

Shareholder Activism & Engagement

Contributing editors

Arthur F Golden, Thomas J Reid and Laura C Turano



2018

GETTING THE
DEAL THROUGH 

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Shareholder Activism & Engagement 2018

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Arthur F Golden, Thomas J Reid and Laura C Turano
Davis Polk & Wardwell LLP

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Preface

Shareholder Activism & Engagement 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Shareholder Activism & Engagement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur F Golden, Thomas J Reid and Laura C Turano of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
January 2018

Japan

Yo Ota, Ryutaro Nakayama and Shigeru Sasaki

Nishimura & Asahi

General

1 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 with 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 (FIE Act) and its relevant orders and ordinances regulate or provide for:

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

The FIE Act has both civil and administrative aspects. 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.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

The Japanese Stewardship Code may also be applied if a shareholder voluntarily chooses to accept the Stewardship Code. The Stewardship Code only lays out principles, which do not have any legally binding power (ie, the Code is 'soft law'). The Stewardship Code provides, among other principles, that an institutional investor should establish and disclose its policy on discharging its responsibility to facilitate the continuous growth of the invested company and to try to increase the medium-term or long-term return of the beneficial owners or clients of the institutional investor. The Stewardship Code also recommends constructive dialogue between the institutional investor and the company to share the issues and come to an understanding on the circumstances surrounding the company.

Such dialogue is also recommended for listed companies. While the Japanese Corporate Governance Code does not provide for detailed

rules but rather provides for several guiding principles, it applies to all listed companies through the listing rules. The Corporate Governance Code recommends that listed companies respond positively to an investor's offer for a meeting in order to facilitate the continuous growth of the company and to try to maximise the corporate value from a medium-term or long-term perspective. While the Corporate Governance Code does not mandate that a listed company comply with all of its principles, it requires an explanation by the company if it chooses not to follow any of the principles. Thus, the Corporate Governance Code may make Japanese listed companies more open to dialogue with institutional investors. At the same time, a listed company may make the counter-argument that, under the Corporate Governance Code, an activist's proposal or idea would not achieve the mid-term or long-term growth of the company.

In addition to the two codes mentioned above, the Japanese Ministry of Justice, which is the drafter of the Companies Act, and the Ministry of Economy, Trade and Industry, after holding discussions with scholars and practitioners, published guidelines for defence measures against hostile takeovers, which also apply to large-scale share purchasing policies (see question 13). Although they are not legally binding, they are expected to be considered best practices.

Guidelines for proxy agents, including ISS and Glass Lewis, influence the voting policies of financial institutions, particularly foreign ones, which act as custodians, and other companies, including insurance companies, which manage the money of others. Consequently, issuers – the listed companies – carefully consider such guidelines.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism is mostly viewed negatively as the activities of activists are sometimes deemed short-termism, which is criticised in the Stewardship Code and Corporate Governance Code. However, those views may change if activist shareholders make proposals that are reasonable or constructive for mid-term or long-term investors. While 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; and
- status as a listed subsidiary.

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

While there are some individual activist shareholders who 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 so clear, such activist funds can be categorised into two types.

The first are 'aggressive' or 'dogmatic' activists who seek short-term returns by putting pressures 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 in order 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, in order 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 are generally in line with other shareholders' common interests, it is not uncommon for such proposals to attract general shareholder support even without intensive proxy campaigning.

In addition to the two types mentioned above, in 2016, a third type of activist appeared in the Japanese market. Funds have started targeting companies whose shares are, in a fund's opinion, overvalued. First, the fund shorts the target shares by borrowing the shares from lenders, then the fund makes a public report to the effect that the target shares are overvalued. After the share price drops, the fund then acquires the shares and returns them to the lenders. Because of the nature of their strategy, this third type of activist typically does not make shareholder proposals.

5 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. On the contrary, US-based activist shareholders have sometimes requested that Japanese companies make drastic business divestitures.

Traditional proposals for the increase of dividends or share buybacks are still made, but activist shareholders have recently been campaigning over governance concerns more often. In addition to proposals regarding outside directors or oppositions 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 which 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.

Shareholder activist strategies

6 Describe 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 apply 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 of 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.

If a shareholder does not demand the inclusion of its proposal in the convocation notice, there are no shareholding minimum 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.

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

In most cases, activist shareholders first tried 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 submit shareholder proposals as mentioned in question 6, 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 of 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 TOB 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.

8 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 who has 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 himself or herself 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 his or her rights to create a nuisance or other similarly irrelevant purposes.

If shareholders unanimously approve a proposal by written consent in lieu of a meeting, such 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 its voting rights in writing or through a website without physically attending the meeting.

9 May directors accept direct compensation from shareholders who nominate them?

The Companies Act is silent on this issue. However, a director must act for 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 a shareholder instead of for the benefit of the company due to being directly compensated by such shareholder, 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.

10 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. See question 6 for the appropriate procedures.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may bring derivative actions (section 847, the Companies Act). 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. In order to ensure that the company may 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 the scope of this new type of litigation, as 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.

Company response strategies

12 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.

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

Based on the report published by the Tokyo Stock Exchange in March 2017, more than 12 per cent of companies listed on the Tokyo Stock Exchange have adopted the Japanese rights plan or 'large-scale share purchasing policies', even though the ratio has been gradually decreasing (the ratio is higher among larger market-cap companies in comparison). Under such a plan, a company implements procedures in advance that a potential raider must follow, though the company does not issue rights or warrants (unlike poison pills in the United States). If a potential raider crosses the 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 other than the violating raider; thus, the raider's shareholding will be diluted.

Other than such a plan, structural defences such as dual capitalisation are rarely possible, particularly because of the listing rules. In addition, as the term of office of a director at a Japanese listed company is one or two years depending on its governance structure, a staggered board is not an effective measure in practice.

While there are few cases where the validity of the rights plan or anti-takeover defence measures has been tested, in the Bull-Dog Sauce case, the Supreme Court recognised the validity of an anti-takeover defence (similar to a poison pill in the United States) implemented by

the company (Bull-Dog Sauce) because the defence measure was fair and reasonable. Though 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 TOB, the Supreme Court stated in obiter that such rights plan had a net positive effect as it heightened the predictability of the outcome of a takeover. The Supreme Court also followed the logic in the guidelines issued by the Japanese Ministry of Economy, Trade and Industry (see question 2).

During 2017, there were no changes in the laws and regulations or court rulings to limit the anti-takeover defences available to a company.

14 May shareholders have designees appointed to boards?

While a company and an activist shareholder may agree to appoint the activist shareholder's designee as a director or a statutory auditor (by means of a standstill agreement), it is unclear whether such an agreement is legally enforceable. Therefore, it has not been common for Japanese-listed companies to enter into such an agreement with an activist shareholder.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The articles of incorporation of all listed companies are available as exhibits to their securities reports on the Electronic Disclosure for Investors' Network (EDINET) run by the Financial Services Agency.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? 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;
- if 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;
- if the request is made in order to report facts obtained through the request to a third party for profit; or
- if the requesting shareholder reported facts obtained through a prior request to a third party 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.

17 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 Japanese 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 the amendment to the FIE Act and new Cabinet orders and ordinances which are scheduled to be implemented from 1 April 2018, listed companies will be required to make 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 Regulations. Even under the new regulations, a listed company may make selective or unequal disclosure if the recipient owes 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 public disclosure at the same time as the disclosure to such third party. If the disclosure is not intentionally made, the company must make public disclosure immediately after the disclosure to such third party. The company may make public disclosure through EDINET

Update and trends

On 29 June 2017, the annual general shareholders' meeting of Kuroda Electric Co, Ltd, appointed Mr Yasunobe as an independent director by a majority vote (52.3 per cent of issued and outstanding shares with voting rights). Even though Mr Yasunobe is a former director of the Electronic Policy Division in the Ministry of International Trade and Industry and a visiting professor at the Graduate School of Commerce and Management (Business School), Hitotsubashi University, he was not in the incumbent slate but was put in the slate by Reno and other shareholders acting in concert with Reno (their aggregated shareholding ratio was more than 35 per cent just before the record date for the shareholders' meeting). Through the proxy fight, Institutional Shareholder Services recommended voting in favour of the Reno's slate considering the slate as the minority independent director, while Glass Lewis recommend voting against. This event was reported to be the second successful case of activists getting their slate approved in a Japanese listed company since in Aderans in 2008. Although there are many views on the factors that led to the voting result, one important factor is the change of the voting attitudes of Japanese institutional investors. In this respect, on 29 May 2017, the Financial Services Agency

amended the Japanese Stewardship Code to give institutional investors an incentive to disclose their voting results as a shareholder in each company in which they invest. Even though the Code is 'soft law' (see question 2), many institutional investors, including Japanese insurance companies, banks, trust banks and asset management companies, that hold large shares of Japanese listed companies, started to disclose the details (ie, whether they voted for or against or abstained in each item in each company). Although those institutional investors have historically voted with management, public disclosure of their voting results might place pressure on them when making voting decisions, and might make it difficult for a listed company to persuade such large institutional investors in proxy fights. Consequently, the daily dialogue with shareholders will become increasingly important to get support for management of the listed company. On the other hand, a new fair disclosure regulation will be implemented, and listed companies may be cautious in engaging in direct dialogue with their shareholders or investors. The dialogue between companies and shareholders may continue to be a hot issue in 2018.

(see question 15), 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.

18 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 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 does not have any way of determining how many proxies an opposing shareholder will receive.

19 Must shareholders disclose significant shareholdings?

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. To determine the shareholding ratio, 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.

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, but 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 every two weeks if the investor holds 10 per cent or less and does not intend to act to significantly influence the operation or management of the issuer company.

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 and mandate an appropriate waiting period. Further, the Japanese Foreign Exchange and Foreign Trade Control Act requires non-Japanese investors to make the filing prior to acquiring 10 per cent or more shares of listed companies in certain industries designated by the Japanese government as vital to national

security, public order or the protection of public safety. Such industries include, among others, electric power, natural gas, telecommunications, broadcasting and railways. The Japanese government may suspend or modify the proposed acquisition of a business in any of these industries. For example, in 2008, the Japanese government ordered the Children's Investment Fund to suspend its acquisition of more than 10 per cent of the shares of Electric Power Development Co, Ltd (known as J-Power).

Regulations in certain industries also limit the non-Japanese shareholding ratio to one-fifth (eg, broadcasting companies) or one third (eg, airlines). In other words, if non-Japanese entities hold more than 20 per cent in aggregate, their voting rights are limited to only 20 per cent and are allocated on a pro rata basis among such non-Japanese shareholders.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

The FIE Act requires a mandatory TOB be conducted when a purchaser acquires shares from off-market trading and consequently holds one third or more of all voting rights. If multiple purchasers act in concert, the above threshold, 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 stated in question 13, certain Japanese companies have adopted the Japanese rights plan, which:

- requires a potential purchaser who intends to acquire a certain percentage (generally 20 per cent or more) of shares to disclose the information of the purchaser and the proposed management plan after the acquisition; and
- alerts the potential purchaser of countermeasures the company may take if the potential purchaser does not comply with the rule or is recognised as an 'abusive raider'.

Under such a plan, the specific percentage is often determined by the shareholding ratio of the purchasers acting in concert. Such plan does not distinguish between market trading and off-market trading. In determining whether the tender offer is 'abusive', an important factor generally is whether the offer is made for all shares of the targeted company. Therefore, an activist may have limited strategies against companies that have implemented such a plan.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from 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, Enforcement Order of the FIE Act; and

Cabinet Office Ordinance on the Solicitation to Exercise Voting Rights of Listed Shares by Proxy). 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 Twitter and LinkedIn) are not commonly used as communication tools during campaigns between targeted companies and activists.

22 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.

23 Are directors commonly involved in shareholder engagement efforts?

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

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

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.

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Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
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