

Expansion of the Scope of English Language Disclosure Pursuant to the FIEA Amendment

On November 4, 2011, the Financial Services Agency of Japan (the “*FSA*”) released the preliminary drafts of the amendments to the Cabinet Order (Cabinet Order No. 321 of 1965) and the Ministerial Ordinance (Ordinance No. 5 of 1973) (the “*Draft Amendments*”) and announced the commencement of public comments procedure in relation to the Draft Amendments. The FSA prepared the Draft Amendments in order to reflect and implement the amendments to the Financial Instruments and Exchange Act (Act No. 25 of 1948, the “*FIEA*”), which was promulgated into law on May 25, 2011 (the “*FIEA Amendment*”).

While there are various significant revisions included in the Draft Amendments, this law bulletin will only focus on the relevant changes under the FIEA Amendment regarding the expansion of the scope of certain disclosure documents that issuers can prepare in English for filing (the “*English Language Disclosure*”). Please note that this law bulletin is intended as a preliminary report and is subject to further assessment upon the FSA’s official announcement of the finalized provisions, which may differ from the Draft Amendments.

I. Background

The English Language Disclosure rule was introduced in order to lighten the burden of foreign companies that would otherwise be required to file their disclosure documents in Japanese. Hence, instead of being required to file full-scale disclosure documents in Japanese, the English Language Disclosure rule permits foreign companies to file certain documents in English that have already been disclosed by them in jurisdictions outside Japan accompanied by a few supplementary documents. Under the current FIEA, the scope of the English Language Disclosure rule only covers continuous disclosure documents, such as Annual Securities Reports (“*ASRs*”), Quarterly Reports and Semi-Annual Reports (please note that Extraordinary Reports are outside the scope of the English Language Disclosure rule).

However, notwithstanding the avowed salutary purpose of this rule, just one foreign company has so far utilized it. It appears that the following issues discourage companies from utilizing the English Language Disclosure:

(A) *Narrow Scope of Applicability of the English Language Disclosure Rule*

Under the current FIEA, the English Language Disclosure rule does not cover the filing of a Securities Registration Statement (a “*SRS*”), which must be filed in Japan in order for a company to conduct public offerings in Japan in certain cases. This means that before a

foreign company can conduct its initial public offering in Japan, it has to prepare and file a SRS that provides full-scale corporate information in Japanese.

The FIEA does permit seasoned issuers to utilize the simplified format of a SRS or a Shelf Registration Statement incorporating continuous disclosure documents by reference, instead of a SRS that provides full-scale corporate information. However, the FIEA currently does not permit foreign issuers to incorporate by reference any English Language Disclosure documents into the simplified format of a SRS or a Shelf Registration Statement. Accordingly, in order for foreign issuers to utilize such simplified SRS or Shelf Registration Statement, they have to file an ASR in Japanese, or otherwise prepare and file a full-scale SRS in Japanese, for its public offerings. Therefore, foreign companies that conduct, or intend to conduct, public offerings in Japan do not have an incentive to file their reports under the English Language Disclosure rule.

(B) Burden of Drafting Supplementary Documents in Japanese

Foreign companies that wish to utilize the English Language Disclosure are required to file summaries in Japanese of the “Risk Factors,” “MD&A” and “Financial Statements” as supplementary documents. Pursuant to the “Guidelines for the English Language Disclosure” released by the FSA in 2008, a summary of the “Risk Factors” should be prepared vis-à-vis the material information relating to that section. However, the standards for the preparation of such summaries are uncertain such that the companies have to draft the summaries at their own risk in order for them to avail of the English Language Disclosure. In addition, it has been pointed out that it is impossible to summarize “MD&A” and “Financial Statements” due to the nature of the information contained in these sections.

II. Outline of the Draft Amendments

(A) Introduction of Foreign Company Statement

Under the FIEA Amendment, a foreign company that is required to file a SRS may file a Foreign Company Statement and a few supplementary documents instead of filing a SRS. The components of a Foreign Company Statement are as follows:

- (1) Document written in Japanese providing information on the subject securities; and
- (2) Document written in English that is disclosed in a foreign jurisdiction and contains information similar to those provided in a continuous disclosure document or SRS. “Disclosed in a foreign jurisdiction” here means a document that is required to be filed in a non-Japanese jurisdiction under the relevant laws or stock exchange rules of that jurisdiction. Please note that an English translation of a document originally prepared in another foreign language is not permitted to be filed as a component of a Foreign Company Statement.

Under the Draft Amendments, a foreign company that wishes to utilize the English Language Disclosure in relation to the filing of a SRS is required to file as supplementary

documents summaries in Japanese of the “Trends in Major Business Indices, etc.,” “Outline of Business,” “Risk Factors” and other matters that such foreign companies think appropriate. The FIEA Amendment also provides that the material contents of a Foreign Company Statement and its supplementary documents be replicated as part of the prospectus of the foreign issuer.

(B) Amendment Regarding Simplified SRS and Shelf Registration Statement

Foreign companies will be permitted under the Draft Amendments to refer to the reports filed pursuant to the English Language Disclosure for purposes of filing a simplified SRS or Shelf Registration Statement. This amendment, together with the amendment explained in II(A) above, should solve to a certain extent the issue discussed in I(A) above (although some practical issues still remain as further discussed in III below).

(C) Amendment Regarding the English Language Disclosure of Continuous Disclosure Documents

The Draft Amendments seek to amend the provisions concerning the English Language Disclosure of continuous disclosure documents to make such provisions parallel with the components of the Foreign Company Statement. The most important amendment proposed in the Draft Amendments is the change in the list of summaries required to be filed as supplementary documents. Summaries of the “MD&A” and the “Financial Statements” are no longer required. Foreign issuers are instead required to file summaries in Japanese of the “Trends in Major Business Indices, etc.” and the “Outline of Business” (note that a summary of the “Risk Factors” still needs to be filed). It should be noted that notwithstanding these amendments, the standards or guidelines for the preparation of such summaries are still unclear. There is a possibility, however, that another guideline regarding this point will be released by April 1, 2012 (as further discussed in II(E) below).

(D) Expansion of the Scope of English Language Disclosure to Extraordinary Reports

The Draft Amendments have expanded the scope of applicability of the English Language Disclosure rule to include Extraordinary Reports, which may be categorized as continuous disclosure documents in Japan. Although Extraordinary Reports submitted under the English Language Disclosure must be written in English, such reports are not required to have been first disclosed by the issuer in a foreign jurisdiction (unlike other continuous disclosure documents).

(E) Effective Date of the New System under the FIEA Amendment

The FIEA Amendment will become effective no later than one year from the date of its promulgation (most likely on April 1, 2012). Foreign issuers would thus be able to utilize the English Language Disclosure for SRSs in relation to public offerings taking place on or after the effective date of the FIEA Amendment. As for Extraordinary Reports, the English Language Disclosure may be utilized by foreign issuers with respect to events that occur on or after the effective date of the FIEA Amendment and that give rise to the obligation to file such Extraordinary Reports.

Inasmuch as the public comment procedure for the Draft Amendments will only be completed on December 5, 2011, the Draft Amendments to the Cabinet Order and the Ministerial Ordinance are still subject to further revisions, depending on the opinions submitted in the course of the procedure. Moreover, the FSA revealed that the Tokyo Stock Exchange and the Japan Securities Dealers Association are due to release guidelines for preparation of the supplementary documents. The details of such guidelines are yet to be announced.

III. Remaining Issues Concerning the Use of the English Language Disclosure

Notwithstanding all of the amendments discussed above, it remains a contentious issue whether it is advisable for foreign issuers to avail of the English Language Disclosure with respect to securities sold to ordinary investors in Japan. Apart from the issues pertaining to “summaries” as discussed above, Japanese investors who do not have a good command of English may find it difficult to comprehend disclosure documents written in English, and this may in turn potentially dampen the appeal of such securities to Japanese investors.

As for continuous disclosure filing requirements, it is likewise questionable, for the same reasons cited in the immediately preceding paragraph, whether foreign companies conducting, or intending to conduct, public offerings in Japan will indeed benefit from utilizing the English Language Disclosure.

Therefore, in deciding whether or not to shift to the English Language Disclosure, the foregoing points as well as the issues discussed in sections I and II of this law bulletin should be carefully considered.

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