Chapter 16

JAPAN

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I OVERVIEW OF GOVERNANCE REGIME

i Sources of law and enforcement

Companies in Japan are generally regulated by the Companies Act.[2] Further, listed companies in Japan are also regulated by the Financial Instruments and Exchange Law (FIEL)[3] and the Securities Listing Regulations published by each securities exchange in Japan (the SLRs). As the securities exchanges in Japan, in publishing their SLRs, generally follow the SLRs published by the Tokyo Stock Exchange (TSE), which is the largest securities exchange in Japan, the information we provide hereafter focuses on the SLRs published by the TSE, and references to 'SLRs' are to the SLRs published by the TSE.

In the event that a company violates the Companies Act, depending on the specific provision that is violated, shareholders or creditors of the company are generally entitled to bring a lawsuit against the company. The Financial Services Agency of Japan is responsible for enforcing the FIEL and, depending on the specific provision that is violated, may levy monetary fines, prison sentences, or even both, in connection with certain violations thereof. SLRs are enforced by the specific securities exchange that published the applicable SLR. Violations of the SLRs generally lead to the securities exchange requiring that company submit an improvement plan. In extreme cases, securities exchanges may even delist the shares of the company.

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2 Act No. 86 of 26 July 2005.

3 Act No. 25 of 13 April 1948.

ii Nature and recent developments in the corporate governance regime

The Companies Act, which has been in effect since 2006, allows a company some flexibility with its governance organisation, such as whether to have a board of directors and whether to have a corporate auditor. Revisions to the SLRs on 30 December 2009, however, require a listed company to have one or more independent directors or corporate auditors (i.e., outside directors or corporate auditors (as defined below) who are not likely to have a conflict of interest with the company's shareholders). If an independent director or corporate auditor has business or other relationships with the company (e.g., if the director or corporate auditor is a main business partner, consultant or a major shareholder of the company), this relationship must be disclosed, and the reasons such a person was appointed as an independent director or corporate auditor must also be provided in the company's corporate governance reports under the SLRs. Further, the Companies Act reform bill was passed by the National Diet on 20 June 2014 and will be enacted on 1 May 2015[4] (the Companies Act as amended by this bill is hereinafter referred to as the Reform Act), and the Reform Act states that if a large public company that is required under the FIEL to submit a securities report does not have an outside director, it must explain the reason for this in its business report and at its annual shareholders' meeting. On 5 February 2014, the TSE announced a revision to the SLRs, which requests that listed companies make efforts to elect at least one independent 'director' because, in practice, most listed companies had elected an independent 'corporate auditor'.

In Japan, roughly speaking, there are two types of governance systems, one being a company with a corporate auditor and the other being a company with committees. In a company with a corporate auditor, the corporate auditor is an organisation that audits the directors' execution of their duties. This type of organisation is the primary type of company in Japan. On the other hand, in a company with committees (without a corporate auditor), three stipulated committees perform auditing and monitoring functions:

a a nominating committee that decides on the agenda of nominating or dismissing directors at shareholders' meetings;

b an audit committee that audits the execution of duties of executive officers and directors; and

c a compensation committee that determines compensation for each executive officer and director.

A majority of each of these committees must consist of outside directors. In a company with committees, because a board may delegate substantial parts of its decision-making authority over the management of the company to the executive officers, the board is expected rather to monitor the execution of the executive officers' duties than to make decisions (although a director can serve concurrently as an executive officer). This type of

4 The timing of the enactment of each amendment of the Companies Act mentioned might differ because each amendment might be subject to an interim measure stipulated by the relevant laws.

organisation was first introduced in 2003 and is used only by a limited number of large companies in Japan.

The Reform Act further introduces a new type of governance structure, a company with an audit committee, anticipating that the new structure will make it easier for Japanese companies to select a monitoring model involving outside directors. A reduction of costs for selecting the monitoring model is achieved by decreasing the number of outsiders. A company with an audit committee is not required to possess a nominating committee or compensation committee. The audit committee must have more than three directors as members, and the majority of them must be outside directors.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure and composition of the board

Japanese companies generally use a one-tier board structure. Under the Companies Act, although a company may choose not to have a board of directors, the typical form of management structure is a company with a board of directors, where the board has decision-making authority. In a company without a board of directors, while there is no board, unless otherwise provided in the company's articles of incorporation (articles), a majority of the directors will decide business matters on behalf of the company. As compared with a company with a board of directors, however, shareholders of a company without a board have broader decision-making authority, such as the ability to approve certain competitive activities or to approve activities that result in conflicts of interest of directors.

A company with a board of directors is required to have three or more directors. A company without a board, on the other hand, is required to have only one or more directors. A company with committees must also have a board, and therefore it is required to have three or more directors. In Japan, no director is required to be a representative of the employees of the company.

As described above, in a company with an audit committee, under the Reform Act, the audit committee must have more than three directors as members, and the majority of them must be outside directors.

Legal responsibilities of the board

Except for a company with committees, a company with a board of directors generally must have a corporate auditor. In a company with a corporate auditor and a board of directors, the board has decision-making authority over the management of the company, and representative directors and other authorised directors are responsible for executing such decisions. The corporate auditor generally audits the execution of duties by directors, with a view to compliance with law.

In a company with committees, while the board may have decision-making authority over the management of the company, it usually delegates substantial portions of such authority to executive officers, and representative executive officers are responsible for executing such decisions. Accordingly, for example, executive officers may be delegated the authority to decide on the acquisition of important assets, incurrence of

significant debt, appointment of important employees and establishment of important organisational changes, while those are items that would be determined by a board of directors in a company with a corporate auditor. The board of a company with committees would then, *inter alia*, determine the agendas of shareholders' meetings, approve competitive activities and activities that result in conflicts of interest of directors, and appoint committee members. The audit committee audits the execution of duties by directors with a view not only to compliance with laws, but also the appropriate performance of their duties.

In a company with an audit committee, under the Reform Act, the core role of the board of directors is to set the basic management policy, to develop the internal control system, and to supervise the execution of business by other directors, including the CEO. Although important business decisions, such as disposing of or acquiring important assets, are required to be made by the board of directors, its shareholders can, through the company's articles, enable the board to delegate these decisions to the CEO. Also, if the majority of the board is held by outside directors, the board can delegate these decisions to executive officers.

Delegation of responsibilities

In a company with a corporate auditor and a board of directors (which is typical of Japanese companies), the board often delegates decisions on certain matters regarding day-to-day operations to individual directors, such as representative directors or other executive directors. However, the board may not delegate certain important company matters to individual directors, including:

a disposing of or acquiring important assets;
b incurring significant debts;
c electing or dismissing important employees, including managers;
d issuing shares at a fair price; and
e approving audited financial statements.

In a company with committees, the nominating committee, audit committee and compensation committee each has its own authority under the Companies Act and cannot further delegate substantial parts of their responsibilities. Apart from the committees' responsibilities, the board has sole decision-making authority over the management of the company with respect to certain matters which include:

a basic management policy;
b matters necessary for the execution of the audit committee's duties; and
c if there are two or more executive officers, matters relating to the interrelationship between executive officers.

Similarly in a company with an audit committee, under the Reform Act the audit committee has its own authority and cannot further delegate a substantial part of its responsibility. Apart from the audit committee's responsibility, the board has sole decision-making authority over the management of the company with respect to certain matters, which include:

a basic management policy; and
b matters necessary for the execution of the audit committee's duties.

A board of directors in a company with committees often delegates decision-making authority over the management of the company to the executive officers (as described above). The board may not, however, delegate certain important matters (in addition to the above-mentioned matters) to executive officers (or to individual directors, because each individual director in a company with committees generally does not have decision-making authority), including:

a approval of share transfers (if the company is a closed company);
b holding of shareholders' meetings;
c appointment or removal of committee members;
d election or dismissal of executive officers; and
e determining the contents of agreements for mergers, demergers or share exchanges.

In Japan, normally the board appoints the CEO or its equivalent from among its representative directors (in the case of a company with a corporate auditor and a board of directors) or representative executive officers (in the case of a company with committees). Generally, the CEO will chair the board meeting, and will perform the role of chair of the board in this sense.

As stated above, in a company with an audit committee, under the Reform Act, although important business decisions such as disposing of or acquiring important assets are required to be made by the board of directors, its shareholders can, through the company's articles, enable the board to delegate these decisions to the CEO. Also, if the majority of the board is held by outside directors, the board can delegate these decisions to executive officers.

Remuneration for directors

In a company with a corporate auditor and a board of directors, the aggregate amount of remuneration of all directors is determined at a shareholders' meeting (if not provided in the articles), and the board determines the remuneration of each director within the parameters of this aggregate amount. The same would apply to a company with an audit committee under the Reform Act. In addition, in a company with an audit committee, the audit committee is given the power to express its view on the election, dismissal, resignation and compensation of other directors at the shareholders' meeting so that the shareholders can make an informed decision on these matters.

On the other hand, in a company with committees, the compensation committee determines the remuneration of each director in accordance with the remuneration policy prescribed by the committee (therefore, shareholders' approval is not required).

An 'open company' (i.e., a company, typically listed, whose articles do not require the company's approval for any transfer of the company's shares, whether it is a company with a corporate auditor or a company with committees) must disclose the aggregate remuneration of all of its directors, corporate auditors and executive officers to its shareholders in its business report. In addition, a listed company must disclose the following information in its securities report: the amount of remuneration and a breakdown by type of payment (e.g., salary, bonus, stock option or retirement payment) for each director, corporate auditor and executive officer if his or her remuneration for the relevant fiscal year is ¥100 million or more (out of 2,466 companies listed as of 30 June 2014, there were 361 directors, corporate auditors or executive officers that

received ¥100 million or more as remuneration for the fiscal year ending March 2013; and an explanation of the company's policies for remuneration of directors, corporate auditors and executive officers and how remuneration is determined if such policies are put in place (e.g., as set forth above, 'remuneration for a director consists of fixed compensation and a bonus, with the fixed portion determined based on the position of the individual and the bonus determined based on the performance of the company and the individual').

Board and company practice in takeovers

Listed companies in Japan generally use a 'precaution type anti-takeover measure', whereby a company announces a takeover process rule but does not issue any securities at first. Although there are many variations of this measure, generally the company announces in advance a certain takeover process rule to the effect that a takeover bidder must provide sufficient information to a board of directors about the bidder and the terms of its bid before the beginning of its takeover, and the bidder refrains from purchasing the shares of the company unless the board of the company completes its analysis of the terms of such a bid (but the analysis by the board must be completed within a certain period, such as 60 days). If such procedures are respected by the bidder, the board will not implement anti-takeover measures, but where the board decides that the value of the company would be damaged, or maximising value would be difficult under such takeover (including if the bidder does not comply with such procedures), usually based on analysis by a third-party committee, certain anti-takeover measures may be implemented, typically the issuance of share purchase warrants free of charge to all shareholders that cannot be exercised by the bidder.

In Japan, the *Bull-Dog Sauce* case[5] was the first case where actual share purchase warrants were issued to shareholders as an anti-takeover measure. In this case, the Supreme Court found that the decision of whether control by a specific shareholder would harm the value of the company or damage the common interests of shareholders should be ultimately determined by the shareholders who hold its corporate value, and that if, at a shareholders' meeting, the shareholders decide that the takeover would harm the value of the company or damage the common interests of the shareholders, such a decision should be respected. In this case, because the issuance of share purchase warrants was approved by more than 80 per cent of the voting rights, the Supreme Court found that such issuance was valid.

Since this case, we have seen fewer attempts at hostile acquisition.[6] In addition, a tender offer regulation under the FIEL was amended in 2007 to the effect that the offeror must disclose more information prior to the tender offer, and that the target company

5 Supreme Court, 7 August 2007.

6 In November 2012, PGM Holdings commenced a hostile takeover bid against Accordia Golf, but the tender offer failed to acquire 20 per cent of the shares. In addition, in March 2013, Cerberus Capital Management, LP commenced a hostile takeover bid against Seibu Holdings Inc, but Cerberus Capital Management, LP only acquired 3.26 per cent (originally held 32.22 per cent and ended up holding 35.48 per cent) through the tender offer.

has the right to issue a questionnaire to the offeror. As a result, the total number of listed companies that have adopted anti-takeover measures has slightly decreased for four consecutive years (from 570 companies at the end of July 2008 to 496 companies at the end of November 2014).

ii Directors

Appointment, nomination, term of office

Directors are elected by a resolution at a shareholders' meeting. In a company with a corporate auditor and a board of directors, the board generally nominates directors with two-year terms of office (maximum). On the other hand, in a company with committees, the nominating committee nominates directors with one-year terms of office (maximum). Further, in a company with an audit committee, under the Reform Act, a director who is a member of the audit committee must be nominated separately from the other directors, and the statutory maximum term of office for a director who is a member of an audit committee is two years, while for other directors it is one year.

Directors can be dismissed at any time by a resolution at a shareholders' meeting. Directors can seek damages for dismissal from the company if they are dismissed without justifiable grounds.

Liability of directors

Generally, directors must perform their duties with the duty of care of a prudent manager in compliance with all laws and regulations, and the articles and resolutions of shareholders' meetings, in a loyal manner.

In addition to the foregoing, in Japan the 'business judgement rule' is applied when considering whether a certain decision of a director complies with the director's duty of care of a prudent manager to the company. Under the 'business judgement rule' in Japan, even if a director has made a certain decision that has resulted in damage to the company, the director is, in principle, deemed to have complied with his or her duty of care of a prudent manager, unless the director made important and careless mistakes in the recognition of facts, or the process and content of the director's decision-making is particularly unreasonable or improper as determined by a management expert. Nevertheless, Japanese courts are not likely to apply the 'business judgement rule' in cases where it can be shown that the director has a conflict of interest.

Recently, in the *Apamanshop* case[7], the 'business judgement rule' was affirmed by the Supreme Court of Japan. In this case, Apamanshop Holdings bought out the subsidiary's minority shareholders at a price per share higher than that set forth in the valuation report in order to make the subsidiary its wholly owned subsidiary. The Court cited the 'business judgement rule' in finding that the directors of Apamanshop Holdings did not breach their duty of care, because a smooth purchase of the minority shareholders' shares was beneficial in maintaining good relationships with Apamanshop's member shops who were shareholders of Apamanshop, the corporate value of the subsidiary after the restructuring was expected to increase and the decision-making process employed

7 Supreme Court, 15 July 2010.

by Apamanshop's directors (i.e., the management committee convened to discuss the purchase and a legal opinion was obtained) was not found to be unreasonable.

Role and involvement of outside directors

Outside directors are defined under the Companies Act as directors who are not serving and who have not previously served as executive directors, executive officers or employees (including managers) of the relevant company or any of its subsidiaries. Under the Reform Act, this requirement is tightened.[8] In a company with committees, a majority of the members of each committee must be outside directors, with each committee required to consist of at least three members. In a company with an audit committee, under the Reform Act, the audit committee must have more than three directors as members, and the majority of them must be outside directors. On the other hand, in a company with a corporate auditor and a board of directors, there are no such outside director requirements concerning board composition.

The TSE requires listed companies to have one or more independent directors or corporate auditors (see Section I, *supra*). Therefore, it is considered that persons who work for a company's parent company or its business partner, or consultants who receive significant fees from a company, etc., cannot be independent directors or corporate auditors of the company. Further, on 5 February 2014 after submission of the Company Act reform bill (which states that if a large public company that is required under the FIEL to submit a securities report does not have an outside director, it must explain the reason why in its business report and at its annual shareholders' meeting), the TSE announced a revision to the SLRs that requests that listed companies make efforts to elect at least one independent director (see Section I, *supra*).

Legal duties and best practice for directors

The legal duties of outside directors are generally the same as for other directors or executive officers. Where provided for in a company's articles, however, the company may contractually limit the liability (to the company) of its outside directors who are not aware of the wrongdoing and not grossly negligent in performing their duties to the extent of the larger of both an amount determined in advance, within the range provided in the articles, and an amount equal to double his or her annual remuneration.

Outside directors generally should review the performance of management, conflict of interest issues, the process and propriety of management decisions and general compliance, and work to improve the corporate culture. Although other directors should take on such roles as well, outside directors are expected to do so more effectively due to their objective position.

Recently, many companies in Japan have organised third-party committees to audit or review conflict of interest issues, such as MBO transactions, internal investigations,

8 For example, directors who are serving as executive directors, executive officers or employees (including managers) of a company's parent company or sibling company also do not qualify as outside directors.

anti-takeover measures, etc., and an outside director is often included as a member of such a committee.

In a company with a corporate auditor and a board of directors or a company with committees, if a director intends to carry out any transactions involving a conflict of interest, approval must be obtained at a board meeting, at which that director may not participate. At the board meeting, the potentially conflicted director must disclose material facts about the transaction. After the transaction, the director must also report material facts about the transaction to the board without delay.

On the other hand, in a company with an audit committee, under the Reform Act, an ex-ante approval by the audit committee of a self-dealing transaction between a director and the company has the effect of switching the burden of proof regarding the violation of a director's duty from the director to the plaintiff shareholders.

iii Auditors

In a company with a corporate auditor, the corporate auditor audits the execution of the directors' duties, including preparation of financial statements. To ensure the independence of the corporate auditor, its term of office must continue until the conclusion of the annual shareholders' meeting for the last fiscal year, which ends within four years from the time of its election (in a closed company, the term of office may be extended until the conclusion of the annual shareholders' meeting for the last fiscal year, which ends within 10 years from the time of its election). On the other hand, a company with committees does not have a corporate auditor. Instead, the audit committee, which consists of directors whose terms of office are one year (maximum), audits the execution of directors' duties, including preparation of financial statements (see Section II, *supra*). Similarly, in a company with an audit committee, which consists of directors whose terms of office are two years (maximum), the audit committee is responsible under the Reform Act for auditing the execution of directors' duties, including preparation of financial statements.

In addition, a 'large company' (i.e., a company with either stated capital in the balance sheet at the end of the most recent fiscal year of ¥500 million or more, or total liabilities as of the end of its most recent fiscal year of ¥20 billion or more) and a company with committees are required to have an accounting auditor, which must be either a certified public accountant or an audit firm. Accounting auditors' terms of office must continue until the conclusion of the annual shareholders' meeting for the last fiscal year, which ends within one year from the time of their election.

To ensure the independence of corporate auditors, under the Reform Act, a corporate auditor or a board of corporate auditors in a company with a corporate auditor, and an audit committee in a company with an audit committee, are given the power to determine the contents of proposals regarding the election and dismissal of accounting auditors to be submitted to a shareholders' meeting, while, in a company with committees, an audit committee has such power under the current Companies Act.

III DISCLOSURE

i Financial reporting and accountability

A representative director or representative executive officer must prepare a financial statement within three months after the end of each business year. A large company that is required to file a securities report under the FIEL (for example, a listed company or a company with at least 1,000 shareholders as of the end of any fiscal year within the last five years is required to file a securities report) must prepare a consolidated financial statement under the Companies Act. However, the FIEL requires all listed companies to prepare a securities report that includes consolidated financial statements (unless they do not have any subsidiaries to be consolidated under the FIEL), as well as a quarterly report. In addition, a representative director or representative executive officer of a listed company must submit a confirmation letter as an attachment to its securities report or other reports, in which he or she confirms that the description of the report is written properly in accordance with the FIEL.

A company with a board of directors must attach financial statements and business reports to the convocation notice of its annual shareholders' meeting. The company must also keep those documents at its head office for five years, beginning two weeks (one week, in the case of a company without the board) prior to the date of the shareholders' meeting. Under the FIEL, a listed company is required to submit its securities report within three months after the end of its fiscal year.

ii Communications with shareholders

Under the Companies Act, directors, corporate auditors and executive officers must sufficiently explain the specific issues related to the agenda of the shareholders' meeting if an enquiry is made by a shareholder. In addition, to improve investor relations, Q&A sessions during shareholders' meetings are now actively encouraged in Japan. Furthermore, Japanese listed companies often hold informal meetings with investors about financial statements and related issues.

IV CORPORATE RESPONSIBILITY

i Internal control

Boards of large companies must develop internal control systems that ensure that directors comply with laws and the articles and that company operations are appropriate. On the other hand, there is no legal requirement for internal control systems for companies that are not categorised as large companies.

Additionally, in a company with committees, regardless of its size, the board must develop internal control systems that ensure that executive officers comply with laws and the articles and that company operations are appropriate. A listed company must submit internal control reports that describe the systems in place to ensure that the financial reports of the company are properly made in compliance with laws.

Further, in a company with an audit committee, under the Reform Act, regardless of its size the board must develop internal control systems that ensure that directors comply with laws and the articles and that company operations are appropriate.

Specific contents of the internal control systems may be decided at the discretion of the company. In its internal control rules, a company often provides general matters related to the control of information and documents; crisis management systems; necessary internal rules and organisations; and compliance programmes, etc.

Under the Whistleblower Protection Act, the employer of a whistle-blower is prohibited from treating the whistle-blower in any disadvantageous manner, such as by demotion or reducing his or her salary, if this is in response to the employee's whistle-blowing.

ii Corporate social responsibility to employees and wider society

In Japan, a company is required to hire a certain number of handicapped persons and to take measures to continue to employ elderly persons under affirmative action-related laws. Activities related to corporate social responsibility by some companies involve actions to be taken in the interests of their stakeholders, such as preserving the environment, supporting volunteer work and creating jobs, although these are not generally required by law.

V SHAREHOLDERS

i Shareholder rights and powers

Voting rights

In general, a company must treat its shareholders equally depending on the class and number of shares owned, and therefore each voting share has the same voting right. The Companies Act does, however, allow for the following exceptions: certain minority shareholders' rights, such as rights to propose an agenda for a shareholders' meeting, to inspect accounting books and to apply to a court for dissolution of the company, and different treatment for each shareholder in closed companies in terms of rights to dividends or distribution of residual assets or voting rights at shareholders' meetings pursuant to the articles.

In a company with a board of directors, matters provided for in the company's articles and the Companies Act may be resolved at a shareholders' meeting. In the sense that each director must observe resolutions passed at shareholders' meetings, shareholders have an influence on the board.

Under the Companies Act, shareholders' approval is required for certain matters, including the following:

- *a* amending the articles;
- *b* mergers, corporate demergers, statutory share exchanges, statutory share transfers, assignment of business and reduction of stated capital;
- *c* election or dismissal of directors and corporate auditors; and
- *d* decisions regarding dividends of surplus (if a company has an accounting auditor and a board of corporate auditors or committees, however, and the term of office of its directors is no more than one year, the authority to determine the distribution of dividends of surplus can be delegated to the board by the articles).

Rights of dissenting shareholders

Shareholders who object to the proposed agenda specifically listed under the Companies Act, such as certain amendments to the articles and certain mergers and acquisitions, may demand that the company purchase their shares at a fair price. This price will be determined through negotiation between the parties (i.e., the company and the dissenting shareholder) or by court decision. If such a demand is made and the parties are able to come to an agreement on the share price, the company must make the payment to the dissenting shareholder within 60 days of the effective date of the transaction contemplated in the proposed agenda to which the dissenting shareholder objected. If the parties are unable to reach an agreement with regards to the share price within 30 days of the effective date, either the dissenting shareholder or the company may file a petition to a court for a determination of a fair price within 30 days of the expiration of that initial 30-day period.

Recently, in the *Tecmo* case[9], the Supreme Court of Japan presented a framework for determining a 'fair price' under appraisal proceedings in cases where a joint share transfer (where two or more companies form a new holding company under the Companies Act) creates synergies. In this decision, the court found that:

a a fair price should be, in general, the value that such share should have had on the date on which the shareholder made a demand to the company for the repurchase of the share, on the assumption that the share transfer ratio designated in the share transfer plan is fair; and

b if a share transfer comes into effect through procedures that are generally recognised as fair, such a share transfer ratio should be seen as fair unless special circumstances existed that hindered the shareholders' ability to make reasonable decisions in the shareholders' meeting.

ii Shareholders' duties and responsibilities

Major shareholders' duties and practice

Under the Companies Act, shareholders do not owe duties to the company other than paying the required share capital contribution for the shares to which they have subscribed. However, under the SLRs, if a listed company conducts certain transactions with its controlling shareholder, such as issuing shares or conducting mergers or business alliances, the company must obtain an opinion from a third party who is independent from its controlling shareholder that such a transaction would not undermine the interests of minority shareholders of the company.

There are no specific duties of controlling shareholders to the company or other minority shareholders under the Companies Act. In an extreme case where a controlling shareholder abuses the company or other minority shareholders (e.g., a transaction with the company involving extremely unfair consideration or a squeeze-out of minority shareholders at an extremely low price), it may be liable for such abusive acts under the Civil Code or other laws, although there are no clear-cut standards for such cases.

9 Supreme Court, 29 February 2012.

iii Shareholder activism

Derivative actions

Under the Companies Act, a shareholder can demand that the company file an action to pursue, *inter alia*, directors or corporate auditors for their liabilities to the company if the shareholder has held shares of the company for the preceding six consecutive months or more. If the company does not file an action within 60 days of receipt of the demand from the relevant shareholder, the shareholder can file an action on behalf of the company.

Further, under the Reform Act, 'multiple' derivative actions will be allowed, subject to certain conditions, where, *inter alia*, a director or corporate auditor of a company might be sued by a shareholder of the company's ultimate wholly owning parent company[10] as long as, *inter alia*, (1) the shareholder owns 1 per cent or more of the total voting rights or outstanding shares of the ultimate parent company and (2) the book value of the shares of the company constitutes more than 20 per cent of the total assets of the ultimate parent company as of the date of occurrence of the underlying events that gave rise to relevant obligations of such director or corporate auditor, etc.

Proxy battles

The FIEL stipulates the rules for proxy fights in listed companies. Under the FIEL, a shareholder or the company that solicits a proxy must provide the other shareholders with a certain set of documents (including a proxy and reference materials that set forth the agenda). It is generally considered to be difficult for a shareholder to embark on and succeed in such a proxy fight, mainly because the shareholder does not know the agenda of the shareholders' meeting until the convocation notice is sent by the company. In the past, because the Companies Act could be interpreted as allowing the company to refuse to provide the names, addresses and other information of other shareholders to a shareholder who wishes to solicit the proxy if the bidder is or works for a competitor of the company, the bidder could encounter even more difficulties. However, under the Reform Act, even if the bidder is a competitor of the company, the company may not refuse to provide such information about other shareholders for that reason. In this sense, one of the hurdles to a shareholder embarking on a proxy fight would be alleviated.

VI OUTLOOK

The Companies Act reform bill was passed by the National Diet on 20 June 2014. The primary objective of the Reform Act is to improve corporate governance (e.g., the 'comply-or-explain' rule for the appointment of outside directors), and to regulate the relationship between parent companies and their subsidiaries (e.g., clarify the liabilities and rights of parent companies with respect to their subsidiaries (including derivative actions by shareholders of a parent company against the directors of its subsidiary)). The Reform Act will be enacted on 1 May 2015. In addition, the Financial Services Agency of

10 The company that directly or indirectly owns 100 per cent of the shares of such company, but that is not a wholly owned subsidiary of any other company.

Japan and the TSE plan to formulate Japan's Corporate Governance Code (the Code)[11] in or around June 2015. The Code would establish fundamental principles for effective corporate governance, including a structure for transparent, fair, timely and decisive decision-making by companies, which pays due attention to the needs and perspectives of shareholders and also customers, employees and local communities. The Code would be applicable to all companies listed on securities exchanges in Japan. Corporate governance will continue to be a hot issue in Japan up to and after the enactment of the Reform Act.

11 The exposure draft of the Code is available at www.fsa.go.jp/en/refer/councils/corporategovernance/20141226-1/01.pdf.

Appendix 1

ABOUT THE AUTHORS

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Mitsuhiro Harada has been a partner in the M&A/corporate group at Nishimura & Asahi since 2010 and was previously seconded to the US international law firm, Sullivan & Cromwell LLP, in New York for one year. Mr Harada has represented Japanese and non-Japanese buyers and sellers in numerous cross-border commercial transactions in various industries, including stock and asset acquisitions, private equity and venture capital investments, joint ventures and strategic alliances.

Mr Harada graduated from the University of Tokyo (LLB) in 1999 and gained his LLM from New York University School of Law in 2006. He was admitted to the Japanese Bar in 2000 and the New York Bar in 2007.

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Mr Nakayama obtained his LLB from the University of Tokyo in 2004, and his LLM degree and the Certificate of Merit Award in Mergers and Acquisitions from the University of Michigan Law School in 2012. Mr Nakayama was admitted to the Japanese Bar in 2005 and the New York Bar in 2013.

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