OASIS

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We wish to commend METI and the Fair M&A Study Group for taking up this important issue of the much-needed revisions to the MBO Guidelines. There has been substantial unfairness for minority shareholders in the existing M&A process for some time, and in the interest of improving the M&A process and protecting minority shareholders' interests, please find our suggestions and comments below. We understand that not all of these improvements are within the purview of the committee, but for the sake of completeness, we have included them here.

General Observations and Suggestions:

- The formation of a METI, FSA or TSE-appointed Takeover Approval Committee comprised of market professionals (including regulators, accountants, lawyers, bankers, buy-side investors and other stakeholder representatives) to approve the appropriate implementation of the M&A process, and ensure that it led to reasonably fair prices for all related party transactions over 30 billion yen. (Related party transactions would include mergers with any current shareholder, or any transaction that management is a party to as a principal, such as an MBO.)
- Third-party Special Committees should be comprised of valuation specialists, bankers, minority shareholder representatives, lawyers and accountants, and all the independent directors of the board, not *only* lawyers and accountants, as is the composition of many Third-party Committees today. The Third-party Special Committee should be elected by the majority of minority shareholders at a special EGM and function independently of the company's board in evaluating and recommending a transaction.
- The current TSE definition of independence should be expanded regarding independent directors, such that all independent directors are genuinely independent with no history with or connection to any related company.

- No squeeze-out of minority shareholders if the majority shareholder owns less than 90% (as per Article 179 of Japan's Companies Act by share consolidation) ("株式等売渡請求権"によるスクイーズアウト) ("全部取得条項付種類株式"によるスクイーズアウト).
- No approval by "clapping method" at shareholder meetings.
- Full "Market Check" or active "Go Shop" shop provisions. We believe this is necessary and should take place through an active auction process after a comprehensive Market Check.
- Full data room and due diligence access for all interested parties (defined as any party interested in making an offer) subject to confidentiality agreements.
- Majority of minority shareholders' approval needed for proposed transactions.
- In the case of a share exchange, an absolute minimum value price or "floor price" should be set, as opposed to simply a share exchange ratio (i.e., collar pricing available).

Our comments and observations for each of the seven issues as set out in the Request for Comment:

[Issue 1] Points in common, points of difference, etc. between transaction types

> We seek opinions/information on the following points:
>
> i) What kinds of points in common, points of difference, etc. exist between transaction types of MBO and acquisition of a controlled company by its controlling shareholder?
> ii) How will points in common, points of difference, etc. identified in i) affect whether or not measures[2], such as establishment of a special committee, need to be taken, and the degree of the necessity; types of measures to be taken and their effectiveness; and whether or not taking a measure causes negative effect and the degree of such effect?

The most common breaches of corporate governance have occurred in related party majority shareholder takeovers. In these types of transactions, we have seen significant violations of minority shareholder rights, including in the absence of a fair, transparent process, the lack of independence of the Third-party Special Committee, and transaction values which are far from fair market values.

In direct answer to (i) above, many of these transactions have resulted in minority shareholder abuse. Conversely, in sales to private equity funds, we have seen Special Committees often working on achieving the highest prices possible through a fair and transparent process. Hence, we believe it is best policy to implement our detailed suggestions to improve the process and the result for minority shareholders in related party transactions and maintain the integrity of Japanese capital markets.

Our recommendation is the formation of a METI, FSA or TSE-appointed Takeover Approval Committee comprised of market professionals (including regulators, accountants, lawyers, bankers, buy-side investors, and other stakeholder representatives) to approve the appropriate implementation of the M&A process, and ensure that it led to reasonably fair prices for of all related party transactions over 30 billion yen. Related party transactions would include mergers with any current shareholder, or any transaction that management is party to as a principal, such as an MBO.

[Issue 2] Special committee

We seek opinions/information on the following points:

i) What do you think of the functions of special committees?
ii) What do you think of the scope of examination by special committees?
iii) What do you think of whether establishment of a special committee is necessary or not?
iv) What do you think of ideal practice of special committees, for example, in terms of the following?
  a) Timing of setting-up
  b) Composition of the committee (e.g., Qualifications as a committee member (independence, titles (outside director, outside statutory auditor, outside expert, etc.), specialization), details of the qualifications, and prioritization of the qualifications)
  c) Involvement in negotiations with the buyer

We believe special committees have often failed in their duties to protect minority shareholders as the result of being insufficiently independent and competent. As a result, we recommend:

- Third-party Special Committees should be comprised of valuation specialists, bankers, minority shareholder representatives, lawyers and accountants, and all the independent directors of the board, not *only* lawyers and accountants, as is the composition of many Third-party Committees today. The Third-party Special Committee should be elected by the majority of minority shareholders at a special EGM and function independently of the company's board in evaluating and recommending a transaction.
- The current TSE definition of independence should be expanded regarding independent directors, such that all independent directors are genuinely independent with no history with or connection to any related company.
- The Third-party Special Committee or its representative should conduct the negotiation process.
- All compensation paid to the Third-party Special Committee should be disclosed.
- All independent directors should be members of the Third-party Special Committee to add fiduciary responsibility to the committee.
- A Statutory Auditor should sit on the Third-party Special Committee to add fiduciary responsibility to the committee.
- Shareholders owning more than a 5% stake should be given access to the Third-party Special Committee. Additionally, the minutes of committee's meetings should be made available to all shareholders over 3%.
- The Third-party Special Committee should have a duty to achieve the highest price, and members of the Committee should sign sworn statements testifying to attaining the highest possible price.
- The Directors should attest that they have achieved the highest price.

- The Third-party Special Committee should have a duty to recommend no action or reject all proposals if no proposal meets a sufficiently high price or level appropriate for the sale of the company. (Just because there is a bid and it is currently the highest one does not mean that it is necessarily sufficient value.)
- The Third-party Special Committee should have the duty to seek out additional buyers.
- Disclosure of all relationships and potential conflicts of interest between the potential buyer and the Third-party Special Committee.
- Disclosure of all relationships and potential conflicts of interest between the potential buyer and the Board of Directors.
- The Third-party Special Committee must disclose all offers received.
- All offers and approaches should be disclosed upon receipt of the offer or approach, not after the offer has been negotiated and accepted.
- The Third-party Special Committee should select independent advisors.
- Disclosure of all payments to all advisors.
- Disclosure of the full negotiation process by the Third-Party Special Committee.
- Disclosure of the full valuation report and fair value opinion report obtained and relied upon by the Third-party Special Committee.
- The issuer of the fair value opinion should assume fiduciary responsibility and liability for its opinion.
- Disclosure of the full underlying data used for the valuation report by the Third-Party Special Committee.
- Advisors selected by the Third-party Special Committee should be internationally recognized and qualified to perform their duties in line with best global practices.
- The majority of minority shareholders must confirm third-party advisors.
- The Third-party Special Committee must present to and answer questions directly from shareholders.
- The Third-party Special Committee must review decisions monthly and adjust its opinions as necessary.
- Shareholders must be able to dismiss the Third-party Special Committee at an EGM called for by a shareholder owning a stake of 3% or greater.
- All cash and securities to be considered “Non-working capital” in the valuation.
- Disclosure of the share price range in the valuation for proposed share exchanges, rather than just the range of the ratios in the valuation and fair value opinion reports.
- For proposed share exchange mergers, the highest of the original offer (in cash as based on the 15 days before and 15 days after the announcement date of the value of the stock swap) or 30-day VWAP prior to official dissent for dissenting shareholders.

[Issue 3] Stock valuation, fairness opinions

We seek opinions/information on the following points:

i) What do you think of the functions of stock valuation and fairness opinions respectively?
ii) What do you think of the roles of stock valuation and fairness opinions respectively in relationship to negotiations/decisions of transaction conditions?
iii) What do you think of the necessity of conducting stock valuation and obtaining a fairness opinion respectively, positive/negative effects caused by obtaining each of?
iv) What do you think of ideal practice concerning stock valuation and fairness opinions, for example, in terms of the following?
  a) Issuance process
  b) Independence, specialization, etc. of third-party assessment institutions
  c) Timing and extent of disclosure

We believe valuation opinions to date have often been biased by company management unrealistically lowering guidance. This lowered guidance leads to valuation opinions that are disconnected from economic reality. We have seen numerous instances where the subsequent results were much stronger than the lowered guidance provided to the valuation agents, Special Committee and Board. In many of these cases, despite the strength of the subsequent results, company managements continue to present the same lower guidance as the basis for the transaction. We believe this is highly problematic.

The problems include: companies utilizing valuers who are not independent from the offeror; flawed assumptions and low projections masked by the lack of disclosure; late and/or limited disclosure (which is sometimes only available because of US F-4 filing requirements, rather than Japanese requirements); and the use of outdated model assumptions which have become market standard in Japan but lack underlying logic. (For example, using a 0% growth rate after three years of substantial growth in the model for a growing company – with the typical defense that *all companies use 0%*. As we know, all companies are not created equal.)

The Special Committee and the Board should seek the highest and most valuable transaction for shareholders, bearing in mind their duties to all other stakeholders as well. The transaction should not only be blessed by the advisor's valuation or fair value opinion. The fair value opinion should be guidance as to what minimum price the Special Committee should accept.

A genuinely independent firm appointed by the independent members of the Special Committee should conduct the fair value opinion.

All relevant information forming the basis of the opinion, as well as the full valuation opinion, including all related financial models, should be made available to the public in Japanese and English on a timely basis.

Directors and the Third-party Committee should be sufficiently qualified to understand the methods used by external valuation experts fully and to question such experts on their process and its appropriateness. They should also be mindful of concepts of control premium, etc.

In direct response to points raised above:

i) The role of the stock valuation and fairness opinion are vital to ensuring a fair transaction, but only if appropriately applied. International standards should be used. It is no longer acceptable for companies to apply 0% growth rates, as is common in Japan but not common internationally. Definitions of working capital should come from public independent studies, not the whims of management.

ii) We have found that stock valuations and fairness opinions have often been used to rubber-stamp a price that the related parties have already agreed upon, with little reference to the value of the underlying business. Valuers provide the broadest ranges possible in these opinions to ensure that the price will look fair compared to lower ranges. They achieve this by employing unlikely scenarios in the model, such as a fire sale of assets or a sudden swing from strong profitability to loss. These valuations often lack common sense and have led to companies being acquired at substantial discounts to their net asset value even though they are profitable. Instead, the valuations should be employed to achieve the best possible price for shareholders and should be the driver of the negotiations, not an afterthought.

iii) We believe that obtaining truly fair valuations and fairness opinions is fundamental to improving corporate governance and protecting minority shareholder rights. Requiring the highest level of protection for minority shareholders will lead to a large increase in investment from domestic and foreign shareholders. The only negative is for companies that seek to abuse minority shareholder rights and buy companies at discounts to their intrinsic values.

iv) We outline the ideal practice above in our earlier suggestions, but the main points include:
   a. Election of the Third-party Special Committee by a majority of minority shareholders, and the ability for shareholders to nominate candidates;
   b. Third-party Special Committee must independently choose advisors, which must be confirmed by the majority of minority shareholders;
   c. Valuations and fairness opinions must seek to achieve the best price for shareholders; and,
   d. Common sense must be employed – a profitable company should not be sold at a discount to the value of its net assets.
   e. Disclosure should be very broad, including the full valuation opinion and all assumptions made in that calculation and all fees payable to the provider of the opinion

[Issue 4] Market Check

We seek opinions/information on the following points:

i) What do you think of the necessity of conducting of Market Check, positive/negative effects caused by conducting of Market Check?
ii) What do you think of ideal practice concerning Market Check, for example, in terms of the following?
   a) Practical methods (Auction (bidding), Market Check (approaching multiple potential buyers), Go-Shop provision (The target company is allowed to actively seek out competing offers for a certain period after the signing of an M&A agreement), etc.)
   b) Actions to take if there is a competing offer (Code of conduct of the board of directors of the target company, whether due diligence by the competing buyers should be granted or not, etc.)

Conducting a Market Check is necessary to ensure fair treatment of all shareholders. Market Checks are a common feature in many developed markets, and their adoption will bolster belief in the integrity of the M&A process in Japan, which will lead to increased confidence and interest in the Japanese financial markets. We believe this is good for corporate Japan.

Ideal practice includes an initial Market Check and an active "Go-Shop" process. Equal access to due diligence, data rooms, and company management should be provided to all potential buyers, subject to necessary confidentiality agreements.

The Market Check should establish the valuation of the company as an independent entity and should not be discounted due to the presence of a large shareholder. There may be limited buyers due to the presence of a large shareholder or the reluctance of company management to partner with a foreign buyer; nevertheless, such reluctance should not diminish the value that shareholders receive. Such a practice is unfair and rewards poor corporate governance. In an ideal scenario for protection for minority shareholders, if a buyer offers a higher price than a controlling shareholder's bid, the controlling shareholder should either match the higher price or offer their shares at that price to the other bidder.

[Issue 5] Majority-of-minority conditions

We seek opinions/information on the following points:

i) What do you think of the advantage/disadvantage of the majority-of-minority conditions?
ii) What do you think of the necessity of adopting the majority-of-minority conditions, positive/negative effects caused by such conditions?
iii) What do you think of ideal practice concerning the majority-of-minority conditions, for example, in terms of the following?
   a) Scope of minority shareholders
   b) Level of the minimum number of shares

Approval by the majority of the minority shareholders is the absolute minimum requirement needed to protect minority shareholders, achieve the full value of the company, and prevent the majority or largest shareholder from buying a company at a price that is lower than what is objectively achievable. Acquisitions by related parties should require affirmative voting, and any non-votes should be considered votes against the merger. Any related party to the offeror should not be considered a minority shareholder.

These steps will ensure that management seeks a fairer price for minority shareholders and improves disclosure justifying a merger, which will ultimately enhance corporate governance.

The approval requirements of the schemes of arrangement in the UK and Hong Kong require a minimum 75% approval by shareholders unaffiliated with the offeror, for example. A requirement of no more than 10% disapproval would provide even more protection for minority shareholders.

[Issue 6] Disclosure

We seek opinions/information on the following points:

i) What do you think of the functions of disclosure?
ii) What information should be disclosed? Why?
iii) What information is hard to disclose? Why?

Disclosure should include:

- Full simultaneous English and Japanese disclosure.
- The full valuation report and fair value opinion report obtained and relied upon by the Third-party Special Committee.
- Full data used in the valuation opinion.
- The full underlying data used for the valuation report by the Third-Party Special Committee.
- Full set of assumptions (and the reason for those assumptions) included in the valuation opinion.
- Full details of payments to all parties.
- Full backgrounds of all Special Committee members.
- A comprehensive description of all relationships and potential conflicts of interest between the company, potential buyer, and Third-party Special Committee. (The TSE definition of independence is not sufficient to justify independence for members of the Third-party Special Committee. These members must be genuinely independent, with no history or connection with any related company).
- All relationships and potential conflicts of interest between the potential buyer and the Board of Directors.
- Full history and recorded minutes of the negotiations by the Special Committee to achieve the highest price.
- All competing offers (in value).
- Values (and not merely ranges or ratios) used.
- The market value of all real estate.
- All disclosure should be made on a timely basis.

- All offers and approaches should be disclosed upon receipt of the offer or approach, not after the offer has been negotiated and accepted.

Such disclosure would help achieve an accurate, fair value for all stakeholders. Full disclosure will help investors make informed decisions and engage appropriately with boards, special committees and each other.

[Issue 7] Other important issues

We appreciate your opinions/information, if any, on important issues concerning fair M&A apart from Issues 1 to 6.

These issues are extraordinarily important for the valuation of securities in the Japanese market. Many securities trade at depressed levels because of existing and feared corporate governance breaches. Many of those breaches relate to unfair M&A practices where a parent company or related party abuses its position and achieves a submarket transaction. This includes: attributing cash and securities as "working capital," management lowering guidance, using 0% as a terminal growth rate after a very short valuation period of 3 years, guiding spending of company assets without including subsequent return on that investment in the model, not providing access to a data room for other potential buyers, etc.

These practices have led to unfair outcomes for many minority shareholders. As a result, cash balances, cross-shareholdings, and other assets on company balance sheets are routinely severely discounted in analysts' equity valuations, in the fear that they will be "taken" from minority shareholders and excluded from the fair value opinion through various methods. These discounted valuations have a significant impact on valuations broadly, leading to a higher cost of capital for all of corporate Japan.

We believe the establishment of Third-party Special Committees elected by minority shareholders who are not affiliated with the transaction, and the establishment of a METI-appointed M&A Committee to approve transactions, are essential steps in protecting and increasing shareholder value in Japan.

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We are available to discuss and elaborate on these suggestions at any time. Thank you.

Respectfully submitted,

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