

Listing in Tokyo Forum 2017

Legal Aspects of a Tokyo Listing

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1. Overview of Japanese Securities Regulations

Overview of Financial Instruments and Exchange Act

- Disclosure requirements
 - Offering-related disclosure
 - Continuous disclosure
 - For internal control report, 3-year exemption available for emerging companies
- Insider trading rules
- Fair disclosure rules (*)
 - * Will come into effect going forward
- Large shareholding report
- Short swing profit rules
- Mandatory tender offer

Disclosure Requirements

■ Japanese disclosure requirements

- Major Disclosure Requirements under the FIEA

Offering-related Disclosure	Securities registration statement	• Equivalent to S-1
Continuous Disclosure	Annual securities report	• Equivalent to 10-K
	Internal control report	• Equivalent to US SOX
	Quarterly report	• Equivalent to 10-Q
	Extraordinary report	• Equivalent to 8-K
Disclosure by Shareholders	Large shareholding report	• Equivalent to Schedule 13D (13-G)
	Parent company report	• Disclosure regarding major shareholders and financial statements of the parent company are required

- Timely disclosure under the TSE listing rules

Overview of TSE Listing Rules (1)

- Timely disclosure requirements
 - When any material decision is made or material event occurs
- Corporate Code of Conduct, including the following

Third party allotment	<ul style="list-style-type: none">• Large-scale third party allotment (issuance of 25% or more of the outstanding shares) etc.• Opinion of independent person (such as outside director) or shareholder approval is required
Takeover Defense Measures	<ul style="list-style-type: none">• Sufficient disclosure• Transparency• Respect for shareholders' rights etc.
Facilitation of Voting Exercise	Proxy materials to be dispatched no later than 2 weeks before the meeting date
Significant Transactions etc. with Controlling Shareholder	<ul style="list-style-type: none">• Transaction with a controlling shareholder (or its subsidiary)• Opinion of any independent person (such as outside director)

Overview of TSE Listing Rules (2)

- Corporate Governance Code
 - Engagement with investors etc.
 - Not particularly onerous as compared to the standards in other major financial markets

- Earnings forecast
 - Issuance of earnings forecast is encouraged
 - At the time of listing, earnings forecast is usually issued
 - While not strictly required, there are many Japanese listed companies issuing annual forecast

Listing Structures For US Issuers

- Options for Tokyo Listing by a US Company
 - Listing as a Foreign Issuer
 - JDR (Japanese Depositary Receipts)
 - Technically, listing of trust beneficiary interests
 - Corporate Inversion (= Listing as a Japanese Issuer)



2. Listing as a Foreign Issuer

Major Legal Considerations

- Major Legal Considerations for U.S. Issuers
 - Whether English disclosure is permitted?
 - Whether a U.S. issuer is permitted to prepare its financial statements etc. in accordance with U.S. standards?
 - U.S. GAAP
 - U.S. SOX
 - Whether SEC registration is required? (* U.S. law issue)

English Disclosure (1)

- Whether English disclosure is permitted?
- Generally yes, if the foreign issuer is subject to the filing requirements for equivalent disclosure under foreign laws and regulations and with the approval of the Financial Services Agency of Japan ("FSA").
 - If a foreign issuer is required to file a 10-K with the SEC, the foreign issuer may use the 10-K as the annual securities statement under the FIEA.
 - FSA approval would be obtained for the US filing

English Disclosure (2)

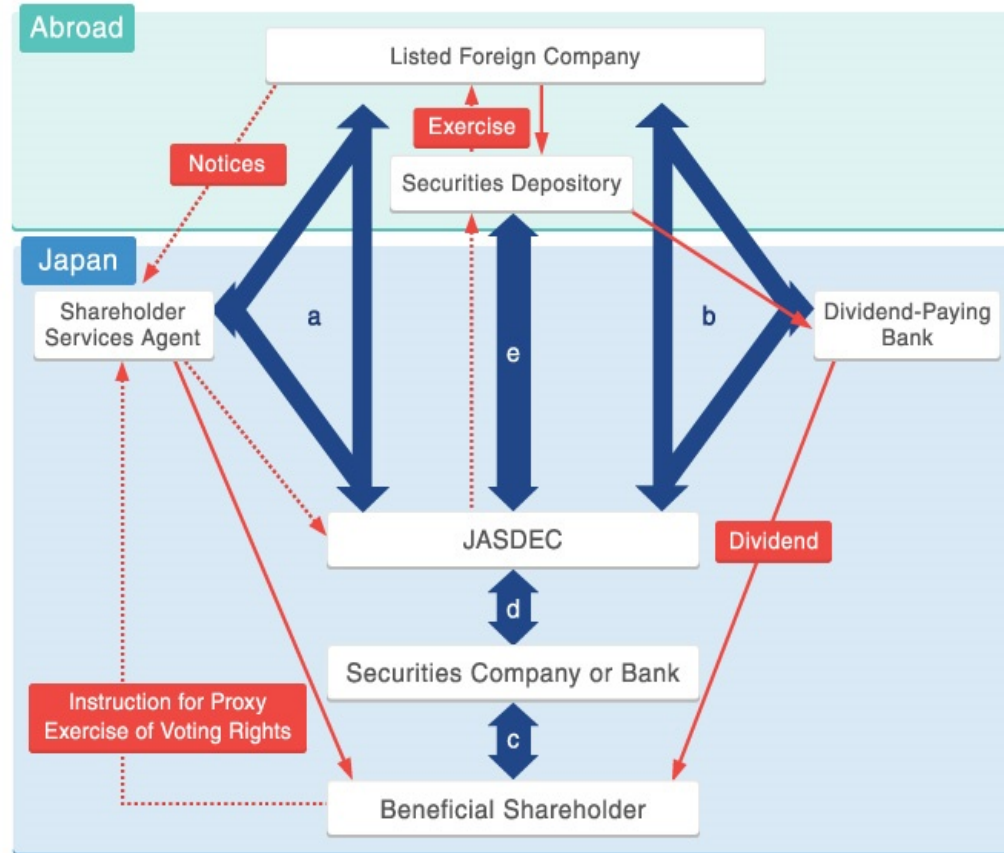
- Benefits of English disclosure might be limited...
 - Under the FIEA, certain supplemental documents must accompany the English disclosure.
 - 10-K must be accompanied by a Japanese summary of (a) the trend of certain key financial metrics, (b) the outline of the business, and (c) risks in the business
 - Particularly in connection with public offerings targeting retail investors, there might be investor protection issues (e.g., investment suitability).
 - TSE position on the timely disclosure in English (?)

Accounting & Audit Standards

- Whether a U.S. issuer is permitted to prepare its financial statements etc. in accordance with U.S. standards?
 - U.S. GAAP
 - Generally yes, if the U.S. GAAP financial statements are “disclosed” in the U.S.
 - U.S. SOX
 - Generally yes, if the internal control report prepared under the U.S. SOX is “disclosed” in the U.S.

Japanese Book-Entry System

Workflow of Shareholder Services Agent and Dividend-Paying Bank



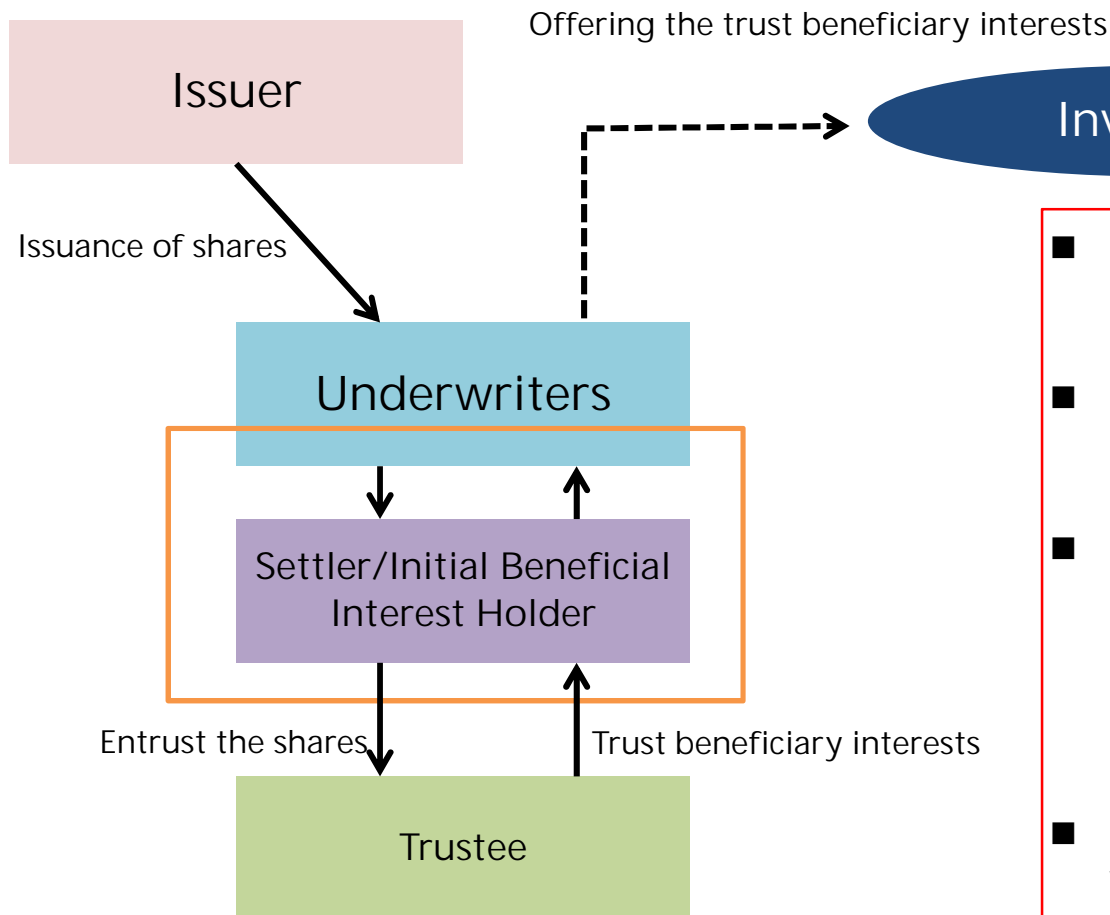
Source: TSE website

- Under the Japanese Book-Entry system, “shareholders” of the foreign listed company are NOT registered owners.
- The shares held by such shareholders are held through Japan Securities Depository Center, Inc. (“JASDEC”).
- Beneficial shareholders can instruct the voting exercise and receive dividends.
- However, as beneficial shareholders are not registered owners, they cannot participate in shareholders meetings. (Information meeting will be held in Japan for beneficial shareholders, where no voting will be conducted.)
- It is also possible for beneficial shareholders to withdraw the underlying shares from the JASDEC system so that they become a registered owner of the shares.



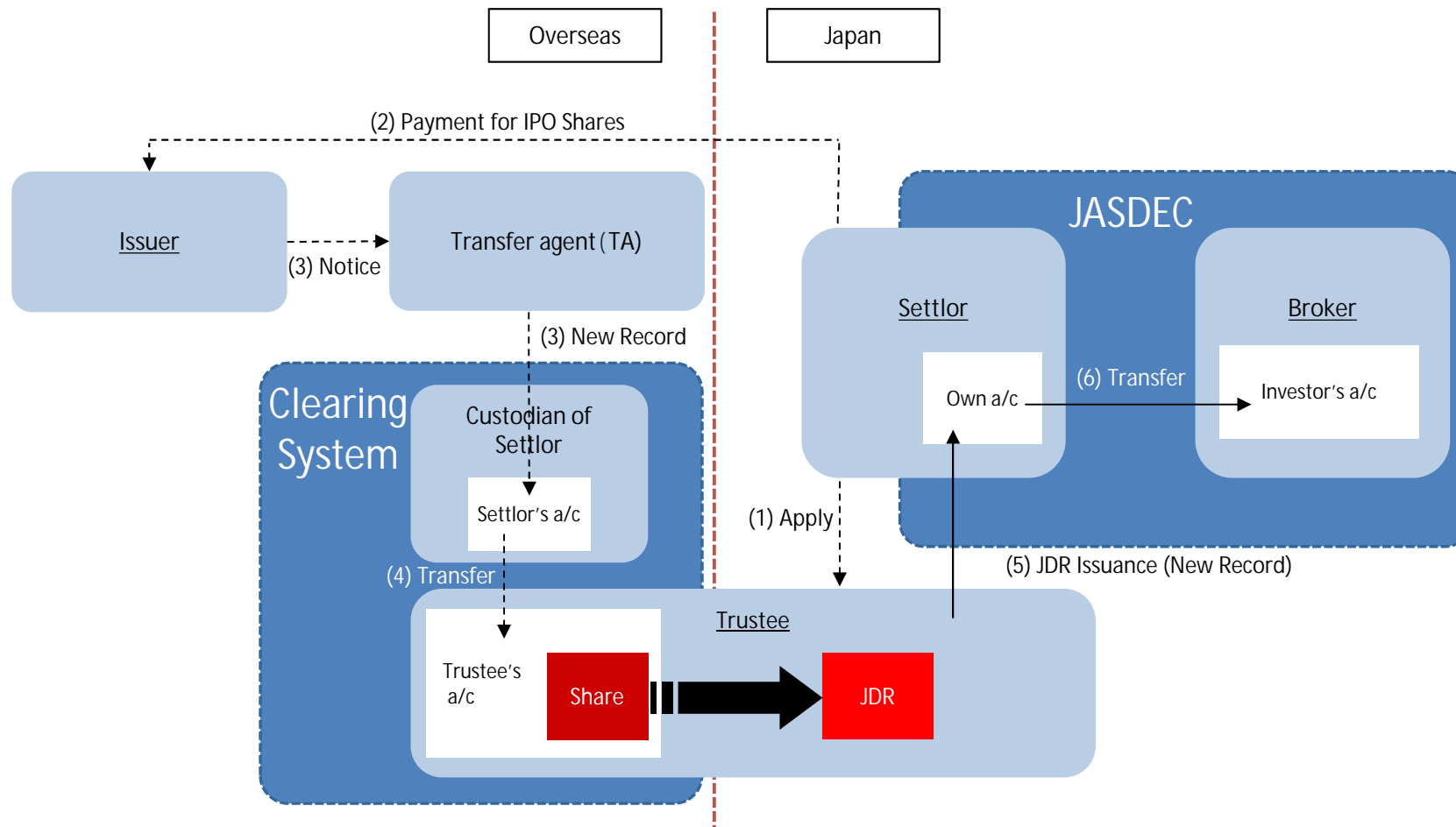
3. JDR Listing

Structure of JDR Public Offering (1)



- Investors who hold the trust beneficiary interests ("Unit Holders") do not own any legal title to the underlying shares.
- Unit Holders can instruct the trustee as to the voting exercise and receive dividends through the trust.
- However, as Unit Holders are not registered owners, they cannot participate in shareholders meetings. (Information meeting will be held in Japan for Unit Holders, where no voting will be conducted.)
- It is also possible for Unit Holders to withdraw the underlying shares so that they become a registered owner of the shares.

Structure of JDR Public Offering (2)



Benefits of JDR Listing

- JDR contributes to extending the investor base.
 - For institutional investors:
 - Institutional investors who have guidelines / system restrictions on investments in foreign securities
 - However, JDRs are “domestic securities” (as the issuer is a Japanese trustee)
 - For individual investors:
 - No need to newly open foreign securities account
 - Increase of the number of individual investors will contribute to brand/corporate recognition in the Japanese market

S-1 Filing in the U.S. (* U.S. law issue)

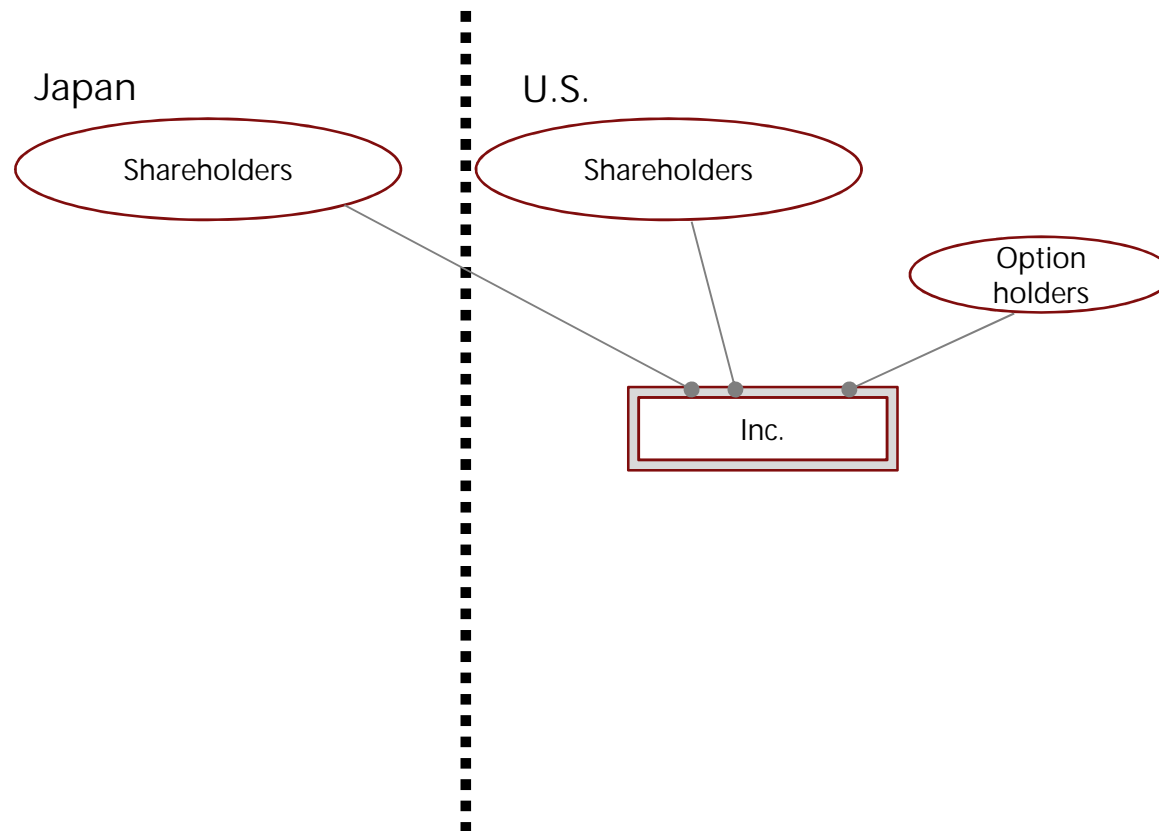
- In the first JDR listing case, the S-1 filing was made while the offering was conducted solely in Japan
- Necessary?
 - Generally, SEC registration is exempted if the safe harbor rules under Regulation S of U.S. Securities Act of 1933 can be relied upon in connection with the offering conducted outside the U.S.
- However, material restrictions for U.S. issuers under Regulation S, including:
 - 1-year distribution compliance period (during which the shares may not be sold to a U.S. person) for non-reporting U.S. issuer
 - Purchaser certificate and covenant requirements



4. Corporate Inversion

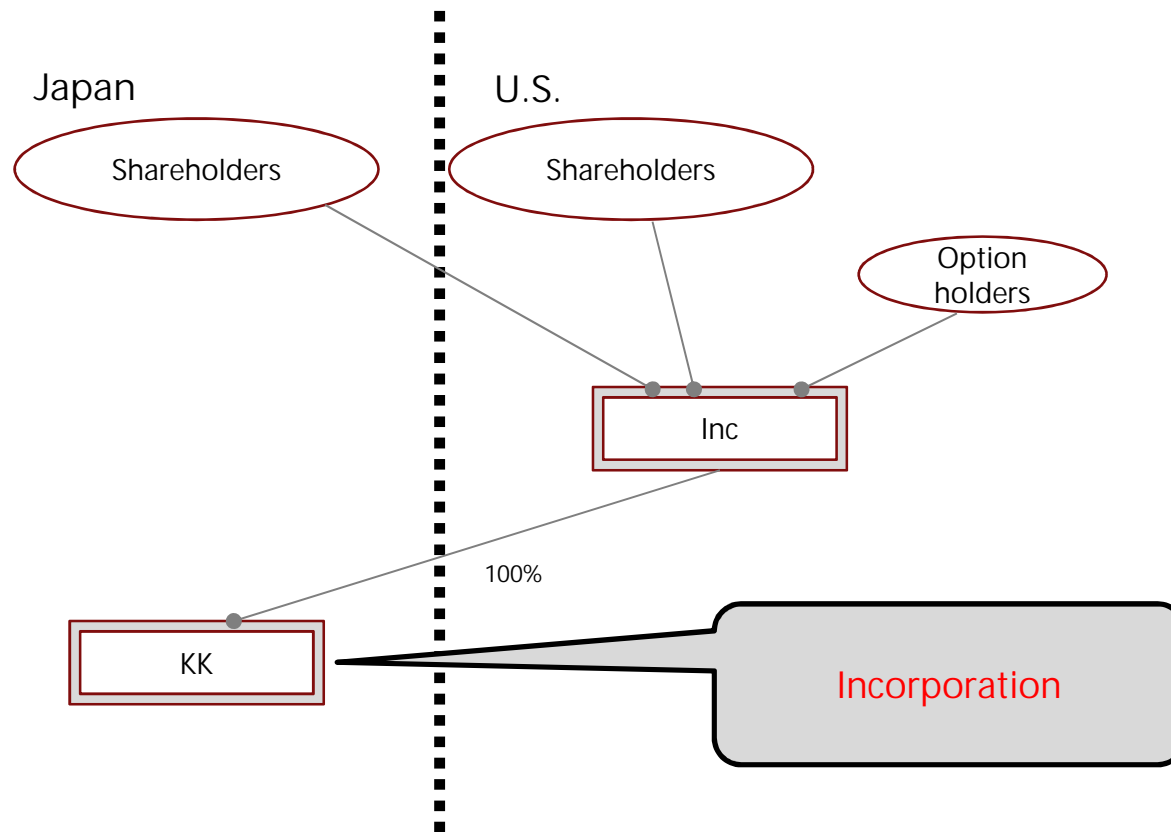
Sample Transaction Structure (1)

Current Status



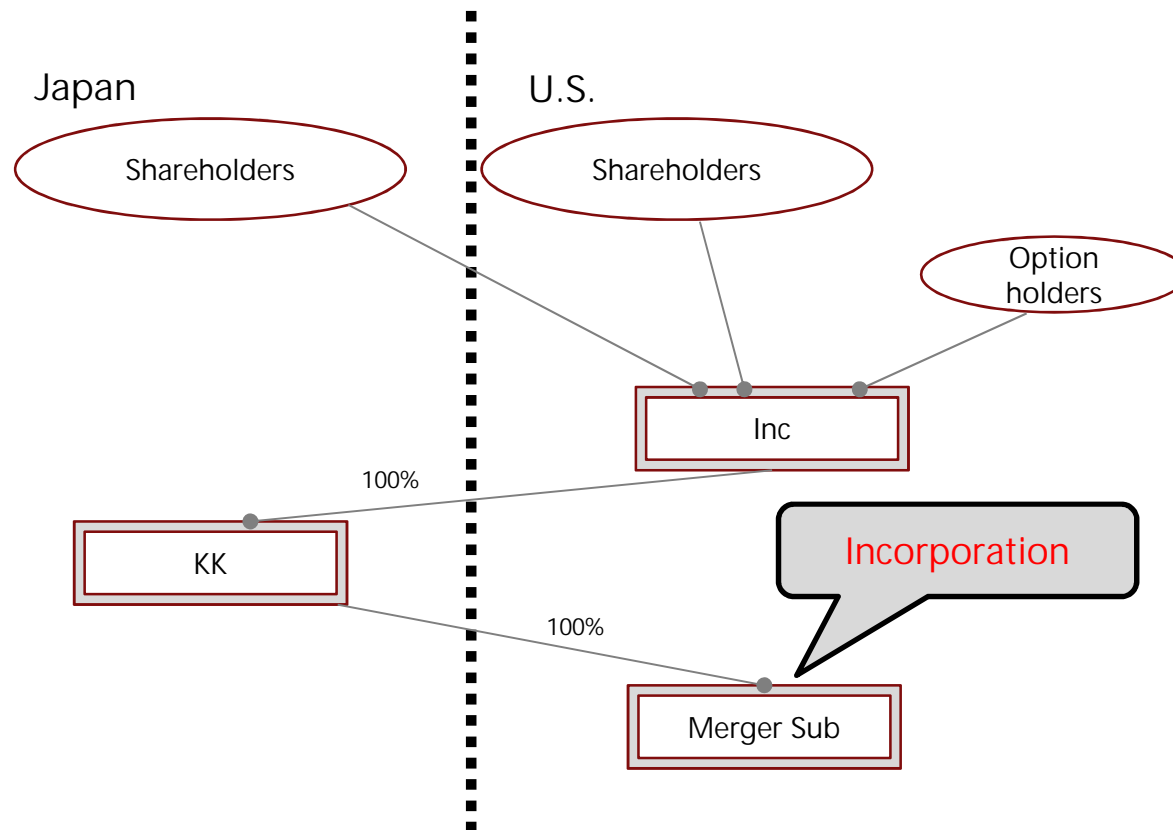
Sample Transaction Structure (2)

Step 1: Incorporation of KK



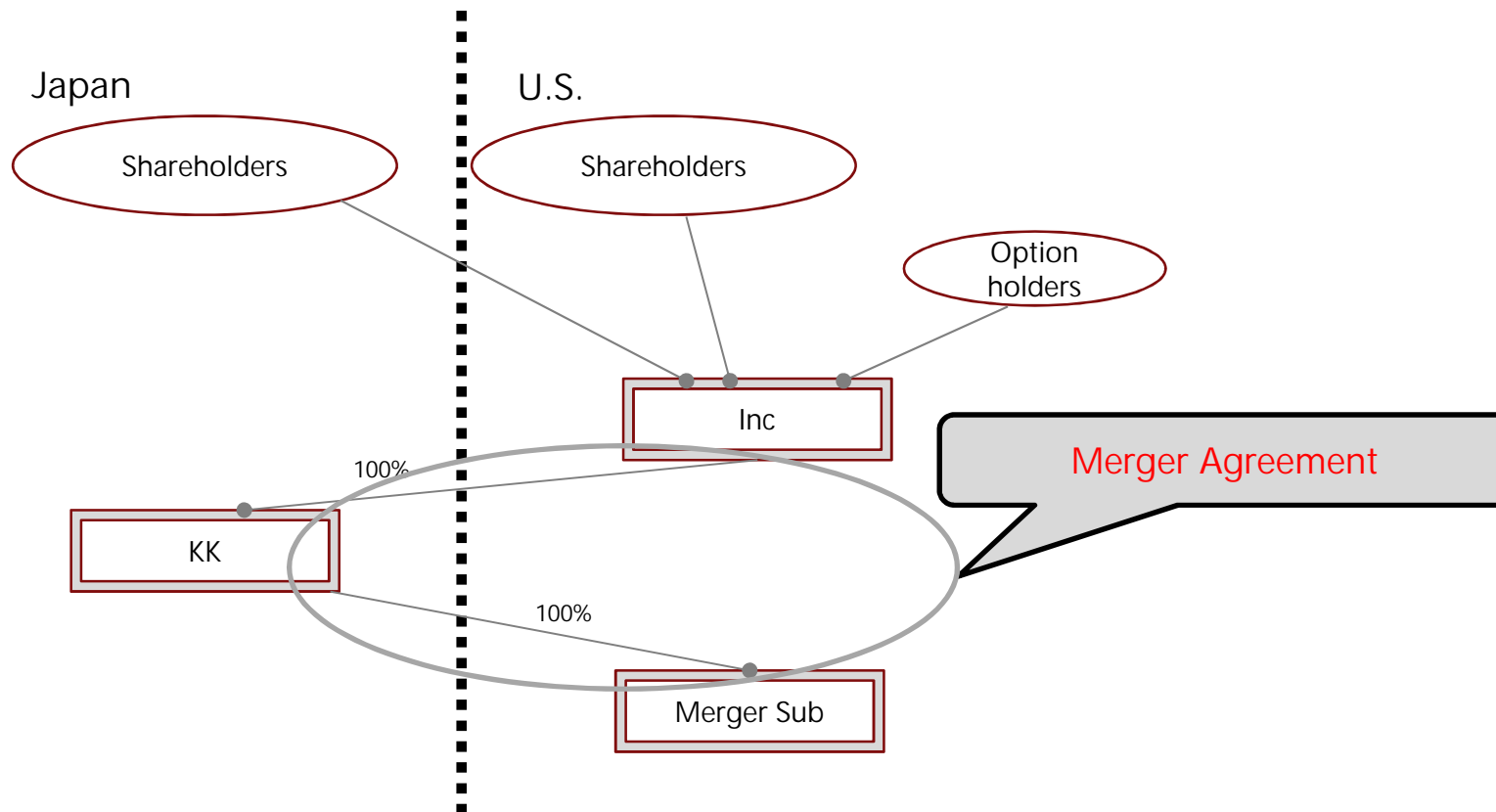
Sample Transaction Structure (3)

Step 2: Incorporation of Merger Sub



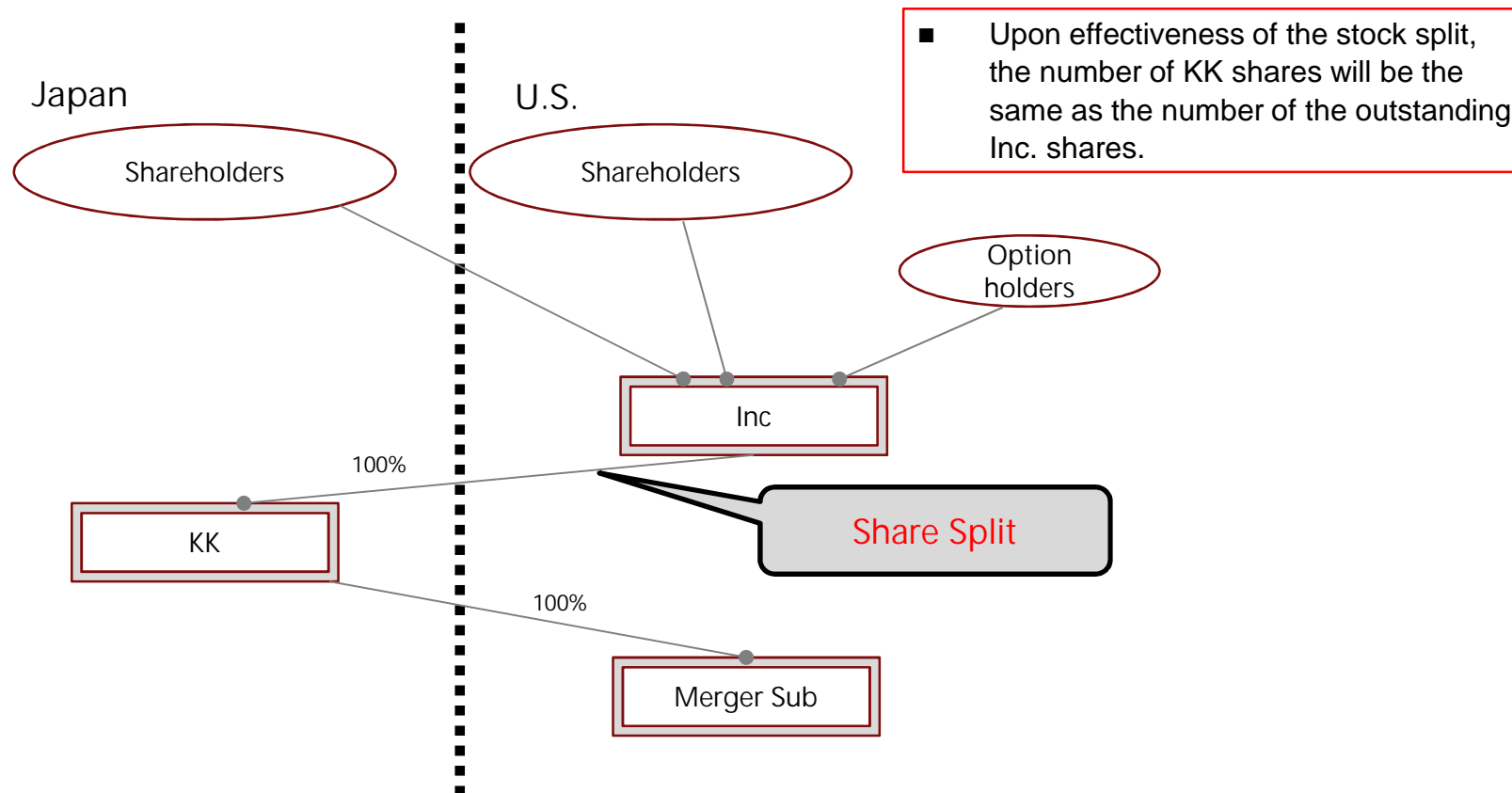
Sample Transaction Structure (4)

Step 3: Merger Agreement



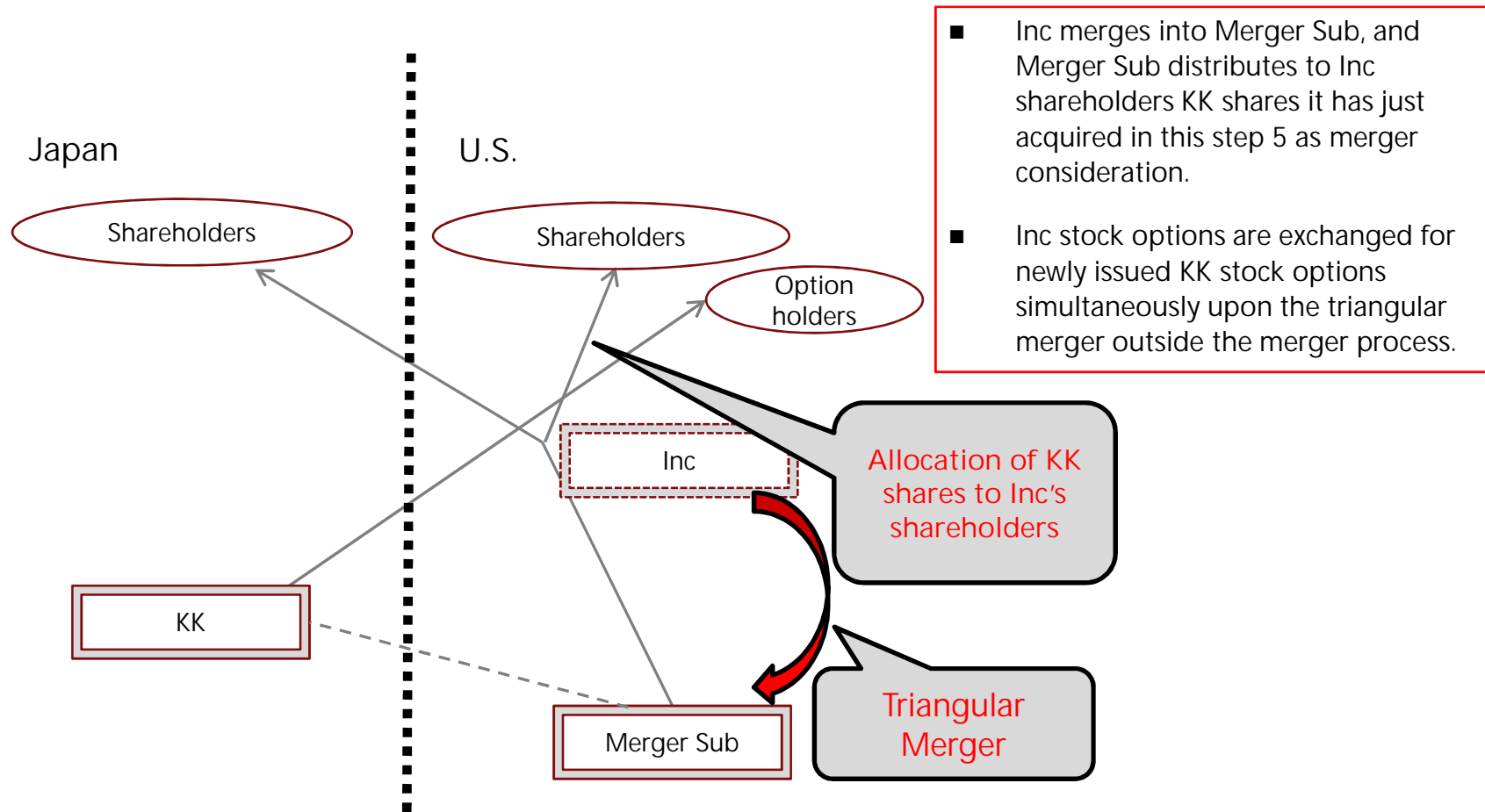
Sample Transaction Structure (5)

Step 4: Share Split of KK Shares (effective immediately before the triangular merger)



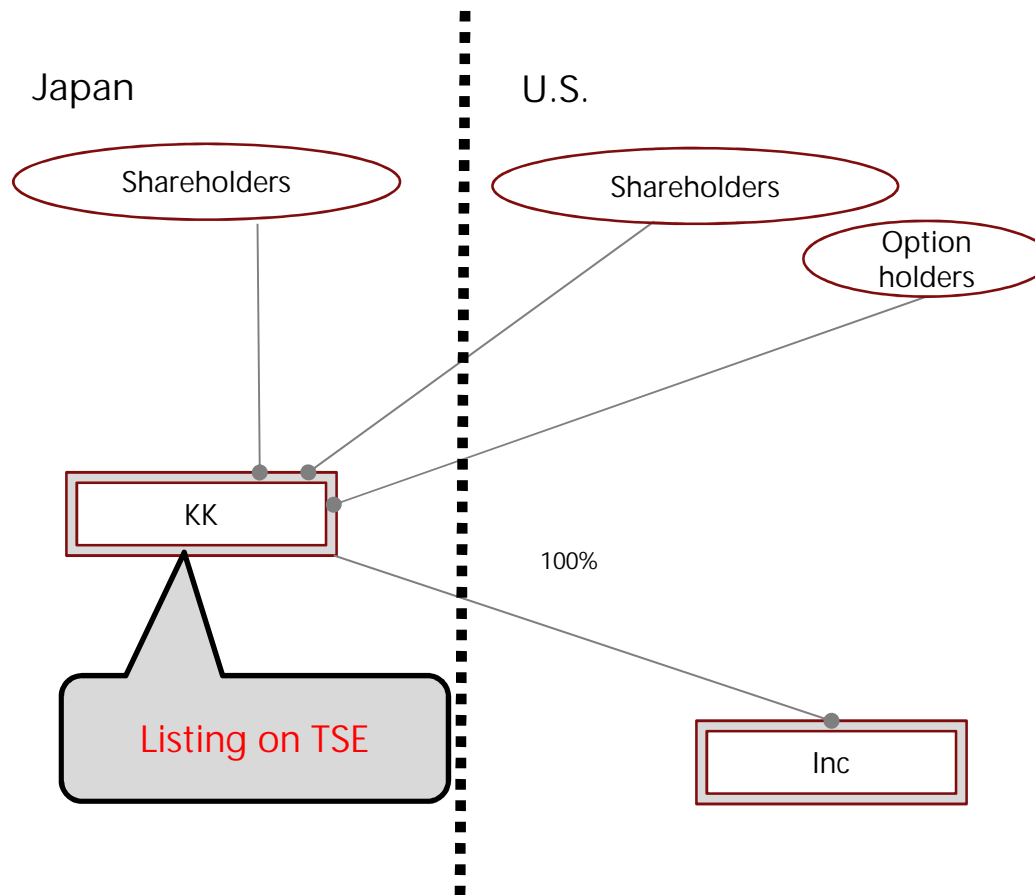
Sample Transaction Structure (6)

Step 5: Triangular Merger



Sample Transaction Structure (7)

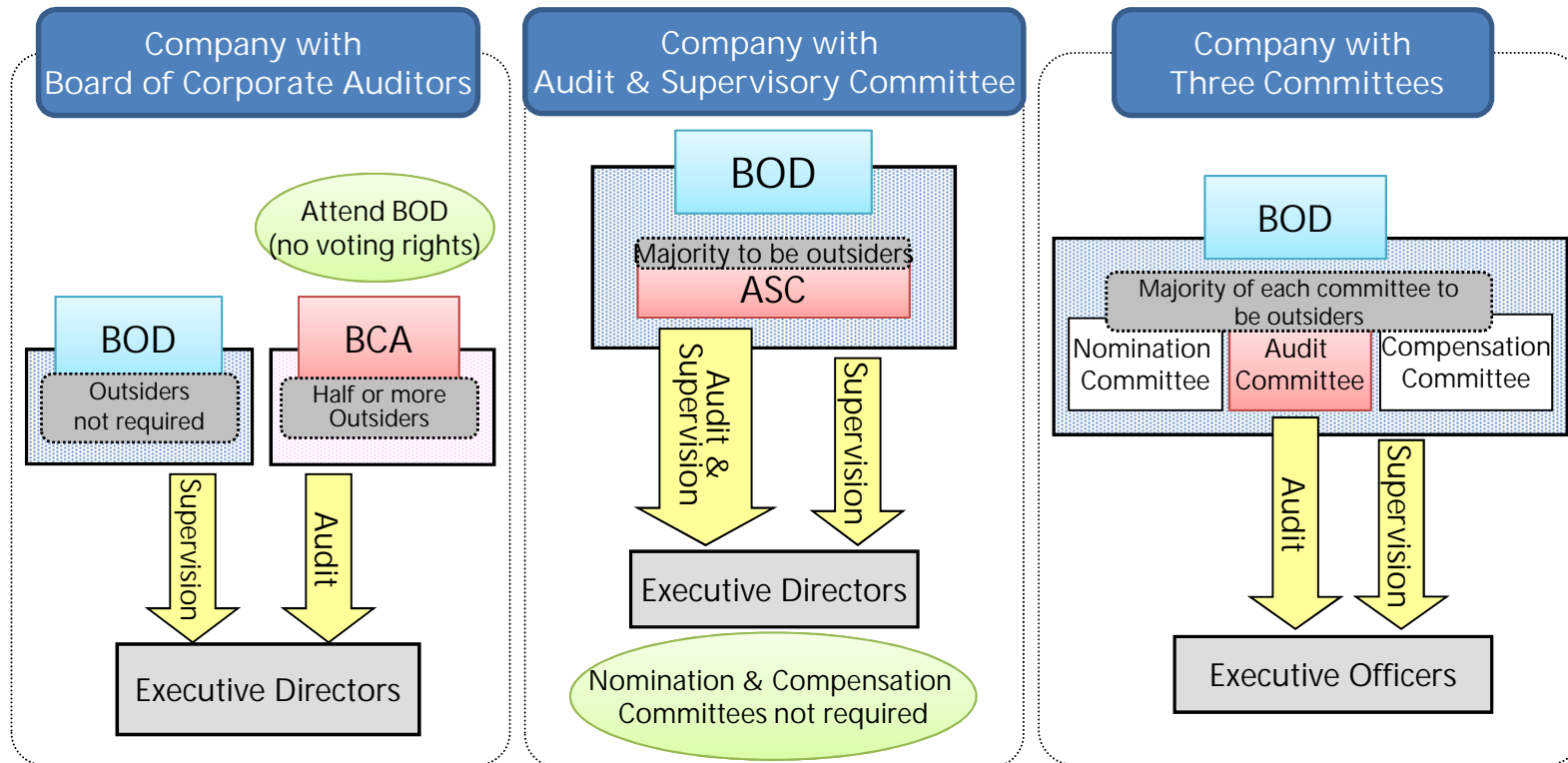
Final Structure



Key Considerations

- Tax implications are critical
- Corporate inversion is essentially a listing as a Japanese issuer governed by Japanese corporate law
 - Some inflexibilities in certain limited respects, but not very different from US state corporate law
- Issues to note include:
 - Structure of equity incentive plan
 - Timeline for annual corporate actions
 - Different from U.S. listed companies
 - Typical example:
 - » March 31: Record date for voting at AGSM and entitlement to annual dividend payment
 - » June: AGSM and dividend payment
 - » After the AGSM, the annual securities report is filed
 - Corporate governance structure

Governance Structures of Listed Companies



"BOD": Board of Directors
 "BCA": Board of Corporate Auditors
 "ASC": Audit & Supervisory Committee

Overview of Governance Structures (1)

	Company with Board of Corporate Auditors	Company with Audit & Supervisory Committee	Company with Three Committees
Corporate Organs	<ul style="list-style-type: none"> • Directors and Corporate Auditors • Committees are not required 	<ul style="list-style-type: none"> • Directors only (no Corporate Auditors) • Audit & Supervisory Committee • Nomination/Compensation Committees are not required 	<ul style="list-style-type: none"> • Directors only (no Corporate Auditors) • Nomination/Audit/Compensation Committees
Composition of Audit Body	<ul style="list-style-type: none"> • 3 or more Corporate Auditors constitute BCA • Half or more must be outside Corporate Auditors • At least 1 full-time Corporate Auditor 	<ul style="list-style-type: none"> • 3 or more Directors constitute ASC • Majority of ASC members must be outside Directors • Full-time ASC member is not required 	<ul style="list-style-type: none"> • 3 or more Directors constitute Audit Committee • Majority of AC members must be outside Directors • Full-time AC member is not required
Appointment, Removal & Term of Office	<ul style="list-style-type: none"> • Corporate Auditors are appointed and can be removed at general shareholders meeting separately from Directors • A simple majority vote is required for appointment; two-thirds vote is required for removal • Term of office for Corporate Auditors is 4 years (1 or 2 years for Directors) 	<ul style="list-style-type: none"> • ASC-member Directors are appointed and can be removed at general shareholders meeting separately from other Directors • A simple majority vote is required for appointment; two-thirds vote is required for removal • Term of office for ASC members is 2 years (1 year for other Directors) 	<ul style="list-style-type: none"> • AC members are appointed and can be removed by Board of Directors from among Directors • Directors (including AC members) are appointed and can be removed at general shareholders meeting • A simple majority vote is required for appointment and removal of Directors (including AC members) • Term of office for Directors (including AC members) is 1 year
Management	<ul style="list-style-type: none"> • Representative Directors and other Executive Directors 	<ul style="list-style-type: none"> • Representative Directors and other Executive Directors 	<ul style="list-style-type: none"> • Representative Executive Officers and other Executive Officers (No Representative Directors)

Overview of Governance Structures (2)

	Company with Board of Corporate Auditors	Company with Audit & Supervisory Committee	Company with Three Committees
Important Business Decisions	<ul style="list-style-type: none"> Must be decided by Board of Directors 	<ul style="list-style-type: none"> Can be broadly delegated to Executive Directors if: <ol style="list-style-type: none"> Majority of Directors are Outside Directors; or Delegation Clause is provided in Articles of Incorporation 	<ul style="list-style-type: none"> Can be broadly delegated to Executive Officers

Company with Board of Corporate Auditors:

The Board of Directors must decide, among others, the following:

- (1) Disposal and purchase of important assets
- (2) Borrowing in a significant amount
- (3) Appointment and dismissal of important employees including managers
- (4) Establishment, change and abolition important organizations including branch offices
- (5) Other important business matters

Company with ASC and Company with Three Committees:

The Board of Directors can delegate to Executive Directors or Executive Officers most of the above, except for certain items including:

- (1) Convocation of General Meetings of Shareholders
- (2) Transactions with conflicts of interest
- (3) Approval of financial statements
- (4) Mergers and other types of business reorganizations

Registration Requirements U.S. (* U.S. law issue)

- Whether the company will qualify as a foreign private issuer (“FPI”)?
 - Any foreign issuer (other than a foreign government) unless:
 - More than 50% of the issuer’s outstanding voting securities are held directly or indirectly of record by U.S. residents; and
 - Any of the following applies:
 - a. the majority of the issuer’s executive officers or directors are U.S. citizens or residents;
 - b. more than 50% of the issuer’s assets are located in the United States; or
 - c. the issuer’s business is administered principally in the United States
- Under Regulation S, an FPI can enjoy the least restrictive requirements for its off-shore offering.

Masakazu Kumagai | Partner



Masakazu Kumagai
Partner

Bar Admissions :
Japan, 2005
New York, 2012

| Who is he? |

- Masakazu Kumagai specializes in capital markets (in particular, equity public offerings and PIPEs and other private placement deals) as well as M&A and private equity fund matters.
- Leveraging on his broad range of expertise, he has extensive experience in handling matters involving TSE-listed foreign issuers, including:
 - First-completed inversion by a TSE-listed US company (Acucela Inc.) redomiciling into Japan; and
 - Delisting of a TSE-listed UK company (Japaninvest, inc.) through a scheme of arrangement.

| Awards |

- Elected as notable practitioner lawyer in IFLR 1000 FINANCIAL AND CORPORATE 2018

| Background |

The University of Tokyo (LL.B., 2004);

Secondment at Ministry of Economy, Trade and Industry (2007-2009);

University of Chicago Law School (LL.M., 2011);

International Associate at Shearman & Sterling LLP, New York (2011-2012)

Mori Hamada & Matsumoto (Partner since 2016)

| Main Publications |

- "US Overseas Investment Report 2017" (IFLR, 2017) (co-author)
- *Private Equity Investment Fund Under the FIEA in "Doing Business in Japan"* (LexisNexis, 60th edition, 2016) (co-author)
- "Comprehensive Analysis of M&A Laws of Japan" (co-author, YUHIKAKU, 2015);
- "The Revision of Regulations on Financing", Commercial Law Review No. 2060, 2015 (co-author);
- "Clarification of 'Solicitation' and Practical Issues", Commercial Law Review No. 2045, 2014 (co-author);

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