Public Offering Without Listing ("POWL") in Japan

The following is a brief overview of the procedures involved with respect to a public offering in Japan by a non-Japanese issuer (a "foreign issuer") without simultaneously listing on a stock exchange in Japan.

Background

In Japan, a foreign issuer wishing to offer equity to the Japanese public was, until 1989, required, as a practical matter, to obtain a listing on the Tokyo Stock Exchange (the "TSE"). Since the TSE's listing criteria are stringent, and the listing process is time-consuming and expensive, many foreign issuers were deterred from raising capital in Japan's public markets and relied instead on a private placement exemption or secondary sales when offering securities to Japanese investors. In 1989, procedures eliminating the TSE listing requirement were put into effect. These procedures made it easier for foreign companies to offer shares in a public offering in Japan, particularly in connection with a global offering involving a public offering in another national market.

General Criteria

An offering is deemed to be a public offering in Japan if it is made to 50 or more persons.¹ The Securities and Exchange Act of Japan (the "SEA") provides that a public offering for the subscription or sale of securities shall not be effected unless the issuer has filed a Securities Registration Statement ("SRS") for the offering with the Director General, Kanto Local Finance Bureau (the "KLFB").²

For a foreign issuer to be able to conduct a POWL in Japan, its stock must be, or should be expected to be, listed on a stock exchange that meets the standards set by the Japanese Securities Dealers Association (the "JSDA"). In addition, the foreign issuer's financial statements must be currently disclosed (or in the process of being disclosed through an initial public offering) in a country other than Japan and the accounting principles used to prepare such financial statements must be approved by the Financial Services Agency.

Registration for Public Offerings by Foreign Issuers

The SRS filed with the KLFB for a public offering must give details of the terms and conditions of the offer and financial statements, together with certain other documents (with Japanese translations), including copies of the issuer's constituent documents and the resolutions (if any) of the issuer's board of directors authorising the issuance of the securities. The SRS must be

¹ There are basically two types of private placements in Japan: (i) private placement to a limited number of investors (i.e., less than 50) during any given six-month period; and (ii) in the case of debt securities, private placement to certain prescribed qualified institutional investors, subject to resale restrictions.

² The SEA provides an exemption from the registration requirements for an offering with an aggregate issuing price of less than ¥100 million. However, it is still necessary to file certain information in the form of a securities notice.
subsequently amended in the event of any material change in such information. The foreign issuer is also required to prepare a prospectus, which must be delivered to investors, at the latest, upon purchase of the securities in question.

As a rule, the SRS becomes effective 15 days after the initial filing, but this period may be extended upon comment by the KLFB or in the event of a material change with respect to the information in the SRS. In accordance with Japanese practice, just before the expiration of this period the foreign issuer will conclude the underwriting agreement with a Japanese securities company, whereby the underwriter agrees to purchase from the foreign issuer, on a firm or best-efforts basis, a certain number of securities for the purpose of public offering in Japan at a specified price upon conditions stipulated therein. Thereafter, the foreign issuer must file a price amendment to the SRS with the KLFB. A Japanese public offering can start only after the KLFB issues a certificate of effectiveness of the SRS, which cannot in principal be issued earlier than one full business day after the filing of the price amendment. However, at the discretion of the KLFB, the price amendment may be declared effective on the filing date if the price is determined based upon a bookbuilding process.

A typical timeline for a POWL in Japan as part of a global offering is set forth below:

| Preliminary Steps | • Informal discussions between the Japanese lead manager and the KLFB take place regarding the planned structure of the offering and to clear any controversial points well in advance of the actual preparation of documentation.  
• The foreign issuer is typically not directly involved in these discussions, although the foreign issuer’s assistance is usually required in order to answer any questions about the basis of accounting and the rationale for the level of disclosure that the foreign issuer has chosen to make. |
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<td>First stage of documentation</td>
<td>• Most of the information required for the SRS is can be found in the international prospectus, although Japanese regulations require certain information typically not contained in the international prospectus; in addition, the parts that cover matters specific to the Japanese offering require special preparation, notably the first section of the SRS that deals with the offer structure in Japan.</td>
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<td>Approval of the SRS by the foreign issuer</td>
<td>• The Japan-specific material is compiled with the material from the international prospectus and submitted to the foreign issuer (as the complete SRS) for formal approval by the board of directors or a person authorised by the board.</td>
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| Translation and filing of the SRS | • The document is translated into Japanese by the Japanese lawyers and accountants; this is typically very time-consuming work and should be commenced as soon as possible.  
• In practice, there can be problems in incorporating last minute changes from the international prospectus into the SRS (however, if necessary this can be dealt with by filing a short amendment after the SRS has been filed, which must be filed by the fourth business day preceding the proposed effective date). |
Prospectus

• Typically, 15 days after the filing the SRS will become effective and the offering may proceed.
• The major part of the SRS, as corrected by any subsequent amendments, is published in the form of the public prospectus for the Japanese offering.

Form of the SRS

The details of the registration mechanism applicable to private issuers have been promulgated by the Financial Services Agency in regulations entitled the Cabinet Order Concerning the Disclosure of Corporate Information, etc. Form 7, which is set forth in these regulations, prescribes the required form of the SRS for use by private issuers. Generally, Form 7 requires a complete description of the organisation and operations of the issuer, as well as the terms and conditions of the securities to be sold.

The following points may affect the time required for SRS preparation:

(i) Form 7 requires inclusion of the financial statements of the issuer (i) in Japanese with respect to its most recently completed five fiscal years, and (ii) in their original language with respect to its most recently completed two fiscal years. Signed originals of the auditors’ reports on such financial statements are required to be included for the two most recently completed fiscal years, together with signed original letters of consent by such auditors to the inclusion of these reports in the SRS. If the relevant SRS is filed more than eight months after the end of the issuer’s most recently completed fiscal year, the latest semi-annual financial statements (which need not be audited) must also be included in the SRS.3

(ii) Form 7 requires a description in reasonable detail of the provisions of company laws of the foreign issuer’s home jurisdiction that are relevant to its organisation and operations (e.g., provisions covering the general meeting of shareholders and the board of directors, powers of the directors, the shares of the company and the accounting policies of the company) and the provisions of their constituent documents (e.g., articles of association) relating to, inter alia, shareholders’ rights, such as the right to vote, elect directors and receive dividends.

The following documents (with Japanese translations) are required to be attached to the SRS:

(i) Power of attorney authorising local Japanese counsel to file the SRS on behalf of the foreign issuer;

(ii) Certificate of incumbency certifying the authority of the relevant officer(s) of the foreign issuer (i.e., the officer(s) issuing the power of attorney referred to in (i) above);

(iii) Legal opinion(s) of counsel to the foreign issuer in its home jurisdiction (who may be in-house counsel) stating, inter alia, that the offering in Japan is lawful, that the filing of the SRS has been duly authorised, and that the descriptions of the laws of the foreign issuer’s home jurisdiction contained in the SRS are true and correct;

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3 Issuers generally retain the Japanese affiliate of their own public accountants to prepare the Japanese language versions of their financial statements. This facilitates obtaining the necessary signed audit letters and consent letters, and also ensures that the translations of the financial statements from their original language are appropriately prepared.
(iv) Excerpts of provisions of the laws of the foreign issuer's home jurisdiction specifically referred to in the legal opinion described in (iii) above;

(v) Copies of the constituent documents, such as the articles of association, of the foreign issuer;

(vi) Copies of the resolutions (if any) of the board of directors (and/or other relevant corporate bodies) of the foreign issuer authorising the issuance of the securities; and

(vii) Copies of the depositary agreement and other material agreements signed and executed for the issuance of depositary receipts if the securities being offered are depositary receipts.

**Parties Involved**

The primary parties involved in a POWL in Japan are the Japanese lead manager, Japanese legal counsel to the foreign issuer, Japanese legal counsel to the managers, the Japanese accountants, and the printer. The main duties of each of these parties are listed below:

| Japanese lead manager | - leads negotiations and the overall organisation of the POWL preparations  
| - confirms to the KLFB that appropriate due diligence has been carried out to verify the contents of the SRS |
| Japanese legal counsel to the foreign issuer | - takes the major role in preparing the SRS and prospectus, including translating any necessary documents into Japanese  
| - likely to be involved in the preliminary discussions and negotiations with the KLFB  
| - files the SRS with the KLFB on behalf of the foreign issuer  
| - after the offering, normally continues to act for the foreign issuer on an ongoing basis to deal with the continuous disclosure obligations |
| Japanese legal counsel to the managers | - handles the structural aspects of the offering  
| - usually undertakes some of the final translation work  
| - assists the Japanese lead manager in communications with KLFB |
| Japanese accountants | - translates the financial section of the SRS  
| - usually involved with the financial section of the foreign issuer's ongoing continuous disclosure documents |
| Printer | - Japanese typesetting takes much longer than English and only a small number of specialist printing firms in Japan are able to carry out the prospectus work efficiently and to the standards required |
Tentative Timetable

The following is a summary timetable for an offering in Japan (with "T" being the date of filing of the SRS):

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<tr>
<th>Date</th>
<th>Action</th>
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<tr>
<td>Present through T</td>
<td>Preparation of SRS</td>
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<td>(4 to 6 weeks)</td>
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<tr>
<td>T minus one week</td>
<td>Submission of draft SRS to the KLFB for review and comment</td>
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<tr>
<td>T</td>
<td>Filing of SRS with the KLFB</td>
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<tr>
<td>T+13</td>
<td>Fixing of the terms of issue and execution of issue documents</td>
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<tr>
<td>T+14</td>
<td>Filing of pricing amendment to the SRS</td>
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<tr>
<td>T+16</td>
<td>Registration becomes effective and the offering commences</td>
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<tr>
<td>T + approx. one</td>
<td>Closing of the issue</td>
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<td>month</td>
<td></td>
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<tr>
<td>T + approx. one</td>
<td>Settlement with investors in Japan</td>
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<td>month and one day</td>
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Using "bookbuilding" may modify the timing of pricing and effective date of the SRS. It is, however, recommended to discuss the timetable with the KLFB in advance.

Over-Allotment Option

The KLFB permits the use of an over-allotment option so long as the SRS covers the maximum number of shares to be offered and sold in Japan (including the shares that would have been sold upon the exercise of the option) and the settlement date for the shares subject to the option is the same as the settlement date for the other shares.

Ongoing Disclosure Obligations

It should be noted that a POWL in Japan subjects the foreign issuer to ongoing disclosure obligations. These obligations include the periodic filing of annual and semi-annual securities reports, as well as extraordinary reports with respect to material public announcements made by the foreign issuer, with the KLFB. These obligations can be exempted upon approval by the Financial Services Agency, so long as there are 24 or less beneficial shareholders in Japan.

Other Requirements

In addition to the requirements noted above, pursuant to the Foreign Exchange and Trade Law of Japan, the foreign issuer is required to file a Report on Issue or Offer of Securities with the Minister of Finance within 20 days after the closing date of the offering. The foreign issuer must also submit to the JSDA a letter of undertaking to provide promptly to the JSDA all major company announcements.
Please do not hesitate to contact Mitsuhiro Yasuda (mitsuhiro.yasuda@linklaters.com), Kozo Sasaki (kozo.sasaki@linklaters.com) or Masato Yamanaka (masato.yamanaka@linklaters.com) should you have any questions with respect to this note.