

Insider trading rule under Financial Instruments and Exchange Act

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[Introduction](#)

[Listed issuers and insiders](#)

[Material facts](#)

[Publication method](#)

Introduction

The amendments to the Financial Instruments and Exchange Act, which introduced the fair disclosure rule, came into effect in April 2018, preventing listed issuers from making selective disclosure of their material information in order to ensure the fairness and transparency of the securities market (for further details please see "[Fair disclosure rule under securities law](#)" and "[Finalisation of fair disclosure rule under securities law](#)"). In 1989 the insider trading rule was introduced under the securities law with a similar aim of ensuring fairness and transparency in the securities market by prohibiting parties with knowledge of undisclosed material facts regarding listed issuers from trading the securities of such issuers. This update provides a brief introduction to the insider trading rule – in particular, how it differs from the fair disclosure rule.

Listed issuers and insiders

Issuers whose debt securities, shares, options or investment securities are listed on a Japanese stock exchange are subject to both the fair disclosure and insider trading rule. However, foreign issuers that are listed on certain foreign securities exchanges specified by the Japan Financial Services Agency (FSA) – including the New York Stock Exchange, the Nasdaq Stock Market, the London Stock Exchange and the Luxemburg Stock Exchange – are exempt from the application of the fair disclosure rule. Notably, such foreign issuers are not exempted from the insider trading rule and must therefore comply with its requirements.

Whereas the fair disclosure rule applies only to listed issuers, the insider trading rule applies to both listed issuers and issuer affiliates (so-called 'insiders'), including:

- directors;
- officers;
- employees;
- agents;
- shareholders holding at least 3% of the voting rights or issued and outstanding shares of the listed issuer; and
- any person who has entered into, or is in the process of negotiating, a contract with the listed issuer.

Further, the insider trading rule applies to non-resident persons or entities if the trade is executed in Japan on the order of such persons or entities. According to press releases issued by the FSA and the Securities and Exchange Surveillance Commission, a monetary administrative penalty was issued against non-resident persons or entities in:

- two cases in fiscal year 2015 (out of a total 22 cases);

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- two cases in fiscal year 2016 (out of a total 43 cases); and
- one case in fiscal year 2017 (out of a total 21 cases).

Material facts

'Material information' under the fair disclosure rule is defined simply as information concerning a listed issuer's operations, business or assets that would have a material effect on an investor's investment decision. However, the definition of 'material facts' under the insider trading rule specifically sets out the type of information to be included within its scope (eg, the issue of shares, the reduction of capital, the repurchase of shares, mergers and corporate splits) and objective thresholds at which a particular fact will be deemed to be material. For example, in the case of the issue of shares, if the aggregate issue price is less than ¥100 million, such issuance will not constitute a material fact under the insider trading rule. In the case of a merger, if the surviving entity's total assets are expected to increase by less than 30% and its gross revenue is expected to increase by less than 10%, such merger will not constitute a material fact under the insider trading rule. Under the fair disclosure rule, there is no such list of information or objective threshold criteria that serves to limit the scope of the definition of 'material information'. Therefore, there can be instances in which information that does not constitute a material fact under the insider trading rule may nonetheless constitute material information under the fair disclosure rule. As such, the scope of material facts under the insider trading rule is generally considered to be narrower than that of material information under the fair disclosure rule.

Publication method

The fair disclosure rule and the insider trading rule both stipulate the manner in which material information and material facts, respectively, must be disclosed or published. Under both rules, the stipulated manner of disclosure of the relevant information includes:

- the filing with the relevant regulatory authorities of securities registration statements, securities reports, semi-annual reports, extraordinary reports or other disclosure documents as required under the Financial Instruments and Exchange Act; and
- the publication of a press release pursuant to the rules of the relevant Japanese stock exchange.

The posting of material information on the listed issuer's website is also permitted as a manner of publication under the fair disclosure rule, but not under the insider trading rule.

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