



New Law Requires Fresh Acquisition Strategies

By Noritaka Niwano

ANDERSON MŌRI & TOMOTSUNE

The new *Financial Instruments and Exchange Law* was passed in June 2006 in the form of an amendment to the current *Securities and Exchange Law*. The law now includes some important amendments to takeover bid (TOB) regulations, raising some key points that now must be considered regarding acquisition strategies.

In general, under the TOB regulations, purchasing large volumes of shares or other equity securities of the issuer outside the market that are subject to continuous disclosure requirements can be made only through TOBs. Here, "large volumes" means, among other things, (i) circumstances in which the shareholding ratio of the purchaser to all voting shares following the purchase exceeds 5%, excluding case (ii), and (ii) when purchasing from no more than 10 persons within the past 60 days, circumstances in which the purchaser's shareholding following the purchase exceeds one-third of the target. Under the old TOB regulations, the restricted outside market transactions were those that directly resulted in the 5% or one-third threshold being exceeded, and neither market transactions (excluding off-hour trading) nor a direct issuance were subject to TOB rules. Thus, when purchasing from a small number of sellers, it was permissible to purchase up to 33% of the shares outside the market and then purchase an additional 1% within the market. It was also permissible to purchase up to 33% of the shares outside the market and then subscribe for new shares issued by the issuer, with the result that the shareholding ratio exceeded the one-third threshold.

However, under the new TOB regulations, certain market transactions and direct share issuance transactions will also be taken into account for the purpose of TOB restrictions, subject to certain criteria. More precisely, if the abovementioned 5% or one-third threshold is exceeded due to any combination of (i) purchasing in the market, (ii) purchasing outside the market or (iii) subscribing for new shares directly from the issuer when the aggregate holding ratio of shares so acquired for a three-month period exceeds 10% and shares representing more than 5% of the holding ratio were purchased outside the market (including those purchased through off-hour trading in the market but excluding those subscribed directly from the issuer), any purchase during a three-month period shall be subject to TOB regulations.

For instance, in terms of the one-third threshold, a shareholder who

already holds 20% shares purchases an additional 10% on September 1, then attempts to acquire an additional 4% on October 1. The shareholder cannot purchase outside the market because the holding ratio will exceed the one-third threshold. Moreover, the shareholder cannot purchase on the market, through a TOB or by subscribing for new shares. Under the new TOB regulations, the preceding 10% should have been purchased through a TOB. Therefore, the shareholder has to wait until the three-month period has expired; after December 1, the shareholder can purchase an additional 4% in the market through a TOB or by subscribing for new shares.

Another example involves a shareholder with 27% of the shares purchasing 6% outside the market on September 1, resulting in a total of 33% of the shares. On October 1, the shareholder seeks to purchase an additional 4%; purchasing in the market or by subscribing for new shares is permissible. Otherwise, a TOB is required. However, the shareholder cannot purchase more because the rule on the 10% acquisition threshold (with 5% outside market purchasing) for three months applies (i.e., 6% of the purchase should have been made through a TOB) and no additional shares can be purchased, even in the market.

Under the new TOB rules, an acquirer must have a well-prepared purchasing strategy at the outset.

Anderson Mōri & Tomotsune

Izumi Garden Tower, 6-1, Roppongi 1-chome
Minato-ku, Tokyo 106-6036, Japan

Tel: (813) 6888 1000

Email: info@amt-law.com

Website: www.andersonmoritomotsune.com