

## MAJOR STATUTORY AMENDMENTS IN JAPAN IN 1981

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### 1. Introduction

The year 1981 was marked in Japan both by extensive amendment of the Commercial Code and relevant statutes [1] affecting virtually all aspects of corporation law, and by the complete revision of the Bank Law and related modification of the Securities and Exchange Law. The amendments to the Commercial Code and relevant statutes took effect on October 1, 1982, except for provisions relating to debentures with warrants, which became effective on October 1, 1981. The revised Bank Law and the modified Securities and Exchange Law came into effect in April, 1982. Most implementing cabinet and ministerial rules were promulgated in spring, 1982.

In this article we summarize the amendments mentioned above. Analysis and assessment are beyond the scope of this brief report.

### 2. The size of a corporation

Stock corporations (*Kabushiki-gaisha*) are subject to different regulations depending upon their size. Their classification as large, medium, or small was introduced by the 1974 amendment establishing varied auditing practices. The 1981 amendment modified the tests for size classification and extended regulation based on corporate size to such other areas as governance and disclosure.

A corporation is “large” when its stated capital is 500 million yen or more, or when the aggregate liabilities on its balance sheet are not less than 20 billion yen [2]. A corporation is “small” when its stated capital is not more than 100 million yen and its aggregate liabilities are less than 20 billion yen [3]. The remainder are “medium”. Large corporations with 1,000 or more shareholders entitled to vote are subject to special regulations regarding shareholder meetings [4].

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### 3. General meeting of shareholders

(1) Under the 1981 amendments, the power of the shareholders was curtailed in one respect and expanded in another. A large corporation is no longer required to submit its balance sheet and income statement to the shareholders for approval if both the account auditor(s) (*kaikei kansanin*) and the supervisors (*kansayaku*) are of the opinion that these financial statements are lawfully furnished [5]. Dividends must be declared by the shareholders in any case. Account auditor(s) required only in large corporations now must be elected by the shareholders [6]; before the 1981 amendment, they were appointed by the board of directors subject to the consent of the supervisor(s).

(2) A proposal right is now available to those shareholders who have held 1% of the aggregate outstanding shares or at least 300 shares for a period of six months [7]. In the case of a corporation whose shares are bundled in "units" [8], 300 shares mean 300 units [9], *i.e.* 300,000 shares in usual cases.

(3) It has long been recognized that the shareholders are entitled to ask questions in connection with the agenda of the general meeting [10]. The 1981 amendment made explicit that, if the shareholder has submitted the question in writing reasonably in advance of the meeting, the directors and the supervisor(s) may not refuse to answer on the ground that they need time to check.

(4) An inspector (*kensayaku*) may be appointed by the court in order to determine whether the general meeting is legally convened and administered. Those shareholders who have held at least 1% of the aggregate outstanding shares for a period of six months are entitled to apply for such appointment [11]. The provision for a court-appointed inspector may be especially useful in the case of an election contest.

(5) The chairman of the general meeting of shareholders will be elected at the meeting, unless the charter specifies otherwise [12]. The chairman is to preside at the meeting and keep order; he is empowered to expel a person who refuses to abide by his decisions [13]. These rules, not new in substance, were made explicit by the 1981 amendment.

(6) Before the 1981 amendment, listed corporations were subject to the Proxy Regulation only when they elected to solicit proxies [15]. Now a large corporation with 1,000 or more shareholders entitled to vote must send the shareholders an information statement [16] and a voting form [17] whenever a general meeting is convened. Unlike proxies, absentee shareholders exercise their voting rights directly by remitting the voting form. The ministerial rules prescribe the items to be stated on the voting form and the information statement [18]. For the time being, a listed corporation may choose between the use of voting forms or a proxy solicitation to all shareholders [19].

(7) Previously, a shareholder with a personal interest in a transaction was prohibited from voting on the matter [20]. This provision was repealed by the 1981 amendment. Now, where a grossly unreasonable resolution is passed by

virtue of the votes of such interested shareholders, the court will rescind it upon application by a shareholder, director, or supervisor [21].

A resolution whose content is violative of the charter and was void before the 1981 amendment is now merely voidable [22]. Prior to the amendment, the courts held a resolution void where virtually all procedural requirements were neglected. Now the statute expressly provides for an application to the court for such declaration [23].

Formerly, the courts refused, without an explicit provision, to rescind a resolution tainted with negligible procedural defects. The law now expressly provides for such refusal to rescind [24].

#### **4. Directors and the board of directors**

(1) A person is disqualified from being a director if he is an incompetent, a quasi-incompetent, a not-yet rehabilitated bankrupt, or was convicted of certain crimes [25].

(2) Before the new amendment, in order for a director to engage in a transaction competitive with the corporation, approval by at least two-thirds of the aggregate outstanding shares was necessary. If the director acted without approval, the corporation was entitled to take over the transaction by a simple majority vote by the shareholders. If the shareholders approved the transaction, on the other hand, the director was considered free of liability for any loss eventually caused to the corporation.

The 1981 amendment changed the picture almost entirely. Now a director may engage in such competitive transactions if approved by the board of directors [27]. The approval does not exempt him from liability for damage suffered by the corporation. Having consummated such a transaction, the director is required to report its material facts to the board without delay [28]. If a transaction is made without the necessary approval, the corporation may either take over the transaction by a resolution of the board [29], or recover damages, the amount of which is presumed to be that of the profits gained by the director or by third persons for whom he acted [30].

(3) A transaction between a director and the corporation must be approved by the board of directors [31]. This was true even before the 1981 amendment. The court had extended this rule to transactions to which a director was not a party but in which a conflict of interest existed. This is now stipulated by an express provision [32]. The interested director has a duty to report the material facts of the transaction to the board without delay [33].

(4) A few amendments were made regarding the liabilities of directors. The provision, which could be read to exempt the director from any liability for competitive transactions, was deleted. Directors will be held liable for unlawful payments made in connection with the exercise of a shareholder's right [34].

False statements in certain documents, such as financial statements, remain a ground for director liability to third parties [35]. The majority view regarded this as an absolute liability. Now it is made clear that a “no fault, no liability” rule applies here and that the burden of proof is on the director [36].

(5) The amended Code expressly provides that the board of directors shall manage the corporation as well as monitor the integrity of the management [37].

The amended Code also makes it clear that certain matters must be decided by the board itself, such as the disposition and acquisition of significant assets and substantial borrowing [38]. This means that the board may not leave these matters to the representative director(s), committees, or employees.

The representative director(s) (*daihyo torishimariyaku*), who correspond to executive officers in the United States, are required to report to the board at least once a quarter [39]. This follows from the monitoring function of the board and control by the supervisor(s).

(6) Each director is entitled to convene a meeting of the board. Where internal rules of the corporation provide that only a specified director is entitled to convene a meeting, each director may request that person to convene the meeting and, upon failure, he may convene it himself [40].

(7) Previously, the minutes of the board meetings were open for inspection by the shareholders and corporate obligees, although in fact such an inspection was refused in many cases. Now court permission is the prerequisite for such a request, and corporate obligees will receive a permit only where such an inspection is necessary for them to recover damages from the directors or the supervisor(s) [41].

## 5. Supervisor

(1) When the Commercial Code incorporated the board system for directors in the 1950 amendment, the function of a supervisor was reduced to account auditing. The resulting experience showed that the board’s control over management was unsatisfactory. Consequently, the 1974 amendment revived the supervisor as a control body with powerful functions, such as injunctive power, except in the case of small corporations whose supervisory functions remained the same as under the prior law. The 1981 amendment goes further toward strengthening the supervisor’s function in large and medium corporations.

(2) The 1974 amendment gave a supervisor power to request reports from the directors. There was controversy, however, as to whether a supervisor was empowered to request reports directly from corporate employees. The 1981 amendment expressly provides for this power [42].

(3) Since the 1974 amendment, a supervisor has been empowered to attend the board meeting and express his opinions there. The 1981 amendment

requires that a supervisor report to the board when he suspects illegal conduct on the part of a director [43]. In this connection a supervisor may request the director to convene a board meeting and, upon refusal, convene it himself [44].

(4) The supervisor of a large corporation may request reports from the account auditor with respect to the latter's audit during the financial year when such reports are necessary for performance of the supervisor's preparation of his report on the financial statements [45]. This is different from the auditor's opinion in regard to the financial statements.

(5) A large corporation is now required to have at least two supervisors [46]. They must appoint a full-time supervisor from among themselves [47].

(6) It was customary for the shareholders to fix the total amount of remuneration for the directors and the supervisor(s) en bloc. The 1981 amendment requires that the remuneration of the supervisor(s) be fixed separately from that of the directors [48]. Where only the total amount is fixed for two or more supervisors, they are to allocate it among themselves [49]. This reform is designed to enhance the independence of a supervisor from the directors.

(7) When the supervisor requests expenses, the directors may not refuse to pay unless they prove that such expenses are unnecessary for the supervisor's duties [50].

(8) The 1981 amendment makes it clear that a supervisor is liable for damage caused to third parties by virtue of a false statement in his report on the financial statements and that he bears the burden of proof as to his due care [51]. The prior statute simply incorporated the provision on director's liability *mutatis mutandis* without specifying how to apply it to a supervisor.

## 6. Account auditor

(1) Corporations subject to the Securities and Exchange Law of 1948 had been required to have their financial statements audited by an independent certified public accountant (CPA). The CPA audited financial statements after the shareholders approved and fixed them, which made it difficult to modify them pursuant to the CPA's opinion. The 1974 amendment required a large corporation, whether subject to the Securities and Exchange Law or not, to have its financial statements audited by an account auditor, who must be an independent CPA or an audit corporation composed of CPAs, before the financial statements are submitted to the shareholders for approval. The 1981 amendment improves this mechanism.

(2) An account auditor was appointed and dismissed by the board of directors with the consent of a majority of the supervisors. Now the shareholders' meeting elects and removes the account auditor(s) [52]. Consent of a majority of the supervisors is necessary for the directors to propose the election or dismissal of an account auditor. The majority may also request the directors to make such a proposal [53].

(3) There was no statutory provision for the term of office of an account auditor. Under the amended statute, the term is for one year, but it is automatically renewed unless the shareholders choose not to re-elect the auditor [54]. The supervisors must consent to the directors' proposal in this respect, as in the case of election or dismissal of an account auditor [55].

(4) The supervisors, by unanimous consent, may remove an account auditor in emergencies: (i) where the account auditor has breached or failed to perform his duty; (ii) where he has committed misconduct inappropriate for an account auditor; or (iii) where he is unable to perform his function because of ill health [56]. The supervisors must notify the shareholders of the fact of and the reasons for the removal at the first meeting held subsequent to such removal [57]. The dismissed account auditor may attend the meeting and express his views on the matter [58]. The same procedure applies to an election, non-re-election, or dismissal by the shareholders meeting [59].

(5) Where the vacancy of an account auditor is not expected to be filled immediately, the supervisors, by majority consent, must appoint a provisional account auditor [60]. He will hold his office until an account auditor is elected by the shareholders.

(6) The test for independence of an account auditor is now more stringent than before, *i.e.* the 1981 amendment enlarged the grounds for disqualification [61]. The same applies to a provisional account auditor mentioned above [62].

## 7. Accounting and disclosure

(1) Financial statements are composed of a balance sheet, an income statement, a business report, and a profit appropriation (loss disposal) proposal [63]. Formerly, the statute did not specify the items to be stated in the business report (*eigyō hōkokusho*). It is now provided that a Ministry of Justice rule shall specify such items [64]. The ministerial rule enumerates items, including segment information, required in the business report of large and medium corporations [65].

(2) Schedules (*fuzoku meisai*) to the financial statements were specified by the previous rule under the Commercial Code. The 1981 amendment makes them much more detailed and requires large and medium corporations to furnish some additional schedules [66].

(3) Financial statements become fixed upon approval by the shareholders. Unlike the previous law, it is no longer necessary for a business report to be approved, but the directors must explain its contents at the annual meeting [67].

As stated above, in the case of a large corporation, the balance sheet and the income statement become fixed upon approval by the board of directors if both the account auditor(s) and the supervisors are of the opinion that these documents are duly prepared; the directors need only explain their contents at

the annual meeting [68]. This means that if any one of either the account auditor(s) or supervisors disapproves these documents, they must be approved at the annual meeting.

In any event, approval of the profit appropriation proposal by the annual meeting is the prerequisite to the payment of dividends. Stock dividends may be declared by a simple majority vote at the annual meeting [69]; the prior law required a qualified majority.

(4) Prior to the 1981 amendment, the directors and the supervisors were subject to potential liability for two years after the approval of financial statements without reservation by the annual meeting, except for liabilities arising from misconduct [70]. This provision was repealed, thus increasing the period of potential liability to ten years [71].

(5) Under the prior statute, schedules to the financial statements were submitted to the account auditor(s) and the supervisors only after they had furnished their respective audit reports on the financial statements. The 1981 amendment accelerated the preparation of schedules, allowing account auditor(s) and supervisors to review the financial statements together with their schedules for at least one week [72].

(6) The 1981 amendment improved the contents of an audit report. The financial statements and their schedules, which had been reviewed in separate reports, are now reviewed in a single audit report. The legitimacy of a change in accounting policy and consistency between the financial statements and their schedules are, among others, additional items to be stated in an audit report of large and medium corporations [73].

A ministerial rule may provide for additional items to be stated in an audit report of large corporations [74]. A supervisor's report must point out, among other things, any breach of duty in connection with transactions tainted by a director's conflict of interests [75].

(7) The amount of the stated capital is, as a rule, the aggregate amount of the issue price of issued shares, whether they are par or non-par value shares [76]. In the past, only the par value constituted the stated capital, irrespective of the issue price, and the balance was credited to the capital surplus account. Now a corporation may credit not more than half of the issue price to the capital surplus account if the balance is not less than the par value [77].

(8) The amended Code makes it clear that provisions (reserves) which may be included under the liabilities caption in a balance sheet are confined to liability provisions and valuation provisions [78], thus requiring any reserved profit to be classified under the caption of earned surplus.

(9) Large and medium corporations must keep financial statements, their schedules, and the audit reports available for inspection by the shareholders and the corporate obligees for five years from the day two weeks before the annual meeting at the principal office, and for three years at branch offices [79]. A small corporation need keep them only at its principal office [80].

(10) After the annual meeting, corporations must publish their balance sheet in a daily newspaper or the *Official Gazette* [82]. This requirement is not new. Large corporations must also publish their income statement [83]. The balance sheet and the income statement may be published in a summary form, which may be more simplified in the case of a small corporation [84].

Numerical figures appearing in these documents may be shortened by omitting certain of the lowest digits; the rules governing this matter vary depending upon the size of the corporation and upon whether the documents are published or not [85]. This reflects considerations of readability and publishing space.

The pending proposal to require all corporations to file their financial statements with the Commercial Registry was again abandoned because of budgetary problems. Consolidated financial statements and semi-annual reports are also left to a future amendment. Currently, only those corporations which are subject to the Securities and Exchange Law are required to furnish them.

## 8. Questionable payments

(1) One of the notorious aspects of Japanese corporate life has been the rampancy of small shareholder gangsters (so-called *sōkaiya*). Payments were extorted by these people. Although the payment was a small sum in most cases, the total amount paid by each corporation and the aggregate amount paid by all corporations, *a fortiori*, was not negligible. The very fact that such gangsters were rampant was detrimental to the sound administration of a corporation and to society as a whole.

The 1981 amendment tries to eliminate this practice by means of restricting expenditures by corporations. Some provisions are expected to function as a further deterrent to bribes.

(2) It is illegal for a corporation to give anyone a pecuniary interest in connection with the exercise of the rights of a shareholder [86]. Where a corporation gives a pecuniary interest to some of its shareholders in exchange for something of little value, such payment is presumed to be made in connection with the exercise of the rights of a shareholder [87].

The person who has received a pecuniary interest in violation of the prohibition is obliged to return it to the corporation [88]. Where the corporation fails to claim such recovery, any shareholder may bring a derivative suit to return it for the corporation [89].

(3) Directors who give a pecuniary interest in violation of the above-mentioned prohibition are liable jointly and severally to the corporation for the amount of such interest unlawfully given [90]. Supervisors who fail to monitor such illegal payments in breach of their duty of care are subject to the same



liability jointly and severally with the directors [91]. A shareholder may bring a derivative suit against the directors and the supervisors [92].

(4) The directors, supervisors, and employees who give anyone a pecuniary interest in violation of the prohibition mentioned above, as well as the person who receives such illegal payment and anyone who causes the payment to be made, will be subject to criminal liability [93].

(5) The supervisor of a medium or a large corporation, upon discovering the director's unjust or materially unlawful conduct, must disclose it in his audit report [94]. In the case of a large corporation, this item is subdivided to show separately the director's breach of duty in connection with corporate donations [95]. The supervisor must summarize the measures he took in connection with monitoring corporation donations [96].

Large and medium corporations must furnish a schedule stating the details of sales and general administrative expenses within the operating expenses in a manner helpful to the supervisor's monitoring of corporate donations [97].

## 9. Issuance of stock

(1) Before the 1981 amendment, a corporation could issue par value stock with a par value of 500 yen or more [98], or even with a par value of 20 yen or more if the corporation was incorporated before the promulgation of the 1950 amendment [99]. The overwhelming majority of stocks listed on exchanges have a par value of 50 yen, an amount that is unreasonably low in today's economy. To rationalize corporate administrative practices and reduce the expenses incurred through the servicing of shareholder, the 1981 amendment increases the par value of each par value stock issued at the time of incorporation by corporations incorporated on or after October 1, 1982, to an amount of not less than 50,000 yen. Incidentally, the issuance price of the par value stocks shall not be less than the par value [100]. Thus, the minimum issuance price of stocks issued at the time of incorporation, whether they are par value or not, is 50,000 yen.

(2) The 1981 amendment abolishes the minimum par value of stocks after incorporation, making it possible to split stocks even if after the stock split par value falls below 50,000 yen. But, to prevent stocks from becoming unreasonably low, stock splitting is permitted only when the net asset value per share of stock after the split is not below 50,000 yen [101]. This limitation is applied not only to par value but also to non-par value stocks.

(3) Before the 1981 amendment, the Commercial Code did not permit the issuance of fractional shares. With the raising of the unit par value and with the concomitant raising of the fractional value, the 1981 amendment establishes a new system for the fractional stock.

Under the amended Code, one one-hundredth of a stock is called one

fractional stock and every shareholder who is given fractional stocks pursuant to the issuance of new stock, stock split, or reverse stock split is entitled to have them entered in the fractional stock register of the corporation [102]. If a shareholder receiving them indicates that the fractional stocks need not be registered, he will receive the cash proceeds from sales of such stocks by the corporation. This also applies to fractional interests of less than one one-hundredth of a stock.

Holders of fractional stocks are entitled to receive cash or stocks pursuant to the retirement, split, or reverse split of a stock or the merger of a corporation. They also have the right to receive a distribution of surplus assets upon the liquidation of the corporation [103]. Further, the corporation may set forth in its articles of incorporation that dividends and pre-emptive rights shall be given to holders of fractional stocks [104], but they may not grant voting rights [105].

Holders of registered fractional stocks may request the corporation to issue fractional stock certificates [106]. Such fractional stock certificates are bearer negotiable instruments and transfer is made by delivering them. Transfer of fractional stocks are not, however, entered in the fractional stock register.

(4) In keeping with the increase of the par value of each stock of corporations organized on or after October 1, 1982, corporations organized before October 1, 1982, will be required to consolidate into one share the number of shares constituting one unit as of a date yet to be decided upon, thus increasing the par value of each stock to no less than 50,000 yen [107]. For this purpose, the unit stock system is introduced as a transitional measure, and on and after October 1, 1982, it will be mandatory for all existing listed corporations to adopt as one unit either (i) the number of shares obtained by dividing 50,000 yen by the amount of the par value of each par value share, or (ii) such number of shares as may be specified in its articles of incorporation [108]. In the latter instance, the number of shares comprising one unit must be such that the total par value of shares constituting one unit, or the net asset per unit of stock as shown in the latest balance sheet, is not less than 50,000 yen [109]. If the issuing corporation fails to adopt either (i) or (ii), option (i) will be deemed to have been adopted [110]. Unlisted corporations are free to adopt the unit stock system or not [111].

Shares constituting less than one unit, hereinafter referred to as less than one unit shares, are entitled to such economic benefits as: the right to receive dividends; the right to receive shares and/or cash upon the free distribution of shares, stock splits or reverse stock splits, capital decreases or mergers; the right to subscribe for new stocks, convertible debentures or bonds with pre-emptive rights; the right to receive a distribution of surplus assets upon liquidation of the corporation; the right to demand conversion of bearer stock certificates into registered stock certificates; and the right to demand the reissue of stock certificates [112]. Any rights other than these are not available to holders of less than one unit shares.

On and after October 1, 1982, corporations are prohibited from issuing certificates of shares constituting less than one unit, except (i) in the case of the conversion of bearer stock certificates into registered stock certificates, and (ii) the reissue of stock certificates because of loss, theft, mutilation, etc. of stock certificates [113]. Therefore, it follows that on and after October 1, 1982, there are two types of less than one unit shares: the less than one unit shares for which stock certificates have already been issued, and the registered less than one unit shares for which no stock certificates have been issued.

Registered less than one unit shares for which no stock certificates have been issued are not transferable because the transfer of stock requires the delivery of a stock certificate [114]. On the other hand, less than one unit shares for which stock certificates have been issued are transferable in the same manner as stocks constituting any number of share units, but the transfer may be registered only if the transferee is at that time already a registered shareholder [115]. However, holders of less than one unit shares are not without recourse. They may at any time ask the issuing corporation to purchase such stocks, whether those for which stock certificates have been issued or those registered as less than one unit shares, at the current market price with the same handling fee as unit stocks [116].

(5) A corporation may issue par value shares, non-par value shares, or both [117]. Before the 1981 amendment, the Commercial Code stipulated that shareholders might seek the conversion of their par value shares into non-par value shares, or vice versa, only when the corporation had issued both par value shares and non-par value shares and when not otherwise stipulated in the articles of incorporation [118]. The Commercial Code was silent about conversion upon the initiative of the corporation. The 1981 amendment expressly provides that the corporation may convert its par value shares into non-par value shares, or vice versa, on its own initiative as well as upon demand of the shareholders [119].

(6) The Commercial Code severely restricts a corporation from purchasing its own shares, even though the corporation may be solvent or have a surplus [120]. Before the 1981 amendment, the same restriction was applied to taking its own stock in pledge. The 1981 amendment, however, allows a corporation to take up to 20% of all its issued stock in pledge [121].

Before the 1981 amendment, a subsidiary might acquire stock in the parent corporation, unless it was wholly owned. The 1981 amendment expressly prohibits a subsidiary from acquiring any stock in its parent if the parent holds more than 50% of the stock of the subsidiary [122]. The amendment further stipulates that a subsidiary holding stock in its parent as of October 1, 1982, must sell it within a reasonable period [123].

The 1981 amendment regulates reciprocal stock holding among two corporations. The amended Code stipulates that a corporation which has acquired more than 25% of the stock of another corporation cannot exercise the voting

right of that stock [124]. Therefore, if a parent corporation holds less than 50% but more than 25% of the stock in a subsidiary, the subsidiary may acquire and hold stock in the parent but cannot vote that stock at the parent's shareholders meeting.

## 10. Corporate bonds with pre-emptive rights

(1) In response to demands from the business world, the 1981 amendment allows corporations to issue debentures with warrants representing pre-emptive rights to newly issued stocks [125]. Therefore, a corporation may now issue straight debentures, convertible debentures, and bonds with pre-emptive rights. When such a bond is issued, the corporation will set the period during which the right may be exercised (no longer than the maturity period of the bond), the quantity of shares redeemable against the bond's face value, and the purchase price of the shares [126].

(2) There shall be two types of bonds with pre-emptive rights: bonds with detachable warrants and bonds with non-detachable warrants. In the case of the former, the warrants may be traded separately from the bonds. In the case of the non-detachable warrant bond, both the bond and the pre-emptive rights are represented by a single bond certificate and neither may be assigned separately. Under administrative guidance from the Ministry of Finance, bonds with detachable warrants may not be issued in the domestic market for the time being because the domestic market is not accustomed to naked warrants.

(3) Unlike convertible debentures, which can be entirely converted into equity before maturity, these kinds of bonds will continue to exist even after the exercise of the pre-emptive rights. This continuity of corporate debt will serve a useful function if the bonds are issued abroad by corporations that have a tendency to accumulate huge amounts of accounts receivable in foreign currency, enabling corporations to hedge against foreign exchange risks. Furthermore, bonds with pre-emptive rights bring additional funds to the corporation on each occasion the pre-emptive rights are exercised, because the warrant holder must pay the subscription money for the new stocks to the corporation whenever he exercises the right. The corporation will decide the total value of shares attached to the bonds, but their value must not exceed that of the bond [127].

## 11. Revisions of the Bank Law and the Securities and Exchange Law

(1) After remaining fundamentally unchanged for more than half a century, the Bank Law was completely revised in 1981 [128]. Four considerations gave

impetus to the complete revision of the Bank Law: (i) profound changes in the economic situation from 1927, when the old Bank Law was promulgated, have made the conditions under which banks must operate much more difficult; (ii) with the growing popularization and diversification of banking, retail banking has become more important; (iii) large issues of government bonds have increased the role of banks in the absorption of such bonds; and (iv) the number and activities of foreign banks have expanded with the internationalization of capital markets.

The old Bank Law [129] had very simple provisions, with administrative guidance playing a very large role in the administration of the law. The new Bank Law incorporates the chief measures resulting from prior administrative guidance and streamlines the regulation of banks in the modern environment. However, the new Bank Law provides the framework of bank regulations; detailed regulation is left to government and ministerial ordinances.

(2) The old Bank Law did not contain explicit provisions on the securities business of banks. Such business became the most controversial of all the problems involved in the revision of the Bank Law. The banking industry urged that banks be allowed to pursue the securities business of public bonds. The securities industry contended that such areas were the main business of securities companies and that banks should be refrained from entering it.

The new Bank Law permits banks to engage in underwriting, arrangement for public offering or secondary distribution of or dealing in government bonds, local government bonds, or bonds guaranteed by the government [130]; however, the revised Securities and Exchange Law requires banks engaging in securities business to obtain approval from the Minister of Finance [131]. The Minister of Finance will make a decision based on the recommendation of a specially organized council of experts [132].

(3) In return for the recognition of the securities business of banks, the 1981 revision of the Securities and Exchange Law expands the side business of securities companies. Before the 1981 revision, securities companies were restricted to side business relating to securities [133]. The revised Securities and Exchange Law, however, broadened the scope of practice to include securities business as well as securities [134]. Transactions involving certificates of deposit and commercial paper issued abroad, which are technically not included as securities, are considered part of the securities business. Securities companies engaged in side business are required to obtain the approval of the Minister of Finance [135]. Under the present foreign exchange conditions, no approval has been given as yet to such side business.

(4) Banks are prohibited from extending a loan to any one enterprise exceeding the percent of stated capital and legal reserves of the bank as fixed by government ordinance [136]. To prevent excessive concentration of bank lending to any one enterprise, the administrative guidance restricted the extension of large credit to one enterprise before the 1981 revision; the revised

Bank Law now provides a legal basis for such a measure.

(5) Because of the public nature of banking, banks are required within three months after the end of each fiscal year to make public the balance sheet and the income statement prepared in compliance with the ministerial ordinance [137]. In addition, banks must keep in their principal business offices, and make available to public inspection, documents explaining business and financial conditions [138]; however, the matters to be included in the documents are left to the discretion of each bank. Needless to say, banks are subject to the disclosure provision of the Commercial Code.

## Notes

[1] Commercial Code (*Shōhō*) (Law No. 48, 1899, as amended by Law No. 74, 1981); Law Making Exceptions to the Commercial Code with Respect to Audit of Corporations (*Kabushikigaisha no kansa tō ni kansuru shōhō no tokurei ni kansuru hōritsu*) (Law No. 22, 1974, as amended by Law No. 74, 1981) [hereinafter cited as Large Corp. Law]; Limited Liability Corporation Law (*Yūgengai-shahō*) (Law No. 74, 1983, as amended by Law No. 74, 1981). This paper does not deal with the amendment to the last statute.

[2] Large Corp. Law, art. 2.

[3] *Id.* art. 22, para. 1.

[4] *Id.* arts. 21-2 and 21-3.

[5] *Id.* art. 16, para. 1.

[6] *Id.* art. 3, para. 1.

[7] Commercial Code, art. 232-2.

[8] The unique temporary measure of “unit shares” is compulsory only for corporations listed on a stock exchange; it is voluntary for unlisted corporations. Supplementary Provisions (*Fusoku*) to the 1981 amendments, art. 15 [hereinafter cited as 1981 Supplementary Provisions].

[9] 1981 Supplementary Provisions, art. 21.

[10] Commercial Code, art. 237-3.

[11] *Id.* art. 237-2.

[12] *Id.* art. 237-4, para 1.

[13] *Id.* art. 237-4, paras. 2 and 3.

[14] Regulation Concerning Solicitation of Proxies for Listed Stock (*jōjō kabushiki no qiketsuken no dairikōshu no kan'yū ni kansuru kisoku*) (Securities Exchange Commission Regulation No. 13, 1948).

[15] Securities and Exchange Law (*Shōkentorihukihō*) (Law No. 25, 1948), art. 194.

[16] Large Corp. Law, art. 21-2.

[17] *Id.* art. 21-3.

[18] Regulation Concerning Information Statement to Be Attached to the Notice of a General Meeting of Shareholders of a Large Corporation (*Daigaisha no kabunushisōkai no shōshūtsūchi ni tempu subeki sankōshorui tō ni kansuru kisoku*) (Ministry of Justice Rule No. 27, 1982) [hereinafter cited as General Meeting Rule].

[19] 1981 Supplementary Provisions, art. 26.

[20] Commercial Code (prior to the 1981 amendment), art. 239, para. 5.

[21] Commercial Code, art. 247, para. 1, item 1.

[22] *Id.* art. 247, para. 1, item 2.

[23] *Id.* art. 252.

[24] *Id.* art. 251.

[25] *Id.* art. 254-2.

[26] Commercial Code (prior to the 1981 amendment), art. 264 paras. 1 and 2, art. 266, para. 1, item 3.

[27] Commercial Code, art. 264, para. 1.

[28] *Id.* art. 264, para. 2.

[29] *Id.* art. 264, para. 3.

[30] *Id.* art. 266, para. 4.

[31] *Id.* art. 265, para. 1, first clause.

[32] *Id.* art. 265, para. 1, second clause.

[33] *Id.* art. 265, para. 3.

- [34] *Id.* art. 266, para. 1, item 2, See note 86 *infra* and the accompanying text.
- [35] Commercial Code, art. 266-3, para. 2.
- [36] Under the Securities and Exchange Law this has been the rule since the 1971 amendment.
- [37] Commercial Code, art 260, para. 1.
- [38] *Id.* art. 260, para. 2. A part of the enumerated items were found in the previous statute.
- [39] Commercial Code, art. 260, para. 3.
- [40] *Id.* art. 259.
- [41] *Id.* art. 260-4.
- [42] *Id.* art. 274, para. 2.
- [43] *Id.* art. 260-3, para. 2.
- [44] *Id.* art. 260-3, paras. 3 and 4.
- [45] Large Corp. Law, art. 8, para. 2.
- [46] *Id.* art. 18, para. 2.
- [47] *Id.* art. 18, para. 2.
- [48] Commercial code, art. 279, para. 1.
- [49] *Id.* art. 279, para. 2.
- [50] *Id.* art. 279-2.
- [51] *Id.* art. 280, para. 2.
- [52] Large Corp. Law, art. 3, para. 1 and art. 6, para. 1.
- [53] *Id.* art. 3, para. 2 and art. 6, para. 3.
- [54] *Id.* art. 5-2, paras. 1 and 2.
- [55] *Id.* art. 6-2, para. 1.
- [56] *Id.* art. 6-2, para. 1.
- [57] *Id.* art. 6-2, para. 2.
- [58] *Id.* art. 6-2, para. 3.
- [59] *Id.* art. 6-3.
- [60] *Id.* art. 6-4, para 1.
- [61] *Id.* art. 4, para. 2.
- [62] *Id.* art. 6-4, para. 2.
- [63] Commercial Code, art. 281, para. 1.
- [64] Amended Commercial Code Enforcement Law (*Shōhō chū kaisei hōritsu shikōhō*) (Law No. 73, 1938, as amended by Law No. 74, 1981), art. 49.
- [65] Regulation Concerning Balance Sheet, Income Statement, Business Report and Schedules of a Stock Corporation (*Kabushiki-gaisha no taishaku-taishōhō, son'eki keisansho, eigyō hōkokusho oyobi fuzoku meisaiho ni kansuru kisoku*) (Ministry of Justice Rule No. 31, 1963, as amended by Ministry of Justice Rule No. 25, 1982), art. 45 [hereinafter cited as Account Rule].
- [66] Account Rule, arts. 46 to 48.
- [67] Commercial Code, art. 283, para. 1.
- [68] Large Corp. Law, art. 16, para. 1.
- [69] Commercial Code, art. 293-2, para. 1.
- [70] Commercial Code (prior to the 1981 amendment), art. 284.
- [71] Civil Code (Mimpo), Law No. 89, art. 167, para. 1.
- [72] Commercial Code, art. 281-2; Large Corp. Law, art. 12.
- [73] Commercial Code, art. 281-3, para. 1, items 5 and 9; Large Corp. Law, art. 13, para. 2.
- [74] Large Corp. Law, art. 13, para. 4 (account auditor's report), art. 14, para. 3 (supervisor's report).
- [75] Regulation Concerning Audit Report of a Large Corporation (*Daigaisha no kansa hōkokusho ni kansuru kisoku*) (Ministry of Justice Rule No. 26, 1982), art. 7 [hereinafter cited as Audit Rule].
- [76] Commercial Code, art. 284-2, para. 1.
- [77] *Id.* art. 284-2, para. 2.



- [78] *Id.* art. 287-2; Account Rule, arts. 33 and 47, para. 1, item 6.
- [79] Commercial Code, art. 282; Large Corp. Law, art. 15.
- [80] Large Corp. Law, art. 23, para. 4.
- [81] Commercial Code, art. 283, para. 2; Large Corp. Law, arts. 15 and 25.
- [82] Commercial Code, art. 283, para. 3.
- [83] Large Corp. Law, art. 16, para. 2.
- [84] *Id.* art. 16, para. 3; Account Rule, arts. 50 to 52.
- [85] Account Rule, arts. 3-5 and 53.
- [86] Commercial Code, art. 294-2, para. 1.
- [87] *Id.* art. 294-2, para. 2.
- [88] *Id.* art. 294-2, para. 3.
- [89] *Id.* art. 294-2, para. 4.
- [90] *Id.* art. 266, para. 1, item 2.
- [91] *Id.* arts. 277 and 278.
- [92] *Id.* arts. 267 to 268-3 and 280, para. 1.
- [93] *Id.* art. 497.
- [94] *Id.* art. 281-3, para. 2, item 10.
- [95] Audit Rule, art. 7, para. 1, item 2.
- [96] *Id.* art. 7, para. 2.
- [97] Account Rule, art. 48, para. 1, item 5 and para. 3.
- [98] Commercial Code (prior to the 1981 amendment) art. 202 para. 2.
- [99] Supplementary Provisions (*Fusoku*) to the 1950 amendment, para. 4.
- [100] Commercial Code, art. 202, para. 2.
- [101] *Id.* art. 293-4, para. 2 and art. 293-3, para. 2.
- [102] *Id.* art. 230-2, para. 1.
- [103] *Id.* art. 230-4.
- [104] *Id.* art. 230-5.
- [105] *Id.* art. 230-6.
- [106] *Id.* art. 230-3, para. 1.
- [107] 1981 Supplementary Provisions, art. 15, para. 1.
- [108] *Id.* art. 16, para. 1.
- [109] *Id.* art. 16, para. 2.
- [110] *Id.* art. 16, para. 11.
- [111] *Id.* art. 15, para. 1.
- [112] *Id.* art. 18, para. 2.
- [114] Commercial Code, art. 205, para. 1.
- [115] 1981 Supplementary Provisions, art. 18, para. 3.
- [116] *Id.* art. 19, paras. 1-3.
- [117] Commercial Code, art. 119.
- [118] Commercial Code (prior to the 1981 amendment), art. 213, para. 1.
- [119] Commercial Code, art. 213, paras. 1-2.
- [120] *Id.* art. 210.
- [121] *Id.* art. 211-2, para. 1.
- [123] 1981 Supplementary Provisions, art. 4, para. 1.
- [124] Commercial Code, art. 241, para. 3.
- [125] *Id.* art. 341-8, para. 1.
- [126] *Id.* art. 341-8, para. 2.
- [127] *Id.* art. 341-8, para. 3.
- [128] Bank Law (*Ginkohō*) (Law No. 75, 1981).
- [129] Bank Law (*Ginkohō*) (Law No. 21, 1927).
- [130] Bank Law, art. 11.

[131] Securities and Exchange Law (Shōken-torihikihō) (Law No. 25, 1948) art. 65-2, para. 1.

[132] The issue of the securities business of banks was settled by the so-called three securities principles: the Bank Law expressly provides the securities business of banks involving public bonds; the approval of the Minister of Finance is necessary for the securities business of banks; and the actual approval of the Minister of Finance will be given later after the enforcement of the new Bank Law.

[133] Securities and Exchange Law (prior to the 1981 revision), art. 43.

[134] Securities and Exchange Law, art. 43.

[135] *Id.* art. 43.

[136] Bank Law, art. 13, para. 1.

[137] *Id.* art. 20.

[138] *Id.* art. 21.

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