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AMENDMENTS TO JAPAN'S FOREIGN DIRECT INVESTMENT LAW: HEIGHTENED REVIEW OF INBOUND INVESTMENTS

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From June 7, 2020, overseas investors may no longer be able to purchase shares of certain Japanese companies. The Japanese government passed amendments to its foreign direct investment laws that lower the government approval threshold from 10% to a mere 1% for share acquisitions of publicly-traded companies that engage in a broad range of business activities deemed critical to national security, public safety, public infrastructure, or Japan's economy (the "FDI Amendments"). The Japanese government claimed that its foreign direct investment laws required a major overhaul because it lacked legislation to effectively screen foreign direct investment to the same recent extent as other developed countries. In particular, Japan's Ministry of Finance noted the 2018 passage of the Foreign Investment Risk Review Modernization Act in the United States and European Union regulations adopted in 2019 establishing a framework for monitoring foreign direct investments as examples of how Japan's foreign direct investment regime lagged behind international standards. As a result, practically every share acquisition by an overseas investor of a publicly-traded company now deemed critical to Japan will require government approval, unless an exemption applies.

This article outlines the broad reach of the FDI Amendments and the exemptions that curtail its application, and then proceeds to highlight issues that prospective overseas investors should consider through a question and answer format. Given the complexity of the FDI Amendments, decision tree diagrams are included at the end of the article to provide a visual

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flow of how the FDI Amendments apply to a transaction.

Prior Foreign Investment Review Regime

The principal statute regulating foreign direct investment into Japan is the Foreign Exchange and Foreign Trade Act (the "FDI Act"). Prior to the FDI Amendments, generally speaking when an overseas investor acquired (either directly or along with its affiliates) any shares of a Japanese privately-owned company or 10% or more of the outstanding voting rights in a Japanese publicly-traded company, then after the closing the investor was required to file a post-acquisition notice report with Japan's Ministry of Finance and the Japanese economic ministry overseeing the industry in which the target company operates (which report provided notice of the closing of the transaction and did not require the Japanese government to consent to the purchase). However, an overseas investor was required to obtain Japanese government approval prior to the closing for its share purchase if the public- or privately-owned target company or any of its subsidiaries engaged in a business that the Japanese government deemed critical to Japan's national security (which was a finite list primarily limited to weapons, aircraft, and nuclear power) or engaged in certain protected industries (another finite list primarily limited to agriculture, petroleum, and leather).

To date, only one proposed foreign investment has been blocked pursuant to the rubric of the FDI Act—the proposed acquisition in 2008 by the Children's Investment Fund (a British hedge fund) to increase its holdings in J-Power, a Japanese electric wholesale company, from 9.9% to more than 20%. Japan's Ministry of Economy, Trade, and Industry objected to the ownership increase based on the argument that the purpose of the Children's Investment Fund was to maximize profits, which was incompatible with J-Power's function as an energy provider to Japan.

Amended Foreign Investment Review Regime

Effective May 8, 2020 (but applying to pur-

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chase transactions only after the expiration of a 30-day grace period), a "Foreign Investor" (as explained below under "Key Defined Terms") is required to obtain a Japanese government approval to acquire as low as 1% of the outstanding voting rights or the issued shares in a publicly-traded "Designated Company" (as explained below under "Key Defined Terms"), unless a newly established exemption applies (as explained below under "Share Purchase Exemptions"). By changing the approval threshold from 10% to a mere 1%, the FDI Amendments will require a Foreign Investor to comparatively submit more filings to the Japanese government to acquire equity of a Designated Company. The FDI Amendments also modify the post-acquisition notice reporting requirements for certain purchases of a publicly-owned Designated Company. The FDI Amendments do not alter the notice and approval thresholds in connection with the purchase by a Foreign Investor of shares of a privately-owned Designated Company, which remain the same at one share or more, unless a newly established exemption applies that eliminates the need for Japanese government approval for the purchase (as explained below under "Share Purchase Exemptions").

The FDI Amendments also require a Foreign Investor to obtain Japanese government approval post-acquisition if it desires to (i) appoint directors and statutory auditors to the Designated Company, or (ii) propose to transfer or dispose of a "Designated Business Sector." Accordingly, the FDI Amendments require Foreign Investors not only to obtain Japanese government clearance for acquisitions, but also for exercising shareholder rights. The contours of obtaining Japanese government approval for the post-acquisition exercise of such shareholders rights is not covered by this article.

Key Defined Terms

As the need to obtain Japanese government approval for an inbound investment will partly depend on the type of investor and the business activities engaged in by the Japanese target company, it is essential to understand the following key terms under the FDI Amendments:

- **Designated Company** means an entity engaged in any Designated Business Sector, including a Core Sector.
- **Designated Business Sector** means any of the general business activities listed under this caption in Annex I (see end of this article).
- **Core Sector** is a subset of a Designated Business Sector as listed under this caption in Annex I and are activities for which the Japanese government considers of great significance to national security (so subject to higher government scrutiny). A company engaged in a Core Sector always will be considered to engage in a Designated Business Sector too, but not always vice versa.
- **Foreign Investor** means an individual or entity that is a non-resident of Japan, and a Japanese-organized company for which 50% or more of the voting rights are directly or indirectly owned or controlled by a non-resident of Japan.

Business activities captured by the FDI Amendments. Deal practitioners may find it difficult to independently determine if a target Designated Company is engaged in a Designated

Business Sector or Core Sector given the expansive definitions of these terms. To reduce ambiguity, all Japanese publicly-traded companies have been given a rebuttable classification as to whether (i) an investment in such an entity is subject only to a post-acquisition notice report, (ii) the entity conducts business in a Designated Business Sector (but not a Core Sector), or (iii) the entity conducts business in a Core Sector. The assigned classification is not conclusive, so if a company is misclassified and actually engages in a Designated Business Sector, then the Japanese government may request the Foreign Investor to undertake remedial measures (so due diligence with the assistance of management over the target company's business operations remains critical). Japanese privately-owned companies do not receive similar public classifications, so an acquirer is required to ascertain business status through due diligence (also with the assistance of the target company's management as it should know whether its goods and services are subject to government controls due to prior communications with local regulators).

Deal practitioners should note that a company's designation is subject to change as its business activities evolve and depending on the developing national security concerns of the Japanese government. For example, the Japanese government recently announced that later this year (the exact date is not known, but is expected to be this summer) companies operating in the fields of vaccines (including applicable raw materials, serums and formulation), medicines that treat and prevent infectious diseases, and advanced medical equipment that is difficult to manufacture or for which few alternatives would be available when an infectious disease spreads globally (such as ventilators, infusion pumps and artificial dialyzers) will be classified as a Core Sector under a new Designated Business Sector "Medical." The new designation is clearly in response to the COVID-19 pandemic.

Expanded scope of Foreign Investors. Prior to the FDI Amendments, to determine the ownership of non-residents of Japan, only the direct voting right ownership of a Japanese company in which foreign entities and individuals directly owned 50% or more voting rights was considered. The FDI Amendments expand the scope of what constitutes a Foreign Investor by stipulating that any ownership of voting rights held by an entity in which a non-resident of Japan owns 50% or more of the voting rights and such entity's "subsidiaries" (as defined under Japanese corporate law) also should be considered to determine Foreign Investor status. By taking into consideration a subsidiary's ownership, the reach of the Foreign Investor definition has significantly expanded. Annex II provides an example of the broad breadth of the definition of a Foreign Investor under the FDI Amendments. The definition of a Foreign Investor under the FDI Act has not been fully replaced by the FDI Amendments. Therefore, pursuant to the FDI Act a Foreign Investor continues to include an individual who is a non-resident of Japan, an entity established under non-Japanese law, an organization that has its headquarters outside of Japan, and an entity (even if formed under Japanese law) for which a majority of its directors (or equivalent) are non-residents of Japan. Given the complexity of the definition of a Foreign Investor, legal counsel should be contacted at the outset of a transaction if the proposed investor may be under the direct or indirect control of a non-Japanese person or entity.

Share Purchase Exemptions

A Japanese government approval for a share acquisition may not be required depending on a complex analysis of (i) the number of shares being acquired, (ii) the type of Foreign Investor, (iii) whether the Foreign Investor agrees to curb its shareholder rights, (iv) the business activities of the target Japanese company, and (v) the history of regulatory compliance by the Foreign Investor. The resulting analysis may lead to the availability of either a "Blanket Exemption" or a "Regular Exemption" that partially or fully avoids the requirement to obtain a Japanese government approval for share purchases. Each is discussed below.

Blanket Exemption

A Blanket Exemption is available only to certain Foreign Investors. Namely, "foreign financial institutions" (defined as high-frequency traders who are registered with Japan's Financial Services Agency, securities firms, banks, insurance companies, asset management companies, trust companies, and registered investment trusts) that are subject to supervision under financial regulatory laws in Japan or other jurisdictions, so long as these Foreign Investors agree to the following (the "General Exemption Conditions"):

- it (along with its "closely related persons") will not become board members of the Designated Company;
- it will not propose at a shareholders' meeting the transfer or disposition of business activities undertaken in relation to a Designated Business Sector; and
- it will not access non-public information about the Designated Company's technology used in a Designated Business Sector.

Receipt of non-public information does not include employment terms, remuneration of board members and financial information. In addition, the third prong of the General Exemption Conditions is not breached if the Designated Company voluntarily provides such non-public information to the Foreign Investor. This qualification prevents a Designated Company from thwarting the acquisition intentions of a Foreign Investor by sharing confidential information for the purpose of preventing the application of a Blanket Exemption.

Purchase of 1% or more of a publicly-traded Designated Company. With a Blanket Exemption, a Foreign Investor can acquire shares with no upper limit in a publicly-traded Designated Company without having to obtain Japanese government approval, even if the publicly-traded Designated Company engages in a Core Sector. However, a Foreign Investor relying on the Blanket Exemption for the purchase of more than 10% of the voting rights or the issued shares in a publicly-traded Designated Company is required to file a post-acquisition notice report with the Ministry of Finance and the Japanese economic ministry overseeing the industry in which the Designated Company operates. The notification allows the Japanese government to monitor foreign investment but is not a method for the Japanese government to unwind a share purchase *ex post facto*.

Purchase of a privately-owned Designated Company. The Blanket Exemption does not fully extend to the purchase of shares in privately-owned companies. A Foreign Investor acquiring as little as one share and as many as all of the

shares of a privately-owned company is subject to the following filing requirements for each share purchase transaction depending on the business activities of the target company:

- if it is a Designated Company that engages in a Core Sector, then the Foreign Investor is required to obtain Japanese government approval and file a post-acquisition notice report with the Ministry of Finance and the Japanese economic ministry overseeing the industry in which the Designated Company operates;
- if it is a Designated Company that does not engage in a Core Sector, then the Foreign Investor is not required to obtain Japanese government approval so long as it (i) agrees to the General Exemption Conditions, and (ii) files a post-acquisition notice report with the Ministry of Finance and the Japanese economic ministry overseeing the industry in which the Designated Company operates; or
- if it is not a Designated Company, then the Foreign Investor is required only to file a post-acquisition notice report with the Ministry of Finance if it will acquire 10% or more of the outstanding voting rights or the issued shares in the target company, and for every equity purchase above such threshold thereafter.

Regular Exemption

A Regular Exemption is available to all Foreign Investors (except for those who are *persona non grata*, as explained below) and provides varying degrees of relief depending on whether the Designated Company engages in a Core Sector. High-frequency traders who have not registered with Japan's Financial Services Agency can utilize a Regular Exemption. In addition, sovereign wealth funds and public pension funds can utilize a Regular Exemption so long as such Foreign Investor has entered into a memorandum of understanding with the Ministry of Finance confirming that its investments are only for economic returns and made without their government's intervention. These memoranda are not publicly available, so a Designated Company undertaking a transaction with this type of Foreign Investor will need to directly obtain comfort from the Foreign Investor that the proposed transaction does not require Japanese government approval.

Purchase of 1% or more of a publicly-traded Designated Company—Non-Core Sector only. For publicly-traded Designated Companies that do not conduct any business in a Core Sector, then the Regular Exemption allows a Foreign Investor to acquire up to 100% of such Designated Company without having to obtain Japanese government approval, so long as the Foreign Investor agrees to all of the General Exemption Conditions. However, a Foreign Investor relying on the Regular Exemption in this context is required to file a post-acquisition notice report with the Ministry of Finance and the Japanese economic ministry overseeing the industry in which the Designated Company operates when (i) its ownership interest in the Designated Company's outstanding voting rights or issued shares reaches 1% for the first time or 3% for the first time, or (ii) the purchase involves 10% or more of the outstanding voting rights or the issued shares in the Designated Company. Accordingly, a post-acquisition notice report is not required when a Foreign Investor's ownership interest falls below 1% or 3% and subsequently returns

to a level above 1% or 3% (so long as the transaction returning to these thresholds did not involve the purchase of 10% or more of the outstanding voting rights or the issued shares in the Designated Company).

Purchase of 1% or more of a publicly-traded Designated Company—Core Sector. For publicly-traded Designated Companies that conduct business in a Core Sector, then the Regular Exemption allows a Foreign Investor to acquire less than 10% of such Designated Company without having to obtain Japanese government approval, so long as the Foreign Investor agrees to all of the General Exemption Conditions, plus the following further conditions:

- it will not become members of any committee of the Designated Company that makes important decisions with respect to the business activities involving the Core Sector; and
- it will not make written proposals that require a response or action by a certain deadline to the board of directors of the Designated Company (or any member thereof) or any committee of the Designated Company regarding the business activities of a Core Sector.

On its face, a Foreign Investor would be able to make verbal suggestions concerning the business activities of a Core Sector without violating the FDI Amendments; however, a Foreign Investor adopting this approach should consult with legal counsel to evaluate whether such verbal suggestions violate the spirit of the FDI Amendments in light of the facts and circumstances.

Similar to a non-Core Sector transaction, a Foreign Investor relying on the Regular Exemption is required to file a post-acquisition notice report with the Ministry of Finance and the Japanese economic ministry overseeing the industry in which the Designated Company operates when (i) its ownership interest in the Designated Company's outstanding voting rights or issued shares reaches 1% for the first time or 3% for the first time, or (ii) the purchase involves 10% or more of the outstanding voting rights or the issued shares in the Designated Company.

Purchase of a privately-owned Designated Company. The FDI Amendments do not differentiate between the treatment of financial institutional investors versus regular investors in relation to purchases of privately-owned company shares, so the discussion under the Blanket Exemption for share purchases of privately-owned companies applies equally in the context of the Regular Exemption.

Persona Non Grata

The FDI Amendments stipulate that no exemptive relief is available to entities under the control of a foreign government, including sovereign wealth funds and public pension funds (unless such entities have entered into a memorandum of understanding with the Ministry of Finance), so Japanese government approval is required for these Foreign Investors to purchase (i) 1% or more of the outstanding voting rights or the issued shares in a publicly-traded Designated Company or (ii) any amount of shares in a privately-owned Designated Company. In addition, any Foreign Investor with a record of being sanctioned due to violations of the FDI Act must obtain Japanese government approval for Japanese equity purchases in the amounts stated above (although the *persona non grata* status will

expire after five years from any sanctions imposed due to certain infractions).

Japanese Government Approval and Notification Filings

Approval filings. To obtain a requisite approval for an equity purchase of a Designated Company, an identical approval filing is submitted to the Ministry of Justice and the Japanese economic ministry overseeing the industry in which the Designated Company operates. The approval filing is required to be submitted within six months of the proposed acquisition, and the waiting period to decide whether the transaction can proceed is 30 days (which can be shortened to two weeks, or extended up to five months if additional information or time to review is requested). The approval filing consists of information concerning the (i) purpose of the acquisition, (ii) means of participation in management in connection with the acquisition, (iii) likelihood of the Designated Business Sector being transferred, wound-down or reduced in size or function, and (iv) ultimate parent company or other persons who have influence over the business decisions of the Foreign Investor. There is no filing fee and the filing is not publicly available. Despite the significance of the approval filing, the information required to complete the filing based on the face of the FDI Act is normally modest, but the Japanese government may make supplemental information requests that can be time consuming to complete and raise sensitivities (such as information about the Foreign Investor's business and its relationship with a governmental body). The Ministry of Justice and the Japanese economic ministry overseeing the industry in which the Designated Company operates will issue a joint opinion on the proposed equity purchase, so a Foreign Investor will not face a split decision. The Foreign Investor will be notified of the Japanese government's decision, but not the underlying rationale for the decision. An investment denial decision will not be directly publicly disclosed by the Japanese government, but meeting minutes of Japan's Foreign Exchange (FDI) Commission where investment denials are discussed are publicly available (so it is conceivable that some information could have probative value if the Foreign Investor seeks to appeal the Japanese government's decision, or could have predictive value for future transactions by other Foreign Investors).

Notice filings. An identical notice filing is submitted to the Ministry of Justice and the Japanese economic ministry overseeing the industry in which the Designated Company operates. The notice filing is required to be submitted within 45 days from the closing of the equity purchase, and does not elicit a Japanese government consent for the acquisition. The notice filing is a short-form document and typically takes only a few days to prepare. There is no filing fee and the filing is not publicly available.

Sanctions. Failure to comply with a Japanese government approval requirement under the FDI Act (including the FDI Amendments) can lead to members of the Foreign Investor's management team being subject to imprisonment for up to three years and/or the Foreign Investor being required to pay a monetary penalty of up to JPY1,000,000 (however, if the amount of the investment for the violative transaction exceeds JPY1,000,000, then the monetary fine can be increased to up to three times the amount of the investment). Failure to comply with a Japanese government notice requirement under the FDI

Act (including the FDI Amendments) can lead to members of the Foreign Investor's management team being subject to imprisonment for up to six months and/or the Foreign Investor being required to pay a monetary penalty of up to JPY500,000.

Frequently Asked Questions

Do the FDI Amendments apply only to share purchases, so transactions by Foreign Investors structured as either asset purchases or business transfers will not require Japanese government consent?

No. The FDI Amendments only amend the portions of the FDI Act that apply to share purchases. The FDI Act already stipulates certain requirements for acquisitions structured as asset purchases, business transfers, mergers, or spin-offs.

What regulations in relation to the implementation of the FDI Amendments still need to be published?

All of the regulations with respect to the FDI Amendments have been published. As noted above, industries classified as a Designated Business Sector will evolve over time depending on the concerns of the Japanese government, so the list should be confirmed at the outset of a transaction.

Could a hedge fund qualify as a "foreign financial institution" and utilize the Blanket Exemption?

Yes. A hedge fund could utilize the Blanket Exemption. For example, the following are considered "foreign financial institutions" that can utilize a Blanket Exemption: an investment advisor that is registered under the U.S. Investment Advisers Act of 1940; an authorized fund manager and an alternative investment fund manager that are subject to license and supervision under the U.K. Financial Conduct Authority; a person who is granted a Type 9 license under the Hong Kong Securities and Futures Ordinance and subject to the supervision of the Securities & Futures Commission of Hong Kong; and a registered fund management company or a licensed fund management company under Singapore's Securities and Futures Act and subject to the supervision of the Monetary Authority of Singapore.

Does the ownership of non-voting equity shares count towards the determination of Foreign Investor status?

The determination of Foreign Investor status (in particular, a resident Foreign Investor) is dependent only on the relationship of voting equity shares. However, both the acquisition of non-voting equity shares and voting equity shares by a Foreign Investor are considered foreign direct investments and subject to a Japanese government prior approval and/or filing a post-acquisition notice report pursuant to the rules stated above.

Do the FDI Amendments only examine the share ownership of the Foreign Investor for purposes of determining whether the Blanket Exemption or the Regular Exemption apply?

No. Shares owned by the Foreign Investor's "closely related persons" are also attributed to the ownership of the Foreign Investor. The term "closely related persons" has a broad and lengthy definition under the FDI Amendments and includes more than what is commonly captured by the terms "affiliate" and "group."

Does the FDI Act apply to a Japanese company that has an overseas subsidiary that is engaged in a Designated Business Sector or Core Sector but its products are not sold in Japan?

The FDI Act (including the FDI Amendments) does not apply to a scenario where the Designated Business Sector is housed exclusively in an overseas subsidiary and there are no business activities in Japan. However, the FDI Act (including the FDI Amendments) would apply if the Japanese company has certain business connections with the overseas subsidiary (*e.g.*, the overseas subsidiary licenses technology from or to a Japanese company and the Japanese company is subject to the acquisition).

Is it possible to hold pre-transaction consultations with the Japanese government to determine whether it will object to a proposed investment by a Foreign Investor?

Yes. It is possible and common to preview a transaction with Japan's Ministry of Economy, Trade and Industry or the Japanese economic ministry overseeing the industry in which the target Designated Company operates to "test the waters" and develop a suitable operating plan.

Can a Foreign Investor qualify for a Blanket Exemption or a Regular Exemption that has a subsidiary or a less than wholly owned affiliate that is classified as persona non grata?

On its face, the *persona non grata* portion of the FDI Amendments applies only if the acquirer is subject to a Japanese government sanction. However, we will need to watch how the FDI Amendments evolve since it would be relatively easy to circumvent the *persona non grata* disqualification if only the record holder of the shares is examined.

What happens if a Foreign Investor who purchased shares of a Designated Company by relying on a Blanket Exemption or a Regular Exemption is subsequently acquired by a person who is classified as persona non grata?

The precise consequences are difficult to determine given the nascent stage of the FDI Amendments. Since ownership and management changes involving a Foreign Investor who purchased shares of a Designated Company by relying on a Blanket Exemption or Regular Exemption are required to report such changes to the Japanese government, it is conceivable that a remedial order could be issued depending on the circumstances.

In addition to the persona non grata exemption disqualification, are there any other provisions that prevent a Foreign Investor from relying on a Blanket Exemption or a Regular Exemption?

As with many statutes, the FDI Amendments include a general "catch-all" clause to deny exemption reliance. A Foreign Investor is not allowed to rely on a Blanket Exemption or a Regular Exemption if its underlying purpose for completing the share purchase is to make it difficult to operate the Designated Business Sector in a stable and continuous manner. For example, the "catch-all" could apply if the Foreign Investor plans to expend comparatively more resources on the target company's non-Designated Business Sector activities to the detriment of certain Designated Business Sector activities, or even withdraw from the Designated Business Sector. The catch-all also could apply if the Foreign Investor plans to undertake a recapitalization of the Designated Company that could lead to the Designated Company having difficulties continuing

to conduct the Designated Business Sector in a manner consistent with past practices. It is difficult to predict how often the catch-all clause will be used given its broad underpinnings, but it could prove useful to the Japanese government if it has concerns with the business practices or reputation of a Foreign Investor.

Are the General Exemption Conditions to which a Foreign Investor must agree under the Blanket Exemption and the Regular Exemption documented in an agreement between the Foreign Investor and the Ministry of Finance, and what happens if there is a breach by the Foreign Investor of a General Exemption Condition post-acquisition?

The General Exemption Conditions do not appear in a separate document, but appear as "check the box" agreements in the post-acquisition notice report a Foreign Investor is required to submit. If the Foreign Investor breaches a General Exemption Condition, then the minister of the Ministry of Finance and the minister of the Japanese economic ministry overseeing the industry in which the target Designated Company operates can issue a notice of breach and request the Foreign Investor to undertake certain corrective actions (*e.g.*, to file the requisite post-acquisition notice report). If the Foreign Investor fails to comply, then the applicable ministers can issue a remedial plan (such as the sale of the Designated Company's shares or assets), and the Foreign Investor will be classified as *persona non grata*.

Could a company that collects sensitive personal data be classified as a Designated Company?

Under the FDI Act, software and IT service companies that use software specifically designed to handle certain personally identifiable information (such as DNA and passport numbers) and certain personally sensitive information (such as health-related data) of one million or more persons are deemed to conduct business in a Core Business Sector. However, a company that just collects, stores and transmits personal information and personally sensitive information would not be classified as a Designated Company. As such, the social networking company, Grindr LLC, most likely would not be classified as a Designated Company under the FDI Amendments simply because it collects, stores, and transmits personal information and personally-sensitive information of dating preferences of certain users (unlike in the United States, where the U.S. government expressed national security concerns over the sale of the company to Beijing Kunlun Tech).

Would the purchase of a company that owns real estate in close geographical proximity to a business engaged in a Designated Business Sector or Core Sector be subject to the FDI Amendments?

Not currently, but we anticipate that legislation may be enacted if abuses are uncovered by the Japanese government.

Will the FDI Amendments impact shareholder activism in Japan?

Most likely, if the activist is a Foreign Investor. Since the FDI Amendments will require Japanese government approval for the purchase of as little as 1% of the outstanding voting rights or the issued shares of a publicly-traded Designated Company (unless an exemption applies), it may become more difficult for a Foreign Investor

shareholder activist to purchase a meaningful toehold position in a Designated Company since a Japanese government approval may be required and obtaining such approval itself could take substantial time and increase the risk of disclosure about the activist's interest in the Designated Company (which, if publicly known, could increase the trading price of the Designated Company). Furthermore, the FDI Amendments require a Foreign Investor to obtain Japanese government approval if it desires post-acquisition to (i) appoint directors to the board of the Designated Company or statutory auditors, or (ii) propose to transfer or dispose of a Designated Business Sector. The foregoing potential curtailments on shareholder rights could limit the playbook of a Foreign Investor shareholder activist, thereby reducing its investment interest in a Designated Company.

Piecing It All Together

The FDI Amendments present significant changes to the FDI Act and will require deal practitioners to carefully consider this new legislation in connection with any share purchase transaction by a non-Japanese investor.

To facilitate an understanding of the FDI Amendments, Annex III sets forth a decision tree diagram with respect to investments in publicly-traded Designated Companies and Annex IV applies with respect to investments in privately-owned Designated Companies.

In addition to restrictions under the FDI Act, a Foreign Investor also should bear in mind whether there are any industry-specific regulations or license requirements that could impact its ability to acquire an ownership interest in a Japanese company. For example, Japanese statutes restrict foreign direct investment exceeding 20% in broadcasters and foreign direct investment exceeding 33% in Nippon Telegraph and Telephone (Japan's former land-line monopoly telephone operator). Similarly, if a target Japanese company operates in a regulated industry, the Foreign Investor may need to obtain an acquisition approval or authorization from the relevant supervisory authority. For example, a person acquiring 20% or more (and in certain cases 15%) of an insurance company in Japan must obtain prior approval from Japan's Financial Services Agency, so it is conceivable that a Foreign Investor could be blocked even if the investment is permissible under the FDI Amendments.

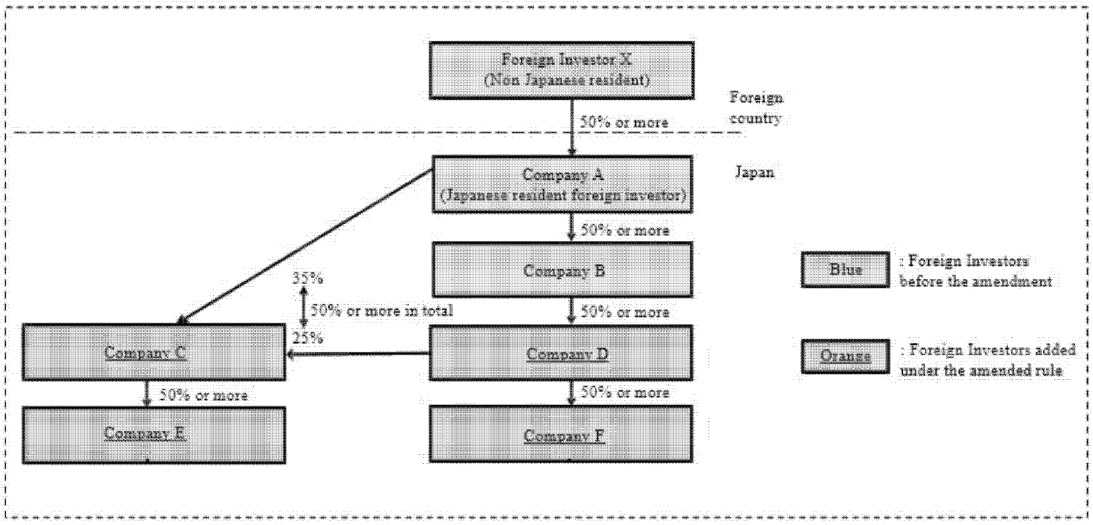
Annex I
Business Activities Subject to FDI Amendments

Designated Business Sectors	Core Sectors*
Weapons	All business activities
Aircraft (*i.e., the manufacturer of aircraft and rockets, and the parts thereof*)	All business activities
Nuclear facilities	All business activities
Space	All business activities
Dual-use technologies (*i.e., manufacturers, engineering service providers and software developers who deal with products and technologies that are subject to Japanese export control regulation*)	All business activities
Cybersecurity	• Cybersecurity-related services (e.g., network security monitoring, software) • Service providers of programs designed for critical infrastructure • Service providers of programs specifically designed to handle personal information and sensitive personal information of one million or more persons
Electricity	• General electricity transmission and distribution utilities • Electricity transmission utilities • Electricity generation utility companies that own a power plant with a maximum generation capacity of 50,000 KW or more
Gas	• General gas/specified gas pipeline service providers • Gas manufacturers • LP gas companies that own a storage facility or core cylinder filling station
Telecommunications	• Telecommunication carriers that provide service across multiple local municipalities
Water supply	• Water supply companies supplying to more than 50,000 people • Bulk water supply companies with a capacity to supply over 25,000m^3 of water per day
Railway	• Railway service companies operating public facilities/infrastructures that are stipulated under Japan's Armed Attack Situations Response Act
Oil	• Oil refineries • Oil storage facilities • Crude petroleum facilities • Natural gas production facilities
Heat supply	None
Broadcasting	None
Public transportation	None
Biological chemicals	None
Security services	None
Agriculture, forestry and fisheries	None
Leather manufacture	None
Air transportation (*i.e., air transportation service providers, such as Japan Airlines*)	None
Maritime transportation	None

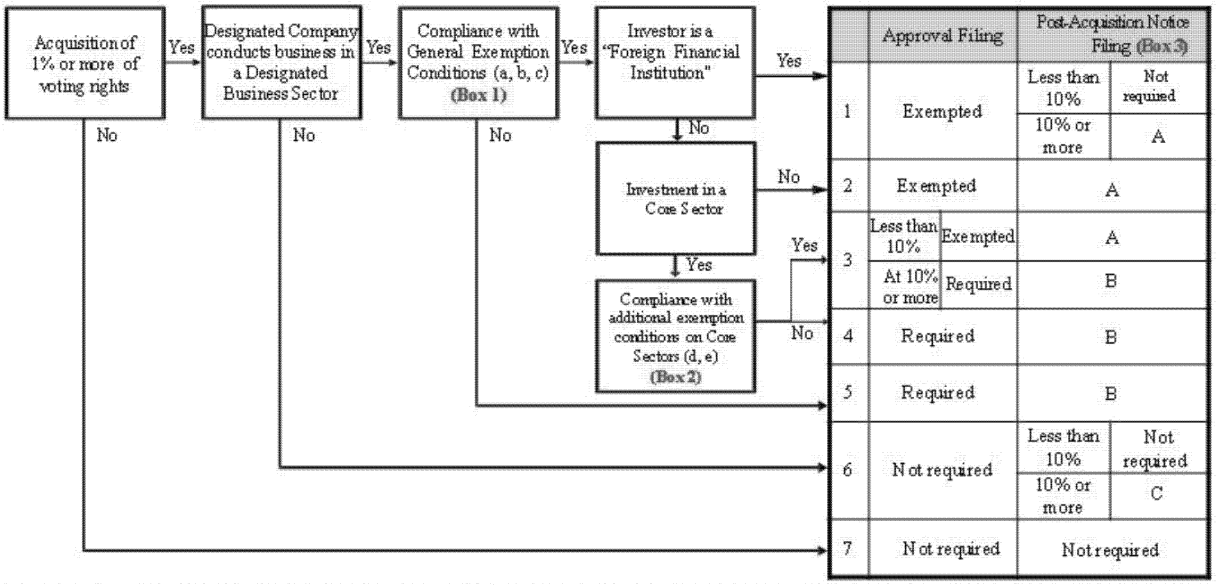
* Core Sectors are summarized herein, so this list should not be considered comprehensive.

Annex II
Foreign Investor Status

- Before the FDI Amendments, a Foreign Investor included companies located in Japan for which 50% or more ownership of their voting shares were owned by foreign investors, as well as direct subsidiaries of such companies.
- After the FDI Amendments, all companies for which their voting shares are owned 50% or more by Company A and/or Company A's subsidiary companies (*as defined under Japanese corporate law*) are regarded as Foreign Investors.



Annex III:
Investments in Publicly Designated Companies



(Box 1)
General Exemption Conditions

Foreign Investor agrees to the following:

a. it (along with its "closely related persons") will not become board members of the Designated Company
b. it will not propose at a shareholders' meeting the transfer or disposition of business activities undertaken in relation to a Designated Business Sector; and
c. it will not access non-public information about the Designated Company's technology used in a Designated Business Sector.

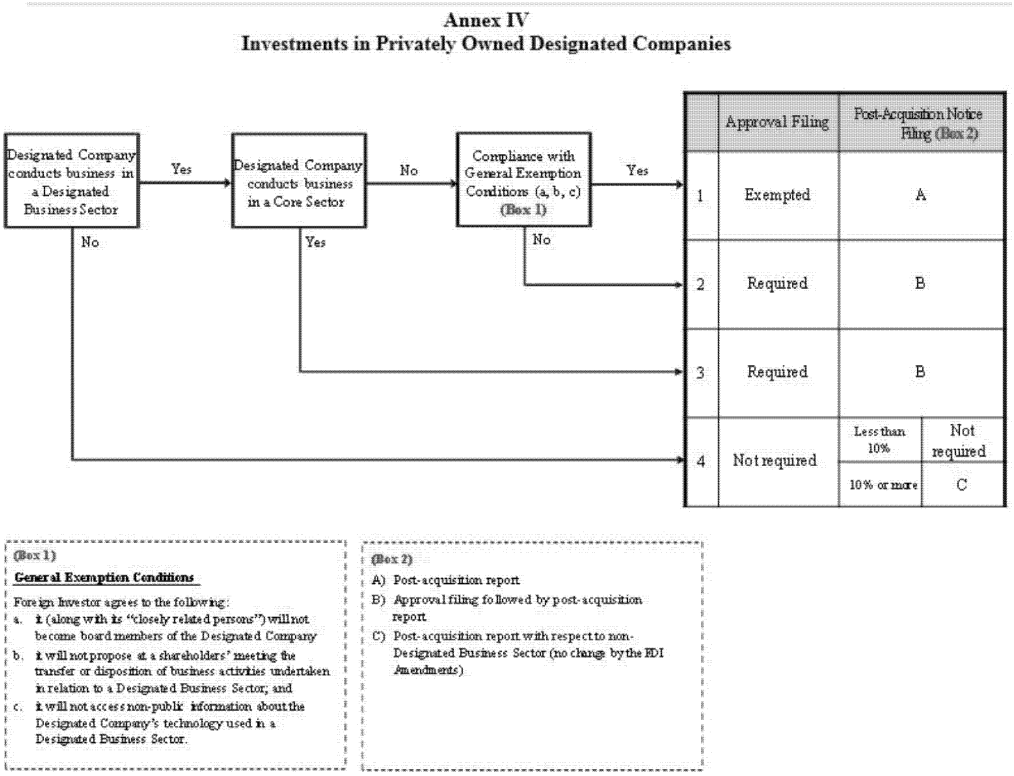
(Box 2)
Exemption Conditions on Core Sectors' Business Activities

Foreign Investor agrees to the following:

d. it will not become members of any committee of the Designated Company that makes important decisions with respect to the business activities involving the Core Sector; and
e. it will not make written proposals that require a response or action by a certain deadline to the board of directors of the Designated Company (or any member thereof) or any committee of the Designated Company regarding the business activities of a Core Sector.

(Box 3)

A) Post-acquisition report (1%/3%/10% rule)
B) Approval filing followed by post-acquisition report
C) Post-acquisition report with respect to non-Designated Business Sector (no change by the FDI Amendments)



REGULATORS AND M&A: TWO MONTHS INTO THE PANDEMIC

On May 29, 2020, ***The M&A Lawyer*** *spoke with Michael Knight and Michael Gleason, who are partners in the Washington, D.C. office of Jones Day, on the topic of antitrust and how dealings with the federal regulatory agencies have developed over the two months since the COVID-19 crisis began in the U.S.*

The M&A Lawyer*: First, what have the practical aspects been in terms of merger reviews? Have the agencies been able to fully perform their functions, given that most of their officials have been working remotely since mid-March?*

Michael Knight: While a few people at the federal antitrust agencies have been found in their offices on occasion, the vast majority are telecommuting and working remotely, so obviously instead of in-person meetings, we're doing calls and videoconferences a lot more. The FTC has set up an electronic procedure for HSR filings, and they have made it workable—it's the only way they are accepting filings right now. For the most part it's been a pretty smooth process.

Michael Gleason: We've continued to see the FTC and DOJ file cases and settle them, ask for divestitures, and proceed with litigation. That's to say that there's ample evidence that they continue to prosecute cases, that they're moving their investigations forward, and are doing what they've always done.