The Shareholder Rights and Activism Review

Editor
Francis J Aquila

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Francis J Aquila

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EDITOR'S PREFACE

Over the years since the financial crisis, shareholder activism has been on the rise around the world. Increasingly institutional shareholders are taking a range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism has become a more prominent, and likely permanent, feature of the corporate landscape. Boards of directors, managements and the markets have increasingly become more attuned to shareholder activism, and engaging with investors has become a priority for boards and managements as a hallmark of basic good governance.

Shareholder activism has become a global phenomenon that is effecting change to the corporate landscape not only in North America but also in Europe, Australia and Asia. While shareholder activism is still most prevalent in North America, and particularly in the United States, shareholder activism is expanding its reach across the globe. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists, and the companies they target, become more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. This inaugural edition of *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this first edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to increase its global footprint, I am confident that this review will serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
October 2016

Chapter 2

JAPAN

Akira Matsushita[1]

I OVERVIEW

A decade ago in Japan, there was much media attention on shareholder activism that often took a hostile approach against the managements of companies. Such shareholder activism significantly decreased due to the worldwide economic crisis in 2008. However, shareholder activism in Japan has been growing again over the last few years due to certain developments in corporate governance policies and the economy in Japan and the increase in assets under management (AUM) of global shareholder activists.

Pursuant to the structural reform prong of Abenomics (the label for the economic policies advanced by Japanese Prime Minister Shinzō Abe) and to improve corporate governance of listed companies in Japan, the Tokyo Stock Exchange issued Japan's Corporate Governance Code (the Governance Code) on 1 June 2015. The Governance Code promotes five general principles to guide listed companies in conducting good governance. One of the principles provides that listed companies should engage in constructive dialogue with shareholders. In addition, a council of experts established by the Financial Services Agency (FSA) released Japan's Stewardship Code (the Stewardship Code) on 26 February 2014 that sets forth principles considered to be helpful for institutional investors who behave as responsible institutional investors in fulfilling their stewardship responsibilities. The Stewardship Code provides that institutional investors should fulfil their stewardship responsibilities through enhancing the medium to long-term investment returns for their clients and beneficiaries through constructive engagement or purposeful dialogue with investee companies. The Governance Code and the Stewardship Code are expected to work as 'the two wheels of a cart' to achieve effective corporate governance in Japan.

Historically, the management of listed companies in Japan tended to not fully consider or heed the voices of shareholders in the companies because the shareholders are often stable shareholders who do not sell their shares and support the management in the ordinary course

1 Akira Matsushita is a partner at Mori Hamada & Matsumoto.

in any case. However, the Governance Code provides that companies who hold shares of other listed companies in cross-shareholding structures should disclose their policies with respect to such cross-shareholding structures. As a result, the number of such stable shareholders in companies might decrease. For example, in November 2015, three megabanks in Japan released their plans to substantially reduce their cross-shareholdings within a few years. In addition, the ratio of ownership of shares in listed companies in Japan by foreign entities increased for three consecutive fiscal years until March 2015 (such ownership ratio slightly decreased in 2015 in response to the decline in stock market prices in Japan).[2] The foregoing developments mean that shareholders who may be supportive of shareholder activism might have increased in the Japanese market.

This article discusses details of shareholder rights and shareholder activism with respect to a stock company (*kabushiki kaisha*) that has shares listed on a financial instruments exchange.

II LEGAL AND REGULATORY FRAMEWORK

i Shareholder rights

In Japan, rights of shareholders are provided under the Companies Act (Act No. 86 of 26 July 2005). Outlines of the shareholder rights that may typically be exercised by shareholders in the context of shareholder activism, among others, are set out below.[3]

Shareholder proposals

The Companies Act provides shareholder proposal rights that are quite favourable to shareholders. A shareholder of a listed company who owns, consecutively for the preceding six months or more, at least 1 per cent of the voting rights of all shareholders in the company or at least 300 votes may demand directors of the company to present proposals submitted by the shareholder as an agenda at the shareholders' meeting and demand the directors to describe the summary of the proposals in convocation notices of the shareholders' meeting by submitting such demand to the directors no later than eight weeks prior to the day of the shareholders' meeting (Articles 303 and 305 of the Companies Act). Additionally, a shareholder attending the shareholders' meeting may submit proposals at the shareholders' meeting with respect to the matters that are within the purpose of the shareholders' meeting (Article 304 of the Companies Act).

Under the Companies Act, the number of proposals that an eligible shareholder can submit is not limited. The company may not refuse a shareholder proposal unless it does not satisfy the requirements set out in the Companies Act or its content violates the law or is considered abusive.[4] If the shareholder notifies the company of the reasons for its shareholder proposal, the company shall describe such reasons in a reference document accompanying the convocation notice dispatched to its shareholders, regardless of the content of the

2 *Tokyo Stock Exchange Inc., et al.*, Result of Survey of Distribution Condition of Shares in 2015, 20 June 2016.

3 The numerical requirements under the Companies Act that are described below may be changed by a company by setting out the changed numerical requirements in the company's articles of incorporation.

4 See Tokyo High Court, judgment, 19 May 2015, Kinyu Shoji Hanrei No. 1473 at 26.

shareholder proposal, unless such reasons are obviously false or the proposals are made solely for defamation or insult. The company may set an appropriate limit for the character count of the description of the shareholder proposal set forth in the reference document.

In this way, a shareholder who submits proposals to the company can deliver the proposals to the other shareholders at the company's expense, and cause the other shareholders to vote on the shareholder proposals using the voting card mailed by the company without conducting a proxy solicitation by itself at its expense.

Calling of a shareholders' meeting

A shareholder of a listed company who owns, consecutively for the preceding six months or more, at least 3 per cent of the voting rights of all shareholders in the company may demand the directors of the company to call a shareholders' meeting regarding any matter that the shareholder calling the meeting is entitled to vote on. If (1) the calling procedure is not effected without delay after the demand or (2) the notice calling the shareholders' meeting designates the date of the shareholders' meeting to be a date falling within the period of eight weeks from the date of the demand, the shareholder who made the demand may call the shareholders' meeting by itself with the permission of the court (Article 297 of the Companies Act).

Enjoinment of acts of directors

In the event a director of a company engages, or is likely to engage, in any act in violation of laws and regulations or the articles of incorporation, if such act is likely to cause irreparable damage to the company, a shareholder who owns the shares consecutively for the preceding six months or more may enjoin such director's act usually by obtaining an order of provisional disposition from the court (Article 360 of the Companies Act). Violations of a director's duties of care and loyalty may constitute a violation of such laws and regulations.

Derivative actions

A shareholder who owns shares consecutively for the preceding six months or more may demand the company to file an action to recover for damages and liabilities caused by its director, and in the event the company does not file such action within 60 days from the date of such demand, such shareholder may file a derivative action on behalf of the company (Article 847 of the Companies Act). A shareholder who contemplates filing a derivative action may gather evidence by exercising its shareholder rights, such as the right to inspect or copy minutes of meetings of the board of directors of the company or its subsidiaries with the permission of the court (Article 371, Section 2 of the Companies Act) and the right to inspect or copy account books of the company (Article 433 of the Companies Act).

Dissenting shareholders appraisal rights

Shareholders who object to certain agenda items at the shareholders' meeting, such as a merger, consolidation of shares or certain amendments to the articles of incorporation that may be related to a merger and acquisition transaction, may demand that the company purchase their shares in the company at a fair price. If dissenting shareholders and the company cannot reach agreement on the price of the shares within a certain period, the dissenting shareholders or the company may file a petition to the court for a determination of the price.

ii Regulations on shareholder activism

Large-scale shareholding report

A shareholder is generally required to file a large-scale shareholding report with the relevant local finance bureau within five business days after the shareholder's shareholding ratio in a listed company exceeds 5 per cent (Article 27–23 of the Financial Instruments and Exchange Act (Act No. 25 of 13 April 1948) (FIEA)). The shareholding ratio is calculated by aggregating shares held by such shareholder with any other shareholders with whom the shareholder has agreed to jointly acquire or transfer shares in the company, or to jointly exercise the voting rights or other rights as shareholders of the company (a 'joint holder'). After filing the report, if the shareholding ratio increases or decreases by 1 per cent or more, an amendment to the report must be filed within five business days from the date of such increase or decrease.

The FSA expressed its position that in the event different shareholders communicate to each other their plans to exercise their voting rights in a certain manner and their plans happen to be the same, such event does not cause such shareholders to be deemed as joint holders because an 'agreement' means an undertaking to act (whether in writing or orally and explicitly or implicitly) rather than the mere exchange of opinions.[5] Therefore, activist shareholders may not be required to file a large-scale shareholding report even if they communicate with each other privately and act in the same manner without explicit agreement.

Under the FIEA, rights to request delivery of shares under a sales and purchase contract as well as options to purchase shares and borrow shares are subject to the large-scale shareholding reporting obligations. However, the holding of equity derivatives that are cash-settled and that do not involve the transfer of the right to acquire shares would likely not trigger the reporting obligations. The FSA released guidelines that provide that derivatives that transfer only economic profit and loss in relation to target shares, such as total return swaps, are generally not subject to the disclosure obligations, provided that holding such cash-settled equity derivatives may trigger such obligations if a holder purchases long positions on the assumption that a dealer will acquire and hold matched shares to hedge its exposure.[6]

Proxy regulations

Any person who intends to solicit a proxy with respect to shares in a listed company shall deliver a proxy card and reference documents containing the information specified in the Cabinet Office Ordinance to the person solicited (Article 194 of the FIEA and Article 36-2 of the Order for Enforcement of the Financial Instruments and Exchange Act (Cabinet Order No. 321 of 30 September 1965)). However, a solicitation of a proxy with respect to shares in a listed company that is made by persons other than the company or the officers, including the directors and the executive officers, thereof and in which the solicited persons are less than 10 persons is exempt from the proxy regulations.

When a solicitor has delivered the proxy card and reference documents to the solicited persons, the solicitor shall immediately submit a copy of such documents to the relevant local finance bureau, provided that if the reference documents and form of voting card are

5 FSA, Clarification of Legal Issues Related to the Development of the Japan's Stewardship Code, 26 February 2014, at 11.

6 FSA, Q&A Regarding Large Scale Shareholding Report of Share Certificates, etc., 31 March 2010, at 10.

delivered by the company to all of the shareholders of the company who are entitled to vote with respect to the relevant shareholders' meeting pursuant to the Companies Act, the solicitor does not have to submit those documents to the relevant local finance bureau. No solicitor may make a solicitation of a proxy by using a proxy card, reference documents or any other documents, or an electromagnetic record, in each case that contains false statements or records on important matters, or that lacks a statement or record on important matters that should be stated, or a material fact that is necessary to avoid a misunderstanding.

iii Rules for directors

Directors' duties

Directors facing shareholder activism must abide by their duties of care and loyalty and treat all shareholders equally under the Companies Act.

The Governance Code has had a major effect on the corporate governance of listed companies in Japan since its release in June 2015. The Governance Code does not adopt a rule-based approach, rather, it adopts a principle-based approach that is not legally binding on companies with a 'comply or explain' approach (i.e., either comply with a principle or, if not, explain the reasons why the company is not complying).

The Governance Code provides that companies should, positively and to the extent reasonable, respond to requests from shareholders to engage in dialogue, and the board of directors should establish, approve and disclose policies relating to measures and organisational structures that aim to promote constructive dialogue with shareholders. Specifically, the senior management or directors, including outside directors, are expected to be more directly involved in dialogue with shareholders. Furthermore, while listed companies cannot accurately know their substantive shareholder ownership structure without conducting shareholder identification searches due to indirect shareholding, such as shareholding through trusts or custodians, the Governance Code provides that companies should endeavour to identify their shareholder ownership structure as necessary in order to promote constructive dialogue with their shareholders.

Stand-still agreement

Stand-still agreements, which may include agreements regarding agenda items of shareholders' meetings, the exercise of voting rights and restraint in acquiring additional shares in the company, have not often been entered into between activist shareholders and listed companies in Japan. There are several precedents of such stand-still agreements though, such as the case of Aderans Holding Ltd entering into an agreement with Steel Partners, a US-based hedge fund, regarding a slate of directors to be submitted to the extraordinary shareholders' meeting in 2008.

Since the Companies Act prohibits a company from giving any property benefits to any person in connection with the exercise of shareholder rights, including voting rights (Articles 120 and 970 of the Companies Act), the company generally cannot agree to reimburse any costs incurred by activist shareholders from their shareholder activism campaigns in connection with their entering into any voting agreement.

Takeover defence measures

The board of directors of a company may adopt takeover defence measures to deter the building of a large stake in the company by activist shareholders. Most common takeover defence measures adopted by Japanese listed companies are the so-called 'advance-warning'

type of defence measures. Under such defence measures, a company establishes rules that must be followed by any potential acquirer who intends to acquire more than a certain level of shares (typically, 20 per cent) in the company, and the company publicly announces such rules before an acquirer actually emerges. No rights or stock options are issued upon the adoption of such rules. If an acquirer violates such rules or an acquisition is considered to be harmful to the corporate value of the company or the common interest of the shareholders of the company, the company would allot stock options to all shareholders without contribution that are only exercisable by, or callable for new shares by the company from, those shareholders other than the acquirer.

Although the number of takeover defence measures adopted by listed companies has gradually decreased in recent years (as of 2015, approximately 480 companies have adopted takeover defence measures), many corporate law practitioners still consider takeover defence measures to be effective safeguards against shareholder activism.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i Profile of activist shareholders

Activist shareholders who engage in shareholder activism in Japan are mainly domestic and global hedge funds and individual investors. In particular, in recent years, foreign activist funds have invested in the Japanese market.

ii Types of companies targeted by activist shareholders

Activist shareholders in Japan have targeted companies of different sizes and in all types of industries. In particular, activist shareholders are more likely to target companies that own a large amount of surplus cash or other assets, have a low return on equity (ROE) or have share prices that are undervalued by the market. Until the end of 2007, activist shareholders often focused on building large stakes in small-cap or mid-cap companies to apply pressure on the managements of those companies. In recent years, activist shareholders have also been targeting large prominent companies, including companies with market capitalisation of over US$20 billion. Another source of targets for activist shareholders is listed companies that have a parent company or a controlling shareholder, and in which there is a structural conflict of interest between the controlling shareholder and minority shareholders.

iii Objectives of shareholder activism

The most common objective of shareholder activism in Japan is to improve capital efficiency of Japanese companies. ROEs of Japanese companies are consistently low compared to the ROEs of many foreign companies. Activist shareholders, therefore, usually demand that Japanese companies conduct a buyback of their shares or increase the amount of dividends. Moreover, activist shareholders urge the companies to carve out their non-profitable businesses and sell their assets that are not utilised or not related to their primary business, including cross-holding shares. Activist shareholders may gain returns on their investments from these activities in the short term.

In recent years, proposals for companies by activist shareholders to conduct potential mergers and acquisitions transactions with another company or to undertake changes in

business strategy of companies are becoming common in Japan. Some activist shareholders usually conduct detailed due diligence on the company's business prior to engaging in such kind of shareholder activism.

Improving corporate governance is also a common objective of shareholder activism. Although the corporate governance of many listed companies have changed as a result of the application of the Governance Code, which, for example, recommends that listed companies appoint at least two independent directors, activist shareholders have continued to advocate for changes in the corporate governance of companies such as with respect to increasing the number of independent directors and adopting stock-price-linked remuneration of directors.

Furthermore, activist shareholders often bring attention in their campaigns to incidents and actions in which directors are not abiding by their duties of care and loyalty. For instance, as activist shareholders often acquire large amounts of shares in companies that have a controlling shareholder, the activist shareholders speak against transactions that may involve conflicts of interest between the controlling shareholder and minority shareholders.

Activist shareholders are also engaging in so-called 'deal activism' with respect to mergers and acquisitions transactions, including mergers, share exchanges or tender offers, in which the support of a certain number of shareholders is necessary to successfully complete such transactions. Activist shareholders may speak against the transactions, and demand that the company amend certain terms that are, in their view, inappropriate. Some activist shareholders also exercise their appraisal rights as dissenting shareholders, and file a petition to the court for a determination of the fair price for the relevant shares.

There are also activist shareholders who take actions mainly in consideration of social issues, which is different from the more common type of shareholder activism that focuses on the increasing shareholder value of the company. For example, shareholder proposals concerning nuclear power generation have been submitted to electric power companies.

iv Tactics used by activist shareholders

Closed engagements

An activist shareholder typically initiates contact with the company in which it has acquired shares by sending a letter to the company describing its demands, after which the shareholder and company engage in private communications. An activist shareholder usually requests quarterly or semi-annual meetings with the management of the company. Some activist shareholders try to resolve issues of the company by proposing alternatives or solutions or providing advice in a friendly manner, and are reluctant to make their engagement with the company public.

Public campaigns

If activist shareholders decide that they cannot achieve their objectives through non-public engagements with the company, they may wage public campaigns with the aim of attracting the support of other shareholders for their objectives. Elements of public campaigns include issuance of press releases, postings of relevant information on websites prepared by them for the campaigns, dissemination of letters to shareholders, provision of information through the media and holding information sessions for other shareholders. Given that the support of public opinion is important in the public campaigns, the tools used by activist shareholders to conduct public campaigns are becoming more sophisticated as ways to deliver information to the public have become more diverse. If the company and the activist shareholder reach

agreement prior to submission of a shareholder proposal or commencement of a proxy fight, the activist shareholder can avoid bearing the expenses relating to such submission or commencement.

Shareholder proposals/proxy fights

To effect changes in companies, activist shareholders can use the right of shareholder proposals under the Companies Act, and conduct proxy solicitation in accordance with the FIEA. As explained above, activist shareholders who intend to obtain an approval for certain agenda at the shareholders' meeting do not necessarily have to make a proxy solicitation because they can communicate their proposals and the reasons for such proposals to other shareholders by having the company dispatch the convocation notice and reference documents describing such proposals and reasons at the company's expense. However, there are practical advantages for an activist shareholder to engage in proxy solicitation for certain reasons, including (1) the submission by shareholders of a voting card to the company that is left blank is generally treated as a vote in favour of the company's proposal and against the shareholders' proposal, (2) the reason for the shareholder proposal that is set forth in the company's reference documents is subject to a character count limit set by the company, but there is no such limit in the case of a proxy solicitation, and (3) a proxy can authorise a procedural motion at a shareholders' meeting.

If an activist shareholder conducts the proxy solicitation, it often approaches and tries to persuade proxy advisers, such as Institutional Shareholder Services Inc (ISS) and Glass, Lewis & Co, LLC (Glass Lewis) to support its cause. The proxy advisers generally have a strong influence, especially on US-based institutional investors.

Empty voting/morphable ownership

Empty voting (i.e., votes by shareholders who have more voting rights of shares than economic ownership in the shares because the shareholders own voting rights of shares that are decoupled from the economic ownership of such shares) may be used by activist shareholders. Empty voting may be implemented by, among other means, equity swaps or record date capture by borrowing shares. Empty voting deviates from the principle of one-share-one-vote in stock companies, and may result in resolutions of shareholders' meetings that are not properly aligned with the interests of the company or its shareholders as a whole because empty voters' voting rights in the company are not in proportion to their economic interests in the company. Thus far, there has been no reported case in Japan in which a grossly improper resolution was made or a proper agenda item was voted down at a shareholders' meeting as a result of empty voting.

As a related issue, activist shareholder may substantively own shares in the company without disclosure by using equity derivatives. Given that dealers that sell equity derivatives usually purchase matched shares in practice to hedge their risks involved in the equity derivatives, activist shareholders, when necessary, may have the ability to terminate the equity derivatives and purchase the matched shares held by the dealers (morphable ownership). Activist shareholders may suddenly emerge in this way as shareholders owning a large amount of the shares without giving the company adequate time to prepare for the shareholder activism.

Litigations

Activist shareholders sometimes engage in litigation as a tactic of shareholder activism, such as seeking an order of provisional disposition for enjoinment of directors' actions and bringing a derivative action against directors of the company to recover for damages and liabilities caused by such directors.

Hostile takeovers

The most aggressive approach of shareholder activism is a hostile takeover, which is an acquisition of shares in a company by an activist shareholder without consent of the management of the company through on-market transactions or tender offers. However, few hostile takeovers have been successfully consumated in Japan partly because there have been stable shareholders in the companies subjected to such takeovers and public opinion in Japan has been generally against hostile takeovers thus far.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

Activist shareholders have recently targeted large-cap companies in Japan as in the case with the US and other countries. One of the most well-known activist hedge funds in the US, Third Point, holds shares of several Japanese large-cap companies. For example, Third Point proposed to the electronic company Sony Corporation (market cap as of August 2013: approximately US$20 billion) that it should carve out its entertainment business and make an offering of shares in the entertainment business to the public, although Sony Corporation ultimately announced that it refused to undertake such proposal in August 2013. According to public information, Third Point also urged the machinery manufacturing company Fanuc Corporation (market cap as of April 2015: approximately US$43 billion) to repurchase a large amount of its shares and to increase the amount of dividends to improve its capital efficiency. Third Point's conduct may have prompted Fanuc Corporation to take actions to increase its shareholder returns during 2015 when Fanuc Corporation made a buyback of its shares and paid a large amount of dividends.

C&I Holdings Co, Ltd, which has some connection to the well-known Japanese activist fund Murakami Fund, made a demand in June 2015 to the electronic trading company Kuroda Electric Co, Ltd to convene an extraordinary shareholders' meeting and submitted a shareholder proposal to elect four outside directors nominated by C&I Holdings Co, Ltd Although the shareholder proposal was not passed at the extraordinary shareholders' meeting, ISS recommended voting for the shareholder proposal (whereas Glass Lewis recommended voting against the shareholder proposal), and shareholders who owned almost 40 per cent of the voting rights in the company voted for the shareholder proposal. This case is an example suggesting that shareholders in Japan are becoming comfortable with, and supportive of, shareholder activism.

Another activist fund, Effissimo Capital Management, have acquired a number of listed companies who have a parent company. Effissimo Capital Management, which owned approximately 30 per cent of shares in automaker Nissan Shatai Co, Ltd, brought a derivative action to recover for damages caused by directors of the automaker and sought an injunction in court against certain acts of the directors on the grounds that the directors were violating their duties of care and loyalty. The fund claimed that the directors were violating their duties because Nissan Shatai Co, Ltd deposited a large amount of cash in a subsidiary of Nissan Motor Co, Ltd which is a parent company of Nissan Shatai Co, Ltd by participating in the

cash management system (CMS) of the Nissan Motor group without reasonable reasons, and the directors of Nissan Shatai Co, Ltd did not manage its cash efficiently. Although the Yokohama District Court dismissed the case in favour of the directors in February 2012,[7] this case indicates that activist shareholders are willing to engage in court and litigation procedures to accomplish their goals.

Although it is not a recent shareholder activism campaign, the proposed share exchange between Tokyo Kohtetsu Co, Ltd and Osaka Steel Co, Ltd was rejected at the shareholders' meeting of Tokyo Kohtetsu Co, Ltd in 2007 as a result of a proxy fight waged by the Japanese activist fund Ichigo Asset Management, which opposed the share exchange. This proxy fight is representative of cases in which shareholder activism may hamper mergers and acquisitions transactions.

V REGULATORY DEVELOPMENTS

The Companies Act was amended on 1 May 2015. One of the purposes of the amendment is to enhance the corporate governance of companies. For example, although the amended Companies Act does not require companies to elect outside directors, directors of a listed company have to explain at the company's annual shareholders' meeting why it is not appropriate for the company to have any outside director if the company does not have any outside director. To prompt companies to have outside directors, the amended Companies Act allows a company to adopt a new governance structure in which the company has an audit and supervisory committee. An audit and supervisory committee audits the activities of directors of the company, and a majority of the members of the committee must be outside directors.

In addition, as discussed above, the Governance Code was issued in June 2015 and the Stewardship Code was issued in February 2014. Consequently, 2015 is often referred to as the first year of corporate governance for listed companies in Japan, and the corporate governance of Japanese companies has in fact improved to some extent. Moreover, the FSA established the Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code in August 2015 for the purpose of following up with the prevalence and adoption of the Stewardship Code and the Governance Code and to further improve the corporate governance of all listed companies.

7 Yokohama District Court, judgment, 28 February 2012, not cited in digests.

VI OUTLOOK

The Governance Code has prompted, and will continue to prompt, listed companies to place greater importance on establishing and maintaining dialogue and relationship with their shareholders. If more cross-shareholdings are dissolved in the future, the number of shareholders who support the managements of companies may decrease and the number of shareholders who are supportive of activist shareholders may increase. As a result, the influence of shareholder activism on the management and direction of companies may be further enhanced. Therefore, managements of listed companies should operate the companies, including conducting proactive engagement and communications with the companies' shareholders, and make appropriate preparations to take into account increasing shareholder activism in the event they are actually targeted by activist shareholders.

Appendix 1

ABOUT THE AUTHORS

AKIRA MATSUSHITA

Mori Hamada & Matsumoto

Akira Matsushita is a partner at the Tokyo office of Mori Hamada & Matsumoto. He focuses on cross-border and domestic mergers and acquisitions transactions, corporate governance, shareholder activism, takeover defence and general corporate and securities law matters. He has extensive experience in advising listed companies subject to shareholder activism, proxy fights or unsolicited takeovers, and in representing clients in high-profile inbound and outbound cross-border mergers and acquisitions transactions.

Mr Matsushita was admitted to the Japanese Bar in 2006 and the New York Bar in 2013. He received his LLB from Keio University in 2005 and his LLM from Cornell Law School in 2012. He also worked at Kirkland & Ellis LLP, Chicago, from 2012 to 2013.

MORI HAMADA & MATSUMOTO

16th Floor, Marunouchi Park Building
2-6-1 Marunouchi, Chiyoda-ku,
Tokyo 100-8222, Japan
Tel: +81 3 6266 8553
Fax: +81 3 6266 8453
akira.matsushita@mhmjapan.com
www.mhmjapan.com