

Client Alert.

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Japanese Tender Offer Rules Expand Exemption for Proprietary Trading System (“PTS”)

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Effective on October 31, 2012, the Financial Services Agency of Japan (“FSA”) amended the Japanese tender offer rules and introduced a new exemption for acquisition of shares made through a proprietary trading system (“PTS”).

Under the Financial Instruments and Exchange Law of Japan (“FIEL”), in general, a purchaser of equity securities issued by a company having a continuous disclosure obligation under the FIEL (such as a company listed on any Japanese stock exchange) must conduct a tender offer (i) when the purchaser’s shareholding ratio is greater than 5 percent after a series of off-market purchases (i.e., purchases conducted outside any Japanese stock exchange) from 11 or more persons during any 61-day period (“5% Threshold”) or (ii) when the purchaser’s shareholding ratio is more than one-third after any off-market purchase (“One-Third Threshold”).¹ A PTS does not constitute a stock exchange under the FIEL and therefore PTS trading of shares was subject to the tender offer requirements. This had been said to be an impediment to development of PTS trading of shares by large institutional investors in Japan.

The new rules introduced an exemption from the 5% Threshold for PTS trading that satisfies certain requirements. The new rules do not affect the One-Third Threshold.

1. Outline of New Exemption from 5% Threshold for PTS Trading

Under the amended rules, when the FSA determines that the electronic data processing systems used for the PTS satisfy the following requirements, trades conducted on such PTS shall be exempt from the tender offer obligations for the 5% Threshold:

1. Information with respect to each order and trade conducted on the PTS shall be immediately made available to the public.²
2. The price quotations and the trading price of securities made on the PTS are determined by auction methods or order matching methods.
3. Holders of securities are secured opportunities to timely effect sales of such securities on the PTS in response to purchase orders.³

¹ With respect to the One-Third Threshold, there is no condition on the number of sellers (i.e., purchase of shares from a single seller can trigger the tender offer requirements). Also, in certain situations, the One-Third Threshold applies to on-market purchase or subscription of new securities (for details, please refer to our newsletter dated November 1, 2006, available at <http://www.mofo.jp/topics/legal-updates/legal-updates/454.html>)

² Specifically, the following information must be made public: (i) for each order, the type and name of the security and the offered price, volume, type (i.e., sales or purchase), and time of order, and (ii) for each trade, the type and name of the security and the price, volume, and time of the trade.

³ To meet this requirement, in general, the electronic data processing systems used in the PTS must ensure that any holder of securities (including individual investors) can participate in trading without trouble and that the trading environment allows the system to process each PTS trade in a timely manner.

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Specifically, trades conducted on the PTS that satisfy the above-mentioned requirements shall not be counted as “off-market purchases from 11 or more persons during any 61-day period” with respect to the 5% Threshold.

The FSA announced on the same day that the J-Market and X-Market managed by SBI Japannext Co., Ltd. and the PTS market managed by Chi-X Japan Limited satisfy the above-mentioned requirements.

2. One-Third Rule Still Applies to PTS Trading

The amended rules have also clarified that any purchase of securities that causes the shareholding ratio to cross or further increase beyond the One-Third Threshold may not be conducted on the PTS unless some exemption applies.

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