

## Revisions to Exemptions from the Insider Trading Regulations for Transactions based on "Agreements Prior to Obtaining Information", or "Plans Prior to Obtaining Information", and for "Counterbid"

A new comprehensive exemption from insider trading regulations has been introduced for transactions based on an "agreement prior to obtaining information" or a "plan prior to obtaining information". The comprehensive exemption was implemented by an amendment to the Cabinet Office Ordinance concerning the Regulation of Securities Transactions, etc. (the "Cabinet Office Ordinance"), which came into force on 16 September 2015. In addition, the interpretation of the exemption clause for a "counterbid" was clarified through an amendment of the Guidelines to the Financial Instruments and Exchange Act (the "Guidelines") on the same day. As a result of these amendments, it is expected that certain previously restricted transactions will become more widely available.

### A comprehensive exemption for "agreements/plans prior to obtaining information"

#### Background to the Revision

The Financial Instruments and Exchange Act (the "**FIEA**") provides an exemption from the insider trading regulations for transactions based on an "agreement prior to obtaining information" or a "plan prior to obtaining information" (Article 166, Paragraph 6, Item 12 and Article 167, Paragraph 5, Item 14 of the FIEA). The exemption applies where a transaction involving the securities of a listed company entered into by a person who has knowledge of non-public material information in relation to the listed company falls outside the insider trading regulations if such transaction was entered into independently of, or without regard to, the material information, on the basis that such transaction would not undermine investor confidence.

While in the past the Cabinet Office Ordinance has provided a list of specific categories of transactions which are exempt, the practical disadvantages of listing each category of transaction individually have been debated. Practically speaking, it was impossible to comprehensively cover all types of transactions which should be exempted from the regulations by adding individual categories to the list<sup>1</sup>. For example, a transaction entered into with a person other than the issuer of securities (the listed company) did not fall under the exemption categories even if the agreement was executed before obtaining the material information. Accordingly, to facilitate transactions, a new comprehensive exemption clause relating to "agreements/plans prior to obtaining information" was added. As a result of this amendment, transactions which should not have been restricted by the regulations, but did not fall under any of the individually listed exemption categories, will now be eligible for exemption.

---

<sup>1</sup> "Development of Systems concerning the Insider Trading Regulations based on Recent Violations and Financial and Corporate Practices", published by the "Working Group on the Insider Trading Regulations" on 25 December 2012.

## Outline of the Revision

According to the amended Cabinet Office Ordinance, transactions based on an "agreement/plan prior to obtaining information" will be eligible for exemption if they meet all three of the following criteria:

1. Existence of a written agreement/plan which was executed/signed before recognising the material information;
2. Terms and conditions of the transaction are specified or determined by a non-discretionary method established in advance; and
3. The transaction is executed in performance of the agreement/plan.

In terms of criterion 1, in view of preventing subsequent fabrication of an agreement/plan, one of the following measures is required:

- (a) A copy of the agreement/plan must be filed with a securities company, and the date of filing confirmed by the securities company;
- (b) A certified date (*kakutei hizuke*) must be affixed to the agreement/plan<sup>2</sup>; or
- (c) The agreement/plan must be disclosed to the public in the manner provided for in Article 166, Paragraph 4 of the FIEA<sup>3</sup>.

In terms of criterion 2, the following terms and conditions of the securities transaction(s) must be specified in the agreement/plan, or a non-discretionary method for their determination must be set out in the agreement/plan in advance: (i) the type of transaction(s) (e.g. buy or sell); (ii) the name of the securities; (iii) the date of the transaction(s); and (iv) the amount of each transaction on the date of the transaction.

In terms of criterion 3, if multiple agreements/plans are prepared in advance to allow a person to choose the most advantageous agreements/plans to execute, it may be deemed that the terms and conditions are not specified in the agreement or determined by a non-discretionary method as a whole even if those agreements/plans are technically separate from each other. As a result, such agreements/plans would not be eligible for the exemption. Transactions would also be deemed ineligible if, for example, only certain transactions scheduled for an advantageous date are executed from among a series of agreements/plans which were expected to be executed on separate dates, as it may be deemed that the transactions are not executed in performance of the agreements/plans.

## Future Development

Following this amendment, it is expected that transactions based on new categories or schemes, which were previously unavailable even though they did not substantively undermine investor confidence, will be utilised and that further securities transactions will be facilitated. Also, by the implementation of this comprehensive exemption clause, it is expected that it will not be necessary to continue discussions on interpretation of the exemptions, which were previously conducted in order to reach a solution within the limited categories of exemptions for transactions based on an "agreement/plan prior to obtaining information".

## Clarification of the "Counterbid" exemption

Under the FIEA, if a tender offer is commenced by a hostile bidder, a person who possesses insider information is allowed to "counterbid" in order to compete against the tender offeror if requested to do so by the target company in accordance with a resolution of its Board of Directors (the "counterbid" exemption, Article 166, Paragraph 6, Item 4 and Article 167, Paragraph 5, Item 5 of the FIEA). However, before this amendment to the Guidelines, which clarified the above point, such counterbid was not eligible for exemption if it turned out that such tender offer had not actually existed, even though it is difficult for a target company to determine the existence of a tender bidder. Therefore, it was argued that this exemption was impractical as it was unclear as to how certain the existence of a tender offer should be.

---

<sup>2</sup> This measure can be taken only where a securities company is one of the parties to the agreement or the decision-maker of the plan (as it would not be suitable for a securities company to take measure 1(a) – the securities company would have to file the agreement/plan with another securities company which is not practical.).

<sup>3</sup> To disclose the agreement/plan to the press or to upload it to a homepage will not be deemed a valid disclosure measure.

In response, the interpretation of this point was clarified by the amendment to the Guidelines (Guidelines Part 1, 166-1, 166-2 and 167-1).

According to the amended Guidelines, a "counterbid" will be eligible for exemption if the following two criteria are met, even if the tender offer did not exist when the request for a "counterbid" was made;

The request for the "counterbid" from the Board of Directors of the target company was made:

1. on the reasonable belief that a tender offer existed; and
2. for the purpose of competing against the tender offeror.

From now on, it is expected that utilisation of the "counterbid" exemption at an earlier stage of a tender offer will increase, for example, where a third party proposes the commencement of a tender offer to a target company and the target company immediately requests a counterbid.

*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.*

## Contacts

If you would like to know more about the subjects covered in this publication or our services, please contact:



**Tatsuhiko Kamiyama**  
Partner

T: +(81 3) 5561 6395  
E: tatsuhiko.kamiyama  
@cliffordchance.com



**Satoshi Mogi**  
Counsel

T: +(81 3) 5561 6295  
E: satoshi.mogi  
@cliffordchance.com



**Tomoko Azami**  
Associate

T: +(81 3) 5561 6318  
E: tomoko.azami  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Akasaka Tameike Tower, 7th Floor, 2-17-7 Akasaka, Minato-ku, Tokyo 107-0052, Japan

© Clifford Chance 2015

Clifford Chance Law Office (Gaikokuho Kyodo Jigyo)

[www.cliffordchance.com](http://www.cliffordchance.com)

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.

501205-4-2847-v0.2

JP-8141-KI