3. Commercial Law

An Act Partially Amending the Securities and Exchange Act. Promulgated on May 31, 1988. Ch. 75. Effective as of April 1, 1989.

[Comment]

The Japanese securities market, along with the financial market, has recently made rapid progress in deregulation and globalization. This partial amendment of the Securities and Exchange Act (hereinafter referred to as "S.E.A.") is intended to respond legally to the urgent problems in the Japanese securities market that have developed as a result of these rapid changes. The contents are as follows.

(1) Review of the corporate disclosure system.

The amended Act reviews the corporate disclosure system with the principal objective of meeting the demand for further mobilizing financing.

First, regarding the filing of a registration statement for the issuance or sale of securities through public offering, the Act introduces the shelf registration system. Under this system, if any corporation issuing securities (a) has already been regularly filing securities reports for not less than 3 years and, furthermore, (b) (1) the total amount of the market price of the listed shares in the corporation or (2) their sales amount for the latest year measures up to the criteria as may be prescribed by an ordinance of the Minister of Finance, the corporation may register the issuance or sale of its securities through public offering by filing with the Minister of Finance the shelf registration statement that lists all items prescribed by the S.E.A. and by any appropriate ordinances of the Minister of Finance (Article 23.3). As a general rule, the shelf registration shall take effect immediately following the elapse of the 15 day period starting from the date on which the Minister of Finance accepted the shelf regis-

tration statement; however, the Minister of Finance may shorten this period (Article 23.5(1)). It is not necessary to file again with respect to the issuance or sale of a security through public offering which has already been registered on the shelf (Article 23.3(3)). When a corporation wishes to induce, through public offering, the buying or selling of stock that has already been registered on the shelf, the corporation shall file with the Minister of Finance supplementary documents that shall state all items prescribed by the S.E.A. and by the appropriate ordinance of the Minister of Finance (Article 23.8). Consequently, where the issuance or sale of a security through public offering has already been registered on the shelf, within the planned issuing period, the issuer or owner of a security can always have others acquire or sell the security through public offering within the limits of the planned issuing amount and depending on financial needs or market conditions. This can be done immediately after filing with the Minister of Finance the supplementary, shelf registration documents.

Secondly, from the viewpoint of coordinating the issue disclosure and the regular disclosure, the amendments introduced three types of disclosure systems: the full disclosure system, the filing system, and the reference system. These systems are concerned with the statement of matters regarding corporate affairs that a corporation issuing securities uses in its securities report for the issue disclosure. How these systems are used depends on the corporation's state of regular disclosure, etc. The full disclosure system is the principal system under which the corporation issuing a security shall actually state in the securities report the matters concerning the corporate affairs (Article 5(1)). On the other hand, under the filing system it is possible to avoid filing this statement of matters concerning corporate affairs of a corporation issuing a security. Instead, the corporation may file a duplicate original of the latest securities report and documents attached thereto, and the semiannual reports and amendments which have been filed subsequent to the filing of the securities report, and a statement of other facts, which occur following the filing of the securities reports, as may be prescribed by an ordinance of the Minister of Finance (Article 5(2)). Under the reference system, the

amended Act will recognize a corporation making a statement referring the viewers to the latest securities reports, documents attached thereto, and semiannual and interim reports filed subsequent to the filing of the securities reports; this statement shall be deemed to be the statement of matters concerning corporate affairs of a corporation issuing a security (Article 5(3)). If a corporation (a) has already been filing securities reports regularly for not less than 3 years and, furthermore, (b) (1) the total amount of the market price of listed shares or (2) their sales amount for the latest year meets the criterion as may be prescribed by an ordinance of the Minister of Finance, the corporation may use the reference system in the issuance or sale of a security of the corporation through public offering. A corporation that meets requirement (a) but is not allowed to use the reference system may use the filing system. All other corporations shall employ the full disclosure system for the issuance or sale of a security through public offering.

Thirdly, the waiting period for a registration statement for issuance or sale of a security through public offering to take effect is reduced from 30 days to 15 days. Shortening of the waiting period, which is at the discretion of the Minister of Finance, has been allowed only if the Minister of Finance determines that the contents of the securities report, etc. can be readily comprehended by the public. Where a corporation has filed a registration statement for issuance or sale of a security through public offering, shorting of the period is also allowed if the Minister of Finance determines that the information on the corporation's corporate affairs has already been disseminated to the public (Article 8).

In addition, the amendments raise the minimum yen amount below which a corporation is exempted from disclosure for stock issue (Article 4(1)); and they expand the scope of securities subject to the disclosure regulations covering stock issues.

(2) Fixing the regulations against insider trading.

Insider trading is trading in securities by any person who is in a position to know any information materially influencing the price of a security when the trading is done before the information becomes publicly known. This is an unfair transaction, comparable to

a rigged horse-race, and it ruins the public's reliance on the securities market.

S.E.A. has not explicitly prohibited insider trading, but generally no scholars have objected to an interpretation that S.E.A., Article 58(i), regulates insider trading. In fact, however, insider trading has never been exposed under this provision, and the administrative authorities have never attempted to regulate insider trading under S.E.A., Article 58(i). Thus the amendments explicitly prohibit insider trading (Articles 190.2 and 190.3), and make the changes in the law necessary to reflect this new situation.

First, the amended Act provides that if (a) an "insider" or "quasi-insider" of a listed corporation, or (b) a tender offerer or person conducting purchasing actions deemed to be a tender offer (hereinafter referred to as "tender offerer, etc."), by virtue of their position or duties, learns of any material fact relating to the business or related matters of a corporation issuing listed securities, or any fact relating to a tender offer or actions comparable thereto, that person (i.e., insider, etc.) shall not trade in any securities to which the fact(s) relate until and unless the fact(s) have been made public in a prescribed way. "Insider" is any officer or employee of a listed corporation, tender offerer, etc., or its shareholder having a right to inspect accounting documents as authorized by the Commercial Code (in the case of a corporate shareholder, including its officers and employees). "Quasi-insider" is (a) any person having statutory authority over a listed corporation or a tender offerer, etc. or (b) any person who has entered into a contract with a listed corporation or a tender offerer, etc. (If the latter person (b) is a corporation, its officers and employees are included.) Some examples would be any official of the supervising government office, a main bank, an underwriting securities corporation, etc.

Secondly, any person to whom an insider or a quasi-insider has directly communicated any material fact ("tippee") is subject to the insider trading regulations. But, as shown by the definition, a tippee's tippee, i.e., one to whom the tippee has communicated a material fact, is not subject to the amended Act.

Thirdly, any person violating these prohibitions could be sub-

ject to imprisonment with forced labor for not more than 6 months or a fine not exceeding five-hundred thousand yen (¥500,000), or both (Articles 200(iv) and 202).

Fourthly, the amended Act grants to the Minister of Finance the authority to order a listed corporation to submit reports and data (Article 154).

In addition, the amended Act extends the scope of Article 189, which provides that a director, auditor, or major shareholder (a person who is the beneficial owner of at least 10% of the total issued shares in a corporation) shall restitute the shortswing profits to the corporation, and that any shareholder may enforce this restitution by means of a derivative suit; Article 189 applies not only to shares in it but also to convertible bonds, warrant bonds, subscription rights, and any options relating to the trading in these securities. On the other hand, the amended Act limits the securities covered to listed securities. In order to make Article 189 effective, the amended Act also imposes a reporting obligation on directors, auditors and major shareholders with respect to the purchase or sale of shares, etc. (Article 188).

(3) Fixing the securities futures market.

For many purposes, especially one of adequately hedging the price risks of securities, in addition to the trading in futures of such securities prescribed by the S.E.A., e.g., government securities, shares, etc., it would seem to be necessary to introduce the trading in futures of securities indexes and others which do not fall under these S.E.A. regulated securities. Therefore, first, in addition to the previous trading in futures, the amended Act includes in the securities futures trading (1) the trading in futures of securities indexes or securities prices, (2) the securities options trading, and (3) the trading in securities futures of foreign market (Article 2(14), (15) and (16)).

Secondly, in light of the complex mechanism and high degree of speculative risk which the trading in securities futures involves, the amended Act imposes on any securities corporation, and on any bank, trust corporation, or other such financial institution as may be prescribed by a cabinet order an obligation that before making an agreement for the trading in securities futures, the securities cor-

poration, etc. must deliver to the customer (excluding those institutional investors, etc. as may be prescribed by an ordinance of the Minister of Finance) a written statement explaining the transactional mechanism, the potential risks and other matters about the futures trading concerned (Articles 47.2 and 65.2(3)). This is meant to assure that an investor will be able to understand the mechanism and risks with respect to any trading in securities futures, and then will be able to participate in the trading.

(4) Changing the business year of a securities corporation.

(To be omitted.)

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4. Labor Law

Partial Amendment of the Trade Union Act, the Labor Relations Adjustment Act, and the National Enterprises Labor Relations Act.

Promulgated on June 14, 1988. Ch. 82. Effective as of October 1, 1988.

[Outline of the Amendment]

1. The National Enterprises Labor Relations Commission was abolished as a separate commission, and was integrated into the Central Labor Relations Commission. The functions of the National Enterprises Labor Relations Commisson were as follows: (1) mediating collective labor disputes in national enterprises; and (2) investigating, hearing, and issuing orders on unfair labor practices in national enterprises. The Central Labor Relations Commission has been responsible for carrying out comparable functions in the private sector; as a result of this amendment, the Central Labor Relations Com-