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Extraordinary Reports of Voting Results

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Summary

- On 31 March 2010, the Financial Services Agency (FSA) announced amendments to the Cabinet Ordinance on Disclosure of Corporate Affairs. Topics addressed the requirement that companies disclose their voting results after general shareholders' meetings.
- Specifically, the FSA now requires listed companies to submit an extraordinary report containing information regarding resolutions voted on at general shareholders' meetings, as well as the number of votes cast for and against each resolution.
- The stipulations apply to annual general shareholders' meetings held for fiscal years ending on 31 March 2010 and beyond (from FY09, for companies which close their books in March).

*This report updates our 1 March 2010 report on the proposed revisions to the Cabinet Ordinance (Japanese only).

1. Amendments to Disclosure Items Regarding Corporate Governance

On 31 March 2010, the FSA announced amendments to the Cabinet Office Ordinance on Disclosure of Corporate Affairs[1]. The content is wide-ranging but calls for the following disclosures related to corporate governance:

(1)Disclosure of cross-shareholdings (2)Disclosure of executive compensation (3)Disclosure of voting results (4)Disclosure of corporate governance structure

These issues were addressed in the Financial System Council's "Report by the Financial System Council's Study Group on the Internationalization of Japanese Financial and Capital Markets: Toward Stronger Corporate Governance of Publicly Listed Companies" [2] (published on 17 June 2009) but not applied in 2009.

[1] FSA report issued on 31 March 2010 (Special Edition No. 67). More information can be found at http://www.fsa.go.jp/news/21/sonota/20100331-8.html (Japanese only).

[2] Please refer to http://www.fsa.go.jp/singi/singi_kinyu/tosin/20090617.html and our report, *Kinyushin Study Group Hokoku III* (*Giketsukenkoshi nado*), issued on 13 July 2009 (Japanese only).

This report will discuss the third topic, disclosure of voting results[3].

2. Extraordinary Report of Voting Results

(1) Overview and Background

The revised Cabinet Ordinance requires listed companies to disclose proxy results for each resolution voted on at shareholders' meetings. This is based on the following statement by the aforementioned Study Group of the Financial System Council:

> "Accordingly, from the perspective of achieving accountability to shareholders, the results of individual resolutions should be disclosed, including the number of votes cast for and against, and rules should be developed by means of statutory disclosure and stock exchange rules."

On 29 October 2009, the Tokyo Stock Exchange requested listed companies to publicly disclose details regarding resolutions voted on at general shareholders' meetings[4]. We believe the FSA had the development of such stock exchange rules in mind when it mentioned statutory disclosure in its revised Ordinance.

The revised Ordinance does not seem materially different from the FSA's "Outline of Proposal of Disclosure Items concerning Corporate Governance"[5] released on 12 February 2010, except that it applies to what can be considered listed companies, rather than so-called "reporting companies." More details can be found in the next section.

(2) Companies Required to Disclose Extraordinary Reports of Voting Results

Companies which issue the following types of securities are required to file extraordinary reports containing their voting results (the amendments include perspectives found in the "Cabinet Ordinance on Disclosure of Corporate Affairs," Article 19.2.2, and the Financial Instruments & Exchange Law, Article 24.1, clauses 1, 2).

(1)Securities listed on an exchange (excluding certain types of listed securities*)
(2)OTC securities (excluding those with liquidity similar to certain types of securities*)

*Refers to securities trading only in a market for professional investors (Tokyo AIM), based on the Financial Instruments & Exchange Law, Article 2.33.

In other words, only listed companies need to disclose their voting results. This probably reflects the fact that recommendations by the aforementioned Study Group were specifically for listed firms.

(3) Submission of Extraordinary Reports

The FSA requires listed companies to submit extraordinary reports without delay in the following situation (based on the *Kaijifurei* ["Cabinet Ordinance on Disclosure Items Concerning Corporate Governance"], 19.1, 19.2.9.2):

[3] Information on cross-shareholdings can be found in our report, *Kabushiki no Hoyu Jokyo no Kaiji* (*Iwayuru Kabushiki Mochiai Kaiji*), issued on 1 April 2010; for executive compensation, please see *Yakuin Hoshu Nado no Kaiji*, issued on 13 April 2010.
[4] From TSE website, http://www.tse.or.jp/news/200910/091029_b.html and our 2 November 2009 report, *Tosho no Sokaigian no Giketsu Kekka Kohyo Yosei*, by Yusei Horiuchi.
[5] From FSA website http://www.fsa.go.jp/news/21/sonota/20100212-2.html.

When a company which files financial reports votes on resolutions at its general shareholders' meeting

Thus, companies must submit an extraordinary report after voting on resolutions at general shareholders' meetings. "General shareholders' meetings" includes both ordinary and extraordinary shareholders' meetings (*Kinyucho no Kangaekata*, 11)[6], as well as meetings of shareholders who own certain classes of shares (*Ibid*, 32).

Extraordinary reports should be submitted "without delay," which apparently means within a practical and reasonable time frame. The FSA states the following in *Kinyucho no Kangaekata*, 15:

Companies have met the requirement to submit extraordinary reports "without delay" if they have disclosed their voting results within a practical and reasonable time frame after tallying votes cast at its general shareholders' meeting

(4) Items to be Disclosed

The following items should be disclosed in extraordinary reports (Based on *Kaijifurei*, 19.2.9.2 *i-ni*).

(1) The day, month, and year when the shareholders' meeting was held (2) Voting agenda (3) Voting results (e.g., regarding appointment/dismissal of one or more executives) a) Number of yeas, nays, and abstentions b) Conditions required for passage of resolution c) Voting results (4) Regarding (3), an explanation is required if some shareholder votes* were not tabulated at the shareholders' meeting.

*Includes proxy votes received in hard copy or electronic formats (as stipulated in Japan's Company Law, 311.2; 312, 3).

Item 2 refers to basic agenda items (e.g., changes to articles of incorporation, handling of retained earnings, etc.), but companies must draw a sharp distinction between items if the difference would otherwise be unclear (*Kinyucho no Kangaekata*, 16, 31).

An extraordinary report should contain the key points voted on at the respective shareholders' meeting (*Kaijifurei*, 19.2.9.2 *ro*). This basically requires a company to disclose its voting agenda, but it must distinguish more clearly between agenda items when necessary to avoid any misunderstanding. For example, when one agenda item is voting on an executive director, the company must disclose not only that it has taken such a vote, but the name of each candidate who was considered (if multiple candidates exist).

Item 3a requires firms to disclose the number of votes cast for each resolution, not simply whether or not a resolution was passed. Thus, companies need to disclose how many votes each candidate received in a shareholder vote to appoint or dismiss an executive[7].

[6] On FSA website, http://www.fsa.go.jp/news/21/sonota/20100331-8/00.pdf

[7] In the past, some disclosures have consisted only of the voting range between the highest and lowest vote-getter or the votes received by the lowest vote-getter, not the tally for each candidate. Under the revised Ordinance, companies must disclose verified tallies and percentages, not ranges or rounded numbers. These amendments only cover disclosure and do not mandate any changes to the vote-

Under Item 3b, companies must disclose the conditions for passing or rejecting a resolution. The FSA explains disclosure of the quorum requirement and number of affirmative votes needed as follows (*Kinyucho no Kangaekata*, 17):

> **Companies should disclose their quorum requirement and the number of yeas needed for a resolution to be approved. For example, a company may define a quorum as attendance by the majority of shareholders who hold voting rights and may explain that a resolution will pass with a majority of their votes.**

In other words, simply describing a resolution as an "ordinary resolution" or a "special resolution" probably would not suffice.

Under Item 3c, companies must include the following items when disclosing voting results (based on *Kigyo Naiyo nado Kaiji Guidelines* [Guidelines for Disclosure of Corporate Affairs], 24.5-30).

> ・Whether the resolution was passed or defeated
> ・Percentage of yeas or nays received (i.e., basis for passage/defeat)

Thus, companies must disclose not only the number of votes a resolution received (Item 3a), but the percentage of votes cast for or against it. This means that companies need to tally the total number of voting rights in order to arrive at a denominator for the voting percentage (*Kinyucho no Kangaekata*, 18).

For practical purposes, the FSA apparently also recognizes the following approach (*Kinyucho no Kangaekata*, 191):

> (Comment Summary): When calculating the percentage of votes received, it may be acceptable to make the denominator the number of voting rights exercised by the day prior to the shareholders' meeting, plus the number of voting rights of all shareholders present at the meeting (excluding any who leave before the end).
>
> (FSA's Answer): This seems to be in line with the FSA's views in *Kinyucho no Kangaekata*.

Some shareholders with voting rights may attend the shareholders' meeting but leave before a vote has been taken. Strictly speaking, these shareholders probably should be excluded from the denominator used to calculate voting percentages[8]. Conversely, a shareholder could join a meeting while it is already in session. Companies will also need to consider how to handle the count when shareholders join or leave the meeting while the vote is in process.

The FSA has considered these practical issues and deems it acceptable to calculate voting percentages (the denominator) by adding the total number of voting rights exercised the day before the shareholders' meeting to the voting rights of all shareholders present the day of the meeting, without adjusting for people who leave the meeting midstream.

Item 4 requires that companies provide an explanation if some votes were not tabulated for shareholders who attended the meeting. The FSA probably stipulated

taking process on the day of the shareholders' meeting (*Kinyucho no Kangaekata*, 9). For example, there are no restrictions on handling any matters regarding discussion of and voting on resolutions at a general shareholders' meeting.

[8] Yano, Koji. "*Tojitsu Toho ni mo Taio! Giketsuken Koshi Kekka Kaiji no Jitsumu*." Business Homu, May 2010, pp. 59-60.

this following the aforementioned Study Group Report, which states, "it is believed that even requiring the disclosure of the balance of votes as ascertained on the day before a meeting could serve as disclosure of reasonable significance" (*Kinyucho no Kangaekata*, 14).

Tallying votes on the day of the shareholders' meeting creates a greater administrative burden, and the majority of voting rights are exercised in writing or electronically the day before the meeting is held. As a result, companies do not necessarily tabulate votes on the day of the shareholders' meeting, if the majority of proxies cast in writing or through other means have been counted the day before the shareholders' meeting[9]. This is considered common practice.

FSA does not simply recognize this common practice. Instead, it requires firms to disclose the reason votes were not tallied on the day of the shareholders' meeting. In our view, the Agency probably anticipates disclosure of the following reason for not tabulating all results (*Kinyucho no Kangaekata*, 8):

> The FSA states that extraordinary reports must include the reason why some yeas, nays, or abstentions were not calculated. (We believe this means if total proxies cast prior to the shareholders' meeting and votes by major shareholders at the meeting met the conditions for a resolution to be passed, and such resolution was passed in accordance with Japan's Company Law.)

(5) Case Studies

The FSA solicited public comments regarding the proposed amendments and responded to questions by providing its interpretation of how disclosure should be handled in a number of concrete, feasible cases, which it listed in *Kinyucho no Kangaekata*. We summarize the major case studies below.

(i) When Quorum is Not Present

A quorum must be present for shareholder decisions to be binding. This means that a requisite number of shareholders with voting rights must attend the general shareholders' meeting or be represented by proxy. Theoretically, a quorum may not be present, in which case the FSA has the following view:

> According to *Kaijifurei*, 19.2.9 *ha*, if a quorum is not present, a company should state that it did not arrive at a decision due to the lack of a quorum

(ii) Motions to Amend

Shareholder proposals in the form of motions may be made on the day of the general shareholders' meeting[10]. In other words, shareholders have the right to make proposals at the general shareholders' meeting.

Article 304 of Japan's Company Law defines this right for shareholders of listed companies, but it limits motions to matters (1) for which shareholders are eligible to exercise their votes and (2) which fall under the scope of that general shareholders' meeting. These proposals therefore differ from those made ahead of

[9] Of course, if the number of yeas and nays are close enough that the final result cannot be determined without getting an exact tally, then the firm must tabulate them in order to determine whether or not a resolution has passed (regardless of whether or not the firm is required to disclose its voting results). Tallying votes made on the day of the shareholders' meeting does not strike us as too heavy of an administrative burden.

[10] Please refer to our 1 July 2009 report, *Rokugatsu no Dogikeishiki Kabunushiteian no Jitsure*i, and our 1 September 2009 report, *Kugatsu no Dogikeishiki Kabunushiteian no Jitsurei*. Both are by Yusei Horiuchi and available in Japanese only

time and usually involve motions to amend resolutions which have already been proposed[11].

If a shareholder moves to amend a resolution which has already been passed by a majority vote (and both the resolution and the amendment cannot be upheld simultaneously), then the motion generally is judged to have been defeated, and there is no need to put it to vote.

The question then arises as to whether companies are required to disclose the voting results for these motions in their extraordinary reports. As illustrated below, the FSA believes that there is no need to change existing requirements for/methods of voting on matters. However, disclosure may be necessary, depending on the situation[12] (*Kinyucho no Kangaekata*, 27).

The revised disclosure rules do not change either the requirements for or the methods of voting on motions to amend resolutions, provided that they are made in accordance with the Company Law. Companies must disclose the voting results for these motions to amend, although the specific content of the disclosure will change depending on the vote.

(iii) Procedural Motions

In addition to motions to amend, shareholders may also make procedural motions (i.e., motions made during the course of the general shareholders' meeting).

As indicated below, the FSA does not mandate disclosure of procedural motions (*Kinyucho no Kangaekata*, 28):

(Comment Summary): Is it safe to assume that motions such as a "no confidence" vote for the chairman (so-called procedural motions) are not included in the definition of "resolutions" as outlined in *Kaijifurei*, 19.2.9.2? (FSA's answer): Procedural motions are not considered resolutions.

3. Timing of Implementation

Most of the amendments to the Cabinet Office Ordinance on Disclosure of Corporate Affairs take effect from 31 March 2010 (Revised Supplementary Provision 1).

Listed companies are required to submit extraordinary reports regarding the results of any votes cast in their ordinary shareholders' meeting starting in the fiscal year ending on 31 March 2010, which corresponds to FY09 for companies which close their books in March (Revised Supplementary Provision 2.1 and *Kinyucho no Kangaekata*, 8)

[11] Kubori, Hideaki; Nakanishi, Toshikazu. "*Atarashii Kabunushi Sokai no Subete*." Shoji Homu, 2007, p. 214, others.

[12] Specific disclosure methods are not laid out. For example, if a motion for amendment is judged to have been defeated due to majority vote in favor of the original resolution, then the company would be required to disclose the necessary information in an extraordinary report (e.g., number of votes for and against, voting results). The company might also disclose reference information, including (1) the fact that there was a motion to amend a resolution, (2) the content of the motion, and (3) the fact that the motion was considered to have been defeated without a vote due to passage of the original resolution.