

# Recent amendments to Foreign Exchange and Foreign Trade Act

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## Introduction

In light of the global trend to further regulate foreign direct investments from a national security viewpoint, the Foreign Exchange and Foreign Trade Act of Japan (FEFTA) and regulations thereunder were subject to amendments which took effect in August 2019 and October 2019 (the 2019 amendments) and in May 2020 (the 2020 amendments).

The 2020 amendments drew particular attention from Japanese stock market participants concerned about the potential negative impact thereof, as the threshold requirement for foreign investors to file prior notifications with the relevant authority before the acquisition of shares in listed companies in Japan was reduced substantially from 10% of all outstanding shares to 1%. However, as the 2020 amendments were promulgated in April 2020, it became clear that:

- they also introduced a new exemption from the aforesaid notification requirement; and
- the exemption has a relatively wide application on foreign investors looking to acquire shares.

Although such concerns may have been alleviated to some extent, the amendments could still limit negotiations between foreign investors and listed companies.

In addition, on 15 June 2020, in light of the global spread of COVID-19, the scope of businesses subject to prior notification requirements was amended to include the manufacture of medical products and devices for infectious diseases. This article provides a brief explanation of the recent amendments to the FEFTA.

## General rules on inward direct investment under FEFTA

In general, a foreign investor (as defined in the FEFTA) is not required to make a prior filing before making an inward direct investment and need only make a *post facto* report. The term 'inward direct investment' is defined in the FEFTA and includes:

- the acquisition of shares in an unlisted company;
- the acquisition of 10% (the 2020 amendments have reduced this threshold to 1%) or more of all outstanding shares in a listed company; and
- the granting of a loan to a company whose principal office is in Japan in excess of a certain prescribed amount.

However, prior notification must be filed with the relevant authority before an investment if:

- it is made in a designated business for which there are concerns regarding national security, public order or safety; or
- a reservation is made under the Organisation for Economic Cooperation and Development's Code of Liberalisation of Capital Movement.

In general, an investment may not be consummated until 30 days after the filing date (this waiting period may be shortened or extended by the authority up to five months) and after examining the

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investment from a national security viewpoint, the relevant authority may recommend or order changes thereto or the suspension thereof.

## **2019 amendments**

Under the 2019 amendments, the scope of designated businesses was expanded to include the manufacture of devices, parts and software for information processing. In addition, the definition of 'inward direct investment' was expanded to include:

- acquiring 10% or more of the total voting rights of a listed company;
- acquiring the authority to exercise proxy voting rights for a listed company on behalf of another shareholder over certain prescribed matters that control or have a material influence on its management, resulting in the foreign investor having authority to exercise 10% or more of the total voting rights; and
- obtaining consent from another foreign investor which holds voting rights in the same listed company to exercise voting rights jointly, resulting in the two foreign investors jointly holding 10% or more of the total voting rights.

## **2020 amendments**

The FEFTA was further amended by the 2020 amendments, which partly tightened and partly relaxed regulations regarding inward direct investment under the FEFTA.

### **Prior notification for share acquisitions**

Under the 2020 amendments, the definition of 'inward direct investment' was further expanded by reducing the prior notification requirement threshold concerning the acquisition of the shares or voting rights of listed companies in Japan from 10% of all outstanding shares or voting rights to 1%, which is the minimum shareholding that would confer a shareholder the right to propose an agenda at a general meeting of shareholders under the Companies Act.

Conversely, the FEFTA was relaxed by introducing an exemption from the prior notification requirements before the acquisition of shares or voting rights of listed companies. The exemption is available for the acquisition of shares or voting rights of listed companies, regardless of whether it is less than or more than 10%, that engage in designated businesses (non-core designated businesses) other than those designated as being likely to pose a risk to national security (core designated businesses) on the condition that:

- the foreign investor or its closely-related persons will not become directors or corporate auditors of said company;
- the foreign investor will not make certain prescribed proposals at the general shareholders' meetings of said company, including those involving the transfer or discontinuation of the company's designated businesses; and
- the foreign investor will not access non-public technical information regarding the company's designated businesses or take other prescribed actions that could lead to such non-public technical information being leaked.

In addition, an exemption is also available for the acquisition of less than 10% of the shares or voting rights of a listed company that engages in a core designated business on the condition that the foreign investor complies with the above conditions and the additional condition that it shall not:

- attend or cause any persons designated by it to attend meetings of the listed company's board of directors or committee meetings with authority to make important decisions in respect of the listed company's core designated businesses; and
- make or cause any persons designated by it to make proposals to such boards or committees or their members in writing or electronic form requesting a response or action in respect of the listed company's core designated businesses.

Further, if a foreign investor falls under the category of 'foreign financial institution' as defined in the FEFTA, the exemption is available even if it acquires 10% or more of the shares or voting rights of a listed company that engages in a core designated business. Conversely, this exemption is not available to any foreign investor which has violated the FEFTA or is a foreign government or foreign state-owned enterprise other than those that do not pose a national security risk and are accredited by the minister of finance.

If a foreign investor acquires shares or voting rights that would constitute an inward direct investment without filing prior notification based on the abovementioned exemptions but fails to comply with the required conditions set out above, the authority may recommend or order the investor to take measures that are necessary to comply with such conditions.

Core designated businesses include all sectors relating to weapons, aircraft, nuclear facilities, space and dual-use technologies and partial sectors relating to cybersecurity, electricity, gas, telecoms, water supply, railway and oil. To clarify the scope of the prior notification requirements concerning listed companies in Japan, in May 2020 the Ministry of Finance released a list of listed companies (updated in June 2020) which categorised them into companies engaged in:

- business other than designated business;
- non-core designated business; and
- core designated business.<sup>(1)</sup>

Of the approximately 3,800 listed companies on the list, approximately 1,550 are listed as companies that engage in non-core designated businesses and 558 listed companies are listed as companies engaging in core designated businesses.

### **Prior notification for voting at general meetings of shareholders**

Under the 2020 amendments, if a foreign investor that holds 1% or more of the total voting rights in a company intends to cast votes at the general shareholders' meeting of a listed company for certain prescribed proposals that have a material effect on the company's management (eg, the election of the foreign investor or a person relating thereto as a director or corporate auditor of the listed company, or the transfer or discontinuation of any designated business conducted by the listed company that is proposed by such foreign investor), such foreign investor must file a prior notification and cast votes after the lapse of the requisite waiting period. In this case, the abovementioned newly introduced exemptions from the prior notification requirement are unavailable. Therefore, if, for example, a foreign financial institution acquires and holds 1% or more of a company's total voting rights (without filing a prior notification based on the abovementioned exemptions in compliance with the abovementioned conditions) but changes its mind and wishes to cast votes for any of the proposals set out above at a general shareholders' meeting, it can do so if it files a prior notification before the general shareholders' meeting.

### **Recent inclusion of medical products and devices for infectious diseases into core designated businesses**

On 15 June 2020 in light of the global spread of COVID-19, the scope of designated businesses and core designated businesses was expanded to include the manufacture of medical products for infectious diseases and highly controlled medical devices to maintain this industry in Japan for public health and safety. Such amendments will be fully implemented on 15 July 2020.

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### **Endnotes**

(1) Please see [here](#).

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