

# English language disclosure for foreign issuers in Japan – how useful is the expanded scope in practice?

Recent legislative amendments in Japan have expanded the scope of permissibility of English language disclosure and made it more "issuer friendly". This Briefing Note will look at the additional options the expansion offers to non-Japanese issuers entering the Japanese capital markets, as well as the flexibility it offers to non-Japanese issuers which already have continuous disclosure obligations in Japan.

## Background

English language disclosure has been available in Japan for some time, but only for continuous disclosure purposes. This option has rarely been used by non-Japanese issuers, because offering documents, whose content largely overlaps with continuous disclosure documents, still had to be prepared entirely in Japanese. Additionally, non-Japanese issuers filing English language continuous disclosure documents were ineligible for setting up shelf programmes in Japan or using simplified forms of securities registration statements for public offerings.

The scope of English language disclosure in Japan has been expanded to offering documents and continuous disclosure in English has been made more "issuer friendly", by amendments to the Financial Instruments and Exchange Act of Japan (law no.25 of 1948, as amended (the "**FIEA**")) and the relevant Cabinet Order and Cabinet Office Ordinances (which will come into force on 1 April 2012).

## Securities Registration Statement ("**SRS**")

Traditionally, first-time public offerings of securities in Japan were only permitted through the filing of a Japanese language SRS (in Form 7 as prescribed by the applicable Cabinet Office Ordinances). From 1 April 2012, non-Japanese issuers may choose to file a Foreign Company Securities Registration Statement ("**Foreign Company SRS**"), partly in English, instead of an all-Japanese SRS in the prescribed form.

A Foreign Company SRS consists of (a) the terms of the offering and the terms and conditions of the securities to be offered (collectively, "**Securities Information**") in Japanese, and (b) the issuer's continuous disclosure documents in English (such as annual reports) or offering documents in English, which are disclosed outside of Japan pursuant to certain laws and regulations including the listing rules which apply to the issuer (collectively, "**English Documents**"). Multiple English Documents, for example, any two or more of the issuer's annual report, interim report and base prospectus, may be included in its Foreign Company SRS.

## Key issues

- Background
- Securities Registration Statement (entirely in Japanese or partially in English)
- Continuous Disclosure in Japan in English
- Shelf Registration Statement
- Remaining issues
- Prospects – how useful in practice?

Additionally, non-Japanese issuers filing a Foreign Company SRS must prepare the following supplemental documents:

- (a) a Japanese language summary of requisite material information contained in the relevant English Documents, or, if any requisite material information is not contained in the relevant English Documents, a separate document in Japanese or in English with an accompanying Japanese summary disclosing such information. "Requisite material information" means information on the issuer's (i) business activities, (ii) key financial information over the most recent five years, (iii) risk factors and (iv) other corporate information, which the issuer considers to be necessary and appropriate to be disclosed in Japanese for protecting the public interest or investors. Unlike the prospectus requirements in the EU, there is no limitation on the length of this summary;
- (b) a document (in Japanese or English) setting out other corporate information (which the issuer would have been required to disclose if it were filing an all-Japanese SRS) not covered by the relevant English Documents; and
- (c) a two-column table setting out (i) items required to be disclosed in an all-Japanese SRS, in one column and (ii) where the corresponding information can be found in the relevant English Documents, in the other.

Furthermore, non-Japanese issuers wishing to file a Foreign Company SRS instead of an all-Japanese SRS must obtain pre-clearance by the Japanese regulator to do so. Such issuers may be required to explain the laws, rules or regulations under which its English Documents are disclosed in their jurisdictions or elsewhere outside Japan.

## Continuous Disclosure in Japan in English

From 1 April 2012, non-Japanese issuers can file all continuous disclosure documents (i.e., Annual Securities Reports ("**ASR**"), Semi-annual Securities Reports ("**SASR**"), Japanese Quarterly Reports ("**QR**") and Extraordinary Reports (collectively, "**Continuous Disclosure Documents**")) in English (collectively, "**Foreign Company Continuous Disclosure Documents**"). Issuers filing Foreign Company Continuous Disclosure Documents will also become eligible to file a Shelf Registration Statement ("**Shelf**"), subject to certain other requirements, in order to set up Japanese shelf programmes.

Instead of filing an all-Japanese ASR, SASR or QR in the prescribed form, a non-Japanese issuer may file its English Documents such as its annual report, half-year report and quarterly report published in English as a "**Foreign Company ASR**", "**Foreign Company SASR**" or "**Foreign Company QR**", respectively.

The following supplemental documents must be attached to a Foreign Company ASR, Foreign Company SASR or Foreign Company QR:

- (a) a Japanese summary of requisite material information contained in the relevant English Documents, or, if any requisite material information is not contained in the relevant English Documents, a separate document in Japanese or in English with an accompanying Japanese summary disclosing such information. "Requisite material information" means information on the issuer's (i) business activities, (ii) changes in key financial information and (iii) risk factors; a Japanese summary of the issuer's "management's discussion and analysis" and description of cash flows or financial statements will, further to the expanded scope coming into force on 1 April 2012, no longer be required;
- (b) a document (in Japanese or English) setting out other corporate information (which the issuer would have been required to disclose if it were filing Continuous Disclosure Documents in Japanese) not covered by the relevant English Documents; and
- (c) a two-column table setting out (i) items required to be disclosed in the Continuous Disclosure Documents in Japanese, in one column and (ii) where the corresponding items can be found in the relevant English Documents, in the other.

The deadline for filing a Foreign Company ASR is two months earlier than that for an all-Japanese ASR (i.e., a Foreign Company ASR must be filed within four months of the end of the fiscal year). A Foreign Company SASR must be filed within three months of the end of the relevant semi-annual period (which is the same for an all-Japanese SASR). A QR is not compulsory for issuers which are not listed on exchanges in Japan. An issuer may voluntarily file a QR; however, once it does so, it must continue to file QRs.

Only issuers who have filed a Foreign Company ASR may file Extraordinary Reports prepared in English, except that the issuers still need to specify which provision of the FIEA has been triggered by the event being reported in Japanese.

Non-Japanese issuers wishing to file Continuous Disclosure Documents in English instead of filing all-Japanese Continuous Disclosure Documents must obtain pre-clearance by the Japanese regulator to do so.

## Shelf Registration Statement

An issuer with an acceptable track record of offering(s) in Japan can file a Shelf and supplements thereto ("**Supplements**") for public offerings of securities in Japan. The Shelf and the Supplements must be in Japanese, although Foreign Company Continuous Disclosure Documents may be incorporated by reference into such Shelf or Supplement (instead of all-Japanese Continuous Disclosure Documents).

In the case where a Foreign Company ASR, Foreign Company SASR or Foreign Company QR is incorporated into a Shelf or a Supplement by reference, a Japanese summary of information which the issuer considers to be necessary and appropriate to be disclosed in Japanese for the protection of public interest or investors must be provided in Japanese in the relevant Shelf and Supplement.

Attachments to a Shelf or a Supplement covering (i) business activities and key financial information for recent years of the issuer and (ii) material events which have occurred after the filing of ASR are also required to be prepared in Japanese. A Japanese translation of item (i) will already have been prepared by the issuer in the process of preparing its Foreign Company ASR. However, item (ii) will need to be newly prepared in Japanese for the purpose of updating the issuer's Shelf programme. Therefore, item (ii) will remain somewhat of a burden on issuers which update their disclosure in Japan by attaching part or whole of their annual, interim or quarterly reports as item (ii), because they still need to be translated into Japanese.

## Remaining issues

Although the scope of English disclosure in Japan will be expanded as of 1 April 2012, it seems possible, based on the current legislation, that only a limited number of issuers – or at least those which tap the Japanese market frequently – will employ a Foreign Company SRS or Foreign Company Continuous Disclosure Documents.

- *Scope of the summary in Japanese.* While the regulators have hinted that issuers will not be *separately* liable for omitting statements when preparing the Japanese language summary for disclosure purposes (i.e. the issuer's liability will be for the summary and the relevant disclosure document read as a whole) during the public comment process of the new regulations, it may possibly be difficult for non-Japanese issuers to decide the parameters of what the issuer considers to be "necessary and appropriate" to be disclosed in Japanese for the protection of public interest or investors.
- *Issuer's information only.* The English Documents that can be included in a Foreign Company SRS or Foreign Company Continuous Disclosure Documents must be published by the issuer itself. This may particularly affect issuers which are operating subsidiaries of listed holding companies. Documents released by the issuer's parent company or holding company cannot be incorporated into a Foreign Company SRS or Foreign Company Continuous Disclosure Documents. Issuers which do not prepare its own quarterly reports in its jurisdiction but wish to disclose contents of its parent company's quarterly reports in Japan need to be aware that (i) they cannot file a Foreign Company QR for such purpose and (ii) the only way to disclose the quarterly results at the parent company level in Japan is to attach a partial or full Japanese translation of the parent company's quarterly results to a Shelf or a Supplement.
- *Marketability.* Whether or not Japanese investors will accommodate disclosure in English remains to be seen and English disclosure may possibly affect the marketability of the securities being offered and/or their pricing. In this regard, marketing materials (such as road show materials) can still be prepared in Japanese in situations where a Foreign Company SRS or a Shelf which incorporates Foreign Company Continuous Disclosure Documents by reference is used for public offering of securities in Japan. While the issuer and its directors, underwriters, sellers and

other persons that use such Japanese marketing materials to induce the investors to acquire the securities being offered, owe disclosure liability in respect of the content of the marketing materials (as read together with the offering documents), preparing Japanese marketing materials may possibly help with the marketability issue. However, as marketing materials by nature tend only to emphasise the "positives" of the issuer, as a matter of proper marketing and subsequent investor relations, parties may need to seriously consider how much of the risk-related disclosure should also be disclosed in Japanese (in the summary or otherwise).

- *Inability to switch between languages.* Based on responses to public comments which had raised queries about the permissibility of choosing English or Japanese disclosure on an "ad hoc" basis, it is unlikely that issuers will be permitted to choose the language of its disclosure as it likes depending on the circumstances. The regulators may not allow issuers to switch back and forth between English language and Japanese language disclosures, on the grounds that it may diminish the predictability by Japanese investors of the language of disclosure and is undesirable for protecting the public interest and investors. For example, if an issuer with a Shelf had filed Foreign Company Continuous Disclosure Documents in 2012, switched to all-Japanese Continuous Disclosure Documents in 2013 for better marketability of its securities being offered in Japan, and then decided that it wanted to switch back to English language continuous disclosure because it did not have any securities offerings scheduled in Japan in 2014, it may not be permitted to do so and may need to continue to file Japanese Continuous Disclosure Documents in 2014. Or, if an issuer had filed a Foreign Company ASR but filed an all-Japanese SASR in 2012, and then decided that it wanted to file a Foreign Company ASR in 2013, it may not be allowed to do so either.
- *Pre-clearance procedure.* The process of obtaining pre-clearance for filing a Foreign Company SRS or Foreign Company Continuous Disclosure Documents is as yet unclear. This is an issue that may be sorted out within the next year or so as practice develops, but, for example, with regard to new issuers from jurisdictions which have not been seen in the Japanese market previously, the process of explaining the laws, rules or regulations under which its English Documents are disclosed in their jurisdictions or elsewhere outside Japan may be an extra burden on top of preparing its offering documents.

## Prospects – how useful in practice?

Issuers frequently tapping the Japanese market may need to consider carefully whether or not using English disclosure is appropriate, bearing the above-mentioned issues in mind and in consultation with securities companies which support their financing and marketing activities in Japan.

However, the amended English disclosure framework under the FIEA will be very useful for non-Japanese filers of Continuous Disclosure Documents which owe continuous disclosure obligations in Japan solely as a result of (i) a past public offering without listing (so-called "**POWL**") in Japan, or (ii) share plans offered to Japanese employees. Such filers will be able to file Foreign Company Continuous Disclosure Documents easily instead of having to go through the process of creating a document in Japanese. Additionally, in such cases, fees of their Japanese legal counsel in respect of their continuous disclosure in Japan would likely be reduced, while the translation fees with regard to full sets of financial statements (which are typically undertaken by the issuers' independent auditors' Japanese affiliate offices) would no longer come into play.

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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