Shareholder Activism & Engagement

Contributing editors
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GETTING THE DEAL THROUGH

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Shareholder Activism & Engagement 2016

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General

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

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

The Financial Instruments and Exchange Law (FIEL) and its relevant orders and ordinances regulate or provide for:

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

The FIEL has both civil and administrative aspects. It is therefore enforced through court rulings and administrative actions by the relevant authorities, such as the Financial Services Agency and the Securities and Exchange Surveillance Commission (SESC). In some cases, criminal sanctions may be imposed for certain violations.

Both the Act and the FIEL are legislated and amended by the Diet, while relevant Cabinet orders and ordinances are enacted by the Cabinet or by various ministries or agencies, as the case may be.

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

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

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

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

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

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

3 Are some industries more or less prone to shareholder activism? Why?

While there is little observable bias among the industries targeted by activist shareholders, on an individual company level, one or more of the following factors often apply to the targeted listed companies:

- low price-to-book ratio;
- excess cash or cash equivalents;
- management scandals or inefficient management;
- status as a conglomerate; and
- status as a listed subsidiary.

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

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

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

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

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on?

Traditionally, dividends and share buybacks have been the main areas of shareholder activism in Japan. Another common request by activist shareholders is the introduction of or increase in the number of outside directors.

Recently, US-based activist shareholders, such as Third Point, have requested that Japanese companies make drastic business divestures.

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

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

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

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

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

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

With respect to general shareholders' meetings, which must be held at least annually, activist funds submit shareholder proposals as mentioned in question 6, and sometimes wage proxy fights to pass their proposals.

While it is not so common, activist funds can also threaten to launch a TOB to the target shares. In addition, some activists use the threat of a lawsuit against the targeted company or its management.

However, regulations on giving benefits to shareholders prohibit any person, including activists, from demanding money or any form of benefit, including a company buy-back of activists' shares, in return for withdrawing their shareholder proposals or requests.

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

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

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

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

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

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

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

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

Shareholders may nominate directors who are not on the company's slate. Nominations are considered to be shareholder proposals. See question 6 for the appropriate procedures.

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

Shareholders may bring derivative actions (section 847, the Act). Shareholders who have continuously held shares for more than six months may demand that the company sue its director (and other officers, if applicable). If the company does not file the lawsuit within 60 days after the demand, the shareholders may bring a derivative action on behalf of the company. The shareholders of the parent company may also file a derivative suit against directors (and officers, if applicable) of wholly owned subsidiaries of the parent company (ie, a double or multiple derivative suit) if such subsidiary does not file the lawsuit within 60 days after the demand against the subsidiary by the parent company's shareholders.

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

Japan does not have class action lawsuits similar to those in the United States, and a person cannot file a multi-plaintiff litigation without obtaining the approval of each plaintiff. Though a new type of 'consumer litigation'

will soon be introduced, securities transactions will be outside the scope of this new type of litigation.

Company response strategies

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

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

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

Almost 500 Japanese-listed companies have adopted large-scale share purchasing policies. Under such a policy, a company implements procedures in advance that a potential raider must follow, though the company does not issue rights or warrants (unlike poison pills in the United States). If a potential raider crosses the threshold (typically, 20 per cent) without complying with the procedures, or a potential raider is recognised as an 'abusive raider,' new shares will be issued and allocated to all shareholders other than the violating raider, thus the raider's shareholding will be diluted.

Other than such a policy, structural defences such as dual capitalisation are rarely possible because of the Act or exchange regulations. In addition, as the term of office of a director at a Japanese listed company is one or two years depending on its governance structure, a staggered board is not a practically effective measure.

While there are few cases where the validity of anti-takeover defence measures has been tested, in the Bull-Dog Sauce case, the Supreme Court recognised the validity of an anti-takeover defence implemented by the company (Bull-Dog Sauce) because the defence was fair and reasonable. Though the anti-takeover defence measures implemented in the case did not involve a large-scale share purchasing policy, the Supreme Court stated in an obiter dictum that such a policy had a net positive effect as it heightened the predictability of the outcome of a takeover. The Supreme Court also followed the logic in the guidelines issued by the Japanese Ministry of Economy, Trade and Industry (see question 2).

14 May shareholders have designees appointed to boards?

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

Disclosure and transparency

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

Articles of incorporation for all listed companies are available on the Electronic Disclosure for Investors' Network as an exhibit of the Securities Report.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

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

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

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

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure?

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

There is no provision similar to Regulation FD that directly requires equal disclosure to all shareholders. However, the disclosure of insider information to specific shareholders under certain circumstances may result in a violation of insider trading regulations.

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

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

19 Must shareholders disclose significant shareholdings?

The FIEL requires a shareholder of a listed company to file a report of the possession of a large volume of shares within five business days after the shareholding ratio of the shareholder exceeds 5 per cent. To determine the shareholding ratio, shares obtained by certain types of stock lending and certain share options have to be aggregated. Though the long positions of total return swaps are generally not included, certain types of total return swaps conducted for purposes other than pure economic profit or loss must also be aggregated. Consequently, in some cases, activists have not filed a report of the possession of a large volume of shares even though they purported to 'own' more than 5 per cent and have made certain demands or held certain conversations as large shareholders.

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

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

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

Additionally, in certain transactions where an acquiring company and a targeted company are considered to be large by industry regulations, antitrust laws require a prior filing and mandate an appropriate waiting period. Further, Japanese Foreign Exchange and Foreign Trade Control law requires non-Japanese investors to make the filing prior to acquiring 10 per cent or more shares of listed companies in certain industries designated by the Japanese government as vital to national security, public order or the protection of public safety. Such industries include, among others, electric power, natural gas, telecommunications, broadcasting and railways. The Japanese government may suspend or modify the proposed acquisition of a business in any of these industries. For example, in 2008, the Japanese government ordered the Children's Investment Fund to suspend its acquisition of more than 10 per cent of the shares of Electric Power Development Co, Ltd (known as J-Power).

Update and trends

Public image of activists in Japan

Similar to how Boon T Pickens established the public image of 'corporate raiders' in the 1980s, Yoshiaki Murakami, a former official of the Ministry of International Trade and Industry, was one of the key players who influenced the public's image of 'shareholder activists' in the early 2000s in Japan.

Mr Murakami first showed up on centre stage during a widely publicised proxy fight against Tokyo Style Company in 2002, which was one of the first proxy fights launched by an activist shareholder. Thereafter, Mr Murakami and his affiliated funds, often referred to as 'Murakami Funds' played a central role in many cases of shareholder activism in the Japanese market.

Murakami Funds' strategy was straightforward – they would target a company that held extra cash or was not very highly leveraged and request additional dividends or share buy-backs. Mr Murakami would also often utilise mass media to attack company management in order to attract public attention.

One of the most famous examples of a proxy fight involved Nippon Broadcasting System (NBS). NBS was a radio broadcasting company that was also the largest shareholder in Fuji Television Network (Fuji TV), a key television network company.

In June 2004, Murakami Funds was the largest shareholder in NBS and had requested that NBS reorganise the group structure in order to establish a joint holding company with Fuji TV. It was anticipated that Murakami Funds would then tender its shares during Fuji TV's TOB. Suddenly, however, Livedoor announced in February 2005 that it held approximately 35 per cent of the shares in NBS and competed against the existing friendly TOB by Fuji TV by trying to acquire more shares in the open market. It was subsequently discovered that Murakami Funds sold its shares to Livedoor rather than to Fuji TV. Fuji TV and Livedoor eventually reached a settlement at substantial cost to each party, but Murakami Funds was perceived to be the only party who succeeded in making a great profit from the deal.

While the NBS case initially instilled the public with an impressive image of Mr Murakami, Mr Murakami was ultimately prosecuted for insider trading for his sale of NBS shares to Livedoor. After a lengthy court battle, the Supreme Court found Mr Murakami guilty and he faded from the mainstream until 2013, when he returned to the Japanese capital market with new affiliated funds managed by his daughter. In order to impress his return upon the public, the managing company of one of his affiliated funds, C&I Holdings, launched a hostile proxy fight against Kuroda Electric, an electronic parts trading company, in 2015.

However, in late November 2015, it was widely reported that the SESC suddenly launched a dawn raid on Mr Murakami, on the suspicion of making abusive short sales and market manipulation. Mr Murakami published a rebuttal on C&I Holdings' website, claiming that he 'never had any intention or reason to abuse the market.'

Although we are not sure how the case will be resolved in the future, the public image of 'activist shareholders' might be affected by Mr Murakami again, which would be an unfortunate step back in current attempts to build strong rapport between activist shareholders and listed companies.

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

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

The FIEL requires a mandatory TOB be conducted when a purchaser acquires shares from off-market trading and consequently holds one third or more of all voting rights. If multiple purchasers act in concert, the above threshold, one third, is determined in aggregate. Therefore, if the aggregate shareholding ratio of shareholders acting in concert exceeds one-third and such shareholders intend to acquire additional shares in an off-market transaction, they must make a TOB. This requirement, however, does not apply to share acquisitions in the market. In addition, even a mandatory TOB does not necessarily result in the acquisition of all the shares of the targeted company, and the purchaser may make a capped TOB.

Certain Japanese companies have adopted large-scale share purchasing policies, or 'advance warning-type takeover defence measures', which:

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

Under such a rule, the specific percentage is often determined by the shareholding ratio of the purchasers acting in concert. Such 'advance warning-type takeover defence measures', referred to as the Japanese rights plan by some Japanese practitioners, does not distinguish between market trading and off-market trading. In determining whether the tender offer is 'abusive,' whether the offer is made for all shares of the targeted company is generally an important factor. Therefore, an activist may have limited strategies against companies that have implemented large-scale share purchasing policies.

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21 What are the primary rules relating to communications to obtain support from other shareholders?

Regulations on proxy solicitations or Japanese proxy rules apply to both companies and shareholders when they solicit proxies (section 194, the FIEL; section 36-2 to 36-6, Enforcement Order of the FIEL; and Cabinet Office Ordinance on the Solicitation to Exercise Voting Rights of Listed Shares by Proxy). If a company solicits proxies, offering certain economic benefits to shareholders to facilitate favourable voting results may violate regulations on giving benefits under the Act. Currently, social media platforms (such as Twitter and LinkedIn) are not commonly used as communication tools during any campaign between the targeted company and the activist.

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

While organised engagement among activist shareholders is not common, when an activist shareholder launches a campaign, other activist shareholders may support such a campaign.

23 Are directors commonly involved in shareholder engagement efforts?

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

Fiduciary duties

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

In general, a director's duty with respect to an activist proposal is similar to other board decisions, namely, the business judgement rule. Unless there is a conflict of interest between the company and the directors, and unless there is a violation of laws or the articles of incorporation of the company, the court generally respects the wide discretion of the board, assuming that the board made a reasonable decision that duly recognised the applicable facts and circumstances. However, even under this Japanese business judgement rule, Japanese courts may sometimes carefully scrutinise the context and situation surrounding the board's decision. In Japan, it has thus far been understood that no controlling shareholder owes any fiduciary duty to minority shareholders.

Getting the Deal Through

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