Overview of Tender Offer Bids under Japanese Law.

- Including amendments which came into effect in December 2006.

Introduction

On 13 December 2006, the amendments to the Securities and Exchange Law of Japan (the “SEL”, expected to be renamed the Financial Instruments and Exchange Law in 2007) came into force and introduced substantial amendments to the tender offer rules (the “2006 Amendments”). These amendments are intended to address various legal and commercial issues resulting from recent changes in tender offer practices in Japan.

In Japan, tender offers had generally been made on a recommended basis. However, hostile tender offers have become a common concern since Livedoor’s acquisition of shares in NBS in February 2005, followed by the tender offer for Japan Engineering Consultants by Yumeshin (July 2005), the purchase of Hanshin Electric Railway shares by Murakami Fund (September 2005), the tender offer for Origin Toshu by Don Quijote (January 2006) and the tender offer for Hokuetsu Paper by Oji Paper (August 2006). These transactions provoked discussion about the techniques used by bidders to take advantage of loopholes in the previous tender offer rules. The defensive measures taken by target companies and the countermeasures taken by bidders were also queried.

In addition, management buy-outs, or “MBOs”, (the purchase of shares of a company by its existing management) via tender offer have become increasingly common since the summer of 2005 – e.g. World (July 2005), Pokka (August 2005), Skylark (June 2006), Kyusai (October 2006), Toshiba Ceramics (November 2006) and REX Holdings (November 2006). Some of these transactions raised issues regarding the extent and manner in which bidders should disclose information to shareholders and investors and deal with the potential conflicts of interests which are inherent in MBOs.

The number of tender offers for listed companies launched in 2006 was 65, compared to 46 in 2005. We expect that the Japanese M&A market will continue to become more dynamic and complex from May 2007 with the coming into force of new corporate restructuring provisions under the Company Law whereby cash-out mergers and triangular mergers will become possible.

This memorandum outlines the tender offer rules under Japanese law, including the 2006 Amendments.
1 Acquiring a publicly listed company in Japan – TOB requirement

1.1 If a bidder (the “Bidder”) wishes to acquire shares in a Japanese or foreign company (the "Target") which is required\(^1\) to file a securities report (yuka shoken hokoku sho) under the SEL, the Bidder may be required to launch a tender offer bid ("TOB") pursuant to the SEL. The Bidder should carefully consider whether or not the intended share acquisition must be made through a TOB, as the Bidder may be subject to both civil and criminal liability if it fails to comply with the TOB rules.

1.2 Securities that must be acquired through a TOB include shares with voting rights and other securities which are easily transformable into voting shares, such as stock acquisition rights (shinkabu yoyaku-ken; “SARs”) and bonds with SARs (e.g. convertible bonds) (shinkabu yoyaku-ken tsuki shasai) (collectively “potential shares”) as well as depositary receipts and other certificates representing interests in those securities (investment certificates) issued by both Japanese and foreign corporations (collectively “Shares”).

1.3 The SEL requires a Bidder to launch a TOB in the following circumstances (paragraphs 1.3.4 and 1.3.5 are new under the 2006 Amendments):

1.3.1 the Bidder acquires Shares off-exchange from more than 10 sellers within a 60 day period\(^2\), following which the Bidder holds more than 5 per cent. of the Target’s outstanding voting rights;

1.3.2 the Bidder acquires Shares off-exchange from 10 or fewer sellers within a 60 day period\(^2\), following which the Bidder holds more than one-third of the Target’s outstanding voting rights;

1.3.3 the Bidder acquires Shares through a transaction effected outside regular trading hours (“off-hours trading”), such as through the Tokyo Stock Exchange’s ToSTNeT system, following which the Bidder holds more than one-third of the Target’s outstanding voting rights;

1.3.4 the Bidder acquires Shares representing more than 10 per cent. of the Target’s outstanding voting rights through a combination of on and off-exchange transactions or a subscription of new Shares within a three month period, where the Shares acquired through off-exchange transactions or off-hours trading represent more than 5 per cent. of the Target’s outstanding voting rights and following which the Bidder holds more than one-third of the Target’s outstanding voting rights (see paragraph 1.5.1 below); and

1.3.5 the Bidder, already holding more than one-third of the Target’s outstanding voting rights, acquires Shares representing more than 5 per cent. of the Target’s outstanding voting rights during a TOB period by a third party (see paragraph 1.5.2 below).

1.4 The determination of whether any threshold applies is made by reference to outstanding shares\(^3\) with voting rights. The shareholdings of “specially related parties” (tokubetsu

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\(^1\) Most commonly, these are publicly listed companies but certain non-listed companies such as any company that has issued shares of ¥100 million or more by way of public offering in the past is also subject to this obligation.

\(^2\) More precisely, the law requires that the number of sellers in the contemplated transaction be aggregated with those in transactions effected in the 60 days prior to the contemplated transaction.

\(^3\) Potential shares are also included if held by the Bidder and/or its specially related parties. When calculating percentage thresholds these potential shares (but not other potential shares) are added to both the numerator and the denominator.
kankei-sha) are generally added to the Bidder’s voting rights ratio. The SEL defines the following two types of “specially related parties”:

1.4.1 parties who are deemed to be specially related to the Bidder through a shareholding or personal relationship ("formal specially related parties"). Where the Bidder is a corporation, this includes (i) the corporation’s officers, (ii) corporations in which the Bidder owns 20 per cent. or more of the voting rights and their officers and (iii) corporations which own 20 per cent. or more of the Bidder and their officers (typically, a parent company and its subsidiary are formal specially related parties with respect to each other; sister companies having no direct shareholding relationship are not deemed to be specially related to each other); and

1.4.2 third parties who are deemed to be specially related to the Bidder by agreement ("substantive specially related parties") including (i) a third party which has entered into an agreement with the Bidder in respect of the joint acquisition, transfer or exercise of voting rights of Shares in the Target and (ii) a third party which has agreed to acquire Shares from, or transfer Shares to, the Bidder after the acquisition of those Shares.

1.5 For the first time, the 2006 Amendments define the scenarios described in paragraphs 1.3.4 and 1.3.5 above as requiring compliance with the TOB rules.

1.5.1 Combination of on and off-exchange transactions (paragraph 1.3.4)

In September 2005, the Murakami Fund acquired bonds with SARs through a combination of on and off-exchange transactions, resulting in it holding more than one-third of the outstanding voting rights of Hanshin Electric Railway. In an unrelated transaction in January 2006, Don Quijote acquired shares in Origin Toshu off-exchange, thereby increasing its voting rights ratio to approximately 31 per cent. Don Quijote then launched a TOB to increase its holding to more than one-third. The TOB failed, but Don Quijote purchased more Origin Toshu shares on-market, increasing its voting rights ratio to approximately 46 per cent.

These two sets of transactions led to discussions about whether they should have been effected through a TOB, as the series of transactions was widely assumed to be intended to acquire more than one-third of the outstanding voting rights of the Target. The 2006 Amendments clarify that a combination of on and off-exchange acquisitions resulting in a Bidder acquiring a shareholding of more than one-third would be subject to the TOB rules if, during a three month period:

(i) the Bidder acquired Shares representing more than 10 per cent. of the Target’s outstanding voting rights through a combination of on and off-exchange transactions and/or a subscription of new Shares (often referred to as a third party allotment or TPA);

(ii) the Shares acquired through off-exchange transactions or off-hours trading exceed 5 per cent. of the Target’s outstanding voting rights; and

4 There are some exceptions. See paragraph 1.5.1 below for more detail.

5 Companies in each of which a majority of voting rights is owned by the same company.
(iii) following such acquisition, the Bidder holds in aggregate, with Shares previously held, more than one-third of the Target’s outstanding voting rights.

For example, if the Bidder:

(a) acquires off-exchange Shares representing 30 per cent. of the Target’s outstanding voting rights; and

(b) within three months therefrom, acquires an additional 4 per cent. of the Target’s Shares through on-exchange transactions and/or a third party allotment which results in the Bidder holding more than one-third of the Target’s outstanding voting rights,

the courts will deem these transactions to be a series of related transactions that breach the TOB rules. (The same would apply even if the Bidder acquired the Shares under (b) through a TOB.) Therefore, if the Bidder does not acquire the Shares under (a) through a TOB, the Bidder is not permitted to engage in any further transactions (including on and off-exchange acquisitions and/or a subscription of new Shares) for the following three month period that would result in the Bidder holding more than one-third of the Target’s outstanding voting rights.

Accordingly, when a Bidder intends to acquire Shares in a Target through an off-exchange transaction or off-hours trading, the Bidder should carefully consider:

(i) whether the Shares to be acquired represent more than 5 per cent. of the Target’s outstanding voting rights; and

(ii) if so, whether it is problematic for the Bidder to be under certain restrictions as to acquiring additional Shares during the following three month period.

Shares purchased and/or subscribed for by substantive specially related parties are deemed to be acquired by the Bidder and will be counted when calculating the 5 per cent. and 10 per cent. thresholds. However, Shares acquired by formal specially related parties are taken into account only when calculating the one-third threshold and not when calculating the 5 per cent. and 10 per cent. thresholds. Accordingly, if a parent company and its subsidiary independently purchase Shares in a Target, they do not need to be particularly concerned about every Share acquisition made by the other party.

The 2006 Amendments do not expressly provide a safe harbour for a series of transactions which complies with the above, i.e. which is not subject to the TOB requirement in paragraph 1.3.4 above. However, it is reasonable to assume that the courts are less likely now than before the 2006 Amendments to deem such a series of transactions to be a single transaction. For example, if the Don Quijote/Origin Toshu situation were to recur now but the Bidder were to wait three months between its off-market and on-market purchases we believe the 2006 Amendment would give the Bidder a good argument that these transactions should not be seen as a single acquisition in breach of the principle in paragraph 1.3.2 above, as was queried by some commentators at the time. In this sense, the 2006 Amendments may provide a practical, if not formal, safe harbour in certain circumstances.
1.5.2 Acquisition during a third party TOB (paragraph 1.3.5)

In February 2005, Livedoor acquired shares in NBS through off-hours trading during a TOB by Fuji Television. In an unrelated transaction in February 2006, Don Quijote acquired shares in Origin Toshu on-exchange that were subject to a TOB launched by Aeon. Both Livedoor and Don Quijote acquired more than one-third of the outstanding voting rights of NBS and Origin Toshu, respectively, notwithstanding the TOBs.

These transactions led to the opinion that if competing Bidders are acquiring Shares in a single Target, the outcome of which may affect control of the Target, such acquisitions must be made through a TOB to ensure that the Target's shareholders receive sufficient information in order to make a decision. In response, the 2006 Amendments require that a person wishing to acquire Shares in a Target (the "Acquirer") must launch a TOB if:

(i) the acquisition is made during another party’s TOB period;
(ii) the Acquirer holds more than one-third of the Target’s outstanding voting rights; and
(iii) the Acquirer intends to acquire Shares representing more than 5 per cent. of the Target's outstanding voting rights.

Condition (ii) above is taken to mean that in both the examples below the Acquirer must make any subsequent purchases through a TOB:

− the Acquirer already holds more than one-third of the Target's outstanding voting rights at the time of commencement of a third party TOB period; and
− the Acquirer holds one-third or less of the Target’s outstanding voting rights at the time of commencement of a third party TOB but then increases its voting rights ratio to more than one-third during the third party TOB period.

1.6 Exceptions to the TOB rules

There are certain exceptions to the TOB rules. The Bidder does not need to launch a TOB in the following circumstances:

1.6.1 where the Bidder and the seller have been formal specially related parties (or had certain other relationships, e.g. were sister companies) for at least one year prior to the acquisition;

1.6.2 where the voting rights ratio of the Bidder (parent company) exceeds 50 per cent. of the Target (subsidiary) before the purchase and the Share acquisition is made from 10 or fewer sellers within a 60 day period. However, note that following the 2006 Amendments, a TOB will be required if the acquisition results in the Bidder holding two-thirds or more of the Target’s outstanding voting rights (see also paragraph 3.3 below); or

1.6.3 where the total number of shareholders is fewer than 25 and all the shareholders consent in writing to the purchase by the Bidder from 10 or fewer sellers within a 60 day period. Note that the 2006 Amendments have added a requirement that if the Bidder wishes to acquire a particular class of Shares where the Target has
issued a class of Shares\(^6\) other than the Shares to be acquired and the acquisition will result in the Bidder holding two-thirds or more of the outstanding voting rights, the Bidder must obtain from each other class of shareholders (or holders of SARs, convertible bonds etc.) either:

- in the case of shares only (not potential shares such as SARs or convertible bonds), a class shareholders resolution (i.e. 50.1 per cent. or more) approving the acquisition without a TOB; or
- in the case of Shares (including potential shares), unanimous consent of all class shareholders (or holders of SARs, bonds etc., as the case may be) (this condition is available only if the number of members of such class is fewer than 25).

2 Announcement of TOB

2.1 TOB commencement public notice (*kokai kaitsuke kaishi kokoku*)

2.1.1 To commence a TOB, the Bidder must issue a public notice in one of the following ways:

(i) through EDINET (an electronic disclosure system operated by the Financial Services Agency), together with publication of certain basic information in a daily newspaper;

(ii) in one national daily newspaper; or

(iii) in two daily newspapers.

In practice, most Bidders adopt option (i) above.

2.1.2 The public notice must include certain information required by the relevant Cabinet Office Ordinance, including the following:

(i) the purpose of the TOB;

(ii) the class of Shares for which the offer is being made;

(iii) the TOB period;

(iv) the TOB price;

(v) the number of Shares the Bidder wishes to purchase;

(vi) the Bidder’s expected holding ratio of outstanding voting rights of the Target if the TOB succeeds;

(vii) the name(s) of the TOB Agent(s) – i.e. one or more financial institutions appointed by the Bidder to handle receipt of all payments, custody of shares, etc.;

(viii) the method of acceptance of the TOB and the date of commencement of settlement of the TOB;

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\(^6\) “Shares” include potential shares, so references to “class of Shares” include, for example, SARs and convertible bonds.
(ix) any other conditions of purchase (e.g. any minimum acceptance condition (as defined in paragraph 3.3.1(i) below) – often 33.4, 50.1 or 66.7 per cent.);

(x) whether or not there has been any agreement with the Target or its officers concerning the TOB (including whether or not the Target will support the TOB); and

(xi) the purpose, business and paid-in capital of the Bidder.

2.2 Tender Offer Registration Statement (kokai kaitsuke todokede sho)

2.2.1 At the same time as the TOB commencement public notice is published, the Bidder must file a Tender Offer Registration Statement ("TORS") with the Local Finance Bureau ("LFB") and send a copy of the TORS to the Target and to any Japanese stock exchange on which the Shares are listed.

2.2.2 The TORS must contain the information set out in the public notice above, together with additional information such as from where the funds for the purchase are derived. The 2006 Amendments require more detailed disclosure than before. For example, if the purpose of the TOB is to acquire a controlling stake in or participation in the management of the Target, the Bidder must describe plans for any corporate reorganisation, material borrowings, changes in the members or the composition of the officers, material changes in the dividend or capital policy, and other management policies, together with reasons for those plans.

2.2.3 The Bidder must also now disclose the following information in the TORS:

(i) if the acquisition is for investment purposes only, the Bidder’s strategy for its shareholding, trading and exercise of voting rights, with reasons therefor;

(ii) whether the Bidder plans to acquire additional Shares after the TOB and, if so, the reasons and details thereof;

(iii) whether the Shares are likely to be de-listed after the TOB, with reasons therefor; and

(iv) the process of determining the TOB price. If the Bidder has obtained any third party opinion, the name of the third party, a summary of the opinion and the background to the decision as to the TOB price based on such opinion. The Bidder does not need to attach a copy of the third party’s opinion to the TORS, except in the case of an MBO as described in paragraph 2.6 below.

2.3 Tender Offer Explanatory Statement (kokai kaitsuke setsumei sho)

The Bidder must send, or provide via the Internet, a Tender Offer Explanatory Statement to shareholders who tender their Shares in response to the TOB.
2.4 Opinion Report (iken hyomei hokoku sho)

Following the 2006 Amendments, the Target must\(^7\) file an “Opinion Report” with the LFB within 10 business days from the commencement of the TOB stating its approval or disapproval of the TOB, with reasons therefor and an outline of the process by which it reached such opinion. Further, the Target must disclose details of any plan to take defensive measures against the TOB. The Opinion Report may be neutral. Alternatively, the Target may file a statement that it is withholding its Opinion Report, stating the reasons therefor. If the Target withholds its Opinion Report, it must state whether an Opinion Report will be given at a later date.

2.5 Right to make inquiries and obligation to answer

The 2006 Amendments codify the common practice of the Target’s management making inquiries to the Bidder about the TOB and the Bidder answering them. Inquiries to the Bidder must be included in the Opinion Report. In response, the Bidder must prepare and file an “Answer Report” in the form set out in the relevant Cabinet Office Ordinance within five business days of the Target filing the Opinion Report. The Bidder is not required to answer all of the inquiries, but it must give detailed reasons for choosing not to answer an inquiry.

2.6 MBO requirements

Nearly 250 MBOs took place in Japan between 1996 and 2005. There were 67 MBOs in 2005 and 80 in 2006\(^8\), including large-sized MBOs such as World Co., Ltd., Pokka Corporation and Skylark Co., Ltd. As the interests of the purchasing members of management and the shareholders differ in MBO situations, the 2006 Amendments introduced the following procedures to ensure investors receive sufficient information in the TORS to assess the fairness of the procedures and the TOB price:

2.6.1 the Bidder must attach to the TORS a copy of any third party opinion used as a reference for calculation of the TOB price (although the Bidder is not required to obtain a third party opinion);

2.6.2 the Bidder must provide details of other measures (if any) it has taken to ensure the fairness of the TOB price;

2.6.3 the Bidder must describe in detail the decision-making process for making the TOB; and

2.6.4 the Bidder and the Target must describe, in the TORS and the Opinion Report, respectively, measures they have taken (if any) to avoid conflicts of interest.

2.7 Public notice and reports of results (kokai kaitsuke hokoku sho)

On the day following the last day of the TOB period (see paragraph 3.1 below), the Bidder must report through EDINET or in one national daily newspaper or two daily newspapers the results of the TOB stating (i) the number of Shares tendered, (ii) the number of Shares to be purchased and (iii) the manner and the starting date of settlement. In addition, the

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\(^7\) Previously a Target was not required to file such a report (except in certain circumstances, such as where it made public comments on the TOB), although typically Targets chose to do so.

\(^8\) Nikkei, 12 January 2007.
Bidder must file a report of results with the LFB and send a copy to both the Target and any stock exchange on which the Shares are listed.

3 TOB terms

3.1 TOB period

3.1.1 The Bidder can determine the length of the TOB period, which must be at least 20 business days \(^9\) but not longer than 60 business days. Prior to the 2006 Amendments, the TOB period was 20 to 60 calendar days.

3.1.2 Following the 2006 Amendments, if the original TOB period is fewer than 30 business days, the Target has a right to extend the TOB period to 30 business days by way of request included in the Opinion Report. Upon such request, the TOB period will be automatically extended without any need for the Bidder to file an Amendment to the TORS with the LFB. The detailed procedures are as follows:

(i) if the Bidder sets the TOB period as fewer than 30 business days, it must clearly indicate in advance in the TOB commencement public notice and the TORS that the TOB period may be extended and must specify the start date of settlement in the event that the period is extended; and

(ii) the Target must specify the last day of the extended TOB period in the Opinion Report requesting the extension and issue a public notice stating the last day of the extended TOB period.

3.1.3 If another party launches a TOB for Shares in the same Target, the Bidder may extend the TOB period until the last day of the other party’s TOB period.

3.1.4 If an amendment other than an extension of the TOB period is made within the 10 business days prior to the end of the TOB period, the TOB period will be automatically extended until 10 business days after the date of the amendment to the TORS.

3.1.5 The Bidder may not terminate the TOB before the expiry of the TOB period, even if Target shareholders tender Shares exceeding the maximum number of Shares to be purchased by the Bidder in the TOB prior to expiry of the TOB period.

3.2 Consideration and discount TOB

3.2.1 There are no restrictions on how the Bidder may determine the TOB price. “Discount TOBs”, where the TOB price is less than the market price, are often seen in Japan – there were 10 discount TOBs announced in 2006\(^10\). A discount TOB may be appropriate to enable a specific shareholder to sell a large shareholding to a specific Bidder while maintaining the listing of the Target and without the Bidder having to buy all the Shares in the Target. For instance, if the TOB price is at a premium, shareholders are likely to tender Shares in the TOB in excess of the maximum number of Shares to be purchased. In this situation, the Bidder must purchase Shares from the tendering shareholders on a pro rata basis, which would result in the specific large shareholder being scaled back. To mitigate this risk, the Bidder may agree a TOB price lower than the market price with the specific large

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\(^9\) Including the date on which the TOB commencement public notice was made.

shareholder, at a level which the other shareholders are expected not to find attractive enough to sell their Shares. The maximum number of Shares to be purchased will typically be set as equal to (or slightly more than) the number of Shares to be sold by the specific large shareholder.

3.2.2 Under the SEL, a Bidder may use shares as all or part of the consideration for the purchase (known as a share exchange offer or share-for-share offer). In this case, the SEL requires that the TORS clearly indicates that the consideration for the TOB is shares. However, for the following and other reasons, a share exchange offer is very uncommon in Japan.

(i) Immediate tax liability – any capital gains on consideration shares through a share exchange offer would be immediately taxable upon receipt rather than after the gain has been realised upon the sale of the consideration shares.

(ii) Disclosure requirements under the SEL – the Bidder must file a Securities Registration Statement and Annual Securities Report with the LFB in respect of the consideration shares.

3.3 Number of Shares and obligation to purchase all Shares

3.3.1 In principle, the Bidder must purchase all of the Shares tendered in the TOB. However, the Bidder may control the number of Shares it is obliged to purchase in the TOB in the following ways:

(i) by setting a minimum number of shares that the Bidder will purchase through the TOB ("minimum acceptance condition"). If the total number of Shares tendered is less than the specified minimum number, the TOB will be withdrawn and no purchases will be made; and/or

(ii) by setting a maximum number of shares that the Bidder will purchase through the TOB ("maximum acceptance condition"). If the number of Shares tendered exceeds the specified maximum number, the Bidder will only purchase the specified maximum number from all tendering shareholders on a pro rata basis (in which case those tendering shareholders will all be scaled back).

3.3.2 By including both conditions 3.3.1(i) and (ii) above in the TORS, the Bidder may commit to purchase no more and no less than a specified number of Shares (subject to paragraph 3.3.3 below). This could be used to ensure that a successful bid would reach a control threshold for the Target, but with a maximum limit so as to reduce financing costs and to maintain the listing of the Target.

However, with respect to condition 3.3.1(ii) above, the 2006 Amendments effectively require that any number of Shares set in a maximum acceptance condition must be less than the number of Shares representing two-thirds of the Target’s outstanding voting rights. This is because if the Bidder acquires two-thirds or more of the outstanding voting rights in the Target, it will be obliged to purchase all the Shares tendered up to 100 per cent.

3.3.3 Following the 2006 Amendments, if the Bidder aims to acquire Shares representing two-thirds or more of the voting rights, it must make a TOB for all the Shares.
issued by the Target, including potential shares such as convertible bonds and SARs. Market participants are concerned that this may unreasonably increase the practical procedures a Bidder must take, particularly if the Target has securities (e.g. convertible bonds) issued overseas.

3.3.4 Notwithstanding the Bidder’s obligation to purchase all the Shares tendered in the circumstances described in paragraph 3.3.2 above, the Bidder has no right to compulsorily purchase Shares that are not tendered in the TOB. There are various practical mechanisms whereby a Bidder can squeeze out minority shareholders, although a change to tax law on 1 October 2006 has led to changes in market practice as Bidders have become concerned that traditional squeeze-out mechanisms would lead to potentially substantial tax charges. A detailed examination of this topic is outside the scope of this memorandum but we expect further developments in squeeze-out practice especially when cash-out mergers become possible in May 2007.

3.4 Uniform terms and conditions

The terms and conditions, including the TOB price, on which a TOB is made, must be the same for all of a Target’s shareholders. If the Shares subject to the TOB include more than one class of Share (including potential shares), the terms and conditions of the TOB may differ between the different classes of Shares. To ensure substantial uniformity thereof, the Bidder is now required by the 2006 Amendments to explain in detail in the TORS the reasons for the difference in price offered for different classes of Shares.

3.5 Change in terms and conditions

3.5.1 The Bidder is only permitted to change the terms and conditions of a TOB to the extent that:

   (i) such change does not disadvantage the Target’s shareholders; and

   (ii) the Target’s shareholders who tendered Shares before the change are permitted to take advantage of the change.

For example, a reduction in the number of Shares the Bidder will purchase is not allowed as it is disadvantageous to the Target’s shareholders. Raising the TOB price is only allowed if the Shares already tendered are purchased at the higher price. The Bidder must file an amendment to the TORS and make a public notice when the terms and conditions of a TOB are changed.

3.5.2 Previously, a Bidder was never permitted to lower the TOB price, on the basis that it would always be disadvantageous to the Target’s shareholders. The 2006 Amendments now permit a reduction in the TOB price provided that it is not a substantial change to the terms and conditions and the Bidder will be placed in a disadvantageous position unless the change is allowed. Specifically, a Bidder may lower the TOB price in the following circumstances:

   (i) in response to a stock split by the Target, provided that the price reduction is in accordance with the split ratio; and

   (ii) in response to an issue of shares or SARs for free by the Target, provided that the price reduction is in accordance with the dilution ratio caused by such issue.
To use this new right the Bidder must indicate in the TOB commencement public notice and the original (not just amended) TORS that the TOB price may be lowered in these circumstances.

4 Withdrawing a TOB

4.1 The Bidder may withdraw the TOB only if the conditions triggering such withdrawal are stated in the TOB commencement public notice and the original TORS. Prior to the 2006 Amendments, the conditions enabling withdrawal of a TOB were limited to the occurrence of a merger, insolvency and other similar events.

4.2 In order to limit possible unforeseeable consequences to the Bidder which may result from anti-takeover defences taken by the Target, the 2006 Amendments provide for the following new permitted conditions for withdrawal of the TOB:

4.2.1 the Target implementing a stock split (which would result in the dilution of voting rights by 10 per cent. or more);

4.2.2 the Target issuing, for consideration or for free, new Shares (including SARs) or selling treasury stock (which would result in the dilution of voting rights by 10 per cent. or more);

4.2.3 the Target granting veto rights or rights to appoint or remove directors and/or statutory auditors to the outstanding shares;

4.2.4 the Target disposing of or transferring significant assets; and

4.2.5 the Target borrowing a significant amount of money (equivalent to or exceeding 10 per cent. of the book value of the Target's total assets).

4.3 Even if an event occurs which satisfies the conditions for withdrawing the TOB, the Bidder may choose to waive its right to withdraw and continue with the TOB.

5 Prohibition of purchases outside the TOB

5.1 The Bidder, its specially related parties and the TOB Agent may not, in principle, purchase any class of Shares (including potential shares, whether or not they are subject to the TOB) other than through the TOB during the TOB period unless any of the following exceptions applies:

5.1.1 where the Bidder has entered into an agreement with the seller prior to the commencement of the TOB and has disclosed details of such agreement in the TORS;

5.1.2 where a formal specially related party lodges a statement with the LFB to the effect that it has no agreement with the Bidder in respect of Shares in the Target and therefore does not have a substantive special relationship with the Bidder; or

5.1.3 where a securities company or other entity acting as TOB Agent purchases Shares in the course of its brokerage business on behalf of a person other than the Bidder or its specially related parties.

11 It is prohibited for a third person to purchase Shares on behalf of the Bidder as such purchase would be regarded as a purchase by a specially related party.
5.2 In addition to the above exceptions, the 2006 Amendments permit a Bidder to purchase Shares in any foreign country in which the Shares are listed, provided that such purchases are made in accordance with the procedures under the laws of that country which are equivalent to the Japanese TOB rules.

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