

Corporate Governance

Companies Act Amendments to Enhance Corporate Governance

The Companies Act of Japan was amended on December 4, 2019 ("Amended Companies Act"), based on the Interim Proposal and the Outline previously issued by the Legislative Council (please see the [March 2018 issue](#) and [February 2019 issue](#) of this newsletter). The Amended Companies Act, which includes various amendments as outlined below, will come into force on or before June 11, 2021, the exact date to be specified by a Cabinet Order.

- Electronic Distribution of Shareholder Meeting Materials** Under the current Companies Act, the consent of each shareholder is required for a stock company to make shareholder meeting materials available via the internet instead of sending the materials to shareholders in writing. The Amended Companies Act will allow companies to make such materials available via the internet, without obtaining the consent of each shareholder, by following certain procedures such as amending their articles of incorporation.
- Limitation of Shareholders' Right to Make Proposals** In order to prevent shareholders from abusing the right to propose matters for adoption by shareholder meeting, the Amended Companies Act will introduce an upper limit of 10 to the number of proposals that a shareholder can submit at a shareholder meeting. Although the bill proposing the Amended Companies Act had originally included a provision allowing companies to reject improper proposals, this was criticized for its potential arbitrary use by companies and so, after further deliberation at the Diet of Japan, was deleted.
- Director Compensation** The Amended Companies Act will revise the rules regarding director compensation such that directors are properly compensated at a level that is reasonable while also providing appropriate incentives for performance of their duties. For example, the Amended Companies Act will obligate directors to explain at shareholder meetings the company's policy for director compensation. In addition, the Amended Companies Act will allow companies to indemnify officers against third-party claims and will introduce new provisions concerning directors and officers liability insurance.
- Mandatory Appointment of Outside Director** The Amended Companies Act will introduce an obligation for listed companies (as well as certain large nonlisted companies) to appoint at least one outside director.
- Establishment of Bond Administration Staff** Under the current Companies Act, when issuing corporate bonds, companies are required to appoint a bond administrator, such as a bank or other financial institution, unless certain exceptions apply (such as if the face value of the bond is JPY100 million or more). However, due to the high cost of hiring bond administrators, in practice, companies tend to avoid appointing bond administrators by relying on the exceptions and administering the bonds themselves, which is not necessarily in the bondholders' interests. The Amended Companies Act will introduce a system that allows certain "bond administration staff," such as individual lawyers, to assist with the administration of bonds on behalf of bondholders, so that bonds may be administered in a manner that is more cost effective for companies and better suited to the interests of bondholders.
- Statutory Share Delivery (*Kabushiki Kofu*)** Under the current Companies Act, when a stock company uses its own shares to acquire another stock company and make it a subsidiary, a third-party inspector must perform a valuation of the shares contributed in kind by the target company's shareholders. By contrast, such a valuation is not required where the buyer company conducts a statutory reorganization called a "share exchange" through which the target company becomes a wholly owned subsidiary of the acquiring company. In order to avoid the application of the more cumbersome rules on contributions in kind, the Amended Companies Act will establish a new type of statutory reorganization called a "Share Delivery (*Kabushiki Kofu*)" with rules equivalent to those of share exchanges pursuant to which a stock company can purchase another stock company with its shares, even where the target company does not become a wholly owned subsidiary.

The Amended Companies Act will have a material impact on corporate law practice in Japan, and companies should take efforts to monitor the impact.

Life Sciences

Amendment to the Pharmaceuticals and Medical Devices Act

The Pharmaceuticals and Medical Devices Act ("PMD Act") was amended on November 17, 2019 ("Amended PMD Act"), and promulgated on December 4, 2019. The amendments can be broken down into the following four areas: (i) improvement of regulations covering product development to post-marketing of pharmaceuticals, medical devices, and regenerative medicine products in order to provide those products more safely, quickly, and efficiently; (ii) enhancement of compliance systems; (iii) review of the roles of pharmacists and pharmacies; and (iv) other revisions.

For the improvement of pharmaceutical, medical device and regenerative medicine product regulations, several systems and procedures were introduced into the PMD Act, including (i) the "*sakigake*" system, a system for shortening the premarketing review period for innovative pharmaceuticals and medical devices; (ii) the conditional early approval system, a system for certain pharmaceuticals or medical devices to receive early approval subject to certain conditions; (iii) a procedure for making partial changes to certain previously approved matters using post-approval change management protocol; (iv) a marketing approval system for medical devices which are to be continuously improved to deal with technical innovation such as artificial intelligence; (v) a provision of package insert information by electronic means; and (vi) mandatory labeling of barcodes.

The amendment relating to the enhancement of compliance systems includes (i) obliging marketing authorization holders and other license holders to establish certain internal compliance systems; (ii) creating administrative fines for the sale of medical products through false or exaggerated advertising; and (iii) codification of procedures for the import of unapproved drugs. The amendment relating to the role of pharmacists and pharmacies includes new regulations concerning patient compliance instruction by videophone. Other revisions include the establishment of an independent committee for the evaluation and monitoring of the government's administration of pharmaceuticals and medical devices in Japan.

The Amended PMD Act will come into effect in three steps: most of the amendment will come into force within one year from the date of its promulgation (December 4, 2019); the obligation to establish compliance systems, the administrative fine system for false or exaggerated advertising, and the requirement of electronic provision of package insert information will come into effect within two years from the date of promulgation; and the mandatory barcode requirements will come into force within three years from the date of promulgation. The Amended PMD Act includes various new regulations which will affect the business activities of life science companies in Japan. Life science companies should closely monitor the content of future enforcement ordinances and industry practice as each component takes effect.

International Trade

Amendments to the Foreign Exchange and Foreign Trade Act

The Foreign Exchange and Foreign Trade Act of Japan ("Forex Act") was amended on November 22, 2019 ("Amended Forex Act"), to incorporate, among other things, certain changes to the definition of "inward direct investment." The Amended Forex Act was then promulgated on November 29, 2019, and will come into effect on a date to be specified by Cabinet Order but no later than six months from the date of such promulgation.

Under the Amended Forex Act, the definition of "foreign investor" will be expanded to include the partnerships where non-Japan investors contribute 50% or more of the investment capital. In that case, the partnership itself, not each investor of the said partnership, will be a "foreign investor" under the Amended Forex Act and must notify or report on certain investment matters. This revision is intended to meet the requests of the venture capital industry to clarify who is obligated to notify and report when an investment fund acquires shares or voting rights of a Japanese company.

Under the current Forex Act, the acquisition by a foreign investor of 10% or more of the stocks or voting rights of a Japanese listed company is considered an "inward direct investment," and accordingly the foreign investor must file either a prior notification (for certain sensitive target industries) or a post-investment report regarding the investment. However, this 10% threshold will be reduced to one percent under the Amended Forex Act. The definition of "inward direct investment" will also include such things as (i) consent by foreign investor(s) to matters that have a material effect on the management of a Japanese company (such matters to be specified by Cabinet Order); (ii) business transfers of Japanese companies to foreign investors; and (iii) mergers, including absorption mergers where a foreign investor acquires a Japanese company. As a result of this expansion to the definition of "inward direct investment," the scope of investments that may be subject to the prior notification or post-investment report requirement will also be expanded.

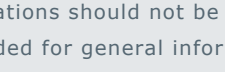
On the other hand, new exemptions to the prior notification requirements for inward direct investments will be introduced. The details of these exemptions have not been determined yet, but it is assumed that portfolio investments will be exempted. It is also assumed that prior notification exemptions will not be applicable to (i) investments by foreign investors who have previously violated the Japan Foreign Investment Law or (ii) certain types of foreign investments specified by Cabinet Order as having an impact on national security. In order to take advantage of such exemptions, it is expected that foreign investors will need to comply with certain conditions set by the Ministry of Finance and the ministries having jurisdiction over the business (e.g., not becoming a board member of the invested company, not proposing a subsidiary, etc.). The details of prior notification exemptions will be stipulated in forthcoming ministerial ordinances and notifications.

Intellectual Property

Enforcement Date of Patent Act Amendment Announced

On November 7, 2019, the Cabinet Order to Specify the Enforcement Date of the Act to Partially Amend the Patent Act, Etc. was promulgated. The Amendment to the Patent Act (excluding certain provisions) will come into force on April 1, 2020. For details, please see the [April 2019 issue](#) of this newsletter.

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