Japan Newsletter
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ARQIS FOREIGN LAW OFFICE

Dusseldorf
Munich
Tokyo

NOTIFICATION AND FILING OBLIGATIONS FOR INVESTORS IN JAPAN

Any investment in shares of a public Japanese stock corporation must be made in compliance with various regulatory filing obligations. This newsletter summarizes the most important reporting obligations to be observed by a foreign investor.

An investor (foreign or domestic) holding shares issued by a company listed on any of the stock exchanges in Japan is obliged to comply with certain regulatory filing and disclosure obligations, depending *inter alia* on the number of shares, the type and size of the invested company and the individual regulations of the competent stock exchange. In line with similar regulations in other countries, these regulatory requirements are closely connected with applicable tender offer regulations (which are not addressed in this newsletter) to ensure fairness and transparency of on- and off-exchange share transactions by providing up-to-date information concerning the ownership of shares in listed companies. These include the following filing obligations applying to most types of equity investments in Japan.

1. LARGE SHAREHOLDING REPORT

Under the Financial Instrument and Exchange Act (FIEA), a holder of more than 5% of the issued shares in a listed company is required to issue a so called large shareholding report (*tairyo hoyu hokoku sho*, LSR). The FIEA defines a person or entity as a holder of shares (Holder) if he/she:

(a) Owns shares in his/her own name or another person's name;
(b) Has the right to acquire shares under a sales contract, etc.;
(c) Exercises voting rights as shareholder pursuant to a monetary trust contract or is authorized to give an instruction to the same effect, with the intent to control the business activities of the issuing company; or
(d) Is an entity with appropriate authority to invest in shares in accordance with an investment contract, etc. or otherwise based on the applicable laws and regulations (Paragraph 3, Article 27-23 FIEA).

a) Filing Requirements

If a Holder owns shares jointly with other persons, such persons are regarded as joint holders (Joint Holders; cf. next paragraph below) under the FIEA. The FIEA requires a Holder of more than 5% of the shares issued by a listed company (Large Shareholder), whether alone or jointly with other Joint Holders, to file an LSR with the Prime Minister (in practice, via the competent Local Financial Bureau) within 5 business days (not counting the date of acquisition) from the date the shareholding ratio exceeds 5% (i.e. 5% Rule).

According to Article 27-23 FIEA, the LSR must specify inter alia the percentage of interest held, the funds (debt or equity) used to acquire the shares, and the purpose of the acquisition. When calculating the shareholding ratio for the purpose of the LSR, also the shares held together with other Joint Holders have to be taken into account. In such case, each Joint Holder has to report in the LSR its respective joint shareholding ratio. Under the FIEA, Joint Holder shall mean a person/entity who:

(a) Actually holds shares or agreed to exercise his voting rights jointly with a Large Shareholder;
(b) Has a marital relationship, or controls or is controlled with more than 50% of the voting rights in or by a Large Shareholder, or is having the same controlling shareholder, etc. (*shihai kabunushi to*) with a Large Shareholder; or
(c) Otherwise has a special relationship with a Large Shareholder (such as director of the Holder, group company of the Holder, or any other person/entity having a special equity relation with the Holder).

Contact:
ARQIS Foreign Law Office
Foreign Law Joint Enterprise with
TMI Associates
Roppongi Hills Mori Tower, 23F
6-10-1 Roppongi
Minato-ku, Tokyo 106-6123
Phone: +81 (3) 6438-2770
Fax: +81 (3) 6438-2777
Email: tokyo@arqis.com
http://www.arqis.com
twitter.com/ARQISTokyo

Thus, regardless of the actual percentage of its individual shareholding, a Joint Holder is required to file an LSR if the aggregate shareholding ratio of the shares jointly held with other Joint Holders exceeds the 5% threshold under the FIEA.

Also, after filing the LSR, if a Large Shareholder decreases or increases its share by 1% or more, or in case of any material change in the content of the LSR already submitted, such Large Shareholder is required to file an amendment report within 5 business days in accordance with Paragraph 1, Article 27-25 FIEA (Amendment Report).

Both the LSR and Amendment Report must be prepared in a specific electronic format and filed electronically through the Electronic Disclosure for Investors' Network (EDINET). The information in the report is made available online to the general public through the EDINET for 5 years from the respective filing date.

b) Penalties/Surcharge

Failure to timely file an LSR or Amendment Report (Article 172-7 FIEA), or to make a material misstatement and/or omission therein (Article 172-8 FIEA), can result in a significant surcharge penalty up to the amount of 0.001% of the aggregate market value of the listed company issuing the shares held by the Large Shareholder. This surcharge applies regardless of the shareholding ratio of the Large Shareholder violating the 5% Rule, and even a slight delay in filing may trigger the surcharge.

2. BANK OF JAPAN REPORT

In addition to the LSR filing obligations, if the equity investment by a foreign investor results in a shareholding of 10% or more of the outstanding shares issued by a Japanese stock corporation, such transaction is regarded as "direct inward investment" (DII) as defined in Paragraph 2, Article 26 of the Foreign Exchange and Foreign Trade Act (FEFTA). Depending on the country of origin of the investor and the nature of the business of the target company, the foreign investor must either (i) submit a notification prior to the scheduled DII (Preliminary BOJ Notification) in accordance with Articles 26 and 27 FEFTA; or (ii) report the DII after the consummation of the transaction (Post BOJ Report) in accordance with Article 55-5 FEFTA.

Although the competent authorities are the Minister of Finance and the Ministry or Agency supervising the area of the business related to the DII as explained below, all filings under the FEFTA are made through the Bank of Japan (BOJ).

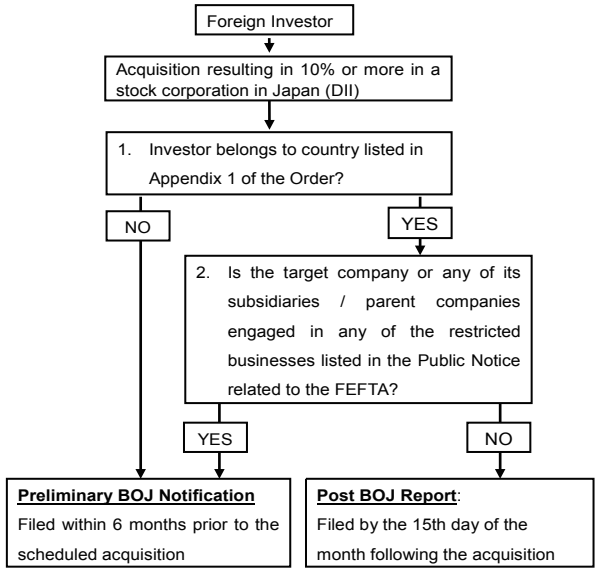
A foreign investor planning to carry out a DII is required to make a Preliminary BOJ Notification if:

(a) Such foreign investor does not belong to any of the countries listed in Appendix 1 attached to the Cabinet Order on Inward Direct Investment (Order), which includes all OECD member states and most other countries in the world, OR

(b) The target company is engaged in any of the restricted businesses listed in the Public Notice related to the FEFTA, which may:
  (i) Adversely affect the national security,
  (ii) Breach the public order,
  (iii) Obstruct the public safety, or
  (iv) Adversely affect the operation of the national economy as a result of the DII.

The Preliminary BOJ Notification has to be filed within 6 months before the scheduled consummation of the DII (Article 27 FEFTA and Paragraph 3, Article 3 of the Cabinet Order on Inward Direct Investment, etc.). A foreign investor filing a Preliminary BOJ Notification must not effect the investment until 30 days have passed from such filing, during which the BOJ notifies the investor of its approval or non-approval. If it is confirmed that no further review is required for the DII, the Minister of Finance and the competent Ministry or Agency may shorten such period. A reduction of the 30 days period to 2 weeks is common in ordinary cases. Depending on the content of the filing, the Minister of Finance may also extend the review period to up to 4 months, or, if further review is necessary and if so requested by the Customs and Foreign Exchange Review Committee, to 5 months. During such extended period the foreign investor is prohibited from carrying out the scheduled DII (Paragraph 3 and 6, Article 27 FEFTA).

BOJ Filing Flow Chart



In the event an investment is deemed to qualify as a restricted business, the competent Ministry may issue a request to the foreign investor to alter or withdraw the DII (Paragraph 5, Article 27 FEFTA). A foreign investor must then notify whether or not it accepts this request within 10 days after its receipt (Paragraph 7, Article 27 FEFTA). If the investor ignores or refuses to accept the request, the Minister may order to alter or entirely withdraw the DII (Paragraph 10, Article 27 FEFTA).

It should be noted that until the date of this newsletter it appears that only one case has become public where a foreign investor was requested to withdraw the investment due to concerns about the industry involved. This was the proposed increase of a 10% shareholding by The Children's Investment Fund (TCI) in the energy provider J-Power Co. Ltd. to up to 20%, which the competent Ministry of Economy, Industry and Trade (METI) objected for reasons of "national security" based on the argument that the purpose of TCI's investment to maximise profit was not compatible with J-Power's function as an energy provider of the country.

If a foreign investor's nationality is listed in Appendix 1 of the Order but the target company is not involved in any of the restricted businesses,

then the investor is required to submit a Post BOJ Report no later than on the 15th day of the month immediately following the month the DII is consummated (Article 55-5 FEFTA). Likewise, a foreign investor granted approval for the proposed acquisition of shares based on a Preliminary Notification filing is also required to file a written report within 30 days from the completion of the acquisition.

The FEFTA may impose a penalty (monetary and/or imprisonment) in case of a violation of either the Preliminary BOJ Notification or the Post BOJ Report obligation, but practically the BOJ usually first requires foreign investors to submit a written explanation for the delay.

3. MAJOR SHAREHOLDER REPORT

In case an investor acquires 10% or more of the voting shares of a listed company, such investor becomes a so-called "major shareholder" of the listed company (Major Shareholder). Because a Major Shareholder is regarded as an "insider", it is subject to a special reporting obligation under the FIEA. Article 163 FIEA stipulates that if a Major Shareholder of a listed company divests or acquires shares for its own account, this shall be reported to the Prime Minister (Major Shareholder Report (MSR), *juyo-kabunushi baibai hokokusho*). In practice, the MSR is filed with the competent local financial bureau, which, in case of a foreign investor, is the Kanto Financial Bureau. While the LSR reporting obligation focuses on protecting the interests of the general public, the MSR aims to prevent insider trading by the Major Shareholder, and/or the officers etc. of a listed company.

The MSR should be filed no later than on the 15th day of the month immediately following the month the sale or purchase of stock was effected. The MSR may be filed, either in writing or electronically, in a standard form providing the details of the sale or purchase, such as date, number of shares, identity of the seller or buyer in the transaction, etc. Unlike the LSR or the Amendment Report, the MSR is not disclosed to the public through the EDINET.

When a Major Shareholder conducts a stock purchase or sale by entrusting a registered financial instruments business operator or authorized broker in Japan (e.g. a securities company), he may submit the MSR via such operator or broker. Failure or omission to file a MSR may be subject to monetary and/or imprisonment penalty under the FIEA (Item 19 of Article 205).

4. MERGER CONTROL FILING

The acquisition of shares in a Japanese stock corporation by a foreign investor may be subject to additional filing obligations under the rules for preventing a substantial restraint of competition in the Japanese market (Merger Control Filing) in accordance with the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antitrust Act). Since the former distinction between domestic and foreign filing companies has been abolished in 2010, the same filing requirements apply to national and foreign companies. The existing two-tier filing system is based solely on the sales of the investor and the target company in Japan with the following thresholds and criteria:

(i) If a company (acquirer) in a corporate group consisting of the ultimate parent company and its subsidiaries, having combined sales in Japan exceeding JPY 20 billion,
(ii) Is to acquire the shares of a target company (target) in another corporate group, consisting of the target and its subsidiaries, having combined sales in Japan exceeding JPY 5 billion, and
(iii) If the acquirer (including its group companies) is to acquire 20% or 50% of the outstanding voting rights of the target, then
(iv) Such acquirer is required to conduct a merger control filing prior to the scheduled acquisition.

As in most countries, the merger control filing has to be made prior to closing a scheduled acquisition in order to obtain the approval of the Japan Fair Trade Commission (JFTC) and the Antitrust Act prohibits the investor to consummate a scheduled acquisition for 30 days after filing, during which the JFTC reviews the investment and notifies the investor of its non-approval, if any (in case of approval, the JFTC does not make any notice). Thus, the filing must be made at least 30 days prior to the consummation of a scheduled transaction.

For calculating the total Japanese sales volume and to determine whether or not the filing obligation applies to an acquisition of shares under the Antitrust Act, the concept of "Corporate Group" has been established which is defined as a group consisting of (i) a company, (ii) its subsidiaries, (iii) the company's parent company, which is not a subsidiary of any other company, and (iv) the parent company's subsidiaries (excluding the company and the company's subsidiaries). To this end, item (iii) above refers to the ultimate parent company. A subsidiary shall mean such company whose majority of shares with voting rights is held by another company or is otherwise controlled by such other company, as defined in separate JFTC rules.

The concept of "Corporate Group" has been adopted in perceiving an acquisition undertaken by an individual company as an act of its Corporate Group for reason of the individual company being under the control of its ultimate parent aiming to maximize the profit of the entire Corporate Group.

Our Offices:

Tokyo Office

ARQIS Foreign Law Office
Foreign Law Joint Enterprise with
TMI Associates
Roppongi Hills Mori Tower, 23rd floor
6-10-1 Roppongi, Minato-ku, Tokyo
106-6123 Japan
Phone: +81 (3) 6438-2770
Fax: +81 (3) 6438-2777
tokyo@arqis.com

Düsseldorf Office

ARQIS Rechtsanwälte
Hammer Str. 19
40219 Düsseldorf
Germany
Phone: +49 (211) 13069-000
Fax: +49 (211) 13069-099
duesseldorf@arqis.com

Munich Office

ARQIS Rechtsanwälte
Prinzregentenplatz 7
81675 Munich
Germany
Phone: +49 (89) 309055-600
Fax: +49 (89) 309055-699
munich@arqis.com