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Financial Law Board

Current Status and Issues Involving the Interpretation of "Solicitation" Under the Disclosure System in the Financial Instruments and Exchange Act
(Summary)

1. Prior Status of Issues Surrounding the Concept of "Solicitation"

Even before the Financial Instruments and Exchange Act (hereinafter "FIEA") came into force, solicitations (specifically, primary or secondary offerings that make "solicitation" a core condition) prior to the submission of a securities registration statement (hereinafter "Registration Statement") had been prohibited, and violation of this prohibition (hereinafter "Prohibition Against Pre-Registration Solicitation") was punishable by criminal sanctions. However, while there had been some academic discussion, since the cases in which severe criminal sanctions were actually imposed were limited, it is hard to say that there had been much accumulation of knowledge based on practical precedents concerning the fundamental and weighty issue of how and when contacts with investors would constitute a "solicitation" that would be prohibited by the Prohibition Against Pre-Registration Solicitation in so-called public offering finance (hereinafter "General Public Offerings") in which solicitations to the general public are made.

In addition, the FIEA's Prohibition Against Pre-Registration Solicitation does not make any textual distinction between the regulation of a capital increase in the form of an allotment to a specific party chosen by the issuer (hereinafter "Third-Party Allotment") and the regulation of a General Public Offering. Consequently, it is recognized that there is a possibility that the business practice in which an issuer has prior contact with the planned recipient before the filing of the Registration Statement may be interpreted as constituting a "solicitation."

2. The 2008 and 2009 Amendments, and Associated Changes to Status of Issues

Circumstances surrounding the concept of "solicitation" were transformed with the two statutory amendments described below that took place in 2008 and 2009 respectively,

bringing about a reaffirmation of the realization that a theoretical consolidation was needed together with a practical clarification of the concept of "solicitation."

First, violations of the Prohibition Against Pre-Registration Solicitation were added as a subject for administrative fines in the Act for the Partial Amendment of the Financial Instruments and Exchange Act, Etc. that came into effect on December 12, 2008 (Law No. 65 of 2008). The level of the administrative fine for a violation of the Prohibition Against Pre-Registration Solicitation was set at 2.25% of the total amount of the issue value of the acquired securities (4.5% for stock certificates and the like), and if this is applied to a large-scale issue, it is possible that a large fine will be imposed. Accordingly, in practice, there could be a non-minimal effect depending on the interpretation of "solicitation."

Second, a provision that keeps advance inquiries that meet certain conditions in third party allotments from constituting a solicitation was newly established in the Guidelines Concerning Disclosure of Corporate Information, Etc., which was revised in the Cabinet Office Ordinance for the Partial Amendment of the Regulation for Terminology, Forms and Preparation of Consolidated Financial Statements, Etc., (Cabinet Office Ordinance No. 73 of 2009) that came into effect on December 11, 2009 (hereinafter, the Guidelines Concerning Disclosure of Corporate Information, Etc. is referred to as "New Disclosure Guidelines"; the specific provision noted above is number 2-11 (2-12 pursuant to a later amendment)). Pursuant to this, the risk that the prior contact with a planned allotment recipient, which is understood to be unavoidable in connection with a Third-Party Allotment, might be covered by the Prohibition Against Pre-Registration Solicitation is understood to have been almost entirely eliminated in actual practice, including the regulation by administrative fine, as long as care is taken to satisfy the conditions of the New Disclosure Guidelines 2-12. It is also true, however, that since the overall concept of "solicitation" still has not been clarified even after the New Disclosure Guidelines came into effect, the risk of falling afoul of the Prohibition Against Pre-Registration Solicitation in certain cases still has not been swept away, and some sort of measure is necessary to deal with this.

3. Synopsis of the Article

The article first presents a brief overview of the status of law, regulation, and guidelines concerning "solicitations" under disclosure rules that apparently were designed

primarily with a view towards General Public Offerings (Part II). Then, it organizes and studies the state of affairs concerning problems having to do with the day-to-day transmissions of information by issuers that may be presented as an issue of whether they would constitute a solicitation in connection with a General Public Offering, in particular, day-to-day information transmissions prior to an IPO (Part III), and advance market surveys (Part IV). Thereupon, the article reviews the status of the elimination of problems that could arise if the Prohibition Against Pre-Registration Solicitation were to be applied as-is to prior contacts between issuers and planned allotment recipients in Third-Party Allotments and problems as a result of the New Disclosure Guidelines (Part V).

Note: The full text of this paper is available only in Japanese.