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MEMORANDUM

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RECENT AMENDMENTS TO THE RADIO LAW AND BROADCASTING LAW

INTRODUCTION

A highly publicized attempted hostile takeover in Japan highlighted a loophole in legislation which is intended to limit the levels of foreign investment in broadcasting corporations, an industry considered to be of national importance to Japan. Until recently, Japan's Radio Law (Law No. 131 of 1950, as amended, the "Radio Law") and Broadcasting Law (Law No. 132 of 1950, as amended, the "Broadcasting Law") has restricted *direct* ownership of Japanese broadcasting corporations to 20% of the voting rights in such broadcasting corporations, without limiting the *indirect* ownership of such entities. Amendments passed by the Japanese Diet on October 26, 2005, and which are to come into effect on April 1, 2006, go to addressing this issue by stipulating that the *combined* direct and indirect ownership of a broadcasting corporation shall be restricted to 20% of the voting rights in such broadcasting corporations.

1. BACKGROUND: THE ATTEMPTED TAKEOVER OF NIPPON BROADCASTING BY LIVEDOOR

On February 8, 2005, LiveDoor, a Japanese internet service provider, announced that it had acquired a 35% holding in Nippon Broadcasting, a Japanese radio broadcaster and member of the prominent Fuji Sankei media group, and that it intended to acquire the rest of the outstanding shares. It transpired that, in addition to the shares LiveDoor had previously owned, it had recently purchased 9.7 million shares, or 29.6%, of Nippon Broadcasting during after-hours, off-exchange trading on the Tokyo Stock Exchange. In order to finance these purchases, LiveDoor had issued Moving Strike Convertible Bonds, to be underwritten by Lehman Brothers, an American investment bank. The issue here was that Lehman Brothers had acquired a significant indirect holding in Nippon Broadcasting whereby, if it converted the bonds into Livedoor stock, it would become Livedoor's largest shareholder and therefore would be able to influence Nippon Broadcasting indirectly. While the attempted takeover by LiveDoor was eventually abandoned, the incident raised concerns among many that the present legislation could not prevent a foreign company from acquiring a significant indirect interest in a corporation as nationally significant as a broadcasting one. Subsequently, there were calls for the Radio Law and Broadcasting Law to be amended.

2. AMENDMENTS TO THE RADIO LAW AND BROADCASTING LAW

The amendments to the laws and relevant ministry ordinances are based largely on the Law concerning Nippon Telegraph and Telephone Corporation, etc. (Law No. 85 of 1984, as amended) and are aimed at filling the gap in the Radio Law and Broadcasting Law with

respect to restrictions on indirect foreign investment. Whereas the previous laws restricted direct ownership of a terrestrial broadcaster (i.e., not a satellite broadcaster, referred to here as a “Broadcaster”) to 20% of the Broadcaster’s voting rights, the amendments restrict the *combined direct and indirect* ownership of a Broadcaster to 20% of the voting rights. Specifically, if the sum of the direct and indirect foreign ownership in a Broadcaster is equal to or greater than 20% of the voting rights, it will not be issued with the requisite license to conduct its broadcasting operations. While this precept is quite straightforward, the identification and calculation of an “indirect” interest is slightly more complicated.

A) IDENTIFYING AN “INDIRECT OWNERSHIP”

The first thing to note is that an indirect interest in a Broadcaster by a foreign entity will not be considered an indirect interest under the amended laws unless that interest entails voting rights in the stock of the company. Furthermore, subject to the exceptions described below, the amended laws will not apply where a foreign company¹ (referred to here as a “Foreign Investor”) has an interest in a Japanese company which in turn owns a direct interest in a Broadcaster (such Japanese company referred to here as a “Direct Japanese Owner”) if (a) the Direct Japanese Owner’s interest in the Broadcaster comprises no more than 10% of the Broadcaster’s stock, or (b) the Foreign Investor’s interest in the Direct Japanese Owner comprises no more than 10% of the Direct Japanese Owner’s stock.

B) CALCULATION

Essentially the level of indirect foreign investment in a broadcaster will be calculated based on the following formula:

$$A(\%) = \frac{B \times C}{100}$$

In which,

A = the level of foreign investment, which must not be greater than 20%

B = the percentage of the stock owned by a Foreign Investor in a Direct Japanese Owner

C = the percentage of the stock owned by the said Direct Japanese Owner in a Broadcaster.

However, where the Foreign Investor owns more than 50% of the stock of the Direct Japanese Owner, for the purposes of the above calculation, then

$$A(\%) = C(\%)$$

Also, where there is another Foreign Investor, the indirect foreign ownership will be deemed

¹ i) A person not holding Japanese nationality, ii) A foreign government or its representative, iii) A foreign juridical person or organization

to be the aggregate of the two holdings of both Foreign Investors i.e.,

$$A(\%) = \frac{(B + D) \times C}{100}$$

In which,

D = the percentage of stock owned by the second Foreign Investor in the Direct Japanese Owner

The calculation immediately above would apply *mutatis mutandis* if there are more than two Foreign Investors.

C) EXCEPTIONS

As mentioned above, the amended laws will not apply where a Foreign Investor owns no more than 10% in a Direct Japanese Owner which has stock in a Broadcaster or where such Direct Japanese Owner holds no more than 10% of the stock of the Broadcaster. However, there are three exceptions to this rule.

Firstly, regardless of their individual holdings, the amended laws will still apply in the case where there are two Direct Japanese Owners that are each owned by the same foreign investor and where:

$$\frac{A \times a + B \times b}{100} \geq 10\%$$

In which:

A = the percentage of the stock of the first Direct Japanese Owner owned by the Foreign Investor

a = the percentage of the stock of the Broadcaster owned by the said first Direct Japanese Owner

B = the percentage of the stock of the second Direct Japanese Owner owned by the Foreign Investor

b = the percentage of the stock of the Broadcaster owned by the said second Direct Japanese Owner

Secondly, if a Foreign Investor has more than a 50% holding in a Japanese company (the “Japanese Company”) which, in turn, has a holding in a Direct Japanese Owner, the amended laws will still apply if the Japanese Company has no less than a 10% holding in the Direct Japanese Owner (and if the Direct Japanese Owner in turn holds no less than a 10% holding in the Broadcaster).

Thirdly, while a Broadcaster may be able to easily ascertain how many shares a Direct

Japanese Owner has in the Broadcaster itself, it may not be able to ascertain how many shares a Foreign Investor has in the said Direct Japanese Owner. Therefore, the amended laws state that a Broadcaster is permitted to inquire to its Direct Japanese Owner as to how many shares the Foreign Investor has in the Direct Japanese Owner. If it does not receive an answer to such inquiry within 7 business days, the percentage of the stock of the Broadcaster owned by the said second Direct Japanese Owner is calculated to be equal to the level of indirect foreign investment.

D) APPLICATION OF THE AMENDMENTS

The amendments do not contemplate any change to the corporate structure of the Direct Japanese Owner once it has purchased a stake in the Broadcaster i.e. they cannot prevent a Foreign Investor from subsequently purchasing a larger stake in the Direct Japanese Owner which would take the combined indirect and direct foreign ownership of the broadcaster to greater than 20%. However, in the case that this happens, the Ministry of Internal Affairs and Communications (“MIC”) is able to make an order that the broadcasting license be revoked so that this situation is able to be rectified, i.e., to allow the combined foreign ownership of the broadcasting company to come below 20% within the remaining term of the license.

In the case that a Foreign Investor acquires an interest in the Direct Japanese Owner before the latter acquires an interest in the Broadcaster, and if the combined indirect and direct foreign investment then exceeds 20%, the Broadcaster would be able to legally refuse to register that portion of the shares owned by the Direct Japanese Owner which puts the combined foreign investment over 20% to the extent that such voting rights exceed the 20% limit. In such a case, the relevant Ministry Ordinance sets out in more detail how it will be determined which shares will be registered (thus, if there are two Direct Japanese Owners, which one will have their voting rights survive).

In the event that a Foreign Investor subsequently acquires an interest in a Direct Japanese Owner which takes the combined foreign indirect and direct ownership of the Broadcaster to over 20%, the voting rights of the Direct Japanese Owner with respect to the Broadcaster will be automatically denied under the amended laws to the extent that such voting rights exceed the 20% limit until the excessive foreign ownership is cured. In such a case, the relevant Ministry Ordinance sets out in more detail how it will be determined which voting rights will be maintained (thus, if there are two Direct Japanese Owners, which one will have their voting rights survive).

Should you wish to receive further information regarding the above, or regarding other issues when investing in Japan, please contact a partner, Koji Fujita (telephone 81-3-6888-1041, email: koji.fujita@amt-law.com).