

TOKYO STOCK EXCHANGE PROPOSAL FOR INCREASED MINORITY SHAREHOLDER PROTECTION IN GOING-PRIVATE DEALS

The Tokyo Stock Exchange (TSE) has proposed stringent new requirements for going-private transactions conducted by controlling shareholders, significant minority shareholders, or management buyouts (MBOs), to safeguard minority shareholders' interests and ensure equitable acquisition prices. The new rules aim to address conflicts of interest between the acquiror (such as founding families, controlling shareholders, and certain affiliates) and other general shareholders in a practical manner.

Overview and current requirements

The proposed regulations will (i) enhance the role of the special committee (SC) which is set up by the board of directors and whose members are mainly outside directors/auditors and external advisors to review the going-private process for the benefit of the general shareholders and (ii) broaden the matters required to be disclosed in relation to the going-private process and valuation/pricing.

Currently, companies are required to obtain an opinion from a SC regarding the fairness for minority shareholders (SC Opinion) only for going-private transactions by controlling shareholders. The current regulations do not specify the points to be included in the SC Opinion.

Outline of new requirements

The TSE now proposes that companies obtain a SC Opinion even for MBOs and for going-private transactions by (i) shareholders holding 20% or more of the shares or (ii) shareholders holding 15% or more of the shares and with certain influence over the company¹.

The TSE proposes the SC Opinion should address the following points:

Key Takeaways

- TSE has proposed stringent new requirements for special committee and timely disclosure in going-private transactions to safeguard minority shareholders' interests and ensure equitable acquisition prices.
- Companies must obtain an SC Opinion even for MBOs and for going-private transactions by shareholders holding 20% or more of the shares or 15% or more with certain influence.
- The SC Opinion should address whether the transaction increases enterprise value and the transactional terms including pricing are fair to the shareholders.
- Companies will be subject to stringent disclosure upon the announcement of the tender offer, whereby the SC Opinion, details of the rationale and key assumptions of the per-share valuation, and the details of relationship with the valuation agent are disclosed.
- The proposed regulations align with the Ministry of Economy, Trade and Industry's "Guidelines for Fair M&A" published in 2019.

¹ Existing regulations do not define "influence", but this would include, for example, where officers or employees of the acquiror assume the position of directors of the company, the acquiror is a material lender to the company, the acquiror is a material technology provider to the company, the acquiror has a material business relationship with the company, or the acquiror is otherwise in a position to exercise a material influence over the company's decisions in relation to financial, operational or business matters.

1. whether the going-private transaction would increase the enterprise value of the company;
2. whether the terms of the transaction (pricing, method, and type of consideration) are fair to the general shareholders, considering the negotiation status, per-share valuation, and appropriateness of the premium offered; and
3. whether the measures taken by the company are sufficient to ensure fairness to the shareholders whose shares would be acquired. The measures to be taken will differ depending on the nature of the transaction, but may include, for example, advice from external advisors, conducting a market check, instituting a condition where approval of majority of shareholders with no common interest with the acquiror is required (Majority of Minority Condition), mandating fair treatment of non-tendering shareholders, and requiring sufficient disclosure.

Notably, the TSE notes that the SC Opinion should review whether any increase in corporate value will be equitably distributed to minority shareholders. This means that the SC must scrutinise whether the expected synergies are fairly allocated to minority shareholders.

Moreover, the disclosure requirements for valuation have been significantly expanded. For instance, in a discounted cash flow analysis, the company must disclose the rationale behind financial forecast periods, assumptions, specific figures or ranges and the methodology for calculating terminal value, as well as the treatment of non-business individual assets.

Additionally, the fee structure of third-party valuation advisors must be disclosed, with contingent fees being potentially viewed negatively from a fairness perspective.

These measures aim to ensure greater transparency and fairness for minority shareholders.

Commentary

Overall, the proposed amendments will bolster the credibility of the Japanese stock market, instilling greater confidence among investors. By mandating fair processes and valuations, these amendments are poised to promote investment in Japan.

In 2019 the Ministry of Economy, Trade and Industry published its "Guidelines for Fair M&A" (Fair M&A Guidelines), which suggested the TSE enhance its disclosure requirements. The announced regulations align with the Fair M&A Guidelines and are a step towards substantively enhancing shareholder protection in going-private transactions by addressing conflicts of interest and information asymmetries between the acquiror and the other shareholders.

The TSE did not impose mandatory obligation to set a Majority of Minority Condition and disclosure of minutes of SC meetings. Nevertheless, voluntary disclosure of minutes of SC meetings or setting a Majority of Minority Condition will be considered a good practice to enhance fairness of the transaction.

The public comment period will end on 14 May 2025, and the proposed regulations are expected to take effect in July 2025.

Further reading

Please also see our prior Client Briefing entitled "The Tokyo Stock Exchange Intends to Toughen MBO Rules in Japan" (January 2025).²

² <https://www.cliffordchance.com/briefings/2025/01/the-tokyo-stock-exchange-intends-to-toughen-mbo-rules-in-japan.html>

CONTACTS

Michihiro Nishi
Partner

T +81 3 6632 6622
E michihiro.nishi
@cliffordchance.com

Masafumi Shikakura
Partner

T +81 3 6632 6323
E masafumi.shikakura
@cliffordchance.com

Shunsuke Nagae
Counsel

T +81 3 6632 6321
E shunsuke.nagae
@cliffordchance.com

Tomohiro Terada
Senior Associate

T +81 3 6632 6662
E tomohiro.terada
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance (Gaikokuho Kyodo Jigyo)

Palace Building, 3rd floor

1-1, Marunouchi 1-chome, Chiyoda-ku, Tokyo
100-0005, Japan

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