PANORAMIC

SHAREHOLDER ACTIVISM & ENGAGEMENT

Japan

LEXOLOGY

Shareholder Activism & Engagement

Contributing Editors

Willem Calkoen and Stefan Wissing

NautaDutilh

Generated on: April 3, 2024

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Shareholder Activism & Engagement

Contributors

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Nishimura & Asahi

Yo Ota	y.ota@nishimura.com
Shigeru Sasaki	s.sasaki@nishimura.com
Bonso Morimoto	b.morimoto@nishimura.com

GENERAL

Primary sources

What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The Companies Act and its relevant ordinances provide for the rights of shareholders in regard to the company and its organisation, such as the right to make a shareholder proposal or initiate a derivative suit against directors. The rights stipulated in the Companies Act are, in principle, of a civil nature and enforced through court rulings.

The Financial Instruments and Exchange Act (the FIE Act) and its relevant orders and ordinances regulate or provide for the following:

- disclosure obligations of companies whose securities are widely held;
- rights of investors to sue the company or its related parties;
- rules regarding a tender offer bid (TOB);
- disclosure obligations of an investor with large shareholdings;
- rules protecting market fairness, such as prohibitions against market manipulation and insider trading; and
- rules regarding a proxy fight.

The FIE Act deals with both civil and administrative matters. It is, therefore, enforced through court rulings and administrative actions by the relevant authorities, such as the Financial Services Agency and the Securities and Exchange Surveillance Commission. In some cases, criminal sanctions may be imposed for certain violations.

Both the Companies Act and the FIE Act are legislated and amended by the Diet, while relevant Cabinet orders and ordinances are enacted by the Cabinet or by various ministries or agencies, such as the Financial Services Agency, as the case may be.

Securities exchange rules and guidelines also regulate disclosures by listed companies, and their communications with investors. While such rules and guidelines are not enforced through court rulings or administrative procedures, securities exchange regulatory entities may impose various sanctions against a violating company, including a suspension of transactions of the company's shares on the securities exchange, a designation as a security on alert, a monetary penalty for a breach of the listing contract, submission of an improvement report, and, in extreme cases, delisting.

Law stated - 20 2 2024

Shareholder activism

How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Activists' campaigns have been very frequent in the Japanese market recently. Based on a financial paper, the number of shareholder proposals hit a record high in 2023, marking

the second consecutive year of record-breaking activity in this regard. In this vein, some funds are trying to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. They will sometimes launch a formal shareholder proposal at a general shareholders' meeting to elect outside directors, to increase dividends, or to make a share buyback.

As these proposals are generally in line with other shareholders' common interests, and due to the fiduciary duty of financial institutions and non-activist types of funds as shareholders complying with the Stewardship Code (which may also be applied if a shareholder voluntarily chooses to accept the Code and does not have any legally binding power), it is not uncommon for these proposals to attract general shareholder support even without intensive proxy campaigning.

Law stated - 20 2□ 2024

Shareholder activism

How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

Historically, shareholder activism has been viewed negatively in most cases, as such activism is sometimes deemed to constitute short-termism, and is criticised in the Stewardship Code and the Corporate Governance Code. However, in some instances, especially in recent years, activists' proposals have been supported by other shareholders, including mid-term and long-term investors. Although there is little observable bias among the industries targeted by activist shareholders on an individual company level, one or more of the following factors often apply to the targeted listed companies:

- low price-to-book ratio;
- excess reserved cash or cash equivalents;
- management scandals or inefficient management;
- status as a conglomerate;
- status as a listed subsidiary; and
- through M&A transactions.

Law stated - 20 2□ 2024

Shareholder activism

What are the typical characteristics of shareholder activists in your jurisdiction?

Although some individual activist shareholders make shareholder proposals or, in some instances, bring a lawsuit against the targeted company, most activist shareholders of Japanese companies are financial funds. While the boundaries are not entirely clear, such activist funds can be categorised into three types.

The first are 'aggressive' or 'dogmatic' activists who seek short-term returns by putting pressure on the company's management in various ways. They criticise the existing management's plans or skills or, as the case may be, any management scandals to put pressure on management, via either private or public methods such as media appeals, proxy campaigns or partial tender offers. Although their arguments are often too dogmatic and myopic to attract the support of other shareholders, to avoid wasting management resources and damaging the company's reputation, management will sometimes compromise with an activist's proposal or support an exit of an activist's investment.

The second are 'soft' activists. They would prefer to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. They will sometimes launch a formal shareholder proposal at a general shareholders' meeting to elect outside directors or to increase dividends. As such proposals generally align with other shareholders' common interests, it is not uncommon for such proposals to attract general shareholder support even without intensive proxy campaigning.

The third type are 'M&A activists'. They invest in a company that is the target of or a party to an M&A transaction, especially with respect to tender offers. These funds do not necessarily object to the transaction itself but demand, as minority shareholders, more favourable conditions for the transactions. When such favourable conditions have been reached, the funds exit.

Recently, some activists have advocated strongly for environmental, social and governance issues, including global warming. This trend is expected to strengthen in the coming years.

Law stated - 20 2 2024

Shareholder activism

What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Traditionally, activist shareholders in Japan have demanded that the targeted companies increase dividends or buy back shares. Another common request by activist shareholders is the introduction of or increase in the number of outside directors. By contrast, US-based activist shareholders have sometimes requested that Japanese companies make drastic business divestitures.

Traditional proposals for the increase of dividends or share buy-backs are still made, but recently, activist shareholders have been campaigning over governance concerns more often. In addition to proposals regarding outside directors or opposition to a company's slate, activist shareholders, especially US-based activist shareholders, have campaigned for divestitures of cross-held shares (or ***mochiai***). In addition, certain US-based activist shareholders have conducted campaigns to raise the TOB prices in some Japanese listed companies that were the targets in friendly M&A transactions by way of the TOB.

On the other hand, some individual activists tend to focus more on social issues, such as the abolition of atomic power plants.

Law stated - 20 2 2024

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

What common strategies do activist shareholders use to pursue their objectives?

In most cases, activist shareholders first try to negotiate with management privately. Aggressive activist shareholders sometimes disclose their proposals or requests publicly without any private negotiation, in order to put pressure on management.

With respect to general shareholders' meetings, which must be held at least annually, activist shareholders may submit shareholder proposals and sometimes wage proxy fights to pass their proposals. Such shareholder proposals include proposals to appoint one or more outside directors. Another form of proxy fight is opposing a company's slate. Activist shareholders have rarely been successful in gaining mainstream investor support for such proxy fights. However, in 2017, Kuroda Electric's general shareholders' meeting approved the only candidate on the dissident slate.

In addition to the above strategies, while it is not so common, activist shareholders can also threaten to launch a tender offer for target shares. Some activists use the threat of a lawsuit against the targeted company or its management. However, regulations on giving benefits to shareholders prohibit any person, including activists, from demanding money or any form of benefit, including a company buy-back of activist shares, in return for withdrawing their shareholder proposals or requests.

Law stated - 20 2 2024

Processes and guidelines

What are the general processes and guidelines for shareholders' proposals?

In principle, in a listed company, a shareholder who satisfies certain requirements may propose a matter to be discussed at a general shareholders' meeting up to eight weeks prior to the meeting (section 303, the Companies Act). The eligible shareholder must possess 1 per cent or more of the issued and outstanding shares, or 300 or more voting rights, for more than six months before submitting the proposal. The same shareholding minimum and shareholding period applies if a shareholder demands that the company describe the specific content of a proposal in the convocation notice of a general shareholders' meeting at the company's cost. A company may limit the number of words in the proposal description in accordance with its internal rules and procedures for managing shares. If the proposal violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal, the company may decline to include the proposal in the convocation notice. In 2019, though the National Diet discussed amending the Companies Act to limit the number of proposals and the abuse of proposals, that amendment was not made.

If a shareholder does not demand the inclusion of its proposal in the convocation notice, there are no shareholding minimums or shareholding period requirements, and every shareholder who has a voting right may submit a proposal at any time. However, a proposal is not permitted if it violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal.

The above rules apply to every shareholder regardless of the nature of the shareholder.

As a result of several public incidents in shareholders' meetings, the Ministry of Justice, which drafts the Companies Act and its amendments, submitted a bill in 2019 to defend against abusive proposals by limiting the number of shareholders' proposals and prohibiting certain proposals that mainly disparage others or disturb the shareholders' meeting. The National Diet amended the Companies Act in 2019 to entitle a company to reject any shareholder proposals exceeding 10 (ie, if 12 proposals are made, a company has to accept 10 proposals but can reject two such proposals). The Diet, however, rejected the amendment to prohibit certain shareholder proposals based on the contents thereof.

Law stated - 20 2 2024

Processes and guidelines

May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders may nominate directors who are not on the company's slate. Nominations are considered to be shareholder proposals.

Law stated - 20 2 2024

Processes and guidelines

May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

For a listed company, a shareholder with more than 3 per cent of all voting rights during the six-month period immediately preceding the proposal may call an extraordinary shareholders' meeting (section 297, the Companies Act).

If the company does not send the convocation notice promptly, or if the convocation notice does not indicate that the extraordinary shareholders' meeting will be held within eight weeks of the shareholder's demand, the demanding shareholder may call, by themselves on behalf of the company, an extraordinary shareholders' meeting with court approval (section 297, the Companies Act). The courts must approve such convocation unless circumstances indicate that the shareholder is merely abusing their rights to create a nuisance or other similarly irrelevant purposes.

If shareholders unanimously approve a proposal by written consent in lieu of a meeting, the approval is deemed to be the equivalent of a resolution of a shareholders' meeting (section 319, the Companies Act). If the consent is not unanimous, the consent is not equivalent to a resolution. In listed companies, each shareholder may exercise their voting rights in writing or through a website without physically attending the meeting.

Law stated - 20 2 2024

Litigation

What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

Shareholders may bring derivative actions (section 847, the Companies Act). Although it may be theoretically possible to bring a tort claim against the company in some instances, derivative actions are the main type of litigation that shareholders initiate.

Shareholders who have continuously held shares for more than six months may demand that the company sue its directors (and other officers, if applicable). If the company does not file the lawsuit within 60 days of the demand, the shareholders may bring a derivative action on behalf of the company. The shareholders of the parent company may also file a derivative suit against directors (and officers, if applicable) of wholly owned subsidiaries of the parent company (ie, a double or multiple derivative suit) if such subsidiary does not file the lawsuit within 60 days of the demand against the subsidiary by the parent company's shareholders.

The company cannot strike down the lawsuit by itself even if it is an abusive action by a shareholder. However, if it is abusive, in theory, the company may pursue a tort claim against the shareholder and request damages. To ensure that the company can recover damages if a derivative action is found to be abusive, the court may order the shareholder to place a certain amount in escrow prior to the start of a derivative action (section 847-4, paragraph 2, the Companies Act).

Japan does not have class action lawsuits similar to those in the United States, and a person cannot file a multi-plaintiff litigation without obtaining the approval of each plaintiff. Although a new type of 'consumer litigation' was introduced on 1 October 2016, securities transactions may be outside its scope. This is because tort claims under the new type of litigation are limited to claims based on the Civil Code of Japan, even though litigation in Japan regarding securities transactions belongs to the wider category of tort claims.

Law stated - 20 2 2024

SHAREHOLDERS' DUTIES

Fiduciary duties

Do shareholder activists owe fiduciary duties to the company?

It is not commonly considered that the shareholders owe fiduciary duties to the company. The listing rules require intensive disclosures with respect to the transactions between the parent company and its listed subsidiary.

Law stated - 20 2 2024

Compensation

May directors accept compensation from shareholders who appoint them?

The Companies Act is silent on this issue. However, a director must act in the best interests of the company. If an individual shareholder directly compensates a director, the payment is treated as a gift, not salary, for tax purposes. In addition, if a director acts for the benefit of any specific shareholders instead of for the benefit of the company due to being directly compensated by such shareholders, it may be a criminal breach of trust that violates regulations on giving benefits to shareholders.

However, some subsidiaries of listed companies are also listed companies themselves, and directors of such subsidiaries are often employees seconded or dispatched from their parent companies. Under such circumstances, the compensation a director receives as an employee of the parent company may inevitably appear to be compensation for acting as a director of a subsidiary. Even in such circumstances, the director must act for the benefit of the subsidiary, not for the parent company.

Law stated - 20 2 2024

Mandatory bids

Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

The Financial Instruments and Exchange Act (the FIE Act) requires that a mandatory tender offer bid (TOB) be conducted when a party acquires shares from off-market trading and consequently holds one-third or more of all voting rights. If multiple purchasers act in concert, the threshold of one-third is determined in aggregate. Therefore, if the aggregate shareholding ratio of shareholders acting in concert exceeds one-third and such shareholders intend to acquire additional shares in an off-market transaction, they must make a TOB. This requirement, however, does not apply to share acquisitions in the market. In addition, even a mandatory TOB does not necessarily result in the acquisition of all the shares of the targeted company, and the purchaser may make a capped TOB as long as the cap is set at less than two-thirds of all voting rights.

Under the FIE Act, persons that have agreed to (1) jointly acquire or transfer the shares, (2) jointly exercise voting rights or other rights as shareholders, or (3) transfer or accept a transfer of the shares between them after the planned acquisition is deemed to be acting in concert. In addition, those who (1) have certain family relationships or capital relationships (in the latter case, including the entities) or (2) serve as an officer of the acquiring company

or other certain company that has certain capital relationships with the acquiring entity, are deemed to be acting in concert.

Law stated - 20 2 2024

Disclosure rules

Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

The FIE Act requires a shareholder of a listed company to file a report of the possession of a large volume of shares within five business days after the shareholding ratio of the shareholder exceeds 5 per cent. In the report on the possession of a large volume of shares, the purpose of the investment has to be disclosed. If the shareholders intend to make certain managerial proposals and shareholders proposals, such intention has to be disclosed.

If multiple persons acquire shares of the same company in concert, or if multiple persons agree on the exercise of voting rights, the threshold is determined based on the aggregate of those persons' shares. However, determining whether multiple persons are acting in concert is difficult and is not necessarily enforced.

Certain institutional investors, including banks, broker-dealers, trust banks and asset management companies, may file the report based on the ratio on the record date, which in principle is set once per two weeks if the investor holds 10 per cent or less and does not intend to act to influence the operation or management of the issuer company significantly.

A violation of the reporting obligation may result in an administrative monetary penalty.

Additionally, in certain transactions where an acquiring company and a targeted company are considered to be large by industry standards, antitrust laws require a prior filing, including disclosure of the shareholding ratio, and mandate an appropriate waiting period. Further, the Japanese Foreign Exchange and Foreign Trade Control Law requires non-Japanese investors to make the filing prior to acquiring 1 per cent (or 10 per cent, under certain exemptions) or more shares of listed companies in certain industries designated by the Japanese government as vital to national security, public order, the protection of public safety or the smooth operation of the Japanese economy. Such industries include weapons, aircraft, nuclear facilities, space and dual-use technologies, and part of the electricity, gas, telecommunications, water supply and railway industries, among others.

Law stated - 20 2 2024

Disclosure rules

Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

To determine the shareholding ratio for a report of the possession of a large volume of shares, shares obtained by certain types of stock lending and certain share options have to be aggregated. Though the long positions of total return swaps are generally not included, certain types of total return swaps conducted for purposes other than pure economic profit or loss must also be aggregated.

Consequently, in some cases, activists have not filed a report of the possession of a large volume of shares even though they purported to 'own' more than 5 per cent and have made certain demands or held certain conversations as large shareholders.

Law stated - 20 2 2024

Insider trading

Do insider trading rules apply to activist activity?

Trading by an activist is regulated by the insider trading rules. If the activist is aware of any material non-public information about the company through the activist activity, market trading by the activist is prohibited until the information becomes public. The mere fact that the activist made the shareholders' proposal may not be material non-public information, depending on the discussions with the company. However, there is still a possibility it may be.

Also, if a group of activists are acting in concert and recognise that one (or more) member in the group acquires 5 per cent or more, other members in the group may be prohibited from acquiring the target shares until the information becomes public under the Japanese Insider trading regulations (section 167 of the FIE Act).

Law stated - 20 2 2024

COMPANY RESPONSE STRATEGIES

Fiduciary duties

What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

In general, a director's duty with respect to an activist proposal is similar to other board decisions; namely, the business judgement rule. Unless there is a conflict of interest between the company and the directors, and unless there is a violation of laws or the articles of incorporation of the company, the courts generally respect the wide discretion of the board, assuming that the board made a reasonable decision that duly recognised the applicable facts and circumstances.

However, even under this Japanese business judgement rule, Japanese courts may sometimes carefully scrutinise the context and situation surrounding the board's decision. In Japan, it has thus far been understood that no controlling shareholder owes any fiduciary duty to minority shareholders.

Law stated - 20 2 2024

Preparation

What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

As activist shareholders have enhanced their presence in Japanese businesses, we generally advise our clients to periodically check the shareholders' composition and improve their governance structures, business plans or financial structures and recommend that they engage in proactive communication with their shareholders.

Law stated - 20 2 2024

Defences

What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Against a corporate raider, the Japanese rights plan or 'large-scale share purchasing policies' may be a structural defence, even though the ratio of companies adopting such plans has been gradually decreasing (in comparison, the ratio is higher among larger market capitalisation companies); and, as at the end of July 2023, less than 10 per cent of the companies listed on the Tokyo Stock Exchange have adopted such plans. Under this plan, a company implements procedures in advance that a potential raider must follow. However, the company does not issue rights or warrants (unlike poison pills in the United States). If a potential raider crosses the shareholding threshold (typically, 20 per cent) without complying with the procedures, or a potential raider is recognised as an 'abusive raider', new shares will be issued and allocated to all shareholders except the violating raider. Thus, the raider's shareholding ratio will be diluted. If an activist does not intend to cross the threshold, such a plan is not a defence against the shareholders. However, companies that have been targeted by activists rarely have such a plan in place.

Other than the above-mentioned plan, structural defences such as dual capitalisation are rarely possible. In addition, as the term of office of a director at a Japanese-listed company is one or two years (depending on the company's governance), a staggered board is not an effective measure in practice.

In 2020, there was an instance where a company (Shibaura Machine (FKA Toshiba Machine)) successfully activated the 'shelf' Japanese rights plan and the activist's tender offer was unsuccessful, even though there was no court ruling on this plan because the activist had withdrawn its campaign after the plan was supported by shareholders at the shareholders' meeting. Therefore, the Supreme Court judgment in the ***Bull-Dog Sauce*** case in 2006 is still important as a precedent. In the ***Bull-Dog Sauce*** case, the company (Bull-Dog Sauce) had not adopted the rights plan and the anti-takeover defence measures in the case were adopted after the raider announced its intent to launch a tender offer. The Supreme Court stated, obiter, that the rights plan had a net positive effect, as it increased the predictability of the outcome of a takeover. The Supreme Court also followed this logic in the guidelines for defence measures against hostile takeovers issued by the Japanese Ministry of Economy, Trade and Industry, and recognised the validity of an anti-takeover defence (similar to a poison pill in the United States) implemented by a target.

In 2021, there were also some remarkable cases. In ***Fuji Kosan v Aslead Strategic Value Fund***, Fuji Kosan, an oil distributing company, successfully defended itself against Aslead by

implementing a rights plan via a resolution at a board of directors meeting and subsequent ratification by a simple majority vote (in favour of implementation) of the shareholders at a general shareholders' meeting. Although this was a Tokyo High Court case, it paved the way for listed companies to implement a rights plan in a timely manner during a hostile acquisition. In *Tokyo Kikai Seisakusho v Asia Development Capital et al*, Tokyo Kikai Seisakusho (TKS), a manufacturing company, successfully defended itself against Asia Development Capital(ADC), an investment company, and Asia Development Fund (ADF), ADC's subsidiary, by implementing a rights plan via a resolution at a general shareholders' meeting, which was approved by majority vote (in favour of implementation) of shareholders other than the relevant parties, including ADC, ADF and the directors of TKS. This was an important Supreme Court case that justified the implementation of a rights plan against a shareholder building a stake through market trading.

After the above precedents, there were no changes to laws and regulations or court rulings to limit the anti-takeover defences available to a company.

Law stated - 20 2 2024

Proxy votes

Do companies receive daily or periodic reports of proxy votes during the voting period?

Trust banks that act as standing agents receive voting forms from shareholders. Consequently, in practice, a company may receive an early voting ratio and other information during the period for sending back voting forms (ie, after the convocation notice but before the due date of the voting forms). The company is not obliged to disclose any information it receives from the voting forms prior to the date of the general shareholders' meeting. During a proxy fight, however, a company cannot determine how many proxies an opposing shareholder will receive.

Law stated - 20 2 2024

Settlements

Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

'Soft' activists would prefer to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. Although soft activists sometimes launch a formal shareholder proposal at a general shareholders' meeting, the company may agree on the proposals without the proxy campaign.

Law stated - 20 2 2024

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

While organised engagement among activist shareholders is not common, when an activist shareholder launches a campaign, other activist shareholders may support the campaign. Consequently, engagement efforts tend to be public and formal. Even during a public campaign, the company may choose to compromise by accepting the activist's proposal or presenting the proposal during the shareholders' meeting as the company's proposal.

Law stated - 20 2 2024

Shareholder engagement

Are directors commonly involved in shareholder engagement efforts?

Although the Corporate Governance Code recommends that directors take a leading role in engaging with shareholders, management or the executive team is in charge of shareholder engagement efforts in most cases. Executive directors are sometimes directly involved in shareholder engagement, but it is at the company's discretion.

Law stated - 20 2 2024

Disclosure

Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Under the Corporate Governance Code, the board of a listed company must determine and approve a corporate governance policy that facilitates constructive dialogue with shareholders, and disclose the policy in a corporate governance report that must be filed under section 419 of the Securities Listing Regulations. Individual communications need not be disclosed.

Through an amendment to the Financial Instruments and Exchange Act (the FIE Act) and Cabinet orders and ordinances that were implemented from 1 April 2018, listed companies are required to make an equal disclosure, to a certain degree, to all shareholders. The new regulation is similar to Regulation FD in the United States, rather than the EU Market Abuse Regulation. Even under the new regulation, a listed company may make a selective or unequal disclosure if the recipient has a non-disclosure obligation and is prohibited from making a transaction of the company's securities. If disclosure to a shareholder, investor or other third party is not exempted and is intentionally made, the company must make a public disclosure at the same time as the disclosure to that third party. If the disclosure is not intentionally made, the company must make a public disclosure to the third party immediately after the disclosure. The company may make a public disclosure through the Electronic Disclosure for Investors' Network run by the Financial Services Agency, TD-net (the electronic disclosure system of the Tokyo Stock Exchange) or its corporate website.

In addition to the above fair disclosure regulation, the disclosure of insider information to specific shareholders under certain circumstances may result in a violation of insider trading regulations.

Law stated - 20 2 2024

Communication with shareholders

What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

Regulations on proxy solicitations or Japanese proxy rules apply to both companies and shareholders when they solicit proxies (section 194, the FIE Act; section 36-2 to 36-6, Order for Enforcement of the FIE Act; and Cabinet Office Order on Solicitation of Proxy Voting for Listed Shares). The regulations set forth certain requirements on the proxy, and also require that certain information be provided to the shareholders during a proxy solicitation. However, if the same information is disclosed in the reference documents that are typically enclosed with the convocation notice of a shareholders' meeting for which proxies are solicited, those who solicit the proxies (the company or the shareholders) do not have to provide the above-mentioned required information separately. Further, if a company solicits proxies, offering certain economic benefits to shareholders to facilitate favourable voting results may violate regulations on giving benefits under the Companies Act. Currently, social media platforms, such as X (formerly known as Twitter) and LinkedIn, are not commonly used as communication tools during campaigns between targeted companies and activists.

Law stated - 20 2 2024

Access to the share register

Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

A shareholder on the shareholders' list may request access to the shareholders' list (section 125, paragraph 2, the Companies Act). The company may reject such a request on certain grounds, including if:

- the request is made for purposes other than exercising general shareholder rights;
- the request is made with the purpose of interfering with the execution of the operations of the company or prejudicing the common benefit of the shareholders;
- the request is made to report facts obtained through a request to a third party for profit; or
- the requesting shareholder reported facts obtained through a request to a third party for profit within two years (section 125, paragraph 3, the Companies Act).

The shareholders' list in a listed company only records nominee shareholders, and the beneficial owners are not recognised by the shareholders' list.

Law stated - 20 2 2024

UPDATE AND TRENDS

Recent activist campaigns

Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

On 31 August 2023, the Ministry of Economy, Trade and Industry (METI) published the Guidelines for Corporate Takeovers after the discussion in the working group, which includes scholars and practitioners from both the investors and issuing companies. Although the Guidelines are not legally binding, they provide principles and best practices regarding transactions or proposals for the transactions to acquire corporate control of listed companies, with a focus on how listed companies and acquirers should behave. The core of the Guidelines is the concept that matters relating to corporate control should rely on the rational intention of shareholders (Chapter 2, Principle 2). The Guidelines also state that sufficient information should be provided to shareholders in order for shareholders to make appropriate decisions on whether they accept acquisition proposals (including the transaction terms). One of the notable points in this aspect is that the Guidelines require not only listed companies but also acquiring investors to appropriately and proactively disclose information useful for shareholders' decision-making, ensuring transparency regarding acquisitions (Chapter 2, Principle 3). Furthermore, because the Guidelines refer to how listed companies and acquirers should behave in the context of unsolicited offers and hostile takeovers, it is expected that rules concerning unsolicited takeovers and hostile takeovers will be further clarified and developed.

As a glimpse at the market in Japan, on the other hand, the recent distinctive trend of some mid- and small-cap companies being subject to hostile or unsolicited takeover actions has remained high in 2023. In some instances, certain groups of investors acquire in aggregate significant portions (for example, more than 20 per cent) of shares in target companies through market sweep to obtain corporate control (mainly through submitting shareholder proposals to change all or a majority of board members). This trend raises two significant issues.

First, under the FIE Act, as a general rule, mandatory tender offer bids are only triggered when an acquirer acquires shares outside of a stock exchange market. Given that these investors acquire target companies' shares in market sweep, in theory, they need not abide by the tender offer procedures. As a result, when acquirers attempt to take over corporate control in a short period through purchasing shares in market trading, shareholders of target companies may not have sufficient time and information to make their decision to proceed with the acquirers' proposals with rational intention. For shareholders to make rational decisions in such cases, the Guidelines articulate that acquirers acquiring significant amounts of shares in market sweep should provide at least the same level of appropriate information to the capital market and target companies as required in the tender offer procedures in a timely manner. However, in actual instances, such disclosures may not

be enough. For instance, Yamauchi No.10 Family Office and its affiliated investment vehicles (hereafter, Yamauchi No.10 Family Office and its affiliated investment vehicles are collectively referred to as 'YFO') have, in 2022, rapidly acquired in aggregate a stake exceeding 20 per cent in Toyo Construction, a major enterprise conducting marine contractor business, through market sweep. Following acquiring the portions of shares, YFO made its proposal publicly that it opposed the majority of Toyo Construction's slate and appointed new board members by submitting the shareholder proposal in the general shareholders' meeting of Toyo Construction. There was scepticism on whether YFO appropriately and proactively provided sufficient information, such as its investment objectives and the primary management strategy, to the shareholders in a timely manner.

The second issue is that there is little information available about these investors as they sometimes do not adequately disclose appropriate information, such as their relationships and their purchase purposes, in mandatory large shareholding reports. Consequently, target companies and shareholders may have difficulty ascertaining those investors as 'acting in concert.' It is believed that the authority (the Securities Surveillance Commission) rarely enforces sanctions on violations of large shareholding reporting rules, contributing to non-submission and false statements in large shareholding reports. On 25 December 2023, the Working Group on Tender Offer Rule and Large Shareholding Reporting Rule of the Financial System Council published a report. To address situations in which investor groups fail to comply with regulations concerning large shareholding reporting rules, this report proposes strengthening enforcement measures against non-compliance.

In addition to such recent market trends, there was a noteworthy case involving a competing takeover bid launched by a listed company. In this case, during the preceding tender offer period, Dai-ichi Life Holdings (DLHD) announced the launch of a competing non-solicited tender offer bid to acquire all the shares of Benefit One, whereas M3 had launched a solicited tender offer bid. Due to tender offer price competitiveness, which may be more favourable terms for shareholders of Benefit One, the board of Benefit One finally determined, on 8 February 2024, to accept DLHD's competing non-solicited tender offer. Based on this case, competing takeover bids might be more active in the Japanese market.

Law stated - 20 2 2024