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Japan will introduce new forex regulations applicable to inward investments by foreign investors in sensitive industries

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On October 8, the Ministry of Finance disclosed the outline of its plan to amend the regulations under the Foreign Exchange and Foreign Trade Act (the “FEFTA”) applicable to inward investments by foreign investors in listed companies in sensitive industries. This legislative change is intended to align Japanese regulations applicable to foreign investments with those of the United States and Europe that have been recently tightened.

Currently, under the FEFTA, foreign investors that contemplate to invest in companies listed in Japan are required to make a prior notification through the Bank of Japan and wait for completion of review of the relevant authorities if (a) their holding amounts to 10% or more as a result of the contemplated investment and (b) the target companies are doing business in sensitive industries such as aviation, rail, defense, manufacturing of integrated circuits, information processing, media, mining, telecoms, utilities and weapons.

The amendments are intended to achieve two different objectives.

One is to facilitate portfolio investments of foreign investors by exempting them from the prior notification requirement.

The other objective is to tighten review of foreign investments that may seriously affect the protection of the national security or other legislative purposes of the FEFTA.

To these ends, in summary, the amendments will (A) reduce the threshold from 10% to 1%; but (B) introduce exemptions from the prior notification requirement available to portfolio investments whilst (C) clarifying that the exemption is not available if the investor (i) falls in a “watch” list category (i.e. past record of offence of the FEFTA or under influence of foreign states); (ii) intends to invest in the industries that are important for the national security such as nuclear power, weapons, electricity and telecoms OR (iii) intends to engage in activities that may influence the issuers’ management concerning important matters such as assumption of a director position, proposal to dispose important assets or access to confidential information.

The amendment (B) will facilitate portfolio investments of foreign investors that do not intend to engage in the activities that may influence management of the issuer companies.

The amendments (A) and (C) will enable the government to scrutinize the proposed investments in smaller proportions and, in an extreme case, suspend the investment if the issues identified during the review process are not resolved.

Depending upon how broadly the term “activities that may influence the issuers’ management” is defined, the amendment (C) (iii) may possibly impede or cause delay in foreign activists’ investments of 1% or more in the sensitive industries, though it may not be the legislative intent of the amendment above.

The government is expected to finalize the details of the amendments and submit a bill to implement the amendments during the current extraordinary session of the Diet, aiming for enforcement in FY2020.

Regulation of foreign investments under the FEFTA has recently been a hot area of legislative changes in Japan.

For example, on September 26, the government amended the formula to calculate the percentage of equity holding of a foreign investor that triggers the prior notification requirement applicable to investments in the sensitive industries.

For the purpose of calculation of the ratio of the holding of the foreign investor, the amendment requires the foreign investor to add in its calculation those shares held by another foreign shareholder with respect to which the foreign investor; (a) is empowered to exercise voting rights via a proxy voting agreement or (b) has agreed to jointly exercise voting rights. This amendment will become effective on October 26, 2019.

For this amendment, please see the METI’ s announcement at the below URL.

https://www.meti.go.jp/english/press/2019/0926_001.html

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This memorandum was prepared by Japanese lawyers (Bengoshi) at Atsumi & Sakai and is provided as a general guide only; it does not constitute, and should not be relied on as constituting legal advice. Please see notice 2. below regarding any subsequent Japanese law advice.

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