

*Outline of revision of disclosure requirements for  
"secondary distribution" (uridashi)  
under the Financial Instruments and Exchange Act*

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The current Japanese regulatory regime under the Financial Instruments and Exchange Act (the "FIEA") governing disclosure in connection with securities offerings provides separate frameworks for (i) offerings for newly issued securities ("primary offerings") and (ii) offerings of already-issued securities ("secondary offerings").

In the case of primary offerings, various disclosure obligations pursuant to the FIEA, including filing of a Securities Registration Statement ("SRS") and subsequent continuing disclosure, are imposed on "Public Offerings" (*boshu*), while primary offerings that constitute "Private Placements" (*shibo*) are exempt from disclosure obligations for issuance. The exemption for Private Placements includes an exemption for so-called "Small Number Private Placements" (*shoninzu-shibo*), which may be available in the case of securities that are not widely held (such as non-listed securities) where offerings thereof are made to fewer than 50 persons in Japan; and an exemption for "QII Private Placements" (*tekikaku-kikan-toshika-shibo*), which may be available if an offering of securities that are not widely held is made only to Qualified Institutional Investors<sup>(\*)</sup> (*tekikaku-kikan-toshika*; "QII").

By contrast, for a given secondary offering, the sole criterion triggering disclosure obligations is whether an identical offering (*i.e.*, upon uniform terms and conditions such as identical sales price for stock or identical principal amount, maturity and interest rate for bonds, etc.) is made to 50 or more persons. A secondary offering falling within this criterion generally will be categorized as a "Secondary Distribution" (*uridashi*) and will be subject to virtually the same disclosure obligations as those imposed in respect of a Public Offering. Any secondary offering that does not fall within this criterion will not be subject to disclosure obligations. There is, in general, no special exemption framework for Secondary Distributions.

### **Amendment**

The "Act for Amendment of the Financial Instruments and Exchange Act, etc." (Act No. 58 of 2009; the "Amendment Act"), enacted in June 2009, substantially changed the disclosure regulations applicable to secondary offerings. In particular, a new disclosure framework will be adopted effective April 1, 2010, under which specific features of the relevant securities or counterparties will be taken into consideration in a manner similar to that applied in the disclosure regulations for primary offerings.

### ***New disclosure framework for secondary offerings***

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<sup>(\*)</sup> This term is defined in detail within a Cabinet Office Ordinance promulgated under the FIEA, and generally comprises a variety of entities having expert knowledge of and experience with investment in securities, such as banks and other financial institutions.

The Amendment Act will abolish the existing disclosure framework for secondary offerings described above and instead adopt a general rule under which any offer of already-issued securities by the issuer thereof, any interested party (*e.g.*, a board member or the like) or principal shareholder of such issuer, or any Financial Instruments Business Operator or Registered Financial Institution, will in principle be deemed to constitute a Secondary Distribution, regardless of the number of counterparties (offerees). As a result, even an offering of shares to a single investor by any of the foregoing will generally fall within the definition of “Secondary Distribution” and may require disclosure.

This change, however, will not necessarily increase the difficulty of engaging in secondary offerings. As further described below, the Amendment Act establishes certain exemptions, so that an offering may be exempt from disclosure obligations.

### *Disclosure obligations for Secondary Distributions*

The following is a summary of the disclosure obligations to be imposed on Secondary Distributions under the new regulatory regime, which do not substantially differ from those applicable to Secondary Distributions under the existing regime:

- (a) *Disclosure upon sale:* As a general rule, no Secondary Distribution shall be made unless an SRS is filed by the issuer with the Japanese regulatory authorities. In addition, the offeror in the Secondary Distribution must prepare and deliver a prospectus to each prospective investor.
- (b) *Continuing disclosure obligations:* The issuer of any securities offered through a Secondary Distribution shall be subject to continuing disclosure obligations under the FIEA, which will be substantially similar to those imposed upon issuers in Public Offerings.

### *Exemptions*

As discussed below, the Amendment Act introduced various exemptions from the imposition of disclosure obligations on Secondary Distributions. These include the following:

#### *(a) Small Number Private Secondary Distribution*

In the event that (i) the issuer is not subject to continuing disclosure obligations with respect to securities of the “same kind” as the securities to be offered, (ii) the number of counterparties in the offering is fewer than 50 and (iii) for certain types of securities, the acquirer is prohibited from transferring the acquired securities except to a single person in a single transaction, then the secondary offering may constitute a “Small Number Private Secondary Distribution” (*shoninzu-shiuridashi*), in which case the issuer will not become subject to any disclosure obligations as a consequence thereof.

It should be noted that, due to item (i) above, this exemption will not be available in respect of any securities listed in Japan.

(b) *QII Private Secondary Distribution*

In the event that (i) all counterparties in the secondary offering are QIIs, (ii) the issuer is not subject to continuing disclosure obligations with respect to securities of the “same kind” as the securities to be offered and (iii) a sales restriction is imposed on the acquirers prohibiting transfer to any person other than one or more QIIs, then the secondary offering may constitute a “QII Private Secondary Distribution” (*tekikaku-kan-toshika-shiuridashi*), in which case the issuer will not become subject to any disclosure obligations as a consequence thereof.

As in the case of “Small Number Private Secondary Distribution”, this exemption will not be available in respect of any securities listed in Japan, due to item (ii) above.

(c) *Foreign Securities*

In the event that (i) the securities to be offered were issued abroad, (ii) the offeror is a Financial Instruments Business Operator or Registered Financial Institution and (iii) information concerning sales and purchase price of the securities is readily available to investors in Japan, the secondary offering will be exempt from disclosure obligations.

Notwithstanding the foregoing, the offeror in a transaction of this type will be required to ensure that “Foreign Securities Information” (*gaikoku-shoken-joho*), comprised of summary information regarding the issuer and the terms of the offered securities, is available to prospective investors; although exemption from such requirement may be available in the event that certain information regarding the relevant issuer and securities is already generally available to investors in Japan.

(d) *Securities Already Subject to Disclosure*

Under the current regulatory regime, a Secondary Distribution of securities as to which appropriate disclosure has already been made (*i.e.*, an SRS or Annual Securities Report / Semi-Annual Report has already been filed with respect to such securities) will be exempt from the requirement to file an SRS. This will continue following the effectiveness of the Amendment Act.

Under the current regime, however, delivery of a prospectus to each investor is generally required in any Secondary Distribution, even if appropriate disclosure has already been made with respect to the relevant securities. Following the effectiveness of the Amendment Act, the obligation to prepare and deliver a prospectus will also cease for any such Secondary Distribution already subject to disclosure, unless the offeror is the issuer, an interested party of such issuer or an underwriter.

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The foregoing constitutes an outline of the revised regulatory regime under the FIEA. Such regime, including the exemptions summarized above, is subject to complex requirements the

imposition of which will depend on a variety of factors. For more information, please contact the attorneys named below.

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