# Japan

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## 1 Setting the Scene - Sources and Overview

### 1.1 What are the main corporate entities to be discussed?

The corporate entities discussed in this chapter are stock companies (*kabushiki-gaisha*) listed on the Tokyo Stock Exchange (the "TSE"). Stock companies are the most common form of corporate entity used for business enterprises in Japan. Generally, only securities issued by stock companies can be listed on a securities exchange in Japan.

The TSE is one of the largest equity markets in the world and has approximately 2,305 listed companies (as of February 20, 2013), including major Japanese companies. The TSE imposes corporate governance requirements on its listed companies.

### 1.2 What are the main legislative, regulatory and other corporate governance sources?

In Japan, the main sources of corporate governance rules are as follows:

(a) Companies Act (Act No. 86 of July 26, 2005) (the "Companies Act"). The Companies Act, along with its subordinate regulations, sets forth the basic principles that a company needs to abide by regarding rights and obligations of management members, organs, the disclosure of information, etc. This act also requires "Large Companies" (companies with capital of JPY500 million or more or with total debts of JPY20 billion or more) with a board of directors to establish a basic policy regarding the internal control system. The Companies Act applies whether or not the companies are listed.

(b) Financial Instruments and Exchange Act (Act No. 25 of 1948) (the "FIEA"). This act, along with its subordinate regulations, requires that listed companies disclose issues relating to corporate governance by way of filing annual securities reports or quarterly reports, disclosing material information in a timely manner by way of extraordinary reports, and submitting internal control reports to the authorities, etc.

(c) The securities listing regulations published by the TSE (the "TSE Regulations"). The main corporate governance requirements for listed companies that these regulations set forth are as follows: (i) to submit corporate governance reports; and (ii) to elect and disclose the name of at least one "Independent Officer", who is defined as an outside director or outside audit and supervisory board member who does not (even potentially) have a conflict of interest with shareholders, and to submit a written notice regarding the Independent Officer.

**Non-regulatory sources**

(a) Articles of incorporation and other internal regulations of each company. All stock companies are required under the Companies Act to establish articles of incorporation that regulate their corporate governance, including organs and the number of directors. In addition, many listed companies have other internal regulations regarding board meetings or other material meetings.

(b) Proxy voting criteria provided by investor groups. Some investor groups provide criteria for proxy voting that influence the corporate governance of listed companies. For example, the Pension Fund Association, which is an association of welfare pension funds and invests and manages assets to provide pension benefits, publicises criteria for its own proxy voting and for proxy voting by trustee companies.

### 1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

On August 1, 2012, the Japanese Ministry of Justice's Legislative Council Companies Act Subcommittee published its draft outline of the amendments to the Companies Act ("Draft Outline"). The push toward reform came mainly from domestic and foreign investors' concerns for the quality of Japanese corporate governance, which they see as one of the major causes of the decrease in Japanese stock prices within the last two decades. A bill that embodies the Draft Outline is expected to be submitted to the Parliament this year. A brief overview follows:

**A new internal governance model – Companies with an Audit and Supervisory Committee**

Companies may opt into a new corporate governance model that will coexist with the traditional Japanese models (see question 3.1). The new model is a "Company with an Audit and Supervisory Committee" within the board of directors, while in the traditional "Company with Audit & Supervisory Board Members", the audit and supervisory board members are not directors.

In this new proposed model, the majority of the audit and supervisory committee members must be outside directors and the committee is empowered with broader audit authority than the audit and supervisory board in the traditional model. Shareholders will elect directors who are members of the audit and supervisory committee separately from other directors.

**Amendment to the qualification of outside officers**

The Draft Outline includes an amendment on eligibility requirements for outside directors and audit and supervisory board members. Directors, executive officers, other employees of a



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parent company, and close relatives of directors and executives of the company would no longer be eligible.

The Draft Outline does not mandate that listed companies have at least one outside director; instead, companies required to submit annual securities reports and having no outside directors on their board must disclose why appointing an outside director would be inappropriate (the so-called "comply or explain" rule).

## 2 Shareholders

### 2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

In listed companies, the operation and management of the company is the responsibility of the directors (in the case of companies with committees, the executive officers; see question 3.1) and only material issues, including the items set forth below, must be approved by a shareholders' meeting under the Companies Act. Most items can be resolved by a majority of the voting rights of shareholders present at the meeting; however, some material issues must be resolved by a greater proportion of voting rights, such as no less than two thirds of the voting rights of shareholders present at the meeting (e.g., amendments to the articles of incorporation, mergers, etc.).

The rights and powers of the shareholders' meeting include the following items:

(a) amendment to the articles of incorporation;
(b) appointment and dismissal of directors, audit and supervisory board members, or accounting auditors (see question 3.2);
(c) approval of financial statements (except for companies which satisfy certain requirements);
(d) approval of mergers, demergers, share exchanges/transfers, or business transfers;
(e) payment of dividends (unless otherwise provided for in the articles of incorporation);
(f) issuance of shares or stock options at especially favourable prices; and
(g) determination of directors' remuneration (see question 3.3) and discharging of directors' liabilities (see question 3.9).

### 2.2 What responsibilities, if any, do shareholders have as regards the corporate governance of their corporate entity/entities?

Since the responsibility of shareholders is limited to the amount of their invested capital, shareholders do not have any responsibilities as regards corporate governance. As to the general liability of the shareholder for acts or omissions of the corporate entity, please see question 2.4.

### 2.3 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

In Japan, companies commonly hold an annual shareholders' meeting within 3 months after the end of each fiscal year. In this meeting, shareholders vote on items such as the appointment of directors/audit and supervisory board members, the distribution of dividends and the approval of financial statements (see question 2.1). Companies also hold extraordinary shareholders' meetings in order to obtain shareholder approval of other corporate actions, such as mergers.

Shareholders who have met certain requirements (level of shareholding or holding period) have the right to demand that directors convene a shareholders' meeting. If directors do not convene within a specific period despite such demand, the shareholder may convene a meeting after obtaining court permission. A shareholder who meets certain requirements may also require that the company include specific proposals as agenda items for a shareholders' meeting by request made eight weeks or more prior to the date of the shareholders' meeting. Shareholders are entitled to ask questions relating to the agenda items at the shareholders' meeting.

### 2.4 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders are not liable for acts or omissions of corporate entities because the liability of shareholders is limited to the amount of their capital invested in the shares for which they have subscribed. Although shareholders can be theoretically liable for the company's acts or omissions under the doctrine of "piercing the corporate veil", the likelihood of a successful application of such doctrine to the shareholders of a listed company is very low.

### 2.5 Can shareholders be disenfranchised?

The situation where shareholders of listed companies can be disenfranchised is very limited. The minority shareholders of listed companies can be squeezed out by (i) share-for-share exchanges or triangular share-for-share mergers or exchanges, (ii) cash-for-share mergers or exchanges, and (iii) a method using "shares subject to call" (*zenbu-shutoku-joukoutsukisyurui-kabushiki*). All of these procedures, in principle, require the approval of no less than two thirds of the voting rights of shareholders present at a shareholders' meeting, and the minority shareholders who are squeezed out have appraisal rights. Since capital gains tax is not incurred at the corporate level, the "shares subject to call" scheme, (essentially a redemption of shares in consideration for another class of shares at the exchange ratio where the minority shareholders would be allocated only a fractional share (i.e., less than a whole share) and receive cash) is the most common procedure used to squeeze out minority shareholders.

A shareholder may not exercise his or her voting rights at a shareholders' meeting of a listed company if the listed company owns 25% or more of the voting rights of such shareholder.

### 2.6 Can shareholders seek enforcement action against members of the management body?

Shareholders may seek enforcement action against the members of the management body (i.e., directors, audit and supervisory board members, and executive officers) mainly by two methods. One method is to initiate a law suit on behalf of the company (i.e., a derivative claim). The other method is to pursue board members directly as individuals (i.e., a direct claim).

Before filing a derivative claim, the shareholders need to request that the company sue such members of the management body, and if the company does not sue the management members within sixty days of such request, the shareholders may sue the members on behalf of the company. These claims are usually brought on the basis of a breach of fiduciary duty by the directors, audit and supervisory board members or executive officers.

If a shareholder suffers damages due to the wilful misconduct or gross negligence of the directors, audit and supervisory board




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members or executive officers in the performance of their duties, the shareholder may directly claim damages against such members.

### 2.7 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

The main disclosure requirements are provided for in the Companies Act, the FIEA, and the TSE Regulations. The Companies Act provides that a company must state in its business report the names, number, and shareholding ratio of its top 10 shareholders as of the end of each fiscal year. The FIEA provides that a shareholder in a listed company must file a report with the authorities concerning its shareholding ratio, the purpose of the holding, and other related matters if the holding ratio exceeds 5%, and to file a report if the holding ratio increases or decreases by 1% or more. In addition, the FIEA and the TSE Regulations provide that a listed company must report or disclose in a timely manner when a main shareholder (i.e., a shareholder who holds 10% or more of the voting rights of the company) changes.

The acquisition of securities by a shareholder is not limited unless otherwise provided for in relevant laws. Parties that intend to acquire one-third or more of the voting rights of a listed company outside the market should be aware of the tender offer regulations under the FIEA, which limit the method, timing and speed with which shareholders may purchase shares in listed companies. Some Japanese companies have adopted anti-takeover devices which are triggered when a bidder acquires a certain pre-determined shareholding ratio (in many cases, 20% of the voting rights of the company). The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade imposes a 30-day pre-notification requirement if (i) a purchaser's voting rights exceed 20% or 50% of all voting rights after the contemplated transaction, and (ii) the aggregate amount of domestic sales of the parties' group companies exceed certain thresholds. Foreign investors should be aware of FDI restrictions under the Foreign Exchange and Foreign Trade Act; if a foreign investor's holding rate of a listed company that engages in weapons manufacturing, the airline industry, nuclear industry, oil industry, or other specified industries relating to the national interest of Japan, will be 10% or more, the investor must file a report with the relevant authorities 30 days prior to the closing of the transaction, which could be subject to investigation by the relevant authorities. Furthermore, there are other special limitations on holding rates of foreign investors in specified industries. For example, a company in the air transportation industry with more than one third of its shares owned by foreign investors is not allowed to engage in air transportation business, and a company in the broadcasting industry with more than 20% of its shares owned by foreign investors will lose its broadcast licence.

## 3 Management Body and Management

### 3.1 Who manages the corporate entity/entities and how?

The management body of a company can be classified into two types: a "Company with Audit & Supervisory Board Members"; and a "Company with Committees". A Company with Audit & Supervisory Board Members is the most commonly used corporate structure for Japanese listed companies. From among the 2,305 companies listed on the TSE, only approximately 50 companies are Companies with Committees.

■ Company with Audit & Supervisory Board Members

Shareholders elect both directors and audit and supervisory board members, and the directors constitute a board of directors. The board of directors appoints representative director(s) among the directors, who can bind the company and take general responsibility for management and operation of the company on a daily basis. Directors must monitor the performance of duties of other directors, and audit and supervisory board members must audit the management of the company by the directors. Important decisions of the company provided by law or the articles of incorporation must be resolved at a board meeting. Most listed companies fall under the category of a "Large Company" (please see question 1.2 for the definition of a Large Company), and the audit and supervisory board members of a Large Company must form an audit and supervisory board.

The Companies Act and the FIEA do not require a listed company to appoint an outside director. In this regard, the TSE Regulations require listed companies to elect at least one Independent Officer (please see question 1.2 for the definition of an Independent Officer).

■ Company with Committees

Shareholders only elect the directors, and the directors form a board of directors and elect the members of three committees from among these directors. No audit and supervisory board member is appointed. The three committees are (i) the audit committee, which mainly audits the directors and executive officers, (ii) the nominating committee, which determines proposals to be submitted at the shareholders' meeting regarding the appointment and dismissal of directors, and (iii) the compensation committee, which determines compensation for each director and executive officer. Each committee must have three or more members who concurrently serve as directors, and a majority of the members must be outside directors (i.e., directors who are not, and have not been in the past, an executive director, executive officer, manager or other employee of the company or its subsidiaries). The board of directors appoints executive officers who manage and operate the company on a daily basis, and directors and the board of directors supervise the executive officers. If two or more executive officers are elected, the board of directors must select representative executive officer(s). Directors who are not outside directors may concurrently serve as executive officers.

### 3.2 How are members of the management body appointed and removed?

In a Company with Audit & Supervisory Board Members, directors are appointed and removed by a shareholders' resolution passed by a majority of the voting rights of shareholders present at a shareholders' meeting. The tenure of a director is two years, unless the term is reduced by the articles of incorporation. A director who is removed without legitimate cause may demand damages (typically compensation for the remainder of his/her tenure). The representative director is appointed and removed by the board of directors. Audit and supervisory board members are appointed and removed by a shareholders' resolution passed by a majority (in the case of removal, two-thirds or more) of the voting rights of shareholders present at a shareholders' meeting.

In a Company with Committees, directors are appointed and removed by a shareholders' resolution. Members of the audit committee, the nominating committee, and the compensation committee are appointed and removed by the board of directors. Executive officers, including representative executive officer(s), are elected and removed by the board of directors. The tenure of a director or executive officer is one year, unless the term is reduced by the articles of incorporation. The board of directors may always remove executive officers, but an executive officer who is removed



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without legitimate cause may demand damages (typically compensation for the remainder of his/her tenure).

### 3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

The Companies Act provides that, for a Company with Audit & Supervisory Board Members, the remuneration of directors must be approved at a shareholders' meeting. Most companies approve a maximum aggregate amount of remuneration for all directors and delegate the board of directors to determine the amount for individual directors. In the case of a Company with Committees, the compensation committee determines the remuneration of each director and executive officer.

The Companies Act provides that a company's business report must state the aggregate amount of compensation (including severance allowance) for directors, audit and supervisory board members, and executive officers. In the case of a Company with Committees, information regarding how the company determines the directors' and executive officers' remuneration, and an outline of the company's compensation policy must be included in the company's business report. In addition, the FIEA requires that companies disclose in the securities report the type of compensation (cash, stock options, bonuses), the total amounts of compensation for directors, audit and supervisory board members, and executive officers, respectively, and the number of members of each group, and the amount of compensation for each individual director, audit and supervisory board member, or executive officer whose total compensation is JPY100 million or more.

### 3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

In addition to the disclosure requirement described in question 2.7, directors, executive officers and audit and supervisory board members are required to report sales and purchases of securities in order to ensure that they do not violate insider trading regulations; if a director, executive officer or an audit and supervisory board member of a listed company buys and sells shares in his/her company within a six-month period and realises profits, the company may require the director, executive officer or audit and supervisory board member, as the case may be, to disgorge the profits to the company. Furthermore, under the FIEL, the number of shares held by directors, executive officers and audit and supervisory board members must be disclosed in the company's securities reports. Under the Companies Act, the number of stock options held by directors, executive officers or audit and supervisory board members must be stated in the company's business report, and the number of shares held by the nominees of directors or audit and supervisory board members must be described in the reference materials provided at shareholders' meetings.

### 3.5 What is the process for meetings of members of the management body?

Directors specified in the articles of incorporation of the company can convene a board meeting by giving one week prior notice (unless a shorter period is provided in the articles of incorporation) to all directors (and audit and supervisory board members in the case of a Company with Audit & Supervisory Board Members), and other directors may require that the board meeting be held whenever necessary. If the articles of incorporation do not specify directors who can convene a board of directors meeting, any director may convene the meeting. Resolutions are passed with a simple majority of directors present at the meeting, and a quorum is represented by a majority of all directors with voting rights (unless otherwise provided in the articles of incorporation). A director who has a special interest in a resolution may not participate in the vote for such resolution.

A resolution may be passed by obtaining the written or electromagnetic consent of all directors if so provided in the articles of incorporation, and a director's report to the board of directors (except for the report made by the representative directors and the executive directors described below) can be made by notice to all directors (and audit and supervisory board members in the case of a Company with Audit & Supervisory Board Members).

The representative directors and the executive officers are required to report to the board at least once every three months regarding the status of the execution of his/her duties, and these reports cannot be made by way of notice. Therefore, a company must hold a board meeting at least once every three months.

### 3.6 What are the principal general legal duties and liabilities of members of the management body?

The principal duties of directors include the following: (i) duty of care (directors must manage the business with the care of a good manager); (ii) duty of loyalty (directors must perform their duties for the company in a loyal manner); (iii) duty to monitor (directors must monitor the performance of other directors, including representative director(s)); and (iv) duty to establish a risk management system (directors must establish internal control systems to manage risks associated with the business; see question 3.7).

If directors or executive officers neglect their duties, they will be liable to the company for damages arising as a result thereof. In addition, they are liable to third parties, such as creditors, for damages incurred by such third parties arising as a result of wilful misconduct or gross negligence in the performance of their duties.

### 3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

The Companies Act requires Large Companies and Companies with Committees to have necessary internal control systems to ensure that (i) directors, executive officers and other employees perform their duties in an efficient manner, (ii) the company properly manages the risks associated with its operations, (iii) directors, executive officers, and other employees perform their duties in compliance with laws, regulations, and the articles of incorporation, and (iv) the performance of duties by directors, executive officers, and other employees are properly audited and monitored by audit and supervisory board members or an audit committee. The systems which must be determined by the board of directors in the case of a Company with Audit & Supervisory Board Members include a system to ensure that the business of the company group, consisting of the company, the parent company, and the subsidiaries, is conducted properly.

### 3.8 What public disclosures concerning management body practices are required?

Under the Companies Act, a company is required to disclose, in its business report to be submitted to the shareholders once every fiscal




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year, the directors' names, positions at the company, positions concurrently held at other companies, total amount of remuneration, the primary activities of outside directors, such as attending board of directors' meetings, related remarks, the company's efforts to avoid any inappropriate business operations, etc.

### 3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

If the articles of incorporation of a company so provide, some of the directors' liabilities to the company may be discharged to a limited extent by board resolution. Further, some of the directors' liabilities may be discharged by a shareholder resolution without the authorisation of the articles of incorporation, though approval of all shareholders is required to discharge the directors' liability in full. Further, a company may, if allowed by the articles of incorporation, also enter into contracts with its outside directors, limiting their liabilities to the company.

Liability insurance for directors, audit and supervisory board members, and executive officers is permitted. The insurance premiums paid by the company on a director's insurance policy covering the liability of a director who does not prevail are considered to be a part of the compensation paid to such director.

## 4 Transparency and Reporting

### 4.1 Who is responsible for disclosure and transparency?

The representative director (or the representative executive officer in the case of a Company with Committees) is in charge of the operation and management of the company and, therefore, is primarily responsible for disclosure and transparency.

### 4.2 What corporate governance related disclosures are required?

The FIEA requires listed companies to disclose (i) their corporate governance policies (e.g., an outline of their policies and the reasons for adopting such policies, etc.), and (ii) information regarding the compensation of directors, audit and supervisory board members and executive officers (see question 3.3). In addition to these disclosures through securities reports and disclosure through business reports as described in question 3.8, the FIEL requires listed companies to submit an internal control report once every fiscal year to the Prime Minister, setting forth an assessment of their internal procedures designed for ensuring the credibility of their financial statements and information that might materially influence the financial statements.

Furthermore, TSE Regulations require listed companies to submit a corporate governance report setting forth issues including the outline of the corporate governance system, basic policy regarding internal control system, and the relationship of the directors, audit and supervisory board members, and executive officers with the company.

### 4.3 What is the role of audit and auditors in such disclosures?

Audit and supervisory board members (in the case of a Company with Committees, the audit committee assumes the same role) audit the business operations of the company managed by directors including internal control systems (see question 3.7 for further details), as well as an annual business report to ensure proper disclosure. The audit and supervisory board presents an auditor report to shareholders, which describes (i) whether or not the business report describes the company's situation properly, and (ii) any unlawful act or material fact that violates laws, regulations or the articles of incorporation in connection with the performance of duties by directors and executive officers, if any. In addition, the accounting auditor, who must be a licensed accountant or accounting firm, audits the financial statements of the company.

### 4.4 What corporate governance information should be published on websites?

Companies are not required to post corporate governance information on their websites, unless companies elect to do so under the Companies Act. Annual securities reports, quarterly reports, extraordinary reports, and other reports of listed companies are publicly disclosed by the Ministry of Finance through the Electronic Disclosure for Investors' Network. Further, certain information relating to corporate governance of listed companies, such as corporate governance reports, is publicly disclosed by TSE through the Timely Disclosure Network.

## 5 Corporate Social Responsibility

### 5.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

No laws regulate corporate social responsibility ("CSR"). In practice, however, many listed companies consider CSR important and have tried to fulfil such responsibility and have disclosed CSR reports.

### 5.2 What, if any, is the role of employees in corporate governance?

No laws provide a specific role for employees in corporate governance. In practice, however, some listed companies negotiate with employees or labour unions over management matters, such as company reorganisation. In addition, the misconduct of several companies has been brought to light by employee whistle-blowers. In this regard, the Whistleblower Protection Act prohibits a company from treating employees unfavourably for blowing the whistle on illicit behaviours within the company.



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