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U.S. PRIVATE EQUITY IN JAPAN: THE ROAD TO SUCCESS OR THE PATH TO FAILURE

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I. INTRODUCTION

Private equity is the new and improved little black dress of today's financial world. High-dollar deals are producing a number of significant returns, record-breaking numbers, and high profile mergers and acquisitions (M&A). While private equity transactions are steadily increasing once again in the United States, the real interest in the headlines is the rise in global deals: "[a]s part of increased global M&A activity [in 2005], worldwide private equity acquisitions totaled $396.9 billion U.S. dollars."[1] Private equity transactions increased in 2006 to $757.6 billion, accounting for approximately twenty percent of the total M&A activity.[2] Major deals involving private equity investment occurred in Europe and the Asia-Pacific, including Spain, Germany, Italy, the Netherlands, Japan, and China.[3] As technology continues to improve and the traditional barriers among nations erode, U.S. firms are aggressively looking outside the country's borders for prime targets.

Although U.S. private equity firms are entering markets everywhere, one country of particular interest is Japan. Japan's attraction arises from the potential for future private equity investment due to a complete transformation of Japan's corporate and securities law. This comment will focus not only on the entry of U.S. private equity investment in the Japanese market, but will also give insight into the potential impact of this union. Part II of this comment addresses private equity and, specifically, private equity structures in the United States. Part III briefly discusses the history of the Japanese economy, identifying some of the recent changes in the country's securities law and the

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[1] CASEY COGUT ET AL., *Global Overview*, *in* PRIVATE EQUITY 2006, at 3 (Getting The Deal Through 2006).

[2] CASEY COGUT ET AL., *Global Overview*, *in* PRIVATE EQUITY 2007, at 3 (Getting The Deal Through 2007), *available at* http://www.gettingthedealthrough.com/narrative_chapter.php?id=43&sector_id=55.

[3] COGUT ET AL., *supra* note 1, at 3.

reasons behind these changes. Cultural ideals and business environments of the two countries greatly influence the success or failure of the U.S. private equity venture into Japan. Part IV compares the corporate and cultural differences between the U.S. and Japan. Finally, Part V explores how the combined effects of deregulation in Japan, the U.S. invasion of Japanese markets, and differences in cultural ideals may affect Japan's economic future.

II. WHAT IS PRIVATE EQUITY?

Private equity securities are not freely tradable on the public stock market.[1] In the U.S., private equity transactions occur through a number of mechanisms, including purchases of stock, asset purchases, tender offers, mergers, leveraged buyouts, or minority investments in public or private companies.[2] Pools of capital invested by private equity firms comprise private equity funds that are subsequently used in private equity transactions. Private equity funds managers invest in companies ranging from those in the early stage of development to those at points of expansion and buyout stages. When investment firms use private equity funds to acquire companies, the transactions are usually "structured as stock purchases, asset purchases, mergers, tender offers, or leveraged recapitalizations (e.g. merger of a target and an acquisition vehicle with the target surviving the merger)."[3] Most private equity transactions occur as leveraged buyouts[4] (LBOs) whereby a "financial sponsor gains control of a majority of a target company's equity through the use of borrowed money or debt."[5] Investment firms frequently secure this new debt with the target company's assets and use the debt to pay a large portion of the purchase price.[6] The use of LBOs is controversial, and opponents continue to view those engaging in leveraged buyout transactions as

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[1] InvestorWords Home Page, "Private Equity," http://www.investorwords.com (last visited Dec. 12, 2007) (Private equity securities of companies are not listed on a public exchange. Transfer of private equity is strictly regulated; therefore, any investor looking to sell his/her stake in a private company has to find a buyer in the absence of a marketplace. Returns on private equity generally occur in three ways: a merger or sale, an initial public offering, or a recapitalization).

[2] COGUT ET AL., *supra* note 1, at 155.

[3] COGUT ET AL., *supra* note 1, at 155.

[4] *See generally* BLACK'S LAW DICTIONARY 166 (8th ed. 2004) (A buyout is "the purchase of all or a controlling percentage of the assets or shares of a business." A leveraged buyout refers to "the purchase of a publicly held corporation's outstanding stock by its management or outside investors, financed mainly with funds borrowed from investment bankers or brokers and usu. secured by the corporation's assets.")

[5] COGUT ET AL., *supra* note 1, at 155.

[6] *Id.*

"Barbarians at the Gate."[7] However, critics of private equity tactics seem to be in the minority as private equity investment strategies strengthen and outside forces continue to fuel the private equity boom. In light of private equity success and profitability, lenders are offering buyout firms "money on the cheap and with more relaxed loan restrictions than in the past."[8] Institutional investors, such as pension funds, are allocating more money to private equity firms,[9] and a number of companies are going private.

A. Going-Private

In light of the dramatic and costly corporate governance reforms, specifically the Sarbanes-Oxley Act of 2002,[10] an increasing number of public companies are turning to going-private transactions.[11] Approximately 1,010 public companies went private in 2006.[12] The primary reason for this development is that companies without publicly traded stock are not subject to the same degree of oversight and government regulation as companies with

[7] *See generally* BRYAN BURROUGH AND JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990) (chronicling the battle on Wall Street for control of food and tobacco giant RJR Nabisco, which ended with a $25 billion leveraged buyout by KKR.); *see generally* Donald Greenless, *Asia joins Europe and the U.S. in private equity buyout boom*, INT'L HERALD TRIB., Dec. 21, 2006 ("The book helped foster an image of private equity firms, and the investment banks they worked with, as avaricious financiers good at exacting fees from buying, restructuring and selling companies, but poor at imparting real value." (quoting James Coulter, co-founder of Texas Pacific Group)).

[8] Nicholas Varchaver, *Private Equity in 2007: Thanks to cheap debt and aggressive pension funds, 2006 was the year of private equity. So What's in store for these dealmakers in the year ahead?*, FORTUNE, Jan. 22, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/01/22/8397970/index.htm (last visited Sept. 25, 2007).

[9] *Id.*

[10] *See generally* DAVID G. EPSTEIN, RICHARD D. FREER, MICHAEL J. ROBERTS, GEORGE B. SHEPARD, BUSINESS STRUCTURES 27-28 (Thompson/West 2d ed. 2007) (The 107th Congress passed the Sarbanes-Oxley Act of 2002 in the wake of financial scandals in 2000, including Enron, WorldCom, and others. Created during what is considered to be a nearly complete breakdown of financial accounting and corporate accountability, Sarbanes-Oxley imposes new processes and responsibilities on auditors, company management, boards and audit committees, while clarifying the responsibilities of these parties. "One of the most pervasive parts of the act was "Section 404" which specified that the company must evaluate its own internal controls, and that it must do so with a set of procedures that both evaluate the design of those controls as well as test their operating effectiveness").

[11] COGUT ET AL., *supra* note 1, at 155.

[12] Varchaver, *supra* note 11 (According to Dealogic, in 2006 1,010 companies were taken private in 2006; this number is a large increase "compared with 664 in 2004 and 324 in 2001.")

stock offered to the public. Going-private transactions involve the acquisition of a public company, usually structured as a tender offer followed by a merger or a one-step merger.[13] Although going-private transactions are a type of private equity transaction, they are subject to the disclosure requirements set forth in Rule 13e-3 of the Securities Exchange Act of 1934.[14] However, there are numerous advantages for companies engaging in going-private transactions including, "the alleviation of significant expenses relating to compliance and audit costs, elimination of public disclosure requirements and decreased risks of liability for directors and management."[15]

The movement of private equity firms into trading publicly listed stocks and bonds has critics worried because in the course of pursuing buyouts private equity executives often get access to nonpublic information.[16] Critics continue to question private equity tactics, noting several emerging trends that suggest the private equity industry is running unchecked.[17] These developments include huge dividends and fees, serial charges, debt bombs and quick flips.[18] In earlier years, buyouts were beneficial even though the sole

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[13] COGUT ET AL., *supra* note 1, at 155; BLACK'S LAW DICTIONARY 1230 (8th ed. 2004) (tender offer is "a public offer to buy a minimum number of shares directly from a corporation's shareholders at a fixed price, usu. at a substantial premium over the market price, in an effort to take control of the corporation"); Franklin A. Gevurtz, *Corporation Law* § 7.3, at 673 (2000) ("Broadly speaking, a direct solicitation of a corporation's stockholders to sell their shares to an acquirer is known as a tender offer because the acquirer is asking the existing stockholders to tender their shares for sale."); *see generally* BLACK'S LAW DICTIONARY 826 (8th ed. 2004) (A merger occurs where "the absorption of one organization (esp. a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former. Corporate mergers must conform to statutory formalities and usu. must be approved by a majority of the outstanding share.").

[14] COGUT ET AL., *supra* note 1, at 155; *see generally* 15 U.S.C. §78a §13e-3 (e) (1934) (Security Exchange Act of 1934 §13e-3 (e) "governs the information required to be included in the disclosure document furnished to holders of the class of equity securities that is the subject of the transaction." The disclosure requirements are much greater for a going-private transaction than for other private equity transactions).

[15] COGUT ET AL., *supra* note 2.

[16] Jason Singer, *Deals and Deal Makers – Carlyle Will Join Financiers' Move into Hedge Funds*, THE WALL ST. J., Aug. 1, 2006, at 2.

[17] Emily Thorton, *Gluttons at the Gate*, BUSINESSWEEK, Oct. 30, 2006, at 61.

[18] *Id.* (In the case of huge dividends and fees, "firms are pulling record sums from the companies they own...[and] charging enormous fees for everything from dispensing advise to covering their taxes." Serial charges are the payments that buyout firms collect from companies several times a year, which often become so large that the companies financial strength is impaired. Debt bombs are created when private equity firms load up companies with so much debt that the companies credit ratings suffer, sometimes leading to bankruptcy. Finally, quick flips refer to the practice of bringing

purpose, currently the same purpose today, was to generate returns.[19] Traditionally, investment firms successfully added value to the broken companies they bought[20] by cutting cost, changing corporate management, and helping companies make more efficient use of their resources. However, certain private equity investment strategies encouraging speedy returns have diminished incentives to make lasting improvements. As a result, many companies suffer worse financial conditions than before the buyouts.[21] In spite of these concerns, the private equity business is booming and remains relatively unregulated. The increase in going-private transactions together with a number of other factors is fueling this boom with private equity firms increasing the size and quality of their portfolios.

B. Rise in Consortium & Club Deals

A leading factor in the high-dollar values of private equity transactions in recent years is rise of consortiums or "club deals."[22] There are a number of advantages for private equity firms who choose to form a consortium. Advantages include diversified risk, reduced competition among private equity funds, and combined expertise in various industries.[23] These advantages improve firms' ability to garner large amounts of capital and permit them to engage in lucrative mergers and acquisitions that are more profitable.[24] However, the development and formation of a consortium also poses special challenges. Challenges generally concern the complex contractual agreements among the different private equity firms. Consortiums often face contractual issues such as the sharing of governance rights, the negotiation of mutually acceptable exit mechanisms and the determination of the material terms of the transaction.[25] Although consortium deals require a substantial amount of effort on the transactional side, the increasing number of

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private companies to the public stock market quickly sometime less than a year after buying them.)

[19] *Id.* at 61.

[20] *Id.*

[21] Thorton, *supra* note 20, at 61.

[22] COGUT ET AL., *supra* note 1, at 3 (Club deals are being used to "garner capital sufficient to pursue large acquisitions, diversify risk and combine expertise in different industries" while reducing the competition among private equity sponsors at auctions.); *see generally* BLACK'S LAW DICTIONARY 259 (8th ed. 2004) (A consortium consists of "a group of companies that join or associate in an enterprise.").

[23] COGUT ET AL., *supra* note 1, at 3.

[24] *Id.*

[25] *Id.* at 5, 159 (Consortiums must have confidentiality agreements which allocate responsibility for breach as well as a shareholder agreement that addresses the obligations of each sponsor in obtaining financing and the differences in targeted rates of returns, ERISA issues, structuring needs and investment ability).

"club deals" suggests that the advantages of a consortium outweigh the disadvantages.

C. Private Equity Targeting Certain Industries

Another prominent development in 2005 was that private equity firms focused their energy and funds on the technology sector.[26] In addition to the increase of private equity investment in the technology sector, firms continue to invest their funds in the traditional areas of industry. Many of these industries, such as banking, transportation, telecoms, and energy, have specific regulatory schemes that impose additional requirements on private equity companies wanting to transact business within these regulated industries.[27] "Typically, approval by the relevant federal and/or state governing agency is required before transactions in these industries may be completed."[28] Regulators' concerns about competing objectives and heightened informational requirements contribute to the complexity of private equity transactions in regulated areas.[29] Even in light of the additional challenges, private equity firms armed with their extensive financial and business networks remain a popular investment avenue.

D. Powerhouses in the Private Equity Business

Before moving into the history of Japan's economic development, it is important to recognize the key players in the American private equity business. Prominent names include Ripplewood Holdings, Bain Capital, Texas Pacific Group, the Blackstone Group, the Carlyle Group, Cerberus Partners, WL Ross and Company, Unison, Kohlberg Kravis Roberts and Company, and Thomas H. Lee. This list is not exhaustive and a number of private equity firms are making big moves in Japan. Ripplewood Holdings was one of the first U.S. private equity firms to shake up the Japanese market with its acquisition of the bankrupt Long-Term Credit Bank, the Shineis Bank, in March of 2000.[30] Later in May of 2001, "Ripplewood [also] acquired the financially troubled audiovisual equipment maker Nippon Columbia Company

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[26] COGUT ET AL, *supra* note 1, at 3.

[27] *Id.* at 158.

[28] *Id.*

[29] *Id.* (Regulators often worry about the "creditworthiness of the resulting business and the long- and short-term objectives of private equity owners." Regarding informational requirements, U.S. regulatory bodies require a significant amount of personal and business information from private equity executives).

[30] ALTASSETS, *Recent Trends in Private Equity*, Apr. 5, 2002, http://www.altassets.com/casefor/countries/2002/nz2817.php (last visited June 10, 2007).

and the failed Japanese resort complex in Miyazaki prefecture, Seagaia."[31] As of October of 2006, Texas Pacific Group planned to invest at "least one billion in Japan to tap accelerating growth."[32] In 2003, Cerberus Partners invested in Aozora Bank while Lone Star took a substantial stake in the Tokyo Star Bank.[33] "Carlyle's first Japanese buyout fund was established in 2001 at Japanese Yen (JPY) 50 billion and has made seven investments in sectors including healthcare, industrial, automobile, business outsourcing, media and telecommunications."[34] Two years later in 2003, "Carlyle acquired Kito Corporation, a leading Japanese manufacturer of hoists and cranes, for a total purchase price of JPY13.4 billion (US$111.8 million)." Taking the Kito Corporation private proved successful as the company re-listed on Tokyo stock exchange in 2007 with shares priced at approximately $3,333 per share.[35] April of 2006, Bain Capital and Advantage Partners acquired MEI Conlux, a global leader in payment acceptance systems.[36] As private equity investment gains momentum more firms are targeting the Japanese market.

III. A BRIEF HISTORY OF THE JAPANESE ECONOMY AND SECURITIES LEGISLATION

Japan was once predicted to dominate the world economy.[37] During the 1950's and 1960's Japan's economic system helped Japan to close the gap and compete with Western economic systems.[38] Many Japanese industries

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[31] *Id.*

[32] Takahiko Hyuga, *Investing: Buyout firms focus on growth in Japan*, INTERNATIONAL HERALD TRIBUNE, Oct. 4, 2006, http://www.iht.com/articles/2006/10/03/bloomberg/bxinvest.php2006.

[33] Toshio Aritake, *The private equity invasion of Japan: Ripplewood and others are shaking up a traditionally closed market*, THE CHIEF EXECUTIVE, June 2004, http://www.allbusiness.com/business-finance/equity-funding/164669-1.html.

[34] THE CARLYLE GROUP, *The Carlyle Group Raises JPY 215.6 Billion Second Japan Buyout Fund; The Largest Ever Japan-Dedicated Buyout Fund*, July 7, 2006, http://www.thecarlylegroup.com.

[35] *See generally*, The Carlyle Group Home Page, http://www.carlyle.com (last visited Dec. 12, 2007) ("Over the last four fiscal years, Kito engineered an impressive surge of nearly 50% in sales revenue and more than four times in operating income. The aggressive overseas expansion and financial strengthening have cemented Kito's global leadership position – the largest industrial hoist and crane manufacturer in Japan and China as well as the second largest in the U.S. by market share.").

[36] *See generally* MEI, *Advantage Partners and Bain Capital Complete Acquisition of MEI Conlux*, http://meigroup.com/global/news (last visited Dec. 12, 2007).

[37] RICHARD KATZ, JAPAN: THE SYSTEM THAT SOURED, THE RISE AND FALL OF THE JAPANESE ECONOMIC MIRACLE (M.E. Sharpe Inc. 1998), *available at* www.businessweek.com/chapter/katz.htm.

[38] *Id.*

from autos to electronics had the "potential to become world-class competitors."[39] However, as the economy matured to a level equivalent to Western economies, achieving world-class competitor status required a different economical approach.[40] The potentially competitive industries "had not yet acquired either the economies of scale or the learning-by-doing efficiencies to be competitive."[41] At this crucial point in Japan's economic development, Japan needed to relax its developmental policies because companies/industries were no longer in their initial stages of development.[42] Unfortunately, during the 1970's, Japan's government and local businesses chose to reinforce rather than loosen developmental policies.[43]

Japan's corporate governance was also deemed detrimental to Japan's economic growth. Noting some of the defining characteristics of the earlier system in place during the 1980's is necessary for a better understanding of the changes that have occurred. First, management within corporations consisted of permanent employees, primarily insiders.[44] The main "objective of management was to provide steadily growing benefits to its permanent employees in the form of seniority wages, promotion opportunities, bonus and severance payments, fringe benefits, [etc.] subject to a reasonable level of profits."[45] Second, the bank was both the supplier and monitor of the corporation.[46] In terms of monitoring, the bank determined whether to liquidate corporate firms or whether to restructure and bail companies out at its own cost.[47] Contributing to the growing problems was the co-mingling of Japanese politics with the banking industry and corporate governance. The "one-party rule by the [Liberal Democratic Party] was taken for granted."[48] "As inflation continued to affect the economy, Japan developed a connection-oriented or bureaucratic-allocation-oriented economy."[49] The aforesaid factors

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Masahiko Aoki, Discussion Paper, *Whither Japan's Corporate Governance?*, STAN. INST. FOR ECON POL'Y RESEARCH NO. 05-14 (2006), *available at* http://siepr.stanford.edu/papers/pdf/05-14.pdf.

[45] *Id.* at 3.

[46] *Id.* at 4.

[47] *Id.*

[48] *Id.* at 4 (The LDP ruled Japan for over half a century. When the leadership of the LDP came to an end in 1993 it was too late. Japan's financial and real-estate market bubbles had burst. The deflation period, one of slow growth, became known as "the lost decade").

[49] COLUMBIA BUSINESS CENTER ON JAPANESE ECONOMY AND BUSINESS, ROLE OF PRIVATE EQUITY IN JAPANESE INDUSTRIAL RESTRUCTURING: THE CASE OF DAIEI 4

combined to fuel the bubble economy and ultimately, led to a system of failed banks.

During the 1990's Japanese banks engaged in an enormous amount of borrowing subject to high interest rates.[50] After borrowing money from the Euro-market, Japanese banks quickly lent the money to Japanese companies.[51] Problems arose, in part, because banks granted loans based on personal connections and alliances rather than financial figures or accounting.[52] The Japanese banks focused primarily on securing the value of collateral in the form of real estate against the value of a loan.[53] In order to take advantage of deferred tax assets, the bank's main goal was to avoid debt forgiveness through cutting costs and wages.[54] In pursuit of this interest, banks continued to lend money to financially troubled companies keeping them running.[55]

In 1987, the collapse of the Tokyo stock market added to the troubled mix.[56] In the aftermath of the stock market crash, banks were no longer able to "find easy capital to borrow and had to liquidate many of their overseas holdings, often at a loss."[57] After the crash, property values, once higher than those in the U.S., declined.[58] The Japanese government attempted to remedy the situation by ordering public sector financial institutions to buy stocks and thus raise prices in stock market.[59] This venture proved ineffective as banks suffered severe losses from the loans used to purchase property.[60] "In the aftermath [] of bursting [] land and equity price bubbles in the early 1990's, persistently high nonperforming loans and a declining value of banks' equity

(2005), http://www0.gsb.columbia.edu/japan/alt_investments/eventreports; Masahiko Aoki, *supra* note 48 at 4 ("...coalitions among LDP politicians, interest groups and ministerial bureaucrats were formed in parallel along various industrial, occupational, and professional lines to protect mutual vested interests of incumbents").

50 Christopher Wood, *The Bubble Economy: Japan's Extraordinary Speculative Boom of the '80s and the Dramatic Bust of the '90s*, ATLANTIC MONTHLY PRESS, Oct. 1992.

51 *Id.*

52 *Role of Private Equity in Japanese Industrial Restructuring: The Case of Daiei*, *supra* note 52, at 4.

53 *Id.*

54 *Id.*

55 *Id.*

56 Wood, *supra* note 53.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

portfolios constrained bank credit and sapped household and business confidence."[61]

A. Post Bubble Period

The bubble period had created excesses in debt, capital, and labor that burdened the corporate sector.[62] "These imbalances combined to hold down both investment demand and household income (and thereby consumer spending.)"[63] Japan's economy was in trouble. The problems deepened, plagued with ineffective solutions and unforeseen external forces, leading to a period of falling demand and falling prices that persisted for a decade known as the "lost ten years."[64]

In the wake of the "lost ten years," after Japan's bubble economy and the globalization of the securities markets, Japan drastically changed its corporate governance and securities law.[65] The past few years have seen revisions to the Commercial Code and most recently, an entire abolishment of the Commercial Code in favor of a more flexible corporate regime. In order to highlight the changes in corporate governance, it is important to note some of the revisions to the Commercial Code that occurred prior to the enactment of the Japan's new Company Law in 2006.

Under the 2002 revisions, companies were free to choose from various options of board structures.[66] Revisions of the 2002 Commercial Code also made "it legally possible for Japanese firms to allow outside directors to gain control of the Board of Directors through committees."[67] Furthermore, the new laws enabled investors to participate in corporate acquisitions through share exchanges and allowed exchanges of stock between Japanese firms and

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[61] Daniel Citrin & Alexander Wolfson, *Japan's BACK!*, 43 FIN. AND DEV. 2 (June 2006), *available at* http://www.imf.org.

[62] *Id.*

[63] *Id.*

[64] *Id.*; *see generally* Masahiko Aoki, *supra* note 47, at 1 (the "lost ten years" refers to "the losses of wealth, growth potential, secure permanent employee jobs and even social morale").

[65] 3 MATTHEW BENDER & CO., DOING BUSINESS IN JAPAN § 1.01 (2005).

[66] Masahiko Aoki, *supra* note 47, at 4 (stating that the change was to an "American-type system with independent subcommittees or a modified traditional system with a semi-independent statutory auditor's board." Also, note that the companies had a choice but did not necessarily choose to implement the American-type system).

[67] HIROYUKI ITAMI, THE JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING, REVISION OF THE COMMERCIAL CODE AND REFORM OF THE JAPANESE CORPORATE GOVERNANCE, www.jil.go.jp/english/documents/JLR05_itami.pdf.

Japanese subsidiaries of a foreign corporations.[68] Bank-related revival funds, foreign-owned equity funds, and other financial services replaced commercial banks as the rehabilitators of financially troubled firms.[69] The changes paved the way for sweeping reform in Japan's securities law. Before continuing to the discussion of the most recent changes in Japan's corporate and securities law, it is critical to identify the organizations that enact new laws and enforce regulations.

B. Organizations Responsible For The Development And Enforcement Of Japan's Securities Laws

Japan's Ministry of Justice (MOJ) and the Ministry of Finance (MOF) play a vital role in drafting securities legislation and enacting and regulating securities laws. The MOJ was responsible for most of the postwar revisions to corporate law.[70] However, the corporate reforms since 2000 have been so comprehensive that the MOJ enlisted the resources and expertise of other organizations.[71] One of these organizations is the MOF, which is responsible for Japan's fiscal and monetary matters. In addition to formulating the national budget, which is central to fiscal policy, the MOF monitors and guides banks and securities companies as to current monetary policy, adjusts the current balance of payments, and determines and maintains what the MOF considers to be an appropriate level in foreign exchange rates.[72]

"Securities markets in Japan are generally the markets where securities transactions are expected to be made at fair market prices in accordance with Japanese law and ordinances, which are regulated by the Financial Services Agency (FSA) on behalf of the Cabinet."[73] The FSA is extremely important to the development of Japan's economy. The organization's principal role concerns "ensuring stability of Japan's financial system, protect[ing] [] depositors, insurance policyholders and securities investors, and smooth[ing] finance through such measures as planning and policymaking concerning the financial system, inspection and supervision of

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[68] *Id.* at 4.

[69] Masahiko Aoki, *supra* note 47, at 7-8.

[70] Mark Poe, Kay Shimizu & Jeannie Simpson, *Revising the Japanese Commercial Code: A Summary and Evaluation of the Reform Effort*, 2 STAN. J. OF EAST ASIAN AFFAIRS 71, 73 (2002).

[71] *Id.*

[72] *See generally* Ministry of Finance Japan Home Page, http://www.mof.go.jp/english (last visited Sept. 12, 2007).

[73] DOING BUSINESS IN JAPAN, *supra* note 68.

private sector financial institutions, and surveillance of securities transactions."[74]

Another important entity involved in Japan's securities regulations, is Japan's Security Dealers Association (JSDA). JSDA is comprised of "all the securities companies and registered financial institutions in Japan (as members of the association)."[75] JSDA's stated purpose is to protect investors and to "promote the implementation of policy measures for the revitalization of the Japanese securities markets in order to contribute to the growth and development of the Japanese economy."[76] The association is primarily responsible for the establishment and enforcement of self-regulatory rules. Implicit in this responsibility is the execution of "on-site" inspections and "off-site" monitoring of its member companies as well as strict enforcement of disciplinary actions for violations of statutory and self-regulatory rules.[77] JSDA also conducts research and studies on potential items of reform and then presents proposals to the Japanese government and other parties for their realization.[78] In response to the globalization of the securities markets, JSDA is actively participating in international conferences, exchanging information and deepening relationships with [foreign] organizations related to the securities industry.[79] Under the most recent changes in Japan's corporate and securities law the MOJ, MOF, FSA, and JSDA will maintain control in their respective areas and continue to influence legislation, law and regulation of investment practices of Japanese and foreign companies.

C. Japan's New Company Law

The most recent and hopeful innovation in Japan's corporate governance is Japan's new Company Law. Prior to the enactment of the Company Law in 2006, Japanese law governing corporations and security transactions existed in a variety of places.[80] The new Company Law is an

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[74] FINANCIAL SERVICES AGENCY, NEW LEGISLATIVE FRAMEWORK FOR INVESTOR PROTECTION, http://www.fsa.go.jp/en/policy/fiel/20061010.pdf.

[75] Japan's Securities Dealers Association Profile, http://www.jsda.or.jp/html/eigo/about_pro.html.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Yoko Okamoto, *Changes in M&A transactions brought about by Japan's Company Law*, ASIALAW, Oct. 2006, http://www.asialaw.com/default.asp?Page=20&PUB=68&ISS0=22742&SID=658305 (Japanese corporate law could be found mainly in three different pieces of legislation "(i) certain parts of the Commercial Code (Law No.48 of 1899) (the Old Commercial Code); (ii) the *Law for Special Exceptions*, etc. to the Commercial Code Concerning

attempt to integrate all Japan's corporate law into a single updated piece of legislation incorporating changes in economic and social attitudes.[81] Japanese legislators intend for the Company Law to "streamline complex regulations of Japanese companies under the current law, [while providing] diversified frameworks for corporate governance depending upon the size of the business and transferability of the shares of the corporation[]."[82] The new set of rules should "give corporations more flexibility allowing for improved operational efficiency and greater responsiveness to the ever-changing economic environment."[83]

Deregulations providing greater convenience and flexibility under the new Company law include:

- "Less time and money required to set up a new company.
- New forms of corporation for increased options when starting a business.
- More flexible corporate governance in line with company scale and type (listed or unlisted) for reduced operating cost and more efficient management.
- More flexible and more simplified corporate reorganization.
- Easier corporate rehabilitation and second chances for entrepreneurs."[84]

While much of the Company Law creates flexibility, a few areas impose more stringent requirements than the previous law. The guidelines regarding establishment and disclosure of internal controls are expanded under the new Company Law to include all large companies ("meaning those with a capital fund of 500 million yen or more or with liabilities of 20 billion yen or more").[85] These disclosure requirements are applicable to private equity firms that use large funds to invest in Japanese companies.

Not all changes are beneficial or conducive to private equity investment. The new law now "prohibits continuous business activities of quasi-foreign corporations (QFC), [which is] a foreign corporation

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Audits of a Joint Stock Company (Law No.22 of 1974); and(iii) the *Limited Liability Company Law* (Law No. 74 of 1938)").

[81] *Id.*

[82] Akio Kawamura & Shigeki Minami, *How Corporation Law affects foreign companies*, INT'L FIN. L. REV., Dec. 2005, *available at* http://www.iflr.com/?Page=7&PUBID=213&ISS=21187&SID=605803.

[83] *Id.*

[84] JETRO, REFORMS UNDER THE NEW COMPANY LAW; WILL IT BE A CATALYST FOR BUSINESS AND INDUSTRIAL REVITALIZATION? JETRO JAPAN ECONOMIC MONTHLY, (2005), http://www.jetro.go.jp/en/market/report/pdf/2005_45_u.pdf.

[85] *Id.*

incorporated in a jurisdiction outside of Japan but has its head office in Japan or has the principal purpose of doing business in Japan."[86] During the consideration of this provision, the Diet[87] members expressed concern that the provision would impede the investment and "business activities of foreign corporations doing business in Japan through a branch instead of a subsidiary."[88] In order to alleviate the Diet's concerns, the MOJ stated that "a foreign corporation that used to engage in or has a plans to engage in substantial business operations overseas will not be deemed a QFC."[89] However, the MOJ statement was never officially adopted in the new Company Law and is considered only a de facto safe harbor rule.[90]

Another facet of the Company Law having broad implications in the private equity context is the availability of cash mergers. In the past "mergers in Japan were only permitted if the shareholders of both merging companies received shares of the surviving corporation, making it difficult for private equity funds, which typically pay cash, to acquire Japanese companies by merger."[91] Acquisitions structured as cash mergers permit private equity funds to acquire a Japanese company without any remaining minority shareholders. A cash merger forces all of the target company's shareholders to sell their shares for cash, so long as two-thirds of the target company's shareholders approve the merger.[92]

D. Triangular Mergers – Hope For Private Equity Investors

When the Company Law took effect in May 2006, one provision and perhaps the most beneficial provision for U.S. private equity investors had a delayed effective date of one year. The provision effective as of May of 2007 permits the use of triangular mergers providing greater flexibility in M&A transactions.[93] "[A] direct statutory stock swap between a foreign and Japanese

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86 Kawamura & Minami, *supra* note 86; Kaishah* (Corporations law) (Law no. 821 of 2005).

87 Japan's parliament is called the Diet. Similar to the U.S. legislative structure, the Diet is divided into the House of Representatives, consisting of 480 members and the House of Councillors, consisting of 242 members. *See generally,* House of Councillors, The National Diet of Japan, http://www.sangiin.go.jp/eng/index.htm (last visited Dec. 10, 2007).

88 Kawamura & Minami, *supra* note 86.

89 *Id.*

90 *Id.*

91 Gregory R. Salathe & Kunio Namekata, *Reform provides M&A opportunities* 2006 SUP. INT'L FIN. L. REV., http://www.iflr.com (last visited Dec. 17, 2007).

92 *Id.*

93 Kaho Shimizu, *Triangular Merger: Are new rules kind to hostile mergers?*, THE JAPAN TIMES, May 1, 2007.

company [] remain prohibited under the new Company Law."[94] Triangular mergers are mergers that allow an acquiring company to use the shares of their parent companies to engage in M&A of other companies in Japan.[95] Under the new Company Law, certain requirements must be met before the triangular merger will be considered a qualified triangular merger.[96] There will generally be three parties to the transaction: a 100% or wholly owned Japanese subsidiary, the foreign parent company, and the target company.[97]

Contrary to popular belief, triangular mergers are not hostile mergers.[98] These transactions are friendly and do not occur in the securities market, but instead occur as "corporate reorganizations, which can only proceed if the internal board of Japanese company agrees first that it wants the transactions to happen."[99] Specifically, two-thirds of the Japanese target company must approve the merger.[100] However, there are circumstances where only approval of the board of directors of the surviving corporation is required. One such situation occurs "if the amount of assets to be handed over to the shareholders of the disappearing corporation is less than 20% of the net assets of the continuing corporation."[101] Additionally, approval of the controlled company is not required if a controlling corporation owns more than 90% of the voting rights of the controlled corporation and makes the controlled corporation a 100% subsidiary.[102] The permission of the controlled corporation

[94] O'MELVENY & MYERS LLP, JAPANESE LEGAL UPDATES: JAPAN'S NEW CORPORATIONS LAW TO BECOME EFFECTIVE MAY 1, 2006 (Mar. 29, 2006), http://www.omm.com/webdata/content/publications/TIJL_03_06.pdf.

[95] JETRO, THE SKINNY ON TRIANGULAR MERGERS IN JAPAN (Sept. 2006), http://www.jetro.org/content/390.

[96] *See* KOJI ISHIKAWA, DLA PIPER, CLIENT UPDATE: JAPAN TRIANGULAR MERGER (Jun. 8, 2007), http://www.dlapiper.com (search DLA Piper homepage for "Japan Triangular Merger") ("Initially, the efficacy of the new M&A provisions was questionable because the Japanese tax code would require the selling shareholders to immediately recognize any capital gains." However, if the merger is conducted properly, selling shareholders can defer any capital gains tax.).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Shimizu, *supra* note 96.

[101] RODERICK SEEMAN'S JAPAN NEW COMPANIES LAW, NEW JAPAN CORPORATIONS LAW, http://www.japanlaw.info/japancommercialcode /NEWCOMPANIESLAW.html (last visited Dec. 31, 2007) (on file with the author).

[102] *Id.* ("[O]pposing minority shareholders can demand that their shares be bought" or file suit if they feel that the laws, regulations or the articles of incorporation are being violated.").

may be required only where the controlled corporation is one with restrictions on share transfers.[103]

"The perceived (perhaps falsely) hostile nature of triangular mergers was the primary reason the Company Law "delay[ed] the effective date of [these] deregulation provisions diversifying permissible consideration until the first anniversary date of the rest of the [Company] law."[104] Whether regarded as hostile or friendly, triangular mergers are expected to facilitate direct foreign investment.

E. Delay Allowed Time to Prepare Defenses Against Buyouts and Takeovers

The one-year delay incorporated in the law granted Japanese companies time to prepare defenses against foreign acquisitions.[105] Now that deregulation provisions are effective, the MOJ "may impose conditions on the use of a foreign parent's stock as consideration."[106] However, in the absence of any restrictions on triangular mergers, U.S. private equity investment in Japan looks promising.

In sum, the new Company Law allows "greater residual control by shareholders if they choose it, greater diversity and flexibility of corporate structure and capital transactions, and new transactions such as triangular mergers – useful for "squeeze-outs" and cross-border swaps."[107] Managers have heightened tension and pressure to perform under the new Company Law because they "must raise corporate value if they fear targeting by activists."[108]

The structural and transactional flexibility arises from the "diverse alternatives for governance, fewer administrative burdens for small private companies and adoption of a structure allowing triangular mergers."[109] Corporate CEO's and commentators believe that triangular mergers will likely stimulate foreign direct investment because "cash can be conserved to be used

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[103] *Id.*

[104] Kawamura & Minami, *supra* note 85.

[105] RODERICK SEEMAN'S JAPAN NEW COMPANIES LAW, *supra* note 104.

[106] Kawamura & Minami, *supra* note 85.

[107] NICHOLAS BENES, JAPAN'S NEW COMPANY'S LAW – ITS IMPACT ON GOVERNANCE, M&A, AND FDI, (June 30, 2006) http://www.jetro.org/documents/event_documents/173/173_ACCJ_BENES_6-30-06_1.pdf.

[108] *Id.* at 3.

[109] *Id.* at 2 (Triangular mergers are friendly transactions that can be used by both domestic and foreign firms whereby the acquirer can use stock as consideration in making the acquisition.).

on operation."[110] Whether good or bad for private equity investment, Japan's new Company Law is not the only change in corporate governance that private equity firms will need to consider when investing in Japan. This year private equity firms will also face the introduction of Japan's new Financial Instruments and Exchange Law.

F. Financial Instruments and Exchange Law

In June 2006, the Japanese Diet passed amendments to Japan's Securities and Exchange Law (SEL), renaming the law the "Financial Instruments and Exchange Law" ("FIEL"). The FIEL imposes an entirely new regulatory framework on investment funds, including private equity funds that take the form of a partnership.[111] This law will go into effect later in 2007.[112] The purpose of this consolidation is to increase user protection and develop an environment where users can invest with confidence, while restoring confidence in the Japanese market and enhancing the attractiveness of the Japanese market as an international market.[113]

The FIEL expands the scope of "securities" covered under the law to cover collective investment schemes (funds).[114] This expansion is especially important to U.S. investors. Instruments covered under the FIEL require "registration for sales and solicitation operations of securities and derivative transactions."[115] Instruments firms must comply with certain rules when conducting any financial instruments business.[116] These rules address conduct concerning obligations on presenting signs, regulations on advertisements, obligations to deliver documents in a written format before and at the time of a contract, as well as the principle of appropriateness.[117] The FIEL also prohibits loss compensation and engagement in "the delivery of false information or

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[110] *Id.* at 2.

[111] Adam Wiseberg and Kei Ito, *Japan's Securities regulations: following in the U.S. footsteps?* INT'L FIN. L. REV. (SUPPLEMENT - Guide to Japan 2007) www.IFLR.com (last visited Dec. 12, 2007).

[112] NICHOLAS BENES, *supra* note 110.

[113] FINANCIAL SERVICES AGENCY, *supra* note 77.

[114] Satoshi Nakamura and Mitsue Tanaka, *The 2007 Guide to Private Equity and Venture Capital; A Regulatory Revolution*, (Paragraph 2 of Article 2 of the FIEL "provides a list of rights and interest that are not in the form of certificates or instruments are accordingly illiquid, but which are deemed securities for the purpose of ensuring public interest or investor protection... Accordingly, private equity or venture capital partnerships will be regulated as deemed securities or Paragraph 2 securities, regardless of whether they are established in Japan or overseas.") INT'L FIN. L. REV., www.IFLR.com (last visited Dec. 12, 2007).

[115] FINANCIAL SERVICES AGENCY, *supra* note 77.

[116] *Id.*

[117] *Id.*

"solicitation by providing decisive judgments on certain matters."[118] The FIEL requires institutions defined as a financial instruments business "to register for self-offering of interests in collective investment schemes and self-management of properties of collective investment schemes."[119]

The FIEL amends the legal name of self-regulatory organizations made up of a membership of financial instruments, such as JSDA, to "Financial Instruments Firms Association."[120] However, these self-regulatory organizations will continue to provide the oversight of its members through activities such as "examination aimed at resolving complaints, the mediation of disputes, the development of self-regulatory rules, surveillance of members in relation with compliance of the laws, regulations and rules and the imposition of sanctions for violations."[121] Following in the footsteps of Japan's new Company Law, the FIEL enhances the effectiveness of internal control systems by introducing statutory quarterly reporting systems that ensure the appropriate disclosure of financial and corporate information.[122] The above-mentioned changes under the FIEL are only a few among many. The implications and effect of the FIEL on U.S. private equity investment remains to be seen. Until the FIEL becomes effective, the Foreign Securities Firms Law (FSFL) will continue to govern and regulate activities of foreign investment firms.

The FSFL generally prohibits an unregistered foreign securities firm from executing the sale or purchase of securities or conducting other securities transactions with any person located in Japan, or from outside Japan."[123] Under this regime, U.S. private equity firms opened offices in Japan and appointed Japanese executives in order to comply with Japan's laws and participate in lucrative buyouts. A foreign securities firm not registered under the FSFL is considered an unregistered firm.[124] Unregistered firms cannot "engage in securities transactions such as selling or purchasing securities with any person in Japan or soliciting in regard to offers for the acquisition of securities."[125] However, there exist a number of significant exceptions relevant to U.S. private equity investors.

Many U.S. firms do not satisfy the requirements of a registered firm. However, the FSFL includes exceptions that provide an avenue for

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118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 DOING BUSINESS IN JAPAN, *supra* note 68, § 10.01.
124 *Id.*
125 *Id.*

unregistered firms to carry out securities transactions from outside Japan to a person inside Japan falling within certain categories.[126] These categories include the Japanese Government or the Bank of Japan; a registered Japanese securities company; a bank, an insurance company, a credit union, a workers credit union, a licensed investment advisor; and more.[127] The FSFL requires any unregistered foreign securities firm to conduct business outside of Japan. Thus, the FSFL prohibits an unregistered firm from visiting or making calls to any of the exempted categories of people or carrying out any road show in Japan.[128] Instead, unregistered securities firms, must direct their marketing material from abroad. Exceptions enabled some U.S. and other foreign private equity firms without a Japanese location to participate in security transactions within Japan. Foreign investors hope that under the relaxed requirements of the FIEL, private equity activity will increase in Japan.

IV. JAPANESE AND AMERICAN CORPORATE CULTURE AT ODDS

The arrival of foreign private equity funds in Japan has brought a number of different responses. The proponents of the movement feel that private equity is re-engineering the Japanese economy in the pursuit of improved performance and corporate governance. Opponents view the movement as an invasion comparable to vulture funds worse than *Barbarians at the Gate*. Hesitancy and doubt about the future of private equity in Japan arises in part from the two country's cultural differences.

Japan has historically been a closed market.[129] Self-nationalism and the belief that "physical assets in [Japan] should also be owned and managed by the Japanese people as an independent nation," pervades the corporate world of Japan and conflicts with American ideals of capitalism. Japanese culture does not promote the concept of survival of the fittest, which would

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[126] *Id.*

[127] *Id.* (The FSFL further provides exceptions for "an investment management company of a registered investment company (within the limitation of certain securities transactions made on behalf and for the account of the investment company); a bank, an insurance company, a credit union, a workers credit union, *Norin Chukin*, *Shoko Chukin*, a credit association or a certain other financial institution that is acting w/in the limitation of its authorized security business; a bank (within the limitation of certain securities transactions made by a written order of and for the account of its customers); or a long term credit bank, a specially approved ordinary bank or a trust bank (within the limitation of securities transactions concerning certain of its long-term or trust certificate)").

[128] *Id.*

[129] Masahiko Aoki, *supra* note 47.

widen the income gap and raise social cost."[130] Many Japanese citizens view companies as belonging to the long-term employees who are committed to them rather than to the shareholders.[131] These cultural perspectives of corporate governance differ vastly from the American ideals of corporate governance and economics. However, some feel that these beliefs led to and helped sustain the "lost ten years" after the bubble economy.

American corporate culture centers on the belief that the shareholders are the owners of a corporation. In light of this view, companies deem massive layoffs and wage cuts a necessary if in the best interest of the company (the shareholders). In the corporate world, the phrase, "Survival of the fittest," embodies the principle that failing companies should and will die. The theory of market capitalism incorporates these ideas. Market capitalism includes guiding principles such as:

- "Sustained economic growth as the way to human progress
- Free markets without government "interference" [is] the most efficient and socially optimal allocation of resources
- Economic globalization [is] beneficial to everyone
- Privatization removes inefficiencies of the public sector
- Governments should mainly function to provide the infrastructure to advance the rule of law with respect to property rights and contracts."[132]

The law's treatment of American corporations as individuals possessing rights as an individual strengthens these ideals. The profit-seeking goal of American corporations creates inherent conflicts when transacting business in Japan. Although Japan's new Company Law incorporates many ideals of the American corporate system, implementation and acceptance of structural changes will take time.

V. WHAT ARE THE COMBINED EFFECTS OF DEREGULATION, U.S. INVASION, AND JAPANESE IDEALS ON THE FUTURE OF PRIVATE EQUITY INVESTMENT IN JAPAN

One question remains – What does the future hold for U.S. private equity investment in Japan? Most private equity investors are both optimistic and uncertain, as with investment in any sector and in any country. Attracting

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[130] COLUMBIA BUSINESS CENTER ON JAPANESE ECONOMY AND BUSINESS, *supra* note 52, at 3.

[131] HIROYUKI ITAMI, *supra* note 70, at 8.

[132] Anup Shah, *The Rise of Corporations*, http://www.globalissues.org/TradeRelated/Corporations/Rise.asp. (last visited Sept. 12, 2007).

foreign investment in Japan are the facts that "Japan has the second largest economy, [Japan's] asset values may be close to bottoming out, [and] Japan has recently revised its insolvency regimes."133 "When considering an investment in Japan, one must take into account the inherent challenges of the Japanese economy, such as the capital demand/supply imbalance, the hollowing out of the manufacturing base, deflation and the difficulties associated with the banking system."134 Unison's partner and co-founder Mr. Ehara stated that the Japanese buyout market is modest and that it is not accurate to view this market as if a floodgate had just opened for private equity activity.135 However, he predicts steady growth in Japan.136 Ripplewood management feels that the investment environment in Japan is becoming attractive as macroeconomic forces continue to drive change and the government recognizes the importance of new forms of capital and foreign investment.137 Timothy Collins, CEO of Ripplewood holdings LLC, recently stated that "[p]rivate equity can be a positive vehicle for change, a positive lubricant, and can play a positive role in bringing the Japanese economy back to its former pre-eminence in the world economy."[138]

Proponents of private equity investment identify advantages of foreign investment in Japan, including the capability to realize changes, implementation of new expertise and the identification of global partners.[139] If private equity firms can exploit these advantages by creating value in the

[133] JETRO, *Private Equity in Japan*, http://www.altassets.com/casefor/countries/2002/nz3255.php 07 (last visited Dec. 15, 2007) (Wilber Ross describing private equity investment in financial service companies in Japan in the context of his firm's acquisition of Kansai Sawayaka Bank (KSB), formerly Kofuku Bank.).

[134] *Id.*

[135] Alicia Ogawa, *Corporate Note: Roles of Private Equity Investment in the Growing Japanese Economy*, http://www.japansociety.org/content.cfm/roles_of_private_equity_investment_in_the_growing_japanese_economy (last visited Dec. 31 2007) (John Ehara, Partner and Co-Founder, Unison Capital Inc. presenting his "views on the contributions of private equity firms to economic growth and business development in Japan." Mr. Ehara predicts there may be 80 transactions in 2006, up from the 14 transactions in 1996 and 67 in 2005).

[136] *Id.*

[137] CENTER ON JAPANESE ECONOMY AND BUSINESS, THE PROGRAM ON ALTERNATIVE INVESTMENTS, *Ripplewood in the Japanese Private Sector*, (Feb. 5, 2003) http://www0.gsb.columbia.edu/null/Collins?exclusive=filemgr.download&file_id=592758&showthumb=0 (seminar with Timothy Collins, CEO of Ripplewood Holdings, LLC, as a keynote speaker).

[138] JETRO, *Private Equity in Japan*, *supra* note 136.

[139] *Id.* at 2.

companies they acquire, then the opposition in Japan should decrease.[140] One of the most significant reasons for the enormous potential for value creation is that Japan is ready for change.[141]

On the other hand, the exit strategy of many private equities has fueled concern that private equity buyouts are not beneficial to Japan in the long-term. Investment firms are taking the cash value out of many companies and then reselling. One of the biggest hurdles private equity has to overcome is the Japanese attitude towards big layoffs. Recently, Japanese labor unions launched a task force to challenge private equity funds targeting certain companies.[142] Unions and other opponents of private equity investment are concerned about private equity investors' disregards for labor rights, job security for employees, and working conditions. Union International Network (UNI) is at the forefront, with the "aim of challenging private equity bids" and "lobbying pension funds, which are helping to fuel a buyout boom by investing in private equity with the hope of making substantial returns for investors."[143] The union backlash arises in the wake of the Japanese corporate reform and demonstrates one of the few barriers U.S. private equity firms will have to overcome.

Further affecting the future of private equity in Japan are the facts that "accounting systems aren't transparent, bankruptcy laws are inadequate, [and] the judicial process is slow."[144] Paul Slawson, the managing principal for EastPoint Capital Management, noted that "Japan has proportionately less accountants than in the [U.S.]: whereas there are 350,000 accountants in the [U.S.], there are only 13,000 in Japan."[145] The deficiency of accountants in Japan coupled with new disclosure and due diligence requirements comparable to those in the U.S. is likely to produce lengthy delays for investment.[146] Although the new Company Law now in place is more flexible and user

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[140] *Id.* at 2.

[141] CENTER ON JAPANESE ECONOMY AND BUSINESS, *supra* note 140.

[142] UNION NETWORK INTERNATIONAL, *Task Force to Challenge Private Equity in Japan*, http://www.union-network.org/uniflashes.nsf/c4bdf194bc536c81c12567bb0057c767/2d22275e9fe30d36c12572f3004e3918? (last visited Dec. 15, 2007).

[143] James Moore, *Union movement looks to Japan in fight against private equity*, THE INDEPENDENT, June 8, 2007, http://news.independent.co.uk/business/news/article2631611.ece (UNI has fourteen affiliates in Japan with more than one million members).

[144] *Nightly Business Report: Ripplewood Holdings: Looking for Business Bargains* (PBS television broadcast Jan. 9, 2006), *available at* www.pbs.org/nbr/site/research/educators/060106_09d.

[145] JETRO, *Private Equity in Japan*, *supra* note 136.

[146] *Id.*

friendly, Japan does not have an adequate number of accountants or lawyers to cope with massive corporate restructuring.[147] Most importantly, there are no guarantees that a Japanese government, suspicious of American culture and ideas will not reverse the new laws by imposing harsh restrictions on foreign investment. The volatile nature of the stock market together with the uncertainty of the practical effect of Japan's new laws and the concerns noted in this comment make U.S. private equity investment in Japan unpredictable at best. However, for now, the trend is toward success.

147 *Id.*