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NEWSLETTER NO.1 – COVID-19 SITUATION

Shareholders' Meetings in Japan in the situation on COVID-19 infection

The followings are news, suggestions of governmental agencies and analysis on possible effect of COVID-19 infection to the ordinary general meetings of shareholders of listed companies in Japan which, but for the COVID-19 infection, are scheduled to be held by the end of June.

1. Timing of Ordinary General Meeting of Shareholders

It would be permitted legally to hold the annual general shareholders meeting of shareholders more than 3 months after the end of the fiscal year.
With regard to this issue, the Ministry of Justice has published its views as follows:

(i) Even if there is a provision in the Articles of Incorporation concerning the time of holding an ordinary general meeting of shareholders, it is not generally considered to be required that an ordinary general meeting of shareholders be held by that time as specified therein even when a situation arises in which it is impossible to hold an ordinary general meeting of shareholders due to a natural disaster or other reasons.
(ii) Even if the Articles of Incorporation set a record date for exercising voting rights at an ordinary general meeting of shareholders and a company is unable to hold an ordinary general meeting of shareholders within three months from the relevant record date due to the situation related to the COVID-19 infection, the company is required to set a new record date for exercising voting rights and give public notice of the relevant record date.
(iii) Even if the Articles of Incorporation stipulate that a specific date is the record date for dividends of surplus, if a situation arises in which it is impossible to pay dividends of surplus on or by a specific date as the record date in relation to the recent situation related to the COVID-19 infection, a date different from a specific date may be set as a record date for dividends of surplus, and dividends of surplus may be paid to shareholders as of the record date.

http://www.moj.go.jp/minji/minji07_00021.html

In Japan, it is common for a listed company to hold an ordinary general meeting of shareholders within three months from the last day of each fiscal year and report on its financial statements and the business report.

Under the Companies Act, a stock company must, in principle, submit its financial statements and the business report for each fiscal year to the ordinary general meeting of shareholders for its approval (Article 438 (2) of the Companies Act). With regard to a company with accounting auditors, such as listed companies in Japan, it is not necessary to obtain approval at the ordinary general meeting of shareholders if the financial statements and business reports are approved by the

board of directors as satisfying the requirements specified by a cabinet ordinance, and it is sufficient for the directors to report them to the ordinary general meeting of shareholders (Article 439 of the Companies Act) (in other words, no approval of the ordinary general meeting of shareholders is required in such case).
In addition, it is common for a listed company to prescribe that the shareholders listed in the shareholder registry as of the last day of the fiscal year are the shareholders entitled to exercise their voting rights at the annual shareholders meeting for that business year in the Articles of Incorporation (without such provisions of the Articles of Incorporation, a listed company must set and give public notice of the record date for holding the ordinary general meeting of shareholders). Under the law, the shareholder's rights for which the record date is set must be exercised within three months from the record date (Article 124 (2) of the Companies Act). Therefore, the ordinary general meeting of shareholders of a listed company is normally held within three months of the end of each fiscal year. Therefore, for a company whose fiscal year is from April 1 to March 31, the ordinary general meeting of shareholders of a listed company is scheduled to be held by the end of June.

However, it can be construed that the foregoing provision does not prohibit a Japanese stock corporation (*kabushiki-kaisha*) from holding an ordinary general meeting of shareholders more than three months after the end of the business year, and even if it approves or reports its financial statements and business reports at the said ordinary general meeting of shareholders, the said approval or report may be valid and lawful.

With regard to this issue, the Ministry of Justice (“MOJ”) has published its views as follows:
http://www.moj.go.jp/minji/minji07_00021.html

“*(i) Provisions of Articles of Incorporation on the Timing of Ordinary General Meeting of Shareholders*

Even if there is a provision in the Articles of Incorporation concerning the time of holding an ordinary general meeting of shareholders, it is not generally considered to be required that an ordinary general meeting of shareholders be held by that time as specified therein even when a situation arises in which it is impossible to hold an ordinary general meeting of shareholders due to a natural disaster or other reasons.
Therefore, in the event that it is impossible to hold an ordinary general meeting of shareholders at the time specified in the articles of incorporation in relation to the recent COVID-19 infection, it may be sufficient to hold an ordinary general meeting of shareholders within a reasonable period of time after the situation has been resolved. The Companies Act stipulates that an ordinary general meeting of shareholders of a stock corporation (kabushiki kaisha) must be convened at a certain time after the end of each fiscal year (Article 296 (1) of the Companies Act). However, it does not require an ordinary general meeting of shareholders to be held within three months after the end of the fiscal year.

(ii) Provisions of Articles of Incorporation on Record Date for Exercise of Voting Rights at Ordinary general meeting of Shareholders

Under the Companies Act, shareholders as of the record date may exercise only those rights that are exercised within three months from the record date (Article 124 (2) of the companies act).
Therefore, if the Articles of Incorporation set a record date for exercising voting rights at an ordinary general meeting of shareholders and a company is unable to hold an ordinary general meeting of shareholders within three months from the relevant record date due to the situation related to the COVID-19 infection, the company is required to set a new record date for exercising voting rights and give public notice of the relevant record date and the details of the rights that the relevant record date shareholder may exercise by two weeks prior to the relevant record date (Article 124 (3) of the Companies Act).

(iii) Provisions of Articles of Incorporation on Record Date for Dividends of Surplus

Even if the Articles of Incorporation stipulate that a specific date is the record date for dividends of surplus, if a situation arises in which it is impossible to pay dividends of surplus on or by a specific date as the record date in relation to the recent situation related to the COVID-19 infection, a date different from a specific date may be set as a record date for dividends of surplus, and dividends of surplus may be paid to shareholders as of the record date. In order for a record date for dividends of surplus to be set, it is necessary to give public notice no later than two weeks prior to the record date, as in the case of (ii) (Article 124 (3) of the Companies Act)."

2. Possibility of Postponing or Adjourning the Ordinary General Meeting of Shareholders

It is possible to postpone an ordinary general meeting of shareholders, which was scheduled to be held in June. On the other hand, the Financial Services Agency of Japan ("FSA") has announced that it is possible to hold a general meeting of shareholders once for resolving election of directors, etc. and adjourn a general meeting to report the settlement of accounts afterwards.
https://www.fsa.go.jp/news/r1/sonota/20200415/20200415.html

Also, on April 28, 2020, the FSA, MOJ and Ministry of Economy, Trade and Industry published the following guidelines on the adjourned meeting.
https://www.fsa.go.jp/ordinary/coronavirus202001/11.pdf

The followings are the announcement made by FSA.

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"*For example, the following procedures may be taken when holding an ordinary general meeting of shareholders at the time originally scheduled for the purpose of procuring funds and making management decisions in a timely manner.*

(A) Holding an ordinary general meeting of shareholders at the time when it was originally scheduled and obtaining the resolution to continue the meeting (Article 317 of the Companies Act). At the initial general meeting of shareholders, the election of directors, etc. are resolved, and explanations will be given to the effect that financial statements and audit reports, etc. will be provided at the adjourned meeting.

(B) A company and auditing firm conduct settlement and audit services after giving due consideration to safety as described above, and provide shareholders with financial statements, audit reports, etc. immediately after completion of these operations to ensure opportunities for shareholders to consider them. At the same time, they will hold an adjourned meeting within a reasonable period of time after the initial general meeting of shareholders.

(C) Sufficient explanations on financial statements, audit reports, etc. are thoroughly provided at the adjourned meeting. When holding an adjourned meeting, a company will provide shareholders with sufficient notice by dispatching notices of the meeting as necessary."

In terms of the tenure of directors, the Articles of Incorporation of a Japanese company usually stipulate that the term of directors shall expire at the end of the ordinary general meeting of shareholders for the last business year ending within one year or two years after the appointment. However, by obtaining the consent of the directors who resign and assume office in advance, and by stipulating in the election proposal the timing of appointment and retirement as the time when individual resolutions are passed, it is possible to treat a new directors as being appointed at the same time as the resolution to appoint new directors being passed (rather than at the conclusion of the ordinary general meeting of shareholders) and existing directors resign at the same time. Therefore, it is possible to hold an ordinary general meeting of shareholders by the end of June and change the directors at that time without reporting the financial and business report to the general shareholders meeting.

If the ordinary general meeting of shareholders itself is postponed and important matters such as the change of the management system, such as by replacing directors or moving to a company with an audit and supervisory committee, or to adopt resolutions related to M&A are expected to be resolved at such meeting of shareholders, these important management matters will also be postponed by postponing the ordinary general meeting of shareholders.

In addition, once the ordinary general meeting of shareholders is postponed, the convergence of the COVID-19 infection is uncertain and a timing to hold the general meeting of shareholders is not foreseen, and the preparations for the meeting are started again after the convergence, so there is a problem that the actual timing of the meeting is considerably delayed.

On the other hand, however, if the ordinary general meeting of shareholders is held by the end of June and adjourned, and new record date for dividend of surplus is set, a record date for the voting right at the ordinary general meeting of shareholders and record date for dividend of surplus

becomes different. It is said that the voting advisory company such as ISS and others have expressed their dissenting opinions to hold the general shareholders meeting by the end of June and adjourn it due to the following reasons:

(i) it is possible to postpone a ordinary general meeting of shareholders itself after changing the record date for dividends with regard to the proposal for dividends.

(ii) it is not appropriate to force shareholders to decide on the resolution agenda such as appointment of directors or providing remuneration without finalizing the financial statements or business reports.

The following factors would need to be considered to decide whether an ordinary general meeting of shareholders will be held by the end of June or an ordinary general meeting of shareholders itself should be postponed:

a. Whether or not the holding of a general meeting of shareholders should be postponed in order to ensure the health and safety of shareholders in light of the impact of the COVID-19 infection.

b. Should the expectation of shareholders who held by the end of March that they can have voting rights at the ordinary general meeting of shareholders?

c. Whether it is necessary to hold a general meeting of shareholders by the end of June so that important agenda (such as ones related to the corporate management or election of directors) becomes effective at that time.

In this regard, on April 28, 2020, the FSA, MOJ and Ministry of Economy, Trade and Industry ("METI") published the following guidelines on the adjourned meeting.
https://www.fsa.go.jp/ordinary/coronavirus202001/11.pdf

"Concerning the adjourned meeting (Article 317 of the Companies Act)

The purpose of these Guidelines is to present matters that should be noted when holding continuing (adjourned) meetings of the General Meeting of Shareholders, which was presented at the "Committee concerning Response to Corporate Settlement and Audit, etc. based on the impact of COVID-19 infection", in view of the fact that there are not many cases in which such meetings have been held so far, and to contribute to the smooth execution of business and other parties concerned. As described below (Section 1), institutional investors (shareholders) are expected to give top priority to the health and safety of employees, etc., and take actions that focus on their substance and purpose, rather than on formal and mechanical standards if the ordinary general meeting of shareholders is held on a date different from ordinary year without judging by mechanical standard or formality.

Section 1 - Primary Purpose
An adjourned meeting will be held in order to ensure the interests and high-quality audits of various stakeholders, such as the need to give consideration to shareholders as of the record date and renew the management system, when the record date for dividends of surplus is set at

the end of March in the event that the financial statements cannot be determined without exposing employees and auditors to the risk of COVID-19 due to unprecedented crises.

Section 2 - Particulars
(1) Decision to hold the adjourned meeting
If the date, time and place of the adjourned meeting cannot be determined at the time of the initial ordinary general meeting of shareholders, a resolution may also be made to delegate to the chairman these matters. In this case, as soon as the date, time, and place of the adjourned meeting are determined, the shareholders will be sufficiently informed in advance.

(2) Appointment of representative directors and corporate auditor
In the first place, the appointment and dismissal of directors and corporate auditors is the authority of the General Meeting of Shareholders (Article 329 (1) and Article 339 (1) of the Companies Act). It is believed that, in order to ensure smooth decision-making at the initial ordinary general meeting of shareholders, it is necessary to carefully explain the outline of the business over the past year and the roles required of newly appointed managers, etc. by utilizing the already published quarterly reports, etc. even there are no audited financial statements.
If it is necessary to reelect directors and corporate auditors whose terms of office are until the conclusion of the ordinary general meeting of shareholders, it is considerable to make it clear that the effect of the appointment will take effect at the time of resolution of election agenda.

(3) Dividends of Surplus
Any resolution to distribute dividends of surplus at the Ordinary General Meeting of Shareholders may be made within the distributable amount calculated on the basis of the fixed financial statements for the fiscal year ended March 2019, as long as the effective date of such act is before the financial statements for the fiscal year ended March 2020 are finalized (Article 461 of the Companies Act). In this case, although the financial statements for the fiscal year ended March 2020 have not been finalized, it is beneficial to consider the distributable amount expected from the financial figures.

(4) Reasonable period
With regard to the period between the initial ordinary general meeting of shareholders and the adjourned meeting, it is considered permissible to hold the adjourned meeting after the lapse of the period necessary to prepare for the settlement and audit affairs and the holding of the adjourned meeting, while giving consideration to the health and safety of the parties concerned, and it is not necessary to construe the range of permissible periods uniformly. However, it is not appropriate for the interval to be too long, and in consideration of the current situation, it is considered as a certain guideline that the interval not exceeding three months should not be exceeded.

(5) Way of Business Execution
It is necessary to properly and rationally carry out the settlement and audit services in this case

while giving due consideration to the safety and health of the persons engaged in the services concerned. The practice of requiring the affixing of a seal on written documents in executing the settlement and audit services should be revised."

3. How to Hold Future Shareholders Meetings Using the Internet, etc.

METI formulated the "Guidelines on Approaches to Hybrid Virtual Shareholder Meeting" based on discussions at the "Study group on Proxy Process and Shareholder Meetings in the New Era" to clarify the legal, practical issues and specific treatment of companies in holding the hybrid virtual shareholders' meeting.

※ hybrid virtual shareholder meeting means a general meeting of shareholders (real shareholders meeting) held in a physical place where directors, shareholders, etc. meet together, while a general meeting of shareholders where shareholders who are not located in the place of the real shareholders' meeting can participate or attend from a remote place by using the internet or other means.

Guidelines on Approaches to Hybrid Virtual Shareholder Meeting:
https://www.meti.go.jp/english/press/2020/0226_002.html

Even after the situation with COVID-19 infectious has ceased to exist, the holding of shareholders meetings using the internet, etc. in japan may become more generalized.

Introduction of Our Law Firm

Iwaida Partners is a law firm specializing in corporate legal affairs, and has engaged in a number of activities, including the management and advice of general meetings of shareholders and legal procedures related to general meetings of shareholders.
If you have any questions about the above matters, the schedule, operation, etc. of the general meeting of shareholders of a listed company in Japan, please contact the following address.

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