Japan Corporate & Finance Insights May 2021

Topics

Share Delivery - Procedure and Tax Implications

By Kosuke Nakagawa and Junya Horiki

May 27, 2021

I. Summary

"**Share Delivery**" (*Kabushiki-Kofu*) has been introduced by the amendment to the Companies Act of Japan in 2019 (which came into force on March 1, 2021, the "**Amended Companies Act**"). This is a new category of organizational restructuring, in which a Japanese Stock Company (*Kabushiki-Kaisha*, the "**Acquiror**") may acquire another Stock Company (the "**Target**") from its shareholders (the "**Transferors**") using the Acquiror's own shares (as well as other assets held by the Acquiror) as consideration to make the Target one of the Acquiror's subsidiaries (and not necessarily a wholly owned subsidiary). We explain the outline of a Share Delivery from legal and tax viewpoints, and also provide notable points to foreign investors in this memorandum.

A Share Delivery allows an Acquiror to retain its cash reserves, and enables Transferors to obtain shares of the Acquiror so as to enjoy the synergy to be created between the Acquiror and the Target.

Accordingly, a Share Delivery has advantages over a traditional M&A transaction in which 100 percent of the consideration consists of cash in such respects. Details of the procedures for a Share Delivery are set forth in Section II. In addition, tax reform in 2021 allows Transferors to defer capital gain in a Share Delivery, which is a permanent measure. We explain this tax reform and criteria for capital gain deferral in Section III. This tax reform has removed what has been considered one of the largest obstacles to share-consideration M&A transactions in Japan. It is expected that a Share Delivery will facilitate efficient organizational restructuring of a business in consideration for shares of a new buyer and thereby assist in the increase of corporate value, and that these transactions can contribute to the enhancement of competitiveness of Japanese companies.

II. Share Delivery System

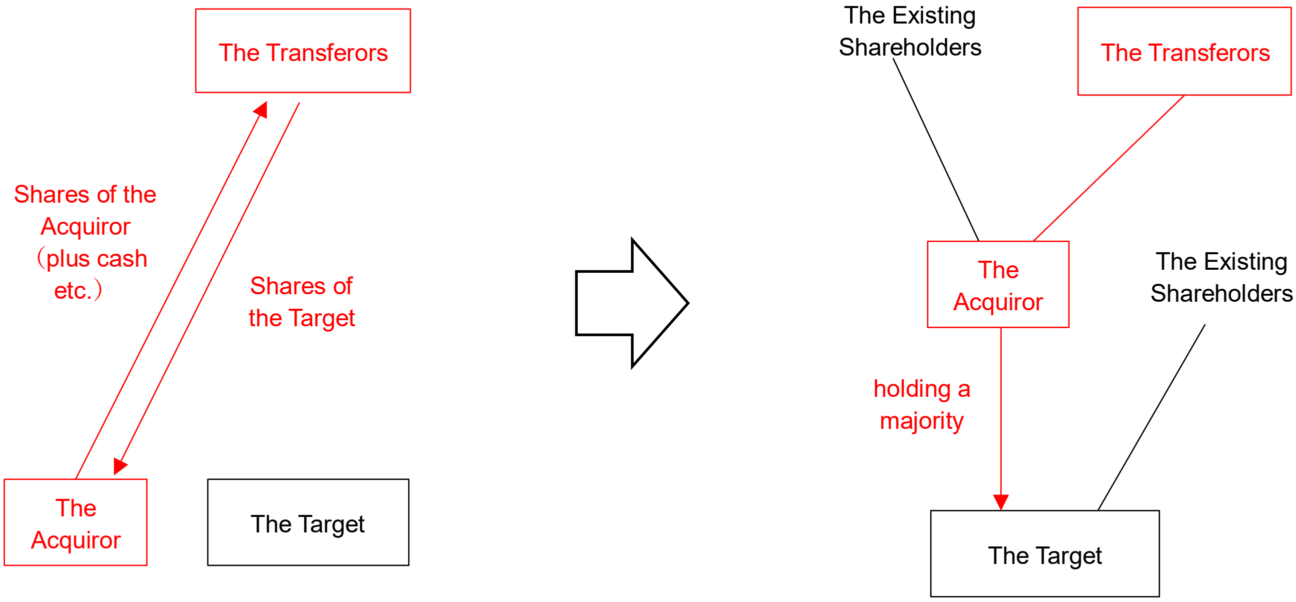
A. Outline of the Share Delivery System

Although prior to the 2019 amendment, the Companies Act permitted Share Exchanges (*Kabushiki-Kokan*) as a means to effect an acquisition using the Acquiror’s own shares, a Share Exchange transaction only can be consummated if the Target becomes a wholly owned subsidiary of the Acquiror. A Share Exchange is not available if the Acquiror seeks only a majority interest in, and not all of, the Target's shares. In addition, a Share Exchange cannot be utilized if it is not approved at a special shareholders meeting of the Target, in principle.

The possible way for gaining a majority interest in a Target by using the buyer’s own shares as consideration before this recent amendment to the Companies Act would be for the buyer to issue its shares to the Target’s shareholders who contribute their own shares of the Target to the buyer (“**Contribution in Kind**”). However, under the Companies Act, as a general matter, a third-party inspector is required to investigate the value of the property contributed in kind to ensure the acquisition consideration paid was a fair price. If the value of the property contributed in kind was significantly less than a certain amount decided in the process for the issuing shares for subscription, then the subscribers for the buyer’s shares and the directors/executive officers of the buyer may be liable to the buyer for that shortfall. The requirement to use such an inspector and the potential liability in case of shortfall in value of property contributed in kind resulted in Contribution in Kind being impracticable as an acquisition method in Japanese M&A transactions. Although these regulations under the Companies Act might be avoided by use of procedures under the ASIC (defined below), the ASIC procedures required an approval of certain elements of the transaction in a formal plan from a competent Ministry, and this approval process caused its own set of practical challenges.

While a Share Delivery requires the Acquiror to conduct procedures relating to an organizational restructuring, it requires neither an inspection by an inspector nor results in the potential liability in case of a shortfall in value of property contributed in kind. With adoption of the 2021 Tax Deferral (defined below), it is expected that the added flexibility of enabling Acquirors to utilize their own shares of stock in a Share Delivery transaction to obtain majority interests in other companies will increase the number of acquisitions of Japanese companies and foster corporate growth and expansion.

Structure Chart of Share Delivery



B. Summary of Procedures

As a technical matter, a Share Delivery is an organizational restructuring where the Acquiror acquires shares in the Target and delivers its own shares to the shareholder(s) of the Target as consideration. Therefore, a Share Delivery is categorized as an organizational restructuring in its nature, along with such transactions as a Share Exchange, a merger, or a company split. Consequently, a Share Delivery requires the Acquiror to conduct procedures relating to an organizational restructuring. On the other hand, unlike other organizational restructurings, a Share Delivery is a set of transfers of shares of a Target based on individual agreements between the Acquiror and the Transferors. Therefore, a Share Delivery has certain characteristics that other organizational restructurings do not have.

1. Procedures on the Acquiror Side

(a) Preparation of a Share Delivery Plan

In a Share Delivery, the Acquiror needs to prepare a Share Delivery Plan that contains certain matters, including:

- trade name and address of the Target;
- the minimum number of shares of the Target to be transferred to the Acquiror;
- the consideration for the Share Delivery;
- the application deadline for the transfer of shares of the Target to the Acquiror; and
- the effective date of the Share Delivery (the "**Effective Date**").

The minimum number of shares to be transferred to the Acquiror must be sufficient to make the Target a subsidiary of the Acquiror. This "subsidiary" is limited to a Stock Company in which another Stock Company holds a majority of the voting rights. This regulation is intended to facilitate the decision for validity of a Share Delivery. (The Companies Act definition of a "subsidiary" refers to a company of which the management is controlled by another company and such control can be, but is not required to be, in the form of voting rights. Thus, it is possible for a Stock Company to have a "subsidiary" of which it controls the management, even if it owns less than a majority of the voting rights of that other company. However, in order for the Share Delivery transaction to be consummated, the Acquiror has to obtain a majority of the Target's voting rights – and not just to obtain management control of the Target – in order for the Target to be a subsidiary following consummation of the transaction.)

(b) Special Resolution of Shareholders Meeting for a Share Delivery Plan

A Share Delivery Plan must, in principle, be approved by a special resolution (passed by a majority of at least two-thirds) of a general meeting of shareholders of the Acquiror. The details of the Share Delivery Plan are typically determined by a resolution of the Acquiror's Board of Directors. However, as with other organizational restructurings, the following rules apply:

First, in a situation where the Acquiror is expected to incur an accounting loss from the Share Delivery transaction, the directors of the Acquiror are obligated to explain the circumstances surrounding that loss at the general meeting of shareholders where approval of the Share Delivery Plan is to be considered. In addition, if the value of the consideration delivered by the Acquiror in a Share Delivery transaction is equal to or less than 20 percent of the Acquiror's net assets (this threshold can be lower if so specified in the Acquiror's Articles of Incorporation), the approval of the general meeting of shareholders of the Acquiror is not required, in principle (this is known as a "**Simplified Share Delivery**"). A Simplified Share Delivery may not be used, however, if an accounting loss is expected to result from the transaction, or if the Acquiror is a company subject to restrictions on transferability in its Articles of Incorporation (a "**Non-Public Company**").

(c) Offer to Transfer

If the Target is a Non-Public Company, the Acquiror would need to approach management of the Target and identify those shareholders who might be willing to transfer their shares of the Target with voting rights in sufficient amount so as to cause the Target to become a subsidiary after the Share Delivery. Following this process of shareholder identification of potential Transferors, the Acquiror notifies those shareholders of the Target who, the Acquiror believes, intend to apply for a transfer based on a Share Delivery of the details of the Share Delivery Plan. Those potential Transferors then apply for the transfer (as such, an "**Applicant**") and deliver to the Acquiror a document that includes information regarding the Applicant's name and address and the number of shares the Applicant is seeking to transfer by the application deadline for transfer as set forth in the Share Delivery Plan.

If the Target is a listed company, the tender offer bid rules under the Financial Instruments and Exchange Act (the "**FIEA**") apply. If the Acquiror is a listed company, certain disclosure requirements under FIEA and the relevant Stock Exchange apply regarding delivery of the Acquiror's shares to the shareholders of the Target. Please see "C. Notable Points – 3. Securities Regulations" below.

(d) Allotment of Acquiror's Shares to Applicants

The Acquiror can decide from which of the Applicants it will accept Target shares in the Share Delivery, and how many of the Applicants' shares of the Target it seeks to be transferred to it (again, so long as a result of such share transfers, the Acquiror gains a majority of the voting rights of the Target). Such decisions normally will be made by the Board of Directors of the Acquiror since these transaction terms fall under the execution of important business operations of the Acquiror. However, as described in "C. Notable Points – 3. Securities Regulations" below, if the Share Delivery is subject to regulation as a tender offer, then the Acquiror has no discretion to choose among the Applicants or how many Target shares it seeks to acquire from each shareholder.

(e) Consummation of a Share Delivery

The Acquiror must notify the Applicants, no later than the day immediately preceding the stated Effective Date, of the number of shares of the Target that it will accept in transfer from the Applicants. Then, on the Effective Date, the Transferors deliver to the Acquiror those shares notified to them by the Acquiror, and the Acquiror delivers its own shares to those Transferors. However, the Share Delivery will not be effective (i) if the total number of the Target shares acquired by the Acquiror is less than the minimum number specified in the Share Delivery Plan, (ii) if the creditors' objection procedures described below have not been completed, or (iii) in certain other cases. If, on or after the Effective Date, the Share Delivery is not successful because it failed to meet those conditions, then the Acquiror must return the shares of the Target to the Transferors, and the Transferors must return the Acquiror’s shares to the Acquiror. As a side note, the Acquiror may change the originally specified Effective Date in the Share Delivery Plan to another date that is within three months from such original Effective Date. This is because, when a tender offer is made using a Share Delivery, the tender offer period is 20 to 60 business days, and in some cases, the tender offer period may exceed 60 business days in conjunction with the initial period; however, it is necessary to restrict the change in a Share Delivery’s Effective Date to a certain extent so as not to unreasonably harm the Transferors' interests.

(f) Record Retention Requirements

As with other corporate reorganizations, Acquirors must maintain certain records at their head offices before and after a Share Delivery takes effect, until six months have passed since the Effective Date. These records include the terms of the Share Delivery Plan and other items specified in a Ministry of Justice Order.

(g) Procedures for Objection of Creditors

If the consideration for the Share Delivery includes any cash or assets of the Acquiror (excluding the Acquiror’s shares), the amount of which is 5 percent or more of the aggregate amount of the consideration (including the Acquiror’s shares), creditors of the Acquiror may raise an objection to the transaction. In this case, the Acquiror is required, as with other organizational restructuring procedures, to follow certain procedures dealing with creditors, such as making a public notice and providing a notice to each known creditor. Creditors of the Acquiror in these circumstances have at least one month period from the date of publication or the date of their notices during which they can object to the Acquiror. This is because if the amount of the consideration exceeds a certain amount, the financial situation of the Acquiror might deteriorate, and there is a need to protect creditors' interests against such Share Delivery. On the other hand, if the Acquiror is only transferring its shares to Transferors in return for shares of the Target, no procedures to protect the Acquiror's creditors are required.

(h) Remedies for the Acquiror's Shareholders

As with other organizational restructuring procedures, if there is a violation of law or regulation or a breach of the Acquiror's Articles of Incorporation in a Share Delivery, which may be detrimental to shareholders of the Acquiror, those shareholders of the Acquiror are entitled to obtain injunctive relief, except in the case of a Simplified Share Delivery.

Further, as with other organizational restructuring procedures, dissenting shareholders of the Acquiror who are against the Acquiror engaging in a Share Delivery have appraisal rights as a remedy, again except in the case of a Simplified Share Delivery.

(i) Possible Claims Seeking Invalidation

Once a Share Delivery is consummated, various kinds of legal relationships will be created based on the validity of the Share Delivery. If there is no temporal limitation on seeking invalidation of the Share Delivery, the legal relationship would become uncertain. Therefore, as with other organizational restructuring procedures, a claim seeking invalidation of a Share Delivery can be asserted only by means of a lawsuit filed within six months of the transaction's Effective Date. While there are no specific provisions regarding the bases for the invalidation of an organizational restructuring including a Share Delivery, a majority view is that these bases are limited to serious defects in the organizational restructuring procedures. For example, it is expected that the bases for bringing an invalidation claim with respect to a Share Delivery will be that the Share Delivery Plan for such transaction did not meet the legally required conditions, that there was a defect in the resolution of the general meeting of shareholders approving the Share Delivery Plan, and/or that the procedures for creditors' objections were not implemented.

2. Procedures on the Target Side

Although a Share Delivery is categorized as an organizational restructuring and involves an exchange of shares of the Target for those of the Acquiror, it does not require a contract between the Acquiror and the Target because the transfers of shares of the Target are based on individual agreements between the Acquiror and the Transferors (i.e., the shareholders of the Target). Accordingly, it is not expected that the Target itself will need to engage in any procedures (such as seeking resolutions at the general meeting of shareholders, dealing with possible appraisal rights for dissenting shareholders, or having procedures dealing with objections of creditors) with respect to a Share Delivery transaction of which it is the subject.

However, if the shares of the Target are shares with restrictions on transfer (i.e., the Target's Articles of Incorporation set forth certain restrictions on transfer of shares, such as requiring the approval of the Board of Directors or the general meeting of shareholders of the Target), then such restrictions must be complied with in order for Transferors to transfer their shares to the Acquiror in a Share Delivery. Thus, to some extent, shareholders of the Target are protected.

In addition, the tender offer rules and the offering disclosure requirements under the FIEA also could apply to a Share Delivery, as described below in "C. Notable Points – 3. Securities Regulations".

3. Time Period Required for a Share Delivery

The period to complete the procedures for a Share Delivery depends on whether the resolution of the general meeting of shareholders of the Acquiror is required (for the approval of a Share Delivery Plan), the procedure for the Acquiror's creditors to object is required (a minimum one-month period is necessary in such cases, as discussed earlier), or, if the tender offer rules are applicable, how many days the tender offer period is set for, among other things. Generally, it is thought that if the Target is a listed company, it would take approximately two to four months from the date of resolution of board of directors meeting for the Share Delivery Plan to the Effective Date because of the applicable tender offer rule. In addition, it is expected that Acquirors will engage in standard due diligence of approximately one to two months in order to prepare the Share Delivery Plan.

C. Notable Points

1. Use and Acquisition of Other Securities and Assets in a Share Delivery

In addition to the shares of the Target, an Acquiror also may receive in transfer, and thereby acquire, share options of the Target. However, it is not permissible for an Acquiror to acquire only share options without also acquiring the Target's shares.

The consideration to be transferred by an Acquiror to the Transferors as noted earlier can be, in addition to its own shares, cash or other assets (or a combination of both); however, at least some component of the consideration must include the Acquiror's own shares. (As discussed above, however, this may trigger the obligation for an Acquiror to follow certain procedures designed to protect its creditors.) Other assets in this context include not only the Acquiror's bonds, share options, and bonds with share options, but also in theory at least shares of the Acquiror's parent company. However, a company is prohibited, in principle, from acquiring shares of its parent company, and a Share Delivery is not an exception to this prohibition. Thus, a stock consideration M&A transaction conducted by a subsidiary using its parent company's shares, such as in a triangular merger, is not permitted in a Share Delivery. Whether or not a Stock Company may acquire the shares of a foreign company which is its parent company would be determined by the law applicable to the foreign company.

2. Limitations on Share Delivery Transactions

As noted earlier, a Share Delivery can only be effected by a Stock Company making another Stock Company its subsidiary, such that the Acquiror gains a majority of the Target's voting rights (and not just management control). Therefore, this transaction structure cannot be used (i) if the percentage of an Acquiror's shareholding does not reach a majority of the voting rights of a Target following the transaction, or (ii) if the Acquiror already owns a majority of the Target's voting rights.

In addition, Targets in a Share Delivery cannot be non-stock companies or a foreign company. Further, a Share Delivery cannot be used when either the Acquiror or the Target is a company under liquidation.

A foreign company cannot be an Acquiror in a Share Delivery, but a foreign company may use a Share Delivery transaction to acquire a majority of the shares of the Target through its Japanese subsidiary (whether an operating company or a SPC). In this case, procedures under the Foreign Exchange and Foreign Trade Act of Japan may be required if the transaction involves inward foreign direct investment and similar matters.

3. Securities Regulations

(a) Securities Offering Regulations

As mentioned previously, a Share Delivery is essentially a set of transfers of shares of a Target based on individual agreements between the Acquiror and the Transferors. Unlike other organizational restructurings that are exempt from regulation as a tender offer under the FIEA, if the Target is a company submitting an annual securities report to regulatory authorities (i.e., it is a listed company), the acquisition of its shares by conducting a Share Delivery transaction will be subject to the tender offer rules, in principle.

Under an applicable tender offer rule, even when limiting the number of shares to be acquired, the number of such shares must be determined according to a pro rata formula, and thus the Acquiror cannot select from which shareholders the Acquiror purchases the shares of the Target or how many shares of the Target the Acquiror purchases from each shareholder. In addition, in this case, if after the Share Delivery the Acquiror would hold shares of the Target in two-thirds or more of its total shares, then the Acquiror is obliged to solicit for, and to purchase, all of the Target's shares offered to sell in accordance with the tender offer rules.

Further, if the Acquiror is a listed company and issuance of the Acquiror's shares as consideration in a Share Delivery constitutes a "Public Offering of Securities" of the Acquiror, then the offering disclosure requirements under the FIEA may apply in principle, such as requiring the submission of securities registration statement and preparation and delivery of a prospectus.

(b) Insider Trading Regulations

Under the FIEA, insider trading regulations apply to certain transactions made by insiders relating to a listed company or a tender offeror, including, without limitation, the following:

- Insiders relating to a listed company that come to know a certain material fact (a "**Material Fact**") about the business of the listed company must not effect a transfer or acquisition for value of certain securities of the listed company before public disclosure of the Material Fact;
- Persons affiliated with a tender offeror who come to know the fact that a tender offer will be launched or suspended by the tender offeror for listed shares, must not effect a purchase or a sale of such listed shares before the public disclosure of the fact that the tender offer will be launched or suspended (as the case may be); and
- Prohibition of providing information on an unpublished Material Fact.

A Material Fact includes both (i) a decision to seek a Share Delivery transaction and (ii) a decision of an acquisition of shares or equity interests followed by a change in a subsidiary. Therefore, if the Acquiror is a listed company, and the Acquiror decides to effect a Share Delivery with respect to a Target, the insider trading regulation will apply until the "decision to effect a Share Delivery" and the "decision of an acquisition of shares or equity interests followed by a change in a subsidiary" are publicized by the Acquiror in a timely manner.

The Target is not in a position to decide whether a Share Delivery is to occur with respect to itself because as noted above, the Target is not a party to such a transaction. However, a Material Fact with respect to a Target includes both (i) a change in a parent company and (ii) a change in major shareholders. Therefore, if the Target is a listed company, and a Share Delivery is to be effected, the insider trading regulation will apply until the "change in a parent company" and the "change in major shareholders" are publicized by the Target in a timely manner. In this regard, if the Target is a listed company, a transfer or acquisition of the Target shares between each Transferor and the Acquiror may constitute a "transfer or acquisition for value of certain securities of the listed company", and so each such transaction also would be subject to the insider trading regulation.

Further, if the Target is a listed company, a Share Delivery is in principle subject to the tender offer regulations as mentioned above, and accordingly, the insider trading regulation will apply until the "fact that a tender offer will be launched or suspended by the tender offeror for listed shares" is publicized by the Acquiror through timely disclosure, public notice for commencing a tender offer, and other means.

III. 2021 Tax Reform Measures

A. Tax Reform Impact on a Share Delivery

1. Outline of Tax Reform

One of the highlights of the 2021 tax reform measures in Japan is a tax deferral on capital gain arising from the transfer of shares in a Share Delivery (the "**2021 Tax Deferral**"). This 2021 Tax Deferral is part of the Government of Japan's efforts to promote efficient restructuring of businesses by companies as well as to maintain and strengthen a company's competitiveness.[1]

Historically, the tax law in Japan has required shareholders to pay tax on capital gain even if, as in certain M&A transactions, they transfer shares of a company being sold and obtain shares of the buyer as consideration and have not realized any cash in the transaction (except in the cases where

[1] "Outline of 2021 Tax Reform" as of December 10, 2021, The Liberal Democratic Party of Japan, https://jimin.jp-east-2.storage.api.nifcloud.com/pdf/news/policy/200955_1.pdf, and "Regarding Outline of 2021 Tax Reform", Masanobu Fujishima https://www.mof.go.jp/public_relations/finance/202102/202102d.pdf

shares of the buyer are obtained as consideration for shares of a company being exchanged in certain corporate reorganization procedures). Because of this unfavorable tax result affecting selling Japanese shareholders, a buyer could not rely on using its own shares as consideration in a M&A transaction, unlike in other countries (such as the United States, Britain, France, and Germany). The impact has been that buyers generally are required to use available cash or borrow funds to proceed with an acquisition, even if their own shares otherwise would be acceptable consideration to a seller. This tax approach was one of the causes slowing down M&A transactions in Japan, particularly by buyers without available access to funds.

The Japan Business Federation (*Keidanren*) began to advocate for a change to this tax treatment, making a public suggestion for the deferral of capital gain in M&A transactions where the buyer's shares are used as the purchase price consideration in 2018.[2] In response, that year the Diet amended Japan's tax laws by passing the Act on Strengthening Industrial Competitiveness ("**ASIC**"), and following effectiveness of ASIC, shareholders could defer capital gain resulting from a M&A transaction where share consideration was used (the "**ASIC Tax Deferral**"). However, the ASIC Tax Deferral only would be allowed if a buyer obtained an approval from the Ministry having jurisdiction over the buyer. Requirements for such approval were very strict, and as a result, the ASIC Tax Deferral was never utilized. In recognition of the lack of the effectiveness of the ASIC Tax Deferral process, the tax laws again were amended on March 26, 2021 and with effective April 1, 2021, following the amendments to the Companies Act to introduce the Share Delivery system, so that, in the case of a Share Delivery, a Transferor can defer capital gain when it obtains shares of the Acquiror. It is expected, therefore, that this tax change will make it more attractive for Acquirors without significant sources of funding but with shares having a value attractive to Transferors to engage in M&A transactions, and that the selling Transferors will now have more potential buyers for shares of businesses they wish to reduce their exposure to. By both removing tax disadvantages and making it easier for a buyer to use alternative sources of purchase price consideration, it is expected that M&A transaction volume in Japan will increase.

2. Requirements and Applicability of 2021Tax Deferral in a Share Delivery

In order for the 2021 Tax Deferral to apply to a Share Delivery, first, all of the conditions for the Share Delivery requirements under the Amended Companies Act must be satisfied AND second, the Acquiror's shares must account for at least 80 percent of the entire consideration paid to the Transferors in the Share Delivery transaction.

[2] "Suggestion to 2018 Tax Reform", https://www.keidanren.or.jp/policy/2017/067_honbun.pdf

Please bear in mind that even if the 2021 Tax Deferral is applied, it is only applicable to the Acquiror's shares received by the selling shareholders in the Target. As mentioned earlier, while under the Amended Companies Act the Acquiror can use a combination of its own shares and other assets (such as cash, share options, and other securities) as consideration, the 2021 Tax Deferral will only apply to the Acquiror's shares received. Any other assets received by the Transferors in return for their shares of the Target remain subject to possible capital gain tax. This tax result may have a structuring impact on the nature and composition of purchaser price consideration utilized in Share Delivery transactions as a consequence.

In addition, if the Transferor is a foreign corporation or a non-resident, the 2021 Tax Deferral can only be applied to the portion of capital gains on the Acquiror's shares corresponding to shares of the Target managed by the Transferor's permanent establishment in Japan. Please note that even if shares of the Target are not managed by the Transferor's permanent establishment in Japan, the share transfer will not be subject to Japanese capital gain tax in principle unless such transfer (i) falls under transfer of shares subject to the so-called 25%-5% rule (a "**25%-5% Transfer**")[3], (ii) is a transfer of shares of a real estate corporation or (iii) is certain other type of transfer of shares.[4] Even when a foreign corporation is subject to Japanese capital gain tax in a 25%-5% Transfer, such taxation may be exempt depending on if a tax treaty is available and its provisions. Accordingly, there will be some cases where Japanese tax is not imposed on capital gain from transfer of shares of the Target by foreign corporation in a Share Delivery. Nevertheless, because tax implications and effects can vary and are substantively dependent on the tax laws and tax treaties in place, which can change, foreign shareholders must undertake their own analysis on foreign and Japanese taxation, in consultation

[3] Under the 25%-5% Transfer rule, a foreign corporation or a non-resident who is a shareholder of Japanese corporation may be subject to Japanese income tax on the capital gain arising from their transfer of shares of Japanese corporation which are not managed by its permanent establishment in Japan in the following case:

(i) a shareholder of Japanese corporation and other person which has a certain relationship with the shareholder (e.g., parent company, subsidiary or sister company of the foreign corporation or relatives of the shareholder) (collectively, "Special Relation Shareholders"), who includes the foreign corporation or non-resident, had 25 percent or more shares of such Japanese corporation sometime within three years before the end of the business year during which the shares are transferred by the foreign corporation or the non-resident; and

(ii) 5 percent or more shares of the Japanese corporation are transferred by the Special Relation Shareholders. including a foreign corporation or non-resident shareholder, within the business year.

[4] If 50 percent or more of the total assets of a corporation consist of land and certain other assets in Japan or shares of another "Real Estate Corporation" sometime within the period from the date which is 365 days prior to the transfer date until the time immediately prior to the transfer of shares, such corporation is a "Real Estate Corporation". When a shareholder together with another person which has a certain relationship with the shareholder which is a foreign corporation or non-resident who transferred the shares of the Real Estate Corporation, held 2 percent or more (5 percent or more in the case of a listed Real Estate Corporation) of the shares of such Real Estate Corporation on the previous day of the start date of the business year during which the shares of the Real Estate Corporation are transferred, such foreign corporation or a non-resident which transfers the shares of the Real Estate Corporation will be subject to Japanese tax on the capital gain from their transfer of shares of the Real Estate Corporation.

with their tax and other advisers, when considering any transaction in Japan, whether or not structured as a Share Delivery.

B. Comparison with ASIC Tax Deferral

Seeking tax deferral on capital gain in M&A transactions involving shares as purchase price consideration has been sought for a long time. A first response was the introduction of the ASIC Tax Deferral in 2018. As mentioned earlier, the ASIC Tax Deferral was conditioned on the buyer obtaining applicable Ministry approval. This approval was for a special business reorganization plan, and such a plan must satisfy certain requirements, including (x) the buyer paying the entire purchase consideration with its shares only, and (y) the consideration price exceeding the amount of the excess funds of the buyer. It was thought that the timing to obtain the approval would take at least three months from preparation of the filing for the approval to its issuance. As a result, the ASIC Tax Deferral was not a feasible option. The ASIC Tax Deferral expired on March 31, 2021.

A comparison between the 2021 Tax Deferral and the ASIC Tax Deferral is set forth in the table below.

Item	2021Tax Deferral	ASIC Tax Deferral
Scheme	Only Share Delivery	Acquisition of shares, which results in a target company becoming a buyer's affiliate
Limitation on period	None	Until March 31, 2021
Consideration	Acquiror's shares must account for 80% of entire consideration in value or more	Only buyer's shares
Acquiror Entity	Stock Company	Stock Company
Target Entity	Stock Company	A company incorporated under Japanese or foreign law
Approval	None	Approval for a special reorganization plan issued by applicable Ministry

C. Conclusion

As mentioned above, a Share Delivery under the 2021 Tax Deferral requires neither approval by a governmental institution nor the limitation that the consideration price must exceed the amount of the excess funds of the Acquiror, and allows cash or other assets as purchase consideration to the extent it is less than 20 percent of the total consideration. Therefore, with the 2021 Tax Deferral, it is expected that Acquirors can retain cash reserves for use other than business restructuring. With the 2021 Tax Deferral, because Transferors would not need to raise funds for payment of capital gain tax from the share transfer, share consideration via a Share Delivery may become a practicable option for large M&A transactions as well as expedite M&A transactions by emerging companies in Japan. Also, shareholders of a Target may enjoy an increase in corporate value, arising out of the synergy between the Target and the Acquiror after consummation of the Share Delivery.

*　　　*　　　*

If you have any questions regarding the matters covered in this memorandum, please reach out to your usual TMI contact or any of the attorneys listed below.

Authors

Kosuke Nakagawa
Phone: +81 3 6438 5438
Email: konakagawa@tmi.gr.jp

Junya Horiki
Phone: +81 3 6438 5312
Email: jhoriki@tmi.gr.jp

Editors

Kensei Ikeda
Phone: +81 3 6438 5701
Email: keikeda@tmi.gr.jp

Masanori Bito
Phone: +81 3 6438 5524
Email: mbito@tmi.gr.jp

Hiroyuki Yoshioka
Phone: +81 3 6438 5683
Email: hyoshioka@tmi.gr.jp

Amendment to the Companies Act relating to Shareholder Proposal Rights

By Mai Kasuga and Akira Taroda

May 27, 2021

I. Introduction

The Companies Act was amended in December 2019 (the "**Amended Companies Act**"), and a part of the Amended Companies Act, including new restrictions on the Shareholder Proposal Rights came into effect on March 1, 2021.

In this memorandum, we will explain the details of the new restrictions on the Shareholder Proposal Rights and the notable points in practice. These restrictions apply only to the Stock Company (*Kabushiki-Kaisha*), and in this memorandum, the Stock Company is simply referred to as the "**company**."

II. Background regarding this Amendment

A. Categories of Shareholder Proposal Rights

The purpose of the Shareholder Proposal Rights is to dispel shareholders' alienation by guaranteeing the right of shareholders to appeal their will to the shareholders meetings, to communicate with directors or other shareholders, and to make the company more open. Specifically, the Shareholder Proposal Rights include the following three collective rights:

- **The Right to Submit the Agenda**: The right of a shareholder to demand that the directors include certain matters in the purpose (agenda) of the shareholders meeting;
- **The Right to Submit the Proposals**: The right to submit proposals on matters that are the purpose of the shareholders meeting at the shareholders meeting; and
- **The Right to Request Notice of the Proposal Summary**: The right to request the directors to state or record in the convocation notice the summary of the proposals with respect to the

matters that are the purpose of the shareholders meeting.

In the above, the term "agenda" refers to the purpose of the shareholders meeting (i.e., the theme), while the term "proposals" refers to the specific bills for the purpose of the shareholders meeting. However, (i) the distinction between agenda and proposals as well as (ii) the number of proposals are not necessarily clearly defined by this definition. Therefore, it is considered that whether something is a proposal or an agenda, and if it is a proposal, how many proposals there are, should be determined by focusing on the substance of what it contains, and not on the formality of how it is described in the convocation notice of the shareholders meeting.

In a company with a board of directors, the Right to Submit the Agenda must be exercised at least eight weeks before the shareholders meeting (or, if a shorter period is specified in the articles of incorporation, such period). On the other hand, the Right to Submit the Proposals may be exercised at the shareholders meeting (i.e., submission of amended proposals) without any prior notice of the proposals to the company (either with or without a board of directors). However, if a shareholder submits a proposal at the shareholders meeting without any prior notice to other shareholders, it may not be feasible to obtain their approvals. Therefore, under the Companies Act, a shareholder is entitled to exercise the Right to Request Notice of the Proposal Summary at least eight weeks (or, if a shorter period is specified in the articles of incorporation, such period) before the shareholders meeting. In order to exercise the Right to Submit the Agenda and the Right to Request Notice of the Proposals Summary at a company with a board of directors, it is necessary to meet the requirements for the number of voting rights held and the holding period, as well as other requirements such as the exercising deadline described above (at least eight weeks (or shorter period specified in the articles of incorporation) before the shareholders meeting). The following table summarizes these requirements for exercising the Right to Submit the Agenda, the Right to Submit the Proposals, and the Right to Request Notice of the Proposals Summary.

Summary of the Requirements for Exercising the Shareholder Proposal Rights

	Public Company	Non-Public Company	
	Company with a Board of Directors		Company without a Board of Directors
Right to Submit the Agenda	[Voting Rights] A shareholder must have held (i) 1/100* or more of the voting rights of all shareholders, or (ii) 300* or more of the voting rights, for at least six months* prior to the date of the	[Voting Rights] A shareholder must have held (i) 1/100* or more of the voting rights of all shareholders, or (ii) 300* or more of the voting rights. No requirements for holding period.	[Voting Rights] No requirements [Deadline] No requirements

	exercise. [Deadline] A shareholder must exercise the right at least eight weeks* prior to the date of the shareholders meeting.	[Deadline] A shareholder must exercise the right at least eight weeks* prior to the date of the shareholders meeting.	
Right to Submit the Proposals	· Attendance at the shareholders meeting. · (i) The proposal does not violate any laws, regulations, or the articles of incorporation, and (ii) at least three years have passed since substantially the same proposal was not approved by at least 1/10 of the voting rights* of all shareholders at a shareholders meeting (the "**Restriction on the Fleeting Proposals**").		
Right to Request Notice of the Proposal Summary	[Voting Rights] A shareholder must have held (i) 1/100* or more of the voting rights of all shareholders, or (ii) 300* or more of the voting rights, for at least six months* prior to the date of the exercise. [Deadline] A shareholder must exercise the right at least eight weeks* prior to the date of shareholders meeting. [Exercise Requirements] The Restriction on the Fleeting Proposals	[Voting Rights] A shareholder must have held (i) 1/100* or more of the voting rights of all shareholders, or (ii) 300* or more of the voting rights. No requirements for holding period. [Deadline] A shareholder must exercise the right at least eight weeks* prior to the date of the shareholders meeting. [Exercise Requirements] The Restriction on the Fleeting Proposals	[Voting Rights] No requirements [Deadline] A shareholder must exercise the right at least eight weeks* prior to the date of the shareholders meeting. [Exercise Requirements] The Restriction on the Fleeting Proposals

* A company may stipulate in its articles of incorporation a smaller number than each item.

In practice, in a company with a board of directors, it is common that the Right to Request Notice of the Proposal Summary is exercised in conjunction with the exercise of the Right to Submit the Agenda, at least eight weeks before the shareholders meeting, and, in this case, the convocation notice for the shareholders meeting describes the summary of the proposals as shareholder proposals, separately from company proposals.

B. Problems prior to this Amendment

In recent years, there have been cases where the Shareholder Proposal Rights have been abused, especially in listed companies, where a shareholder has submitted an enormous number of proposals (e.g., more than 100 proposals submitted by a shareholder at a single shareholders meeting). An excessive number of shareholder proposals may impair the decision-making function of the shareholders meeting, and increase the costs required for deliberations at the company and printing the convocation notices for the shareholders meeting. However, the Companies Act prior to this

Amendment (the “**Old Act**”) did not contain clear provisions to restrict the number of the shareholder proposals.

III. New Restrictions on the Shareholder Proposal Rights

A. General

In the Amended Companies Act, in order to restrict the abusive exercise of the Shareholder Proposal Rights, with regard to the Right to Request Notice of the Proposal Summary, if a shareholder of a company with a board of directors exercises its Right to Request Notice of the Proposal Summary, the company may limit the number of proposals that may be submitted at the same shareholders meeting to ten proposals, and refuse its Request for Notice of the Proposal Summary for which the number of proposals exceeds ten (the “**Regulations**”).

On the other hand, there remains no limit on the number of agenda or proposals that can be presented under the Amended Companies Act with respect to the Right to Submit Agenda and the Right to Submit Proposals at the shareholders meeting.

Regarding the Right to Submit the Agenda, it is not appropriate to impose restrictions in the Amended Companies Act because (i) the Right to Submit the Agenda is a shareholder’s basic right, and, as opposed to the Right to Submit the Proposals, there is no provision to restrict the submission of substantially the same agenda under the Old Act; (ii) while the abusive exercise of the Right to Submit the Agenda occurs in a company that is required to deliver reference documents for the shareholders meeting (in principle, a company that has 1,000 or more shareholders), that company is considered to be able to reject the exercise of the Right to Submit the Agenda if the shareholder does not add a summary of the Proposal when the shareholder exercises the Right to Submit the Agenda; and (iii) it is unlikely that an enormous number of the agenda will be proposed by a shareholder, and there is no need to impose restrictions on the number of agenda.

With regard to the Right to Submit the Proposals at the shareholders meeting, no provision to restrict the number of proposals is set forth in the Amended Companies Act because (i) at a shareholders meeting of a company with a board of directors, it is not possible to resolve any agenda other than the agenda set forth in the convocation notice of the shareholders meeting; (ii) the scope of the submission of an amended proposal is limited to the extent that it is generally foreseeable from the agenda; and (iii) depending on the manner of exercising the Right to Submit the Proposals at a shareholders meeting, it is possible that the submitted proposal will not be taken up based on the authority of chairperson of the shareholders meeting to organize the meeting and to maintain order.

B. Details of Restrictions on the Right to Request Notice of the Proposal Summary

1. Companies Subject to the Regulations

The Regulations apply to a company with a board of directors. There is no change in the regulations on the Right to Request Notice of the Proposal Summary regarding a company without a board of directors (in other words, in a company without a board of directors, shareholders may exercise the Right to Request Notice of the Proposal Summary on more than ten proposals).

Especially in the listed companies among companies with boards of directors, the abusive exercise of Shareholder Proposal Rights has been controversial. Therefore, it is necessary to consider whether to apply the Regulations to specific situations.

Further, this Amendment is intended to restrict the exercise of the Right to Request Notice of the Proposal Summary by shareholders, and, therefore, the number of proposals submitted by the directors of the company is not limited.

2. Limitation on the Number of Proposals

The Regulations restrict the number of proposals that a shareholder may propose at the same shareholders meeting by exercising its Right to Request Notice of the Proposal Summary to ten or fewer. If the number of proposals proposed exceeds ten, the company may reject the Request for Notice of the Proposal Summary with respect to the exceeding number of proposals.

The maximum number of proposals is set at ten because even electric power companies where shareholders make relatively active proposals make at most about ten proposals every year and there is usually no need for a shareholder to submit dozens of proposals to the same shareholders meeting.

In addition, since shareholders must have a certain number of voting rights in the company in order to exercise their Rights to Request Notice of the Proposal Summary, several shareholders are allowed to jointly exercise their Rights to Request Notice of the Proposal Summary. Each proposal that is jointly presented by several shareholders is counted as one proposal for each shareholder. For example, once ten proposals are jointly presented by several shareholders in the aggregate, none of them shall be entitled to exercise the Request for Notice of the Proposal Summary for additional proposals.

3. How to Count Proposals

In principle, the number of proposals is counted from the standpoint of their substance. However, special provisions have been newly introduced with regard to the number of proposals for (i) the election and dismissal of directors, accounting advisors, statutory auditors or accounting auditors ("Officers, etc."), (ii) non-reelection of accounting auditors, and (iii) the amendment to the articles of incorporation, to avoid inconvenience by formally applying the provisions of the Amended Companies Act.

One proposal for the election or dismissal of each candidate of Officers, etc. should be counted as one proposal in nature. However, according to this interpretation, in a company with a large number of Officers, etc. or a large maximum number of directors, etc. set forth in the articles of incorporation, the number of proposals for the election or dismissal of Officers, etc. can easily exceed ten. Therefore, with regard to proposals for the election or dismissal of Officers, etc., regardless of the number of candidates, a proposal for election or dismissal shall be counted as one proposal under the Amended Companies Act. The same applies to the number of proposals for non-reelection of accounting auditors.

Under the Amended Companies Act, even if a shareholder submits several items as one proposal for the amendment to the articles of incorporation, each item shall constitute one proposal in principle; provided, however, that two or more proposals for the amendment to the articles of incorporation shall be deemed to be one proposal if there is a possibility that the contents of the resolutions for such proposals may contradict each other if these proposals are resolved with different results (either passed or rejected).

The following table summarizes these special provisions:

Outline of the Special Provisions

Article 305, para.4	Proposals	Counting method	Specific examples
Sub-para. 1	Proposal for election of Officers, etc.	Regardless of the number of candidates for Officers, etc., the number of the	・Proposals for the election of Directors A and B and Statutory Auditor C ⇒ The number of the proposals shall be one.

		Proposals shall be one.	
Sub-para. 2	Proposal for dismissal of Officers, etc.	Regardless of the number of Officers, etc. to be dismissed, the number of the Proposals shall be one.	・Proposals for the dismissal of Directors A and B and Statutory Auditor C ⇒ The number of the proposals shall be one.
Sub-para. 3	Proposal not to reelect the accounting auditor	Regardless of the number of accounting auditors who are not to be reelected, the number of the Proposals shall be one.	・Proposals for re-election of Accounting Auditors X and Y ⇒ The number of the proposals shall be one.
Sub-para. 4	Two or more proposals relating to the amendment to the articles of incorporation	The number of the proposals shall be one, if there is a possibility that the contents of the resolutions may contradict each other in case two or more Proposals are resolved with different outcomes (either passed or rejected).	・(i) Proposals for establishing the audit committee, etc., and (ii) proposals for abolishing the statutory auditors. ⇒ The number of the proposals shall be one. Under the Companies Act, companies with audit committee, etc. shall not have statutory auditors. Therefore, in cases where (i) above is passed and (ii) above is rejected, the contents of the resolutions for items (i) and (ii) contradict each other. Accordingly, the number of the Proposals for items (i) and (ii) above shall be one.

4. Method of Determining Proposals That Can Be Refused

Under the Amended Companies Act, when a shareholder of a company with a board of directors exercises the Right to Request Notice of the Proposal Summary, if the number of proposals to be submitted by the shareholder exceeds ten, the company may take ten (or more) proposals and refuse the remaining proposals. Directors shall determine the method of determination of the proposals of the request for notice of proposal summary that are to be refused pursuant to the duty of care of a prudent manager; provided, however, that if requesting shareholders show the order of priority among the proposals in the request, directors must follow the order of priority.

It would be practicable that directors establish certain rules in advance in the Share Handling Regulations, etc. in order to avoid confusion with respect to the method of determining the number of proposals, as the following example shows.

Example of Method of Determining the Proposals that will be Those Exceeding Ten

In principle, a resolution shall be determined by counting the number of items in the order of the shareholder's list (in the case of horizontal writing, by counting the number of items from the top, and in the case of vertical writing, by counting the number of items from the right). In the case where it is difficult to determine the order for reasons, such as the proposals not being listed in order, the directors shall decide such items at their discretion.

The company may accept a request for notice of proposal summary for more than ten proposals. However, it should be noted that treating each shareholder differently without reasonable grounds may not be allowed in light of the principle of equality of shareholders.

5. Applications of the Provisions Concerning Restrictions on Proposals in Violation of Laws and Regulations or the Articles of Incorporation

The provisions of the Amended Companies Act limit the number of Proposals that shareholders can propose by exercising the Right to Request Notice of the Proposal Summary to ten items, and do not exclude the application of the Restriction on the Fleeting Proposals. Therefore, (i) ten proposals subject to the Right to Request Notice of the Proposal Summary are reasonably identified by the limitation on the number of proposals, and (ii) if these ten proposals contain a proposal that violates the Restriction on the Fleeting Proposals, this proposal will be eliminated (and, therefore, the number of proposals to be taken up may be less than ten).

IV. Impact and Points to be Considered on Practice

A. Impact and Points to be Considered

1. Impact on Shareholders

The content of the Amended Companies Act concerning shareholder proposals does not substantially restrict the rights of shareholders who are willing to exercise shareholder rights, and it is not considered to have a significant impact on actual practice. However, it should be kept in mind that, in exercising the Right to Request Notice of the Proposal Summary, a portion of the proposal summary may not be notified to other shareholders if a shareholder submits more than ten proposals.

2. Impact on Companies

If a shareholder requests a notice of summary of the proposals that exceed ten, it will be necessary to properly determine the number of proposals in accordance with the Amended Companies Act and to take appropriate measures while complying with the principle of equality of shareholders.

B. Transitional Measures

This Amendment came into force on March 1, 2021. However, with respect to requests for notice of Agenda that were made before this Amendment entered into force, the provisions then in force shall remain applicable.

*　　　*　　　*

If you have any questions regarding the matters covered in this memorandum, please reach out to your usual TMI contact or any of the attorneys listed below.

Authors

Mai Kasuga
Phone: +81 3 6438 5577
Email: Mai_Kasuga@tmi.gr.jp

Akira Taroda
Phone: +81 3 6438 6141
Email: Akira_Taroda@tmi.gr.jp

Editors

Masanori Bito
Phone: +81 3 6438 5524
Email: Masanori_Bito@tmi.gr.jp

Hiroyuki Yoshioka
Phone: +81 3 6438 5683
Email: Hiroyuki_Yoshioka@tmi.gr.jp

Shareholder Meeting Materials Will Also Be Provided in Electronic Format

By Kosuke Ueno, Taro Matsumoto and Risako Tsuda

May 27, 2021

I. Background to the Introduction of Electronic Provision Measures

Under the Companies Act, materials provided to shareholders upon the convocation of a general meeting of shareholders (including reference documents for the meeting and for exercising voting rights, financial statements, business reports, etc.) must generally be delivered in writing (not including electronic means).

Currently, there are two exceptions to this rule:

- Any such materials may be provided electronically, such as via the internet, upon obtaining the consent of each individual shareholder. However, it is difficult for listed companies to obtain consent from all individual shareholders in practice.
- Some materials can be deemed to have been provided to shareholders if they are consistently available on the company website and the Articles of Incorporation so provide. This system has been primarily used by listed companies. However, there are limits to the information that can be disclosed via the internet under this system.

In light of the above and referring to the Notice & Access system in the U.S. and Canada, the Companies Act was amended in December 2019 to introduce a new system to provide shareholders with meeting materials via the internet for stock companies with Articles of Incorporation that provide for electronic provision. Under this new system, obtaining the consent of each individual shareholder is not required, and all the materials for shareholders meetings are disclosed to shareholders via the internet. The introduction of these electronic provision measures is expected to assist companies in reducing printing and postage expenses for shareholders' meeting materials and to make ample information available to shareholders at an earlier time. This amendment is scheduled to be enacted within three (3) years and six (6) months of December 11, 2019.

II. Summary of Electronic Provision Measures

A. General

Electronic provision measures allow the directors of a company to make the information contained in the convocation notice for a shareholders' meeting and the attachments thereof available to the shareholders through the company website. Under this system, the company must send a written convocation notice to each shareholder setting forth a minimum amount of information, including the date, time, place, and agenda of the shareholders' meeting and the website URL on which shareholders may access the shareholders' meeting materials.

When a company provides information electronically, the company may set a password so that only shareholders can access the information, unlike electronic public notices which must disclose information to the general public. The password must be provided to each shareholder by the electronic provision statutory deadline: three (3) weeks prior to the date of the general meeting of shareholders or the date on which the convocation notice of the general meeting of shareholders is issued, whichever is earlier.

In order to introduce electronic provision measures, a company must stipulate that it may introduce electronic provision measures in its Articles of Incorporation, but it is not required to include the website address for the electronic provision in its Articles of Incorporation. The introduction of electronic provision measures in the Articles of incorporation will be recorded in the company registry as well.

In principle, whether to introduce an electronic provision system is determined at the discretion of a company, but companies that issue book-entry shares, including listed companies, must stipulate that they will introduce electronic provision measures in their Articles of Incorporation. To that end, a company issuing book-entry shares as of the effective date of the amended Companies Act will be deemed to have passed a resolution to amend its Articles of Incorporation to introduce an electronic provision system as of the effective date.

In summary, the procedures for general meetings of shareholders of listed companies after the enforcement of the amended Companies Act will be as follows:

- Shareholders' meeting materials will be provided electronically.
- Convocation notices to shareholders setting forth a minimum amount of information will be provided in writing.

- Each shareholder is entitled to request the delivery of written documents, as some shareholders may have difficulty accessing the internet.

Existing electronic means of providing information will continue to be available after the introduction of the electronic provision measures. Therefore, under an electronic provision system:

- a company may send convocation notices via electronic means to shareholders upon their individual consent; and
- a company does not have to deliver written documents with respect to certain information (some of the shareholders' meeting materials) to shareholders who have requested the delivery of written documents, if so provided in the Articles of Incorporation.

B. Matters to be Provided Electronically

A director of a company with Articles of Incorporation providing for electronic provision may provide the following information electronically to its shareholders:

- Information stated in the convocation notice of a general meeting of shareholders, including the date, time, and place thereof;
- Information stated in the reference documents for a general meeting of shareholders and a voting rights exercise form (if the company allows shareholders who do not attend the general meeting of shareholders to exercise their voting rights in writing or electronically);
- Outline of shareholder proposals (if any);
- Financial statements and business report;
- Consolidated financial statements; and
- A statement that the information provided electronically has been amended and the information before the amendment (if any of the above information has been amended).

C. Period of Electronic Provision

All of the above information must be consistently provided electronically three (3) weeks prior to the date of the general meeting of shareholders or the date on which the convocation notice of the general meeting of shareholders is issued, whichever is earlier, until three (3) months after the date of the general meeting of shareholders.

The purpose of requiring a company to complete electronic provision at least one (1) week earlier than the two-week statutory deadline for issuing a convocation notice for a general meeting of shareholders for public companies is to ensure that shareholders have sufficient time to exercise their voting rights through early disclosure of information. The information is required to be available via electronic provision for three (3) months after the date of the general meeting of shareholders so that it may be used in a lawsuit seeking the rescission of a resolution at the general meeting of shareholders. Such a lawsuit must be filed within three (3) months of the date of the relevant general meeting of shareholders.

D. Exceptions to Electronic Provision

Companies required to submit an annual securities report listing the items for which electronic provision will be implemented through Electronic Disclosure for Investors' Network (EDINET)[5] will be provided with a special exception allowing the company not to provide such information electronically.

The purpose of this provision is to integrate the disclosure of business reports and financial statements under the Companies Act and the disclosure of annual securities reports under the Financial Instruments and Exchange Act and to promote efforts to disclose annual securities reports prior to the general meeting of shareholders.

However, this provision is limited to matters provided electronically for ordinary general meetings of shareholders and does not apply to extraordinary general meetings of shareholders or general meetings of class shareholders. In addition, the above regulations do not apply to voting documents, because voting documents include the name and title of the shareholder and the number of voting rights that can be exercised, and it is not appropriate to disclose this information through EDINET.

E. Shareholder Proposal Rights

When a shareholder of a company with Articles of Incorporation providing for electronic provision makes a proposal for a general meeting of shareholders, the shareholder may request that an outline of the proposal be provided electronically, rather than in the convocation notice. If a company receives such a request from a shareholder, it must provide the information pertaining to the outline of the proposal electronically.

III. Convocation Notice of General Meeting of Shareholders

---

[5] https://disclosure.edinet-fsa.go.jp/EKW0EZ1001.html?lgKbn=1&dflg=0&iflg=0

A. Deadline for Issuing the Notice

Under the amended Companies Act, a company that has implemented electronic provision measures must issue a convocation notice of a general meeting of shareholders at least two (2) weeks prior to the relevant general meeting of shareholders, regardless of whether the company is a public company.

B. Matters to be Included in the Notice

A company that implements electronic provision measures shall include the following matters in the convocation notice of a general meeting of shareholders:

- Date, time, and place of the general meeting of shareholders;
- Agenda;
- If a voting rights exercise form is being used, a statement to that effect;
- If electronic voting is being used, a statement to that effect;
- If electronic provision is being used, a statement to that effect;
- If the EDINET exception is being used, a statement to that effect; and
- The URL of the website pertaining to the electronic provision (or, if the EDINET exception is applied, the URL of the relevant EDINET page).

The matters to be included in the convocation notice of a general meeting of shareholders are limited to those matters that are important to encourage shareholders to access the website so that the time and cost of printing and mailing the convocation notice will not be an excessive burden on the company. However, it is not prohibited for a company to add information to the above items or enclose documents at its discretion.

C. Non-Delivery or Non-Provision of Reference Materials for General Meetings of Shareholders

Under the Companies Act prior to the amendment, a company was obliged to deliver and provide the following reference materials at the time of the convocation notice.

- Reference documents and a voting rights exercise form for the general meeting of shareholders, if voting by mail is permitted;
- Reference documents for the general meeting of shareholders, if electronic voting is permitted;

- Financial statements and business reports (for an ordinary general meeting of shareholders of a company with a board of directors); and
- Consolidated financial statements (for an ordinary general meeting of shareholders of a company with a board of directors and an accounting auditor).

A company that has implemented electronic provision measures is not required to deliver and provide reference documents for a general meeting of shareholders when providing the convocation notice of a general meeting of shareholders, because each shareholder can access the website indicated in the convocation notice and view the information contained in these materials thereon.

IV. Request for Delivery of Documents

A. Persons Who May Submit a Request

A shareholder of a company using electronic provision measures may request that the company deliver a document stating information to be provided electronically. However, a shareholder who has consented to the electronic issuance of convocation notices of general meetings of shareholders may not request the delivery of documents, because such a shareholder is classified as having access to the internet and does not need to be guaranteed the right to request the delivery of documents.

A shareholder who holds less than one unit of shares, a shareholder who holds non-voting shares, and shareholders after the record date can request the delivery of documents, but the company is not required to deliver the requested documents. This is because these shareholders are not allowed to exercise their voting rights at the relevant general meeting of shareholders, and the company does not need to issue a convocation notice of the general meeting of shareholders to these shareholders.

B. Process of Making a Request

A shareholder listed on the shareholders' register can request the delivery of documents from the company orally or in writing. On the other hand, a book-entry shareholder can request the delivery of documents through the immediately superior institution (the account management institution managing the shareholder's account).

C. Obligation to Deliver Documents

Where a shareholder has requested the delivery of documents from the company, the directors of the company will deliver a document stating the information provided electronically to the shareholder with the convocation notice of the general meeting of shareholders. However, where the company sets a record date, delivering this document only to shareholders that have requested the delivery of documents by the record date will be sufficient.

A company may omit the delivery of documents for some of the electronically provided information by stipulating in its Articles of Incorporation that documents delivered to shareholders are not required to state all or part of the electronically provided information specified by the applicable Ordinance of the Ministry of Justice.

D. Termination of Delivery of Documents

Once made, a request for the delivery of documents shall be effective for all subsequent general meetings of shareholders.

However, if one (1) year has elapsed since the date on which the shareholder made the request, the company may notify the shareholder of the termination of the delivery of documents and require the shareholder to submit any objections he/she may have within a certain period of time (which may not be less than one (1) month).

V. Interruption of Electric Provision Measures

The information provided pursuant to the electronic provision measures must remain available via electronic provision for three (3) months after the date of the relevant general meeting of shareholders.

However, tampering due to server downtime, virus infection, etc. may occur, and to always invalidate electronic provision measures due to any interruption during such electronic provision period would be excessively disadvantageous to the company and may unnecessarily confuse shareholders.

Therefore, a remedy is provided to avoid the effects of such interruption on the effectiveness of the electronic provision measures, even if an interruption occurs during the electronic provision period.

In order for the remedy to apply, all of the following requirements must be met:

- The company has acted in good faith and without gross negligence in causing the interruption of the electronic provision, or the company has justifiable reason for the interruption of the electronic provision.

- The total time of the interruption of the electronic provision does not exceed one-tenth (1/10) of the period of the electronic provision.
- If the interruption of electronic provision occurs during the period from the date of commencement of electronic provision to the date of the general meeting of shareholders, the total time of the interruption of the electronic provision shall not exceed one-tenth (1/10) of the relevant period.
- Promptly after the company becomes aware of the interruption, the company electronically provides the affected shareholders with the following information: (i) that the electronic provision has been suspended, (ii) the time of the suspension of the electronic provision, and (iii) the details of the suspension of the electronic provision.

VI. Schedule

The introduction of electronic provision measures will take some time to implement, as book-entry transfer institutions, account management institutions, and share registry administrators need to update their systems. Therefore, unlike amendments to other provisions of the Companies Act, this amendment is scheduled to be enacted within three (3) years and six (6) months from December 11, 2019. A company issuing book-entry shares that is deemed to have adopted a resolution to amend its Articles of Incorporation will be subject to a six (6) month grace period after the enforcement of the amendment.

* * *

If you have any questions regarding the matters covered in this memorandum, please reach out to your usual TMI contact or any of the attorneys listed below.

Authors

Kosuke Ueno
Phone: +81 3 6438 5462
Email: Kosuke_Ueno@tmi.gr.jp

Taro Matsumoto
Phone: +81 3 6438 6118
Email: Taro_Matsumoto@tmi.gr.jp

Risako Tsuda
Phone: +81 3 6438 6418
Email: Risako_Tsuda@tmi.gr.jp

Editors

Masanori Bito
Phone: +81 3 6438 5524
Email: Masanori_Bito@tmi.gr.jp

Hiroyuki Yoshioka
Phone: +81 3 6438 5683
Email: Hiroyuki_Yoshioka@tmi.gr.jp