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■ Executive Compensation

Recent Trends on Regulations on Stock-Based Compensation in JapanI. Introduction

Executives of listed companies in Japan have historically received compensation as a fixed amount of cash that is not linked to company performance. However, in recent years many listed companies in Japan have begun to introduce new types of compensation linked to the company's financial performance, such as restricted stock or performance shares. This change in executive remuneration is in response to measures taken by the Japanese government and the stock exchange which are intended to improve the mid- to long-term business results and shareholder value of companies listed in Japan as an incentive for sustainable growth. The introduction of the Corporate Governance Code by the Tokyo Stock Exchange in 2015 is one such example.

II. Restricted Stock and Performance Shares

Amid the measures aimed at the promotion of restricted stock or performance shares, the most influential has been the report titled "Guidebook for Introducing New Stock-based Compensation ("Restricted Stock") as Board Members' Compensation to Encourage Companies to Promote Proactive Business Management", issued by Ministry of Economy, Trade and Industry in 2016¹. Since the issuance of the report, to date, numerous listed companies have introduced restricted stock or performance shares.

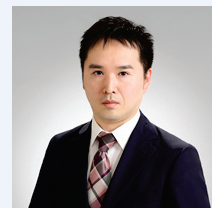
"Restricted stock" typically means common stock granted to officers or employees who execute a transfer restriction contract with the issuing company. Pursuant to such contract, the officers or employees are obliged not to sell or transfer the shares during the restricted period, and the issuing company will have the right to re-acquire the shares for zero consideration under certain conditions (e.g. the officer or employee leaves the company before the restricted period expires). "Performance shares" (also known as "performance shares units" in Japan) typically means common stock to be issued to officers or employees who have achieved certain financial or nonfinancial targets.

However, as restricted stock and performance shares have gradually become popular, their interplay with existing associated legal issues has come under greater scrutiny. One issue is that the issuance of new shares or disposition of treasury shares by a company without any consideration is generally not permitted under the Companies Act of Japan (the "Companies Act"). This means that the officer or employee would

¹ Outline of 2019 version of the report is available at https://www.meti.go.jp/english/press/2019/0531_004.html

Authors in this Issue

■ Executive Compensation

**Motoki Saito**

Partner

+81-3-6889-7406

motoki_saito@noandt.com

■ Antitrust/Competition

**Ryohei Tanaka**

Partner

+81-3-6889-7457

ryohei_tanaka@noandt.com

need to contribute cash or assets (for this purpose, provision of services is not considered as consideration) in order to acquire the shares. In practice, in order to overcome this issue, the issuing company creates a monetary receivable and the officer or employee satisfies such receivable as contribution in kind to the issuing company as consideration for the restricted stock or performance shares. While this method is considered valid under the Companies Act, the creation of the monetary receivable is somewhat complicated and not easy to understand for investors.

Another issue is disclosure. Under the Financial Instruments and Exchange Act of Japan (the "FIEA"), the issuance of common stock or disposition of treasury shares for the purpose of granting restricted stock or performance shares was, to a certain extent, no different from a public offering of common stock. That means that if the aggregate issue or disposition amount is 100 million yen or more, a securities registration statement was required to be filed by the issuing company, and the stock could only be issued or delivered after the securities registration statement became effective. Such requirement imposed certain burdens and restrictions on companies that intended to introduce restricted stock or performance shares.

III. Amendment of the FIEA Disclosure Requirement

In order to address the disclosure issue mentioned above, an amendment which took effect on July 1, 2019 introduced an exemption to the securities registration statement filing requirement under the FIEA. The exemption covers the issuance of restricted stocks with certain transfer restrictions to directors, officers or employees of the issuing company or a company that is a direct wholly-owned subsidiary of such company. Instead of filing a securities registration statement, only an extraordinary report is required to be filed by the issuing company.

Although this exemption is not available for all types of restricted stock, the amendment is expected to reduce the burden on companies that intend to introduce restricted stock. On the other hand, the exemption is generally not available for performance shares.

IV. Amendment to the Companies Act

In addition to the above, an amendment to the Companies Act has been proposed to enable a listed company to issue shares or to dispose of treasury shares to its directors and executive officers without consideration. If the amendment takes effect, the issuing company would not need to use the monetary receivables scheme discussed above in order to grant restricted stock or performance shares to its directors, and the company would be able to simply grant shares to its directors. The amendment bill is expected to be submitted to the Diet this fall and may come into effect in 2021.

However, even if the amendment takes effect as currently proposed, the ability to issue new shares or dispose of treasury shares without consideration is not expected to extend to stock-based compensation granted to officers who are not directors or corporate executive officers. In that case, the issuing company would still need to use the monetary receivables scheme discussed above for such officers and employees.

V. Conclusion

Restricted stock and performance shares are relatively new forms of compensation in Japan and there are still various legal issues and legislative measures that require further thought. The above-mentioned measures are just two examples of some of the recent changes in this area and, although they may not work perfectly, they are expected to further facilitate and promote companies' ability to utilize restricted stock and performance shares as compensation for their officers and employees.

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by Junichi Ikeda, Takayuki Fujii, Yuto Tanaka, Shota Hamasaki and Satoyuki Nakano
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- ***Lexology Getting the Deal Through - Securities Finance 2019 Japan***
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by Shinichi Araki and Motoki Saito

■ Antitrust/Competition

New Commitment Procedure under Anti-Monopoly Act

I. Introduction

On December 30, 2018, a new commitment procedure under the Anti-monopoly Act (the “AMA”) came into effect following the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (also known as TPP11). The commitment procedure enables enterprises to voluntarily resolve suspected violations of the AMA with the Japan Fair Trade Commission (JFTC) and, if a commitment is approved, the conduct of the enterprise concerned will not be determined to be a violation of the AMA and the enterprise will not be subject to legal penalties.

In addition to all future investigations, the new commitment procedure is available to ongoing investigations which had already been initiated prior to December 30, 2018.

It is expected that the new procedure may lead to the JFTC taking a more active enforcement role going forward.

II. Outline of commitment procedure

The commitment procedure is a three-step process as follows:

- Following the commencement of an investigation, the JFTC may issue a written notice of commitment procedure to the suspected enterprise.
- The enterprise which seeks to use the commitment procedure must submit an application to the JFTC within 60 days from the date of the notice of commitment procedure.
- The JFTC will either approve or reject the application.

III. Notice of commitment procedure

The commitment procedure is only available once an investigation has been initiated and at the discretion of the JFTC. A suspected enterprise cannot seek to avail itself of the commitment procedure prior to the launch of an investigation, nor if the JFTC does not issue a written notice of commitment procedure. The JFTC has already made clear that it will not apply the commitment procedure in the following cases:

- hardcore cartels, such as bid rigging and price fixing;
- repeated violations (for example, where the suspected enterprise has been subject to legal measures for a violation of the same provision of the AMA within the last 10 years); and
- egregious suspected violations which are equivalent to criminal accusations.

IV. Application for approval

Once a notice of commitment procedure has been issued by the JFTC, the suspected enterprise has 60 days from the date of the notice of commitment procedure to submit an application for approval. The deadline for the application for approval cannot be extended as a matter of statute.

When applying for approval of a commitment, the suspected enterprise must prepare and submit a commitment plan, which should include:

- details of the measures to be taken to remedy the suspected violation (i.e., remedial measures);
- the deadline for implementing the remedial measures; and
- the documents or evidence demonstrating the feasibility and reliability of the proposed remedial measures (i.e., the commitment plan).

V. Approval

A commitment will be approved if the commitment plan is considered to be:

- sufficient to remedy the suspected violation; and

- reliable (i.e., expected to be implemented with a high degree of certainty).

In other words, an application will be rejected unless the JFTC is convinced that the commitment plan meets both of the above conditions. In making its determination, the JFTC may seek third-party opinions if it deems necessary. All approved commitments will be publicly announced.

Once a commitment has been approved, the JFTC will not impose any legal penalties with regard to the suspected violation unless the approval is revoked and, after further investigation, the JFTC finds that the suspected violation contravenes the AMA. No penalties apply for a failure to implement a commitment plan, unlike in other jurisdictions with similar mechanisms in place.

Failure to implement measures in accordance with an approved commitment plan may result in the revocation of approval, in which case the JFTC will resume its investigation.

VI. Comment

(i) Benefits for suspected enterprises

If a commitment is approved, the suspected enterprise's conduct will not be determined to be a violation of the AMA and the JFTC will not impose legal penalties. As a result, it will be harder for potential plaintiffs to pursue the suspected enterprise for civil liability compared with cases in which the JFTC finds that there has been a violation of the AMA and legal penalties are imposed. The AMA provides that an enterprise will owe strict civil liability if the JFTC finds that the enterprise has violated the AMA and the JFTC has imposed legal penalties in relation to such violation.

Further, given that the JFTC will not need to complete a full-scale investigation which may include detailed analysis of the impact on competition, calculation of the administrative surcharge amount and the undertaking of hearings and other strict procedures, the commitment procedure will likely result in shorter investigations and reduced costs for suspected enterprises.

While there were cases prior to the introduction of the commitment procedure in which the JFTC terminated the investigation after the suspected enterprise proposed certain remedial measures, the introduction of the commitment procedure to the AMA provides clear legal grounding and procedural certainty to both suspected enterprises and the JFTC.

(ii) JFTC enforcement actions

The commitment procedure may lead to the JFTC enforcing the AMA more actively and effectively, as it will enable the JFTC to resolve cases without needing to first complete a full-scale investigation and prove a violation of the AMA, which may also be the subject of further dispute, particularly in difficult unilateral conduct cases.

However, as of July 24, 2019, the JFTC has not made any public announcement in relation to an approved commitment since the commitment procedure's introduction.

NAGASHIMA OHNO & TSUNEMATSU

www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
 Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



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