

## Takeover Bids under Japanese Law: Basic and Practical Considerations (Part 2 of 2)

Continuing from the previous article, we will continue to review the issues arising in a potential tender-offer bid using the following fictional case.

[Case]

A stock corporation P (Company P) started negotiation on the transfer of shares of a listed company T (Company T) in the middle of April with A (Company A), which owns Company T's shares (60% of the voting stock), and got a feeling that Company A was in a forward-looking attitude. Each of Company T's fiscal year end and the record date for voting right in the annual shareholders meeting is March 31. In the negotiation, Company A stated that it would like to sell all of Company T's shares it owns as soon as possible and, at the latest, before the annual shareholders meeting of Company T. Company P fundamentally understood Company A's position.

### 4. Schedule and Procedures for the Tender Offer

#### 4-1 Schedule

[Issue in Practice 6]

Considering the fact that it will normally take around three months from the beginning of preparation for the tender offer until the completion thereof, we would recommend that the schedule should be as flexible as possible.

Also, it should be noted that any event that may cause changes to the schedule would not occur during the period of the tender offer. For example, according to the Financial Services Agency, disclosure of the flash earnings report during the period of the tender offer would constitute an event to be corrected in the tender offer notification. Since it would be necessary to extend the period of the tender offer in such a case<sup>1</sup>, such disclosure should be avoided as much as possible.

---

<sup>1</sup> In a case where an amendment is submitted and the remaining period of the tender offer is less than ten business days from next day following the day on which such amendment is submitted, the tender offer period should be extended until the expiration of 10 business days from the date on which such amendment is submitted (Article 27-8 (8) of Financial Instrument and Exchange Act ("FIEA"), Article 22(2) of Cabinet Office Ordinance in relation to disclosure in the tender offer for shares not by the relevant issuer ("COO"))

This article was first published in a the *M&A Review*, January 2010, Vol.24, No.1.

**If you have any questions or comments regarding this publication, please contact:**

Shintaro Kuroda  
Partner  
[skuroda@orrick.com](mailto:skuroda@orrick.com)  
+81 (0) 3 3224 2817

Daiki Akahane  
Associate  
[dakahane@orrick.com](mailto:dakahane@orrick.com)  
+81 (0) 3 3224 2836

The outline of the schedule for a friendly tender offer is as follows. Depending on the individual situation, it will normally take around three months from the beginning of the preparation of the tender offer until the completion thereof.

Time	Procedures	
	[Tender offeror]	[Subject company]
1-2 months prior to the beginning of the period of the tender offer	<ul style="list-style-type: none"> <li>• appointment of an agent for the tender offer, FA, attorney, etc.</li> <li>• due diligence on the subject company</li> <li>• negotiation of the relevant agreements, etc. with the subject company</li> <li>• preparation to obtain shareholders' list</li> <li>• negotiation for the application contract in respect of the tender offer with the major shareholder ("Application Contract") and the execution thereof</li> <li>• preparation of public notice for commencing the tender offer, tender offer notification and tender offer statement, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• preparation of the subject company's position statement</li> </ul>
The day prior to commencement of the period of the tender offer	<ul style="list-style-type: none"> <li>• resolution of the board of directors on execution of the tender offer</li> <li>• press release</li> </ul>	<ul style="list-style-type: none"> <li>• resolution of the board of directors on the position statement</li> <li>• press release</li> </ul>
The first day of the tender offer period	<ul style="list-style-type: none"> <li>• public notice for commencement of the tender offer</li> <li>• submission of the tender offer notification</li> <li>• drafting and preparation of delivery of the tender offer statement</li> </ul>	

From the second day of the tender offer period until the last day thereof (20 business days to 60 business days)	<ul style="list-style-type: none"> <li>• delivery of the tender offer statement</li> <li>• amendment of the public notice for commencing tender offer, tender offer notification and tender offer statement</li> <li>• change of terms of the purchase</li> <li>• withdrawal of the tender offer</li> </ul>	<ul style="list-style-type: none"> <li>• submission of the position statement (within 10 business days from the day of the public notice for commencement of the tender offer)</li> </ul>
The day following the last day of the tender offer period	<ul style="list-style-type: none"> <li>• public notice or public announcement of the result of the tender offer</li> <li>• submission of tender offer report</li> <li>• resolution of the board of directors and press release on the result of the tender offer</li> <li>• sending notice for the purchases to the accepting shareholders</li> <li>• submission of the extraordinary securities report (in case where any changes of specific subsidiaries<sup>2</sup> occur)</li> <li>• submission of report of possession of large volume (within 5 business days from the day following the last day of the period of the tender offer)</li> </ul>	<ul style="list-style-type: none"> <li>• press release regarding change of parent company or major shareholder</li> <li>• submission of the extraordinary securities report (if a change of parent company<sup>3</sup> or major shareholder<sup>4</sup> occurs.)</li> </ul>
5 business days after the end of the tender offer period	<ul style="list-style-type: none"> <li>• settlement (5 business days after the end of the tender offer period)</li> <li>• status report of parent company (if the tender offeror newly falls under the definition of the parent company<sup>5</sup> after the purchase of shares pursuant to the tender offer.)</li> </ul>	

In planning the schedule, it should be noted that any event that may cause changes to the schedule should be avoided during the period of the tender offer to the greatest extent possible. For example, according to the Financial Services Agency, disclosure of a flash earnings report during the period of the tender offer would constitute an event to be corrected in the tender offer notification. Because in such a case it would be necessary to extend the period of the tender offer<sup>6</sup>, such disclosure should be avoided if possible. In the above Case, considering the fact that (i) Company T's fiscal year end is March 31, (ii) Company A is willing to sell the shares prior to the annual shareholders' meeting, and (iii) according to the relevant stock exchange, the flash earnings report is required to be disclosed soon after the fiscal year end<sup>7</sup>, the tender offer procedure should be triggered after Company T's earnings announcement, which should be brought forward as far as possible.

<sup>2</sup> Article 19(2)(iii) of Cabinet Office Ordinance of Disclosure of Businesses and Property etc. of Company ("Disclosure COO")

<sup>3</sup> Article 19(2)(iii) of Disclosure COO

<sup>4</sup> Article 19(2)(iv) of Disclosure COO

<sup>5</sup> Article 24-7(1) of FIEA

<sup>6</sup> In case where an amendment is submitted and the remaining period of the tender offer is less than 10 business days from the day following the day on which such amendment is submitted, the tender offer period should be extended until the expiration of 10 business days from the date on which such amendment is submitted (Article 27-8 (8) of FIEA, Article 22(2) of COO)

<sup>7</sup> According to the Guidelines for the Form of Full Year Flash Earnings issued by the Tokyo Stock Exchange (As of June of 2009), it is appropriate for a company to disclose the information on financial results within 45 days from its fiscal year end at the latest (if the 45<sup>th</sup> day is not a business day, by the next following business day), though it is more desirable to disclose within 30 days (if the fiscal year end is the end of any month, within the month following the fiscal year end).

## 4-2 Important Issues Relating to the Procedures for Tender Offer

We note that in practice there are a number of issues in preparing for a tender offer. Among the various important issues relating to the procedures for the tender offer, here we will review those in respect of (i) the way to obtain information related to the shareholders, (ii) the preparation of the tender offer notification, and (iii) the resolution on the position statement by the issuer of the shares related to the tender offer (“Subject Company”), which based on our experience would require attention.

### (a) Important Issues in Obtaining Information Related to the Shareholders

#### [Issue in Practice 7]

In a case where a tender offeror is to obtain information related to the shareholders of the Subject Company, the Subject Company which voluntarily provides the information related to its shareholders to a tender offeror might be in violation of the Act on the Protection of Personal Information (“APPI”). Therefore, the tender offeror should obtain the information related to the shareholders by way of (i) exercising the right to review and/or copy the shareholder registry as a holder of shares of the Subject Company, (ii) obtaining a copy of the shareholder registry through a major shareholder who does not fall under the category of a business operator handling personal information, or other measures.

During preparation for the tender offer, the tender offeror needs to obtain information related to the shareholders of the Subject Company in order to (i) estimate the number of shares to be subscribed, (ii) obtain the contact information to be used in solicitation for applications, and so on. However, since the information relating to individual shareholders contains personal information, such as the relevant name and date of birth, to obtain the information relating to the shareholders from the Subject Company falling under the category of a business operator handling personal information<sup>8</sup> would likely constitute the provision of personal data to a third party, which is prohibited pursuant to Article 23-1 of the APPI.

Therefore, in the practice, a tender offeror would generally obtain information related to the shareholders in the following ways.

First, if a tender offeror has already been a shareholder of the Subject Company, as the APPI permits provision of personal information based on the relevant laws and regulations (Article 23-1-1 of the APPI), such tender offeror is able to exercise the right to review and/or copy the shareholder registry (Article 125-2 of Companies Act) as a shareholder.

On the other hand, when a tender offeror is not yet a shareholder of the Subject Company, it would be possible for a tender offeror to acquire one share or unit of shares of the Subject Company prior to the tender offer procedures. (However, it should be noted that if a tender offeror has had access to some material nonpublic information through due diligence, etc., such acquisition of the shares might constitute insider trading.) In addition, if a major shareholder as a seller is not a business operator handling personal information, a tender offeror would be able to have such major shareholder, exercise the right to review and/or copy the shareholder registry and then obtain such copy of the shareholder registry from such major shareholder.

On the above Case, if Company A, a major shareholder, does not fall under the category of a business operator handling personal information, it would be convenient for Company P to obtain the shareholder registry of Company T through Company A’s exercise of its right to review and/or copy the shareholder registry.

### (b) Important Issues in Respect of Preparation of Tender Offer Notification

#### [Issue in Practice 8]

---

<sup>8</sup> An entity/company which handles more than 5000 items of personal information on any day during the past six months may possibly fall under the category of “Business Operator Handling Personal Information”. (Please refer to Article 2 of cabinet order in respect of APPI)

Since the items to be described in the tender offer notification are varied and numerous and, if a tender offeror submits a tender offer notification which contains a false description of material matters, such tender offeror might be subject to criminal liability (Article 197-1(3) of FIEA), a tender offeror needs to pay sufficient attention in preparing its tender offer notification.

In this regard, if there exists an Application Contract between a major shareholder and a tender offeror, in practice, such a fact is often reflected in the content of the “Purpose of Purchase, etc.”

As listed in the above schedule, under FIEA, three kinds of documents are legally required to be disclosed in relation to the commencement of the tender offer: the public notice for commencing tender offer, the tender offer notification and the tender offer statement. In this article, we will discuss the preparation of the tender offer notification, which contains the most detailed description. The tender offer notification consists of the following five items (Form 2 of COO).

- 1) The outline of the tender offer
- 2) The situation of the tender offeror
- 3) How the shares are possessed and traded by the tender offeror and any person in special relationship with such tender offeror
- 4) Businesses between the tender offeror and the Subject Company
- 5) The situation of the Subject Company

Due to limitations of space, we will provide an explanation of issues related to “the purposes of the purchase” and “the period of purchase, the price for purchase and the number of shares planned to be purchased” contained in “1) the outline of the tender offer” and “3) how the shares are possessed and traded by the tender offeror and a person in special relationship with such tender offeror” as follows, since particular attention should be paid to such items in practice.

- (A) “the purposes of the purchase” and “the period of purchase, the price for purchase and the number of shares planned to be purchased” contained in “1) the outline of the tender offer”

x: The Purposes of the Purchase

- If the purpose of the tender offer is either acquisition of control or participation in management of the Subject Company, (i) measures to acquire control or to participate in management, and (ii) basic management policy after acquiring control or plans upon participation in management should be specified<sup>9</sup>. Also, as an element which might support fairness of the price for purchase, the detailed steps that led to the tender offer are likely to be described to some extent<sup>10</sup>.
- In order to obtain an approving statement from the Subject Company, it would generally be necessary for the enterprise value of the Subject Company to be expected to be enhanced by the consummation of the tender offer. Therefore, such expectation and the reason thereof are to be specified to some extent.
- In a case where there exists an Application Contract between a major shareholder and a tender offeror, in practice, it is likely that the summary thereof is described with a heading such as “matters related to a material agreement”. As we refer to in 5-1 below, if an Application Contract does neither (i) contain provisions that would allow a

---

<sup>9</sup> “Points for Description” (5)a, Form 2 of COO

<sup>10</sup> Please refer to No. 78 of “Outline of the Public Comments and JFSA’s position on the Public Comments” as of December 13, 2006.

major shareholder to withdraw its proposal for application, nor (ii) provide material conditions precedent for application by a major shareholder, nor (iii) contain provisions that would allow a major shareholder to fail to apply to the tender offer or to cancel an Application Contract, absence of such provisions or conditions in the Application Contract should be described. Considering the fact that the purchase itself could not be concluded when there exists the minimum number of shares planned to be purchased (Article 27-13(4)(i) of FIEA) and no major shareholder applies for purchase of its shares, the purpose of the above description in the Application Contract is to (i) avoid such failure of the tender offer, and (ii) disclose the content thereof.

- If it is expected that the relevant shares would be de-listed from stock exchange or OTC market after the purchase, such expectation and the reason thereof should be specified<sup>11</sup>. In this regard, in a case where a squeeze out is scheduled upon acquiring the control of the Subject Company, the steps to be taken for such squeeze out would be specified under the heading of “policy of restructuring of organization upon the tender offer” which is a part of “the purposes of the purchase”.

y: The Period of Purchase, the Price for Purchase and the Number of Shares Planned to be Purchased

Since an appropriate price for the purchase would be the most considerable incentive for a shareholder to subscribe, a satisfactory description of the basis of the calculation of the purchase price and how such basis is obtained is required. If a tender offeror has listened to an opinion of a third party in calculating the purchase price, i.e., a tender offeror has made reference to a written appraisal obtained from a third party, (i) the name of such third party, (ii) the summary of such appraisal and (iii) how a tender offeror has determined the purchase price based on such appraisal would be specified<sup>12</sup>.

In addition, in order to cope with a situation where a major shareholder does not proffer its shares, it would be common to provide the minimum number of shares planned to be purchased, which is equal to the number of shares owned by such major shareholder (Article 27-13(4)(i) of FIEA)

- (B) “3) how the shares are possessed and traded by the tender offeror and a person in special relationship with such tender offeror”

If there exists any person in special relationship (Article 27-2(7) of FIEA), how such person in special relationship owns the shares needs to be described, and, as a precondition, it is necessary to understand who would fall under the category of a person in special relationship. The issues related to the scope of a person in special relationship has been already referred to in 3-3 of Part 1 of this article.

- (c) Important Issues in Respect of the Resolution on Position Statement by the Subject Company

- (A) Content of the resolution on position statement

[Issue in Practice 9]

The Subject Company’s position statement in response to the tender offer is composed of two parts: (i) approval or disapproval of the tender offer itself and (ii) whether or not the Subject Company recommends that its shareholders accept the offer for purchase.

---

<sup>11</sup> “Points for Description” (5)e, Form 2 of COO

<sup>12</sup> “Points for Description” (6)f, Form 2 of COO

(i) If the Subject Company goes no further than approving the tender offer itself, the price for purchase does not necessarily exceed the relevant market price, however,

(ii) if the Subject Company recommends that its shareholder accept the offer, the price for purchase must exceed the relevant market price.

When the tender offer procedure has been initiated, it is mandatory for the Subject Company to submit a position statement with respect to the tender offer (Article 27-10(1) of FIEA).

Such statement is composed of two parts: (i) approval or disapproval of the tender offer itself and (ii) whether or not the Subject Company recommends that its shareholders accept the offer for purchase. Whether the Subject Company approves the tender offer (i) depends on whether the result of the relevant tender offer would enhance the enterprise value of the Subject Company, and, therefore, is not necessarily affected by the price for purchase. However, because when the price for purchase falls below the relevant market value, it is irrational for the Subject Company to express its opinion recommending its shareholders' application for the tender offer, if a tender offeror needs to obtain such recommendation from the Subject Company, the relevant market value is a material factor in determining the price for purchase. Although it is rather likely that the Subject Company would recommend its shareholders' application for the tender offer when it expresses approval to the tender offer itself, it is also possible that, upon expressing approval of the tender offer, the Subject Company leaves determination to its shareholders as to whether its shareholders should apply for the tender offer.

Normally, in order for a tender offeror to obtain a loan from a lender, it is considered necessary to have the Subject Company approve the tender offer. However, we are of the view that it depends on each lender whether such lender requires the Subject Company's recommendation of the application for the tender offer.

#### (B) Measures to Avoid or Mitigate Conflict of Interest in the Resolution on a Position Statement

##### [Issue in Practice 10]

The resolution on a position statement must be adopted by the board of directors as an important operation of a company's business (Article 362(4) of Companies Act). In this regard, in a case where there exists a conflict of interest between a director and the Subject Company, such as in an MBO, etc., the Subject Company would be required to take measures to avoid or mitigate such conflict of interest, such as referring to a consultation with a third party committee, etc.

The determination of the content of a position statement constitutes an important operation of a company's business and, therefore, if the Subject Company is a company with board of directors, in general, the relevant resolution on a position statement should be adopted by the board of directors (Article 362(4) of Companies Act)<sup>13</sup>.

When a tender offeror is one of the directors of the Subject Company or is a person who has a common interest with the director(s) of the Subject Company (such as in an MBO), there exists a conflict of interest between a director and the Subject Company and it is advisable to take measures to avoid or mitigate such conflict of interest. Specifically, such measures may include (i) referring to a consultation with outside director(s) or an independent third party committee and (ii) obtaining consents from all directors and auditors of the Subject Company<sup>14</sup>.

---

<sup>13</sup> "ANALYSIS TOB" by Anderson, Mori and Tomotsune, Page 227. Since Article 25(1) (iii) of COO delegated by Article 27-10(1) of FIEA provides "Resolution of the board of directors" as an item to be mentioned in a position statement, it is believed that FIEA and COO assume that a position statement should be made by resolution of the board of directors.

<sup>14</sup> In the light of issues related to the conflict of interest, "Guidelines regarding MBO for the Purpose of Enhancement of Enterprise Value and Ensuring Fair Proceedings" by Ministry of Economy, Trade and Industry ("MBO Guidelines"), Page 14 lists the items (a) to (d) as measures to avoid unreasonably arbitrary judgment by directors;

(a) if there exist outside director(s), consultation with such director(s) or an independent third party committee on the

In this regard, a director who has a special interest in respect of the resolution on a position statement can not participate in a vote for the relevant resolution (Article 369(2) of Companies Act). However, since who would fall under the category of a person with a special interest is not entirely clear, the scope of directors to be excluded from the vote requires careful consideration<sup>15</sup>.

In the above Case, if (i) A, a majority shareholder, has executed an application agreement with Company P, a tender offeror, and (ii) A serves as a director of Company T, it would be rather likely that A would be considered to have a special interest in respect of consummation of the tender offer. As a result, it would be safer to exclude A from a vote for the resolution on a position statement in order to ensure the fairness of such resolution.

## 5. Regulations relating to the Tender Offer

### 5-1 Applying Shareholders' Right to Cancel

[Issue in Practice 11]

In a case where a major shareholder applies for the tender offer and, in the relevant Application Contract, such shareholder agrees not to cancel the executed contract in response to the tender offer, since Article 27-12 of FIEA provides that (i) an applying shareholder may at any time cancel an agreement pertaining to the tender offer during the tender offer period (Article 27-12(i) of FIEA) and (ii) the tender offeror may not request the applying shareholder to pay damages or penalty incurred as a result of cancellation of the agreement (Article 27-12(ii) of FIEA), the question is whether the above agreement to prohibit cancellation by a applying shareholder is valid.

Under FIEA, (i) an applying shareholder to the tender offer may at any time cancel an agreement pertaining to the tender offer during the tender offer period (Article 27-12(i) of FIEA) and (ii) the tender offeror may not request the applying shareholder to pay damages or penalty incurred as a result of cancellation of the agreement (Article 27-12(ii) of FIEA).

In relation to the above regulation, the question is the validity of an agreement between a tender offeror and a majority shareholder in which, in order to secure the major shareholder's application, the major shareholder applies to the tender offer and agrees not to cancel the executed agreement in response to the tender offer<sup>16</sup>(such agreement will be hereunder referred to as the "No-Cancellation Agreement").

In this regard, considering (i) that Article 27-12 of FIEA is to thoroughly protect shareholders by furnishing the right to cancel an Application Contract to applying shareholder and (ii) uniformity of the regulation on the tender offer, it could be construed

---

appropriateness of the MBO and the conditions of MBO (or negotiation between such parties and a director in charge of MBO) and paying serious attention to the result of such consultation

- (b) consents from all of directors and auditors (excluding the director(s) with conflicts of interest)
- (c) obtaining independent advice from an attorney and advisors in respect of the manner of decision making and disclosing the identities of such attorney and advisors
- (d) obtaining an appraisal, etc. from an independent third party by the Subject Company on the price proposed in the MBO

<sup>15</sup>Page 15 of MBO Guidelines provides that "It is pointed out that, in order to enhance clearness and reasonableness of decision making in relation to MBO, the scope of "special interest" should be construed broadly. For example, not only the representative director who would lead the MBO but also the directors who have agreed to invest into the buyer and/or participate in the management should be excluded from the resolution. On the other hand, it is pointed out as well that, since there is a possibility that a director who does not participate in the MBO may try to defend his own interests, to broaden the scope of "special interest" would not necessarily enhance the above clearness or reasonableness." Considering the above, at this moment, it is difficult to clearly identify the scope of persons with special interest in relation to MBOs, etc.

<sup>16</sup>In a case where a major shareholder owns more than half of the issued shares and the minimum limit of the number of shares planned to be purchased is equal to the number of shares owned by such major shareholder, if such major shareholder does not apply to the tender offer or withdraw application, the tender offer automatically ends in failure. Therefore, in such case, in order to ensure the major shareholder's application, such application contract may be entered into between the parties concerned.

that the above article of FIEA might not be waived even by an agreement between the relevant parties and the Application Contract would be invalid<sup>17</sup>.

On the other hand, when there exists a No-Cancellation Agreement, it is likely that a major shareholder with sufficient negotiation skills has negotiated with a tender offeror prior to the commencement of the procedures for the tender offer and, upon satisfactory review of the conditions for purchase and the contents of the Application Contract, a No-Cancellation Agreement has been reached. In view of such circumstances, an interpretation that, for the major shareholder who has been in prior negotiation with a tender offeror, it is not necessary to provide protection under Article 27-12 of FIEA similar to the protection for an ordinary shareholder and therefore Article 27-12 of FIEA does not uniformly prohibit execution of a No-Cancellation Agreement and such No -Cancellation Agreement is not necessarily invalid is not an entirely unreasonable interpretation. However, even under such interpretation, if a majority shareholder cancels an Application Contract against the No-Cancellation Agreement, the cancellation remains valid, though a tender offeror might be able to request damages pursuant to the Application Contract<sup>18</sup>. Based on the latter interpretation, in the above Case, if Company P and A agree that A would apply to the tender offer and A would not cancel the contract in relation to the tender offer in the Application Contract between Company P and A, such agreement would be valid.

## 5-2 The Other Regulations

As to the conditions for the tender offer, there are various other regulations in addition to those in respect of the above cancellation rights to be exercised by an applying shareholder. Among others, the important regulations are the following:

- (A) Obligation to purchase all of offered shares and obligation to solicit purchase of all of issued shares

In a case where the ratio obtained by dividing (a) the aggregate number of shares owned by a tender offeror and relevant persons in special relationships upon consummation of the purchase, etc. by (b) the total issued and outstanding shares is equal to or exceeds two thirds, a tender offeror should (i) conduct a transfer of shares or other procedures to settle the transaction with respect to any and all offered shares (Obligation to purchase all of offered shares/Article 27-13(4) of FIEA and Article 14-2-2 of Cabinet Ordinance regarding FIEA (“FIEA Cabinet Ordinance”)) and (ii) in principle, offer to purchase or solicit proposals to offer to sell any and all shares issued by the Subject Company (Obligation to solicit purchase of all of issued shares/Article 27-2(5) of FIEA and Article 8(5)(iii) of Cabinet Ordinance).

Because in some cases it could be difficult to determine in advance whether the above obligations would arise and the solicitation required to comply with the obligation to solicit purchase of all of issued shares involving different types of shares should be conducted as a part of one specific tender offer procedure (Article 27-2(5) of FIEA, Article 8(5)(iii) of Cabinet Order and Article 5(5) of COO), in practice, in such an uncertain case it would be safer to conduct a solicitation for all of the relevant shares from the beginning.

- (B) Regulations on change of conditions of purchase

Although in principle a tender offeror may be able to change the conditions of purchase (Article 27-6(2) of FIEA), in certain cases where the changes to be made would be disadvantageous for applying shareholders, such as in the following cases (a) through (g), a tender offeror should not make such changes to the conditions (Article 27-6(1) of FIEA, Article 13(2) of Cabinet Order).

---

<sup>17</sup> Please refer to Katsuro Kanzaki “*Disclosure (part 2)*”, Vol. 154 Hogaku Kyoshitsu, Page 72 and Nishimura & Partners “*M&A Encyclopedia*” Commercial Law Center, Inc., Page 77.

<sup>18</sup> Please refer to Shoji-Homu, Vol. 1855, Page 31; Ken Kiyohara, “Detailed Practice of Tender Offer”, Chuokeizai-sha, Inc., Page 244 and Tadashi Ishii and Tomohiro Sekiguchi, “TOB Handbook”, Nikkei Business Publications, Inc. 145.

- (a) to lower the price for purchase (Article 27-6(1)(i) of FIEA)<sup>19</sup>;
- (b) to reduce the number of shares planned to be purchased (Article 27-6(1)(ii) of FIEA);
- (c) to shorten the period for purchase (Article 27-6(1)(iii) of FIEA);
- (d) to increase the minimum number of shares planned to be purchased (Article 27-6(1)(iv) of FIEA, Article 13(2)(i) of Cabinet Order)<sup>20</sup>;
- (e) to extend the period for purchase for more than 60 business days (Article 27-6(1)(iv) of FIEA, Article 13(2)(ii) of Cabinet Order)<sup>21</sup>;
- (f) to change the type of consideration for the purchase (Article 27-6(1)(iv) of FIEA, Article 13(2)(iii) of Cabinet Order); or
- (g) in a case where the conditions of purchase provided by a tender offeror states that the tender offeror may withdraw the tender offer if there occurs any significant changes in the business or property of the Subject Company, etc. (Article 27-11(1)), to change the contents of such conditions of purchase (Article 27-6(1)(iv) of FIEA, Article 13(2)(iv) of Cabinet Order)

There exist exceptions to each of the above cases as referred to in the footnotes. Among others, in practice, with respect to an exception for reduction in the price for purchase as a result of a stock split implemented by the Subject Company, it should be noted that such reduction becomes effective only when a condition stating that a reduction of the price for purchase may occur pursuant to the terms provided in Cabinet Office Ordinance is added to a public notice for commencing tender offer and tender offer notification (i.e. such condition is provided therein).

(C) Regulations on withdrawal, etc. of tender offer

Issue in Practice 12]

In a case where a tender offeror submits a prior report to the relevant authority pursuant to the amended Anti-Competition Act in relation to the purchase of shares planned in the tender offer, if the period during which the tender offeror may receive a prior notification of an order to take certain measures to eliminate a violation (a waiting period) does not end until the day before the last day of the period of the tender offer, according to FSA, normally, the tender offeror may withdraw the tender offer due to the lack of “permits” (Article 14(1)(iv) of Cabinet Order) for an acquisition of the relevant shares.

In this regard, however, the tender offeror should in advance provide a condition in a public notice for commencing tender offer and tender offer notification stating that the tender offer may be withdrawn under the above circumstances.

A tender offeror may not, in principle, withdraw offers or cancel contracts relating to the tender offer (withdrawal, etc. of the tender offer) after having made a public notice for commencing the tender offer (Article 27-11(1) of FIEA).

<sup>19</sup> As a further exception, if a tender offeror added a condition to the public notice for commencing tender offer and tender offer notification stating that the tender offeror may lower the price for purchase pursuant to the relevant cabinet office ordinance when the Subject Company implements a stock split etc., the price for purchase may be changed (Article 27-6(1)(i) and (2), Article 13(1) of Cabinet Order). In practice, it should be noted that such change becomes effective only when a such condition is added (i.e. when such condition is described in a public notice for commencing tender offer and tender offer notification).

<sup>20</sup> As a further exception, if, with respect to the shares issued by the Subject Company, a competitive tender offeror newly appears or a competitive tender offeror increases the number of shares planned to be purchased, the minimum number of the shares planned to be purchased may be increased (Article 13(2)(i) of Cabinet Order).

<sup>21</sup> As a further exception, if (i) an amendment is voluntarily submitted or an order to submit an amendment is issued and, therefore, the period of the tender offer is required to be extended (Article 13(2)(ii) of Cabinet Order) or (ii) a competitive tender offer is commenced or a competitive tender offeror extends the period of the tender offer (□ of the same), the period of the tender offer may be extended for more than 60 business days.

However, when a tender offeror provides in the public notice for commencing the tender offer and the tender offer notification that the tender offer may be withdrawn if certain circumstances occur with respect to the business or property of the Subject Company or its subsidiaries, the tender offeror may undertake such withdrawal, etc. of the tender offer if a relevant event occurs (Article 27-11(1) proviso). Such events that would allow the tender offeror to undertake withdrawal, etc. of the tender offer are limited to those listed in each sub-clause of Article 14(1) of Cabinet Order (share for share exchange, share transfer, merger and split of company, split of shares or investing units, etc.). Although the scope of such events has been substantially expanded, nonetheless the tender offeror cannot freely withdraw the tender offer. In this regard, it should be noted that the above exception is allowed only when the relevant conditions are added (i.e. such conditions are provided in a public notice for commencing the tender offer and tender offer notification). Also, since withdrawal, etc. is permitted in the case of matters “similar” to the matters listed in Article 14(1)(i)イ to ヨ of Cabinet Order (Article 14(1)(i)ヱ of Cabinet Order) and events “similar” to the events listed in Article 14(1)(iii)イ to ヲ of Cabinet Order (Article 14(1)(i)ヰ of Cabinet Order) which are designated in the public notice for commencing the tender offer and tender offer notification, in practice, it is important to determine whether as to the matters/events discovered in due diligence or other procedures should be provided in the relevant documents. We would recommend consulting with the relevant authority to determine whether certain matters/events might fall under the category of the “similar” matters/events listed in Cabinet Order.

In relation to the above, “Law to Amend a Part of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade” (Law number 51 of 2009, “Amended Anti-Competition Act”), which has been in force since January 1, 2010, provides that an acquisition of shares on a scale larger than a certain threshold requires a prior notification to the Fair Trade Commission (“FTC”)(Article 10(2) of Amended Anti-Competition Act). A company which has submitted such prior notification may receive an order to take necessary measures to eliminate the relevant acts in violation of the Amended Anti-Competition Act (i) before the expiration of the thirty-day waiting-period from the date of acceptance of such notification ((8) of the same article) or (ii) if FTC requests submission of necessary reports during such thirty-day waiting period, before the expiration of the period up to the later of (x) the date on which one hundred-twenty days from the date of acceptance of such notification or (y) the date on which ninety days from the date of acceptance of such reports from the company have passed ((9) of the same article, “Waiting Period”). According to FSA, it takes the position that, if such Waiting Period does not expire by the day before the last day of the period of the tender offer, normally, a tender offeror may withdraw the tender offer due to the lack of “permits” (Article 14(1)(iv) of Cabinet Order) for an acquisition of the relevant shares<sup>22</sup>. In this regard, however, the tender offeror should in advance provide a condition in a public notice for commencing tender offer and tender offer notification stating that the tender offer may be withdrawn under the above circumstances.

Even if a tender offeror does not provide a certain condition, if any of the significant matters stipulated in the Cabinet Order occurs with respect to the tender offeror, such as an order to commence bankruptcy proceedings, the tender offeror may withdraw the tender offer. Specifically, the events are listed in Article 14(2) of the Cabinet Order (such as death, a judgment to commence guardianship, dissolution, an order to commence bankruptcy proceeding, etc.)

(D) Prohibition of purchase not through tender offer

In principle, a tender offeror should not purchase the shares dealt with in the tender offer other than through the tender offer during the period of the tender offer (Article 27-5 of FIEA). It should be noted that (i) a party in a special relationship with a tender offeror is treated as the tender offeror for purposes of the above regulation (Article 27-3(3), Article 10 and 8(4) of Cabinet Order) and (ii) the shares which should not be purchased other than through the tender offer include not only the shares which are specifically dealt with in the tender offer but also all types of shares issued by the Subject Company.

*This publication is designed to provide Orrick clients and contacts with information they can use to more effectively manage their businesses and access Orrick's resources. The contents of this publication is for informational purposes only. Neither the publication nor the lawyers who authored them are rendering legal or other professional advice or opinions on specific facts or matters. Orrick assumes no liability in connection with the use of the publication.*

---

<sup>22</sup> Please refer to FSA “Q&A regarding Tender Offer of Shares” added on November 26, 2009, [http://www.fsa.go.jp/policy/m\\_com/20091126.html](http://www.fsa.go.jp/policy/m_com/20091126.html), Shoji-Homu Vol. 1886, Page 14 et seq.