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.

2. Passive Foreign Investment Company ("PFIC")

U.S. counsel will need to confirm whether the registrant is a PFIC.[29] 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 that 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.

3. Office of Foreign Assets Control

U.S. counsel will need to consider the extent of each party's transactions, if any, with countries or with specific individuals and entities that are the target of U.S. economic and trade sanctions administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury ("**OFAC**"). If

---

[27] The level of comfort should be similar to that necessary for the filing of an annual report on Form 20-F, for which the CEO and CFO are required to sign certificates attesting 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.

[28] 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.

[29] Generally, a foreign corporation is a PFIC if either: (i) 75% or more of its gross income in any taxable year is "passive" income, such as dividends and interest; or (ii) at least 50% of the gross value of its assets (based on an average of the quarterly value of the assets) is attributable to assets that produce passive income or are held for the production of passive income.

significant, certain disclosure about these transactions may be required to be included in the Form F-4.

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.

5. Section 12(g)

An FPI registering a business combination on Form F-4 may also be required under Section 12(g) of the Exchange Act to file with the SEC an Exchange Act registration statement regarding a class of its equity securities if, as of the last day of the registrant's most recent fiscal year:

- it has more than US$10 million of total assets; and
- its shares are "held of record" by either 2,000 persons or 500 persons who are not accredited investors[30], in either case, of whom at least 300 are U.S. residents.[31]

Generally, if applicable, the requirement to file an Exchange Act registration statement would not be expected to adversely affect the transaction schedule or to significantly alter the disclosure and other requirements applicable in a registration on Form F-4.

6. 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 (so-called "Blue Sky" laws). 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.

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 that do not directly relate to the preparation of Form F-4, but which will be applicable once an entity becomes an SEC reporting company. An SEC registrant 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.

---

[30] "Accredited investors" is a term defined under Rule 501 of Regulation D referring to persons or business entities meeting certain requirements for income, net worth, asset size, governance status or professional experience. The alternative test counting accredited investors is not available for a bank, bank holding company or savings and loan holding company.

[31] Note that any employee who received such shares under an employee compensation plan in a transaction exempt from registration under the Securities Act would not be counted for purposes of these thresholds.

A. 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.

1. Document Retention Policy

To avoid liability for document destruction, 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.

2. 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, which 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".

3. 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.

4. 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 it has not.

5. Attorney Conduct Rules

An SEC registrant needs 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.

6. 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. 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, but is defined in a more limited manner 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. Examples of such non-GAAP financial measures include free cash flow, EBITDA or adjustments to operating income to exclude "non-recurring" items. Registrants are not prohibited from using non-GAAP financial measures in their disclosures, but are required to include the most directly comparable GAAP financial measures to any non-GAAP financial measure and a reconciliation of any non-GAAP financial measure to that comparable GAAP financial measure. 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".[32]

7. 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.

B. Requirements Arising under Other U.S. Laws

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

1. 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 nonpublic information. Furthermore, it is illegal for any person in possession of material nonpublic 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 nonpublic 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, as they could be seen as participating in insider trading. Most FPIs that are

[32] Note that this exclusion also covers financial measures that are included in forecasts provided to a financial advisor and used in connection with a business combination transaction if they are provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction and the forecasts are being disclosed to comply with Item 1015 of Regulation M-A. See Questions 101.01, 101.02 and 101.03 of the SEC Compliance & Disclosure Interpretations on Non-GAAP Financial Measures (available at **https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm**).

publicly listed in their home jurisdiction 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 of material nonpublic information, and, as necessary, change the way they interact with the investment community.

2. 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.

3. 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.

4. Current Reporting on Form 6-K

In addition to filing annual reports on Form 20-F, FPIs must also make interim "current" reports on Form 6-K. The general principle reflected in Form 6-K is that an FPI registered with the SEC should furnish to the SEC material information in English that the company makes public in its home market. As such, FPIs should disclose 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.

5. 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 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.

An annual report on Form 20-F must be filed within four months after the end of each fiscal year. In addition to providing substantive information, SEC rules require companies that file financial statements prepared in accordance with U.S. GAAP or IFRS to supplement all such financial statements with financial statements formatted in an interactive data format called eXtensible Business Reporting Language, or "**XBRL**".[33] The rules contain a transition period which allows issuers to begin filing the XBRL financial statements in their first annual report on Form 20-F rather than in their initial registration statement on Form F-4.

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.[34] 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. Due to an accommodation granted by the SEC to FPIs, 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.[35]

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.

---

[33] In addition, the SEC adopted a rule on June 28, 2018 requiring all filers (including FPIs) to embed XBRL data directly into the body of SEC filings. This requirement to adopt "**Inline XBRL**" takes effect in phases based on the type of filer, but will be effective for all FPIs by June 15, 2021.

[34] In order to deregister, the average daily trading volume ("**ADTV**") of the shares of the registrant in the United States must be 5% or less of the registrant's worldwide ADTV, or it must have less than 300 shareholders resident in the United States. Prior to filing Form 15F to terminate its reporting obligations under the Exchange Act, a registrant must have continued such reporting obligations for at least 12 months (and have filed or furnished all reports required during such period), and have filed at least one annual report on Form 20-F. In addition, the registrant must have maintained its listing in Japan over the preceding 12 months and must not have sold (subject to certain limited exceptions) its shares in a U.S.-registered offering in the preceding 12 months.

[35] We note, however, that the registrant would still need to continue to publish electronically disclosure documents in English following deregistration if it intends to take advantage of the exemption from registration available under Rule 12g3-2(b) of the Exchange Act.

Conclusions

Registration on Form F-4 can appear challenging and the process can be complicated. However, many dozens of Japanese companies and over a thousand other foreign issuers have previously registered with the SEC. While the initial preparations can be considerable, the burden of maintaining SEC registration will generally be greatly reduced for Japanese registrants who choose to report exclusively in IFRS. 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.

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

Ken Lebrun
phone: +81 3 5574 2631
email: ken.lebrun@davispolk.com

Jon Gray
phone: +81 3 5574 2667
email: jon.gray@davispolk.com

Christopher Kodama
phone: +81 3 5574 2668
email: christopher.kodama@davispolk.com

Lucas C. Adams
phone: +81 3 5574 2661
email: lucas.adams@davispolk.com

Chihiro Sasaki
phone: +81 3 5574 2658
email: chihiro.sasaki@davispolk.com

Mari Foster
phone: +81 3 5574 2655
email: mari.foster@davispolk.com

Paul Jun
phone: +81 3 5574 2656
email: paul.jun@davispolk.com

Alexander Coley
phone: +81 3 5574 2662
email: alexander.coley@davispolk.com

Haruka Mori
phone: +81 3 5574 2664
email: haruka.mori@davispolk.com

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.
Market Price and Dividend Information	Information regarding the nature of the trading market(s) of the shares of acquiror and target and information on dividends.
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.

Section	Required Disclosure
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 beneficial holders of 5% or more of the shares of acquiror and target.
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 advisors) 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, such fact 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.