September 5, 2011
Financial Law Board

Foreign Companies and Proxy Solicitation Rules (Summary)

In today's globalized economy, it is not at all unusual for a company in one country to list its shares on the securities exchanges of another. Numerous foreign companies are listed on the Foreign Section of the Tokyo Stock Exchange and the number of foreign companies listed in Japan is expected to increase with the establishment of the new professional-oriented TOKYO AIM market. To increase the number of foreign companies listed on domestic securities exchanges, we must clarify the laws and regulations that will be applied to them when they list in Japan. However, the language of Article 194 of the Financial Instruments and Exchange Act (hereinafter "the FIEA"), which regulates the solicitation of proxies, is ambiguous about whether it applies to foreign companies[1]. This paper examines the interpretation of Article 194 of the FIEA and the Cabinet orders and Cabinet Office ordinances formulated under it (for the purposes of this paper, all related laws, orders, and ordinances will be referred to as "proxy solicitation rules"), and discusses the potential scope of proxy solicitation rules going forward.

Article 194 of the FIEA states, "no person shall conduct solicitation for having said person or a third party exercise by proxy the voting rights pertaining to the shares of the company which issues the shares listed on a Financial Instruments Exchange, in violation of the provisions of a Cabinet Order." The problem is that since the FIEA does not define the terms "shares" and "company which issues the shares" as used in this article, it is unclear whether "shares" includes "shares issued by foreign companies" or "companies which issue the shares" includes "foreign companies." Whether the article should be applied to (the shares issued by) listed foreign companies remains unclear, even when one takes into consideration the legislative intent behind Article 194 of the FIEA.

[1] For example, one question is whether Article 194 of the FIEA would apply in the event a foreign company listed on a Japanese security exchange sends proxies to Japanese shareholders (in most cases, shareholders throughout the world, including Japanese shareholders) at the time of its General Meeting of Shareholders to solicit proxy exercise of their voting rights. The penalty for violating this article is a fine not exceeding 300,000 yen (Article 205-2:2).

Although it is unclear from the literal language and the legislative intent of Article 194 of the FIEA whether it applies to shares issued by listed foreign companies, the language of Article 36-2 to 36-6 of the Enforcement Order to the FIEA and the Cabinet Office Ordinance on Solicitation of Proxy Exercise of Voting Rights in Listed Shares (hereinafter "the Cabinet Office Ordinance") clearly suggests that they were designed to regulate proxy solicitations involving only domestic companies. The reasons for this conclusion are listed below. Based on the current Article 36-2 to 36-6 of the Enforcement Order to the FIEA and the Cabinet Office Ordinance, it is difficult, therefore, to interpret that proxy solicitation rules would apply to listed foreign companies.

(1) Information required in the reference documents stipulated in the Cabinet Office Ordinance (Article 36-2:1 of the Enforcement Order to the FIEA and Article 1:1 of the Cabinet Office Ordinance) are basically identical to the information required in the reference documents for General Meetings of Shareholders (Article 301:1 of the Japanese Companies Act) as stipulated beginning Article 73 of the Enforcement Ordinance to the Japanese Companies Act. It is unreasonable to require such information from foreign companies when they are governed by organizational statutes and regulations different from the Japanese Companies Act.

(2) The Cabinet Office Ordinance clearly identifies the cases in which the intent is for "company" to include foreign companies (Article 2:4:5 of the Cabinet Office Ordinance). Therefore, as an *argumentum e contrario*, it would be natural to conclude that foreign companies are not included in the word "company" in the Cabinet Office Ordinance unless specifically noted.

(3) Since the definitions of many of the terms regarding the information required in the reference documents stipulated in the Cabinet Office Ordinance are taken directly from the definitions in the Japanese Companies Act and its Enforcement Ordinances, it can be concluded from a textual interpretation that none of the provisions would apply to foreign companies, which are not "joint-stock companies" under the Japanese Companies Act. If these provisions are not applied, there is little meaning in applying the remaining provisions to foreign companies. Therefore, it is unlikely that the intent was to apply the Cabinet Office Ordinance to foreign companies.

(4) Among the information required in the reference documents stipulated in the Cabinet Office Ordinance, items such as compensation, as defined in Article 10 through Article 12, mirrors the list of items subject to shareholder resolution under the Japanese Companies Act. Since foreign companies are subject to different organizational statutes and regulations, requiring them to provide the same information as with companies governed by the Japanese Companies Act would be inconsistent with the intent of the law, which is to provide shareholders with information necessary for proxy exercise of voting rights.

As can be seen, taking into account the language of current laws, orders, and ordinances, including Article 36-2 to 36-6 of the Enforcement Order to the FIEA and the Cabinet Office Ordinance, it is essentially impossible to adopt an interpretation that would apply proxy solicitation rules to shares issued by foreign companies. However, since the literal language of Article 194 of the FIEA does not provide such a clear conclusion, prompt improvements and clarifications should be made so as to strengthen the competitiveness of Japan's financial and capital markets. Following are some ideas for making the improvements. One potential approach would be to amend the Cabinet order stipulated in Article 194 of the FIEA (and the Cabinet Office ordinance stipulated in the Cabinet order) so that proxy solicitation rules are applied to shares issued by foreign companies. When this approach is pursued, one idea to make rules consistent would be to include measures that allow the use of the foreign company's home-country disclosure documents (and to eliminate the need to create reference documents in Japanese) on the assumption that such documents pose no threat in terms of investor protection. If the intent of the authorities is to interpret that Article 194 of the FIEA applies to foreign companies *in abstracto*, but they, as the authority delegated the responsibility under the law, consider it unnecessary to regulate the shares of listed foreign companies as described in the article, another approach is to amend the Cabinet order and Cabinet Office ordinances to make their intent explicit. In a larger context, it would also be possible to amend the laws themselves from the standpoint of addressing the problems of overlapping jurisdiction and roles between the Japanese Companies Act and the FIEA. Regardless of the approach taken, prompt clarifications should be made about whether the proxy solicitation rules apply to foreign companies.

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