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RECENT DEVELOPMENT

Analysis of the Newly Amended Commercial Code of Japan

by *Mark Edward Foster**

I. INTRODUCTION

The most far-reaching and extensive revisions ever made to the Japanese Commercial Code went into effect on October 1, 1982.¹ The revisions, which are the culmination of a decade of legislative study and debate, have produced extensive amendments to the key sections of the Commercial Code—the sections on Corporate Shares, Shareholders, Directors, Accounting and Auditing. This is the so-called “Company Law” of Japan.

A number of factors contributed to the Japanese lawmakers' recognition of the need to amend the Commercial Code. As originally adopted in 1899 the Code was patterned after the German model² and, while having undergone several piecemeal amendments, had not been thoroughly revised despite significant developments in the Japanese economy. Consequently, it became necessary to update certain provisions of the Commercial Code, e.g., the par value of shares, in light of modern commercial reality. As will be discussed, the new Code's greatest impact is twofold. It increases the rights of shareholders both by the express grant of new pow-

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¹ SHŌHŌ NO ICHIBU KAISEI SURU HŌRITSU (Law to Amend Portions of the Commercial Code), Law No.74 of 1981 [hereinafter cited as Law No. 74, or the Amendments]. Law No. 74 is basically comprised of two main parts. The first part contains extensive amendments to the Commercial Code and the second amends the “Law Regarding Special Exceptions to the Commercial Code.” There is also a shorter section, entitled “Supplementary Provisions”, which prescribes transitional measures to be employed and deals with the issue of retroactivity of the Amendments. The principal section of the Commercial Code affected by the Amendments is Book 2 “Kaisha” (Corporation) which is the subject of this article.

² Y. NODA, INTRODUCTION TO JAPANESE LAW 53 (A. Angelo trans. 1976); see also BALLON, TOMITA, & USAMI, FINANCIAL REPORTING IN JAPAN 6 (1976).

ers and by limiting the powers of the directors, and it requires a significant increase in the scope of disclosure of corporate business, finance and accounting matters. By comparing the pre-amendment and new Code provisions, the significance of the new provisions can be effectively summarized.

II. AMENDMENTS TO THE LAWS CONCERNING SHARES

A. *Minimum Par Value and "Share Unit System" (Tan-i-Kabu) Established*

Perhaps the most innovative and at the same time potentially troublesome provision of the Commercial Code Amendments is the establishment of a minimum amount of 50,000 yen (U.S. \$200)³ for each share purchase transaction. This is accomplished in several ways under the new Code. First, for new companies established after October 1, 1982 and issuing par value shares, the minimum par value at the time of incorporation cannot be less than 50,000 yen.⁴ For shares without par value⁵ issued by newly incorporated companies, the issuing price at the time of incorporation cannot be less than 50,000 yen.⁶

For companies already established prior to the effective date of the amendments, a new system of "share unit" (*tan-i-kabu*) is established.⁷ The share unit system is mandatory for companies listed on the stock exchange and traded publicly, and requires the minimum amount for any single share transaction to be 50,000 yen. For instance, where the present par value of the stock is 50 yen (as is commonly the case), the minimum number of shares which must now be purchased is 1000, and 1000 shares would therefore constitute one "share unit." While the new Code does not require that existing companies consolidate their shares to reflect a 50,000 yen per share valuation, provisions for share consolidation do exist. In fact, the new Code seems to contain a rather strong incentive to consolidate.⁸

The result of these provisions is quite drastic, especially considering that the common par value of pre-amendment shares is 50 yen⁹ as compared to the new requirement of a 50,000 yen minimum.¹⁰ While a thou-

³ For purposes herein, an exchange rate of 250 yen to U.S. \$1 will be used for reference, although obviously the rate is subject to fluctuation.

⁴ Law No. 74, *supra* note 1, at art. 166.2.

⁵ Both par value and no par value shares are authorized. Law No. 74, *supra* note 1, at art. 166(6).

⁶ *Id.* at art. 168-3.

⁷ *Id.* at arts. 15-20 (Supp. Provisions, 1981).

⁸ See *infra* note 41 and accompanying text.

⁹ BALLON, TOMITA, & USAMI, *supra* note 2, at 116-17.

¹⁰ Law No. 74, *supra* note 1, at art. 166.2.

sand-fold increase in the minimum possible purchase amount may appear to exclude prospective shareholders, it is actually believed that despite this requirement, the various other new provisions will cause a resurgence of middle-income people investing in corporate shares.¹¹ The impact of the new minimum purchase amount is further diminished by the fact that even though the par value of a given stock may have previously been only 50 yen, in practice the stock exchanges had already established a minimum of 1000 shares per transaction for such 50 yen par value stock, thereby already having effectively instituted a 50,000 yen minimum trading unit.¹²

Another important reason for the establishment of a unit share system is to prevent the disruptive behavior of the notorious *sōkaiya*.¹³ In the past it had been extremely easy and inexpensive for *sōkaiya* to purchase the necessary one share of stock to enable them to attend and vote at general shareholders' meetings. These *sōkaiya* served different purposes; sometimes they were hired by company management to prevent minority shareholders from raising controversial issues, or at times one management faction would hire *sōkaiya* to assist in its efforts to obtain or maintain dominance in an intra-company factional dispute.¹⁴ The widespread use of *sōkaiya* has led to shareholders' meetings which were notoriously short and unproductive, often conducted in the virtual absence of democratic procedure or debate.¹⁵ The 50,000 yen share unit system and the resultant denial of voting rights to holders of less than one share unit is one significant step in making it more difficult (or at least more costly) for the *sōkaiya* to attend and disrupt shareholders' meetings.¹⁶

The share unit system in the amended Code clearly indicates a desire to eliminate shareholders who own below the set number of shares required to constitute one share unit, that is, shareholders owning less than

¹¹ Mainichi Daily News, Oct. 2, 1982, at 1, col. 1.

¹² Nihon Keizai Shinbun, Mar. 2, 1975, at 4, col. 6.

¹³ "Sōkaiya" is from the root "sōkai," which means shareholders' meeting. *Sōkaiya* therefore means "person whose business is attending shareholders' meetings."

¹⁴ BALLON, TOMITA, & USAMI, *supra* note 2, at 190-91.

¹⁵ The Tokyo Metropolitan Police Department estimates that approximately 100 billion yen (U.S. \$400 million) was paid to *sōkaiya* by corporations during 1981. Mainichi Shinbun, Nov. 4, 1982, at 7, col. 2. However, an ironic twist on the usual function and activities of *sōkaiya* occurred in the recent scandal surrounding Mitsukoshi Department Stores and its long-time President Okada. In that instance, the *sōkaiya* group known as "Rondan dōyūkai," led by a Mr. Masaki, claimed partial responsibility for exposing the graft and corruption which led to Okada's resignation and for which he is now standing trial. Shukan Asahi, Apr. 23, 1982, at 18, col. 6.

¹⁶ There are other provisions in the Amendments which are also aimed at preventing the disruptive *sōkaiya*. These are the denial of voting rights to shareholders with less than one unit share, and an express provision prohibiting gratuitous offers of material benefits to anyone in exchange for exercise of shareholder's rights. Art. 294-2.

50,000 yen worth of shares.¹⁷ Under the new Code, these odd-lot shareholders are essentially given two choices: either to keep their shares without having any voting rights (but retaining the right to dividends)¹⁸ or to demand that the company repurchase the shares at the current market price.¹⁹ In this respect, the holders of odd-lot shares totalling less than one share unit are relegated to second class status.²⁰ Nevertheless, though the denial of voting rights to holders of odd-lot shares is drastic, no other realistic solution for implementing the intended share unit system would seem to exist. Further, since most shareholders in the past have not been particularly concerned about voting rights, as a practical matter odd-lot shareholders will probably simply hold onto their shares without voting.

The cost to corporations of processing the documents related to small holdings, such as distributing annual reports, notice of meetings, etc., also has been causing considerable concern. By instituting this system, therefore, the companies hope to cut back on administrative expense.²¹ Moreover, if voting rights were to be retained by odd-lot shareholders, it would allow *sokaiya* who hold less than 50,000 yen worth of shares to continue to engage in their disruptive practices.

B. Restrictions Established on Corporate Purchase of Stock

In addition to the above changes which primarily affect individual shareholders, the new Code also introduces several restrictions on the holding and purchasing of shares by a corporation. First there are restrictions relating to the parent-subsidiary corporation relationship. Under the new Code, a subsidiary corporation may not own shares in its parent if the parent owns more than 50 percent of the subsidiary's stock.²² In addition, if a company (Company A), either alone or in combination with its subsidiary corporation(s), owns more than 25 percent of another company's stock (Company B), Company B may not exercise voting rights

¹⁷ Tan-i mivan kabushiki, "odd-lot holders".

¹⁸ Law No. 74, *supra* note 1, at art. 18. (Supp. Provisions, 1981).

¹⁹ *Id.* at art. 19. (Supp. Provisions, 1981).

²⁰ The treatment of "broken lot" (*hakabu*) shareholders, who obtain shares as a result of the issuance of new shares, or after a stock consolidation or split, stands in contrast. Broken lot shareholders are entitled to register their broken share, Law No. 74, *supra* note 1, at art. 230-2, and to have a certificate issued, *id.* at art. 230-3, and to aggregate broken shares (either by obtaining from someone else another partial share, or as a result of further stock splits, etc.) until such broken shares constitute a whole share, at which time they become entitled to exercise all rights of a shareholder, including voting. *Id.* at arts. 230-4, 230-5, 230-7, 230-8.

²¹ Journal of the Sangyo Horei Center, *Discussion of the Amended Stock Corporation Law*, 2 JAPANESE BUS. L.J. 313 (1981).

²² Law No. 74, *supra* note 1, at art. 211-2.

with respect to any of the stock of Company A which it might own.²³

These restrictions are quite novel in terms of expressly restricting, or at least indicating legislative disapproval towards, mutual and reciprocal stock holding. In the past, it had not been uncommon for businesses in Japan to form alliances with other companies for political purposes and to engage in mutual purchase and holding of large blocks of stock, thereby allowing directors of one company to expand their influence over the subsidiary or other company.²⁴ In fact, one estimate reports the amount of such shareholdings to be 60 to 70 percent of the total traded on the Tokyo Stock Exchange.²⁵ However, it remains to be seen what the effect of these proscriptions will be—beyond causing the companies potentially affected to simply reduce their holdings to the 25 percent or lower point.

While the new Code is more restrictive concerning the parent-subsidiary relationship, it is somewhat more permissive with respect to a company repurchasing or taking in pledge its own issued stock (so-called treasury stock). The pre-amendment Code severely restricted such activity,²⁶ whereas under the amended Code, a company can without limitation reacquire up to five percent of its own stock.²⁷

C. Stock Splits Facilitated

The new Code also will make stock splits (*kabushiki no bunkatsu*) easier to accomplish. Under the pre-amendment Code, stock splitting was permitted in theory.²⁸ However, since it expressly required that par value be at least 50 yen²⁹ per share for most presently existing companies, in practice this placed severe limitations on the number of stock splits because of the revaluation necessary after any split. This has had a serious

²³ *Id.* at art. 241(3).

²⁴ KOSEI TORIHIKI LINKAI NENJI HOKOKU SHOWA 49-NENBAN 191 (Fair Trade Commission Annual Report, 1974).

²⁵ Nihon Keizai Shinbun, Oct. 22, 1982, at 4, col. 4.

²⁶ Former art. 210 allowed a company to repurchase its own shares only if certain exceptional conditions existed, such as corporate amalgamation. The new Code, Law No. 74, *supra* note 1, at art. 210, has retained the previous exceptional conditions, but now also allows for the free acquisition of shares totalling up to 5% without any of the exceptional conditions listed therein having to be met.

²⁷ *Id.* at art. 210.

²⁸ Former art. 293-4, providing for stock splits, has remained intact without alteration under the new Code.

²⁹ Prior to the implementation of Law No. 74, the Code required that par value, where designated, be at least 500 yen. This figure was set in the 1951 amendment. However, most companies of significant standing had been organized prior to then, under the previous 50 yen minimum par value. The relevant standard controlling most companies was therefore 50 yen.

impact on those companies which have prospered, driving the market price of their stock beyond the reach of the ordinary investor who has thus been kept out of the market.³⁰

Under the amended Code, there is no express requirement that a minimum par value be maintained after incorporation, but only that after any stock split, the corporation's net assets shall not fall below 50,000 yen per outstanding share.³¹ Thus, any time the company's financial condition has become favorable enough to allow for the maintenance of this net asset to share ratio, a company is now able to effect a stock split, even, say, of 3:1 if advisable. This is potentially an encouraging sign for investors and should be another factor stimulating an increase in the number of individuals turning to the over-the-counter market for investment purposes.

III. AMENDMENTS CONCERNING THE RULES FOR CONVENING AND CONDUCTING GENERAL SHAREHOLDERS' MEETINGS

Traditionally, shareholders' meetings in Japan have not been conducted with the same prevailing attitude of discussion and debate that American and European shareholders have come to expect. Under the pre-amendment Code, in fact, shareholders were not even entitled to suggest agenda items for upcoming general shareholders' meetings.³² In this context, the minutes from general shareholders' meetings have often been contained on two or three pages, reciting perfunctorily those in attendance, the resolutions adopted and adjournment of the meeting. Indeed, as mentioned, the *sokaiya* have played an important role in this. Under the new Code, shareholders' rights are significantly strengthened, and the conduct of general shareholders' meetings is intended to be somewhat more democratic.

The Amendment now allows a shareholder who owns either 300 or more shares or shares amounting to at least one percent of those outstanding to submit possible agenda items for an upcoming meeting.³³ If he does so in writing at least six weeks prior to the upcoming meeting, the directors must upon demand include these proposals in the notice of the meeting sent to all shareholders.³⁴ The previous rule was that a share-

³⁰ Journal of the Sangyo Horei Center, *supra* note 21, at 311.

³¹ Law No. 74, *supra* note 1, at arts. 293-4(1), 293-3(2). The same rule prevails for the consolidation of shares by the corporation for purposes of adjusting the number of shares in order to make the net assets per share at least 50,000 yen. *Id.* at art. 293-3(3).

³² Prior to the Amendment, shareholders could make proposals concerning motions at the meeting, but could not submit agenda items. BALLON, TOMITA, & USAMI, *supra* note 2, at 316. Art. 232-2 is entirely new.

³³ Law No. 74, *supra* note 1, at art. 232-2(1).

³⁴ *Id.* at art. 232-2(2).

holder could only propose to a director that a meeting be held and suggest an agenda for the meeting. If denied this meeting, the shareholder had little recourse.³⁵

Calculation of the requisite 300 shares is somewhat cumbersome. For new companies organized after October 1, 1982, the 300 share requirement simply means 300 unit shares.³⁶ For established companies, however, the Amendment apparently provides a strong motive for them to consolidate their stock to reflect a 50,000 yen minimum per share net asset and, therefore, to allow only those who hold 300 unit shares or more the right to make agenda proposals.³⁷ Otherwise, based on pre-amendment valuation, a shareholder holding only 300 shares with an initial purchase of only 500 yen per share would be entitled to this proposal right.³⁸

The other primary changes in these Code sections relate to conduct of the general meeting (*teiji kabunushi sōkai*). The shareholders now have the right to request that the directors and auditors explain matters directly related to the conduct of the meeting.³⁹ While this may seem insignificant, it must be realized that in the past it was almost unheard of for a shareholder to question or call for discussion concerning management activities. However, the chairman has a corollary right to ask any person who is disturbing the meeting to leave.⁴⁰ These measures, together with the previously mentioned limitation on voting rights of a corporate shareholder which is itself more than 25 percent owned by the company conducting the meeting,⁴¹ should create a much more favorable atmosphere for democratic discussion at general shareholders' meetings.

IV. DIRECTORS, BOARD MEETINGS AND INSIDE AUDITORS

A. *Qualification and Conduct of Directors*

The pre-amendment Code contained no express limitations on director (*torishimariyaku*) qualifications.⁴² The new Code, however, provides

³⁵ Former Art. 237 has not been changed, and consequently the only way for such a meeting to have been held, in the absence of the new Art. 232-2, was for the Court to have ordered that a meeting be held, an occurrence virtually unheard of in Japan.

³⁶ Law No. 74, *supra* note 1, at art. 21. (Supp. Provisions, 1981).

³⁷ *Id.* at art. 293-3(3); art. 15 (Supp. Provisions 1981).

³⁸ *Id.* at art. 232-20(2). As under American corporation law, the shareholder is not provided with a license to propose anything whatsoever, but is confined to matters which are within the ambit of the articles of incorporation and which can be resolved at the general meeting.

³⁹ *Id.* at art. 237-3.

⁴⁰ *Id.* at art. 237-4(3).

⁴¹ *Id.* at art. 241(3).

⁴² Art. 254-2 is entirely new. Previously there were Penal Code provisions which related

that several categories of persons are now disqualified, including persons who have been declared bankrupt and those who have been convicted and imprisoned for violations of the Commercial Code or any other law.⁴³

New limitations on competitive dealings and broader bases for potential liability have also significantly increased the individual director's level of responsibility. Under the new Code, a director must obtain the approval of the whole Board of Directors before entering into transactions which are potentially competitive with the company's business.⁴⁴ Even where this approval is given, the director must thereafter report the material facts concerning the transaction to the board.⁴⁵ Moreover, not only will the individual director who conducts competitive business be liable to the corporation for any damages resulting, but *each* director who assented in the resolution to approve the competitive dealings is jointly and severally liable.⁴⁶ The new Code creates the presumption that the amount of the director's profit is the measure of damages to the company.⁴⁷

Directors can be removed at any time by resolution at a general shareholders' meeting, except where they are serving for a set term, in which case "just cause" is required.⁴⁸

B. Board of Directors Meetings

Previously, the directors by resolution customarily appointed one of their members as representative director (*daihyo torishimariyaku*), who was then designated as the one who could call board meetings.⁴⁹ While this procedure undoubtedly streamlined things in many instances, the designated director was then the only one who could convene board meetings.⁵⁰ Under the new Code, the other directors retain the right to call board meetings even when a particular director has been designated.⁵¹ The procedure allows for the director making the demand to convene the meeting if, after demand, the designated director sends no notice calling

to disqualification and non-qualification to assume management positions, but opinion was divided as to their application to directors, who are not always considered company management personnel. *Journal of the Sangyo Horei Center*, *supra* note 21, at 318.

⁴³ Law No. 74, *supra* note 1, at art. 254-2. The Penal Provisions for Commercial Code violations are set forth in Book II, Chapter VII thereof.

⁴⁴ *Id.* at arts. 264(1), 265.

⁴⁵ *Id.* at art. 264(2).

⁴⁶ *Id.* at art. 266.

⁴⁷ *Id.* at art. 266(4).

⁴⁸ *Id.* at art. 257.

⁴⁹ *Id.* at art. 261.

⁵⁰ *Id.*

⁵¹ *Id.* at art. 259(1), (2).

the meeting.⁵² In any event, after the amendment, board meetings must now be held at least once every three months.⁵³

As mentioned, the representative director typically wielded broad powers in the conduct of the company's business. While not expressly limiting the representative director's powers, the new Code does specify several functions which must be performed by the whole board. These include the disposal or acquisition of substantial assets, the incurring of substantial obligations, the appointment of key employees and the establishment of branches or divisions of the company.⁵⁴

Finally, regarding board meetings, the minutes must now be maintained for 10 years, and must contain the substance of the proceedings and record the attendance of directors and auditors. Shareholders are entitled to review these minutes and can obtain a court order if necessary to do so.⁵⁵

V. PROVISIONS CONCERNING REPORTING AND ACCOUNTING TO SHAREHOLDERS

A. *Inside Auditors "Kansayaku"*

Japanese corporations have been required to have at least one person entitled *kansayaku*, which is commonly translated as an inside, or statutory, auditor.⁵⁶ The inside auditor must be distinguished from independent certified public accountants (*kōnin kaikei-shi*), since the inside auditor is normally appointed on the basis of friendship or loyalty, and is not a professional accountant. Under pre-amendment procedure,⁵⁷ the role and function of the statutory auditor was in many cases merely to review and certify that certain documents, e.g., balance sheets, business reports, etc. were formally correct. Under the new Code, the inside auditor in many respects is placed on the same level of responsibility and accountability as a director.

The same restrictions as to who may serve as director are applicable to inside auditors.⁵⁸ In terms of powers and duties, the new Code empowers the inside auditor to attend board meetings and report potential vio-

⁵² *Id.* at art. 259(3).

⁵³ *Id.* at art. 260(3).

⁵⁴ *Id.* at art. 260(2).

⁵⁵ *Id.* at art. 260-4.

⁵⁶ The Amendment now requires that large corporations capitalized at over 500 million yen also must retain an accounting auditor "*kaikei kansanin*" who must be a certified public accountant. Law for special exceptions to the Commercial Code concerning auditing, etc., of stock corporations, Law No. 22 of 1974, ch. II, art. II.

⁵⁷ BALLON, TOMITA, & USAMI, *supra* note 2, at 28, 146-49.

⁵⁸ Law No. 74, *supra* note 1, at art. 280.

lations by a director of the law or of the articles of incorporation.⁵⁹ The inside auditor now may even request that a board meeting be convened,⁶⁰ and may also request that a director or any other employee prepare a report concerning business operations.⁶¹

While the powers of the inside auditor are somewhat enlarged, so are the liabilities. The pre-amendment liability of inside auditors to shareholders or other third parties was unclear, but that uncertainty no longer remains. An auditor who makes false statements in reporting, either intentionally or from gross negligence, is liable to the same extent as a director.⁶²

B. Accounting Requirements

1. Documents Required

Under the new Code, there are a number of far-reaching changes in both the methods used in producing the various accounting documents and the prescribed contents of these documents. The result is that companies now must fundamentally alter their method of accounting and characterization of funds and that dividends must be paid against a significantly greater portion of assets than was the case prior to the Code's amendment.

In March of 1982, issued prior to the effective date of the amendment in order to give sufficient lead time to corporate accounting departments, the Ministry of Justice provided detailed instructions as to the contents of the mandatory reports, as well as the "detailed accompanying statement."⁶³ First, the new Code requires that financial reporting submitted or made available to shareholders be standardized. Prior to the amendments, the information reported and forms presented by various companies to shareholders lacked consistency. The new Code requires a balance sheet (*taishaku taishōhyō*), a profit and loss statement (*soneki*

⁵⁹ *Id.* at art. 260-3(2).

⁶⁰ *Id.* at art. 260-3(3).

⁶¹ *Id.* at art. 274.

⁶² *Id.* at arts. 280(2); 266-3(3).

⁶³ KABUSHIKI KAISHA NO TAISHAKU TAISHŌHYŌ, SONEKI KEISANSHO, EIGYŌ HŌKOKUSHO OYOBI FUZOKU MEISAISHO NI KANSURU KISOKU (Regulations Concerning Corporate Balance Sheet, Profit-Loss Statement, Business Report and Detailed Attachments Thereto), Mar. 31, 1982. The Regulations provide nine mandatory items for the business report, including: capital investment, description of business plants or branches, parent-subsidiary relationship, business results over the past three years, names of directors, auditors, and the seven major shareholders, and amounts of debts and to whom owed. As for the contents of the "detailed attachments" to the other three reports, they must contain 16 items, including: fluctuations in relationship with subsidiaries, number of its own share acquired, transactions with directors, auditors and controlling shareholders, amount of reserves, disclosure of liens on assets, fluctuations in long term debt and/or paid in capital. *Id.*

keisansho), a business report (*eigyō hōkokusho*), and a proposal concerning disposition of profits or allocation of losses, all of which are to be submitted along with a detailed accompanying statement.⁶⁴ Furthermore, the Code now requires that such documents, which are to be prepared by a director, be approved by the full board as well as audited by the inside auditor⁶⁵ prior to being submitted for consideration and approval at the general shareholders' meeting.⁶⁶

With these requirements established, the right of the shareholders to obtain much more extensive and objective information is codified. While these new provisions are open to some procedural questions,⁶⁷ it is clearly the intention of the Japanese Diet (Parliament) that shareholders and creditors be provided with more thorough and verified information concerning corporate finances.

2. Accounting Method

The most profound changes in the Code sections dealing with accounting methods relate to the allocation of the issue price of each share of stock between the paid-in capital and capital surplus accounts.⁶⁸ While these changes are more prospective than immediate in nature because they apply only to new issues of stock, the eventual result will be an increase in the portion of profits out of which dividends must be paid, presumably in order to improve the low dividends historically paid by Japanese companies.

Prior to the amendments, when issuing new shares the Code required only that the amount equal to par value be credited to the stated capital account; any excess could be credited to capital reserves (*jumbi-kin*).⁶⁹ What this typically has meant is that where the par value is 50 yen, but the issue price several thousand yen, only the 50 yen was credited to

⁶⁴ Law No. 74, *supra* note 1, at art. 281(1).

⁶⁵ *Id.* at art. 281(1), (2).

⁶⁶ *Id.* at art. 283(1). An exception is the business report. It need not be specifically approved by, but merely reported to, the shareholders. *But see supra* note 63, for the detailed requirements as to its contents.

⁶⁷ For example, while both the accounting documents and detailed attachments must be approved by both the Board and the Auditors, *id.* at art. 281(1), (2), it is not expressly clear which must occur first. It would seem that the Board should approve such documents prior to the Auditors, but since there is no penalty for post-audit approval there would appear to be no prohibition against doing so, and in fact this is what many companies are doing.

⁶⁸ *Id.* at arts. 281-95.

⁶⁹ *Id.* at art. 284 (pre-Amendment). With no-par stock, up to one quarter of the issue price could previously be diverted from stated capital; however, since most shares have been par value, this distinction has not been of great importance.

stated capital.⁷⁰ Since Japanese corporations traditionally have used stated capital and not current earnings as the main base on which dividends are figured,⁷¹ this artificially low amount of stated capital has contributed to the notoriously low dividend amounts paid by Japanese corporations.

The amendments now require in principle that the total amount of the issue price, whether of par value or not, should be credited to stated capital.⁷² However, the amendments also allow the board to credit only the amount of the issue price in excess of par value (or with no-par shares, 50,000 yen) to capital reserve, as long as this amount does not exceed one-half of the total issue price.⁷³ For instance, where the market price of newly issued value 500 yen shares is 5000 yen per share (note that 10 such shares would be the minimum purchase allowed), only up to 2500 yen of the 4500 yen excess of purchase price over par value may now be credited to reserves.

The foregoing changes, contained in the accounting sections of the Code establishing limitations on the amounts that can be credited to capital reserves, not only should make a greater portion of the profits available for distribution as cash dividends, but they also simplify the procedure for voting stock dividends. The Code formerly required that in order to declare a stock dividend a special resolution be passed by two-thirds vote at the general shareholders' meeting.⁷⁴ Now, merely an ordinary resolution by simple majority vote can determine stock dividends.⁷⁵

VI. OTHER NEW PROVISIONS

A. Bonds with Warrants Now Permitted

Corporate planners have desired that companies be entitled to issue, along with standard and convertible bonds, some form of bond giving preemptive rights to the bondholders to purchase stock⁷⁶ (i.e., bonds with preemptive rights which would allow the purchaser to hold both stock and bonds simultaneously) and to exercise the stock purchase rights separately from the rights as bondholder. This type of instrument would provide a method, attractive from the investor's position, for the company to raise additional funds (presumably many investors would like simultane-

⁷⁰ Since the mid-1970's, companies have usually set the issue price of new shares at the prevailing market price rather than at par value.

⁷¹ See BALLON, TOMITA, & USAMI, *supra* note 2, at 116-19.

⁷² Law No. 74, *supra* note 1, at art. 284-2(1).

⁷³ *Id.* at art. 284-2(2).

⁷⁴ Former Art. 293-2 required that a two-thirds vote (pursuant to Art. 343, which is unchanged) be obtained in order to declare a stock dividend.

⁷⁵ Law No. 74, *supra* note 1, at arts. 239, 293-2.

⁷⁶ Journal of the Sangyo Horei Center, *supra* note 21, at 332.

ously to enjoy the rights of both bondholder and stockholder). It is also advantageous from the company's position since, for example, it could be issued at a somewhat lower interest rate than ordinary bonds and could be used as one means of hedging against foreign exchange risks incurred due to the growing amount of foreign currency claims many companies are now holding.

The new Code accordingly provides for the issuance of debentures giving preemptive rights to subscribe to new shares (*shinkabu hiki-ukekentsuki shasai*),⁷⁷ along with retaining the provisions relating to convertible bonds.⁷⁸ The debentures with preemptive rights can be either with detachable or fixed warrants. Where the warrant (representing the preemptive stock purchase rights) is detachable, it can be negotiated separately from the board. When the purchase rights evidenced by the detachable warrant have been exercised, the bond remains outstanding until redeemed by the company.

B. Further Restrictions on *Sōkaiya*

As previously discussed, the 50,000 yen minimum transaction of share purchase is aimed, in part, at curbing the activities of *sōkaiya*.⁷⁹ There is an additional provision, as well, in the new Code aimed at *sōkaiya* activities, which expressly prohibits the granting of "gratuitous" offers of "material benefits" to anyone in exchange for exercise of shareholder's rights.⁸⁰ There are some gaps in the new Code provisions though. For example, it is not expressly clear that the "gratuitous benefits" are prohibited to be offered to persons *not presently* shareholders (although clearly the law is so intended). Neither does a prohibition against individual directors offering such "benefits" exist, but only against the company doing so.

Nonetheless, the significance of this Code section is that it is included in the new Code. Violations of the provision are punishable by imprisonment and/or fines, and directors and auditors are jointly liable. While no one is claiming the complete elimination of the *sōkaiya* as a result, it is certain to have at least some impact on their future activities.⁸¹

⁷⁷ Law No. 74, *supra* note 1, at art. 341-8 through 341-15.

⁷⁸ *Id.* at art. 341-2 through 341-7.

⁷⁹ *Supra* notes 13-16 and accompanying text.

⁸⁰ Law No. 74, *supra* note 1, at art. 294-2.

⁸¹ A newly created task force of the Tokyo Metropolitan Police Department arrested 140 persons during the October 1 through November 1, 1982 period, on charges of extortion related to *sōkaiya* activities now made illegal. *Mainichi Shinbun*, Nov. 3, 1982, at 4, col. 2.

VII. CONCLUSION

The Amended Commercial Code must be viewed as instituting sweeping changes in the conduct of Japanese corporations' activities. For instance, simply with respect to the newly imposed limitation on allocation to capital reserves, it is estimated that of the 1.4 trillion yen (\$5.6 billion) allocated to capital reserves by companies during the 1980 year, approximately 1 trillion yen (\$4 billion) would have been affected if the new limitations had at the time been in force.⁸² Thus, the changes have had, and will continue to have, a profound impact upon corporate accounting departments and certified public accountants.

The changes concerning shareholder rights are no less significant. While the new Code does not, for instance, go so far as requiring cumulative voting, as do many corporation codes, the amendments must be examined in context. It remains to be determined whether, as expected and hoped, there will actually be an upsurge in the amount of domestic and foreign investors in over-the-counter purchases. If an increase in such purchases does not occur, however, it cannot be blamed on the drafters of the modernized Amended Commercial Code.

⁸² Nihon Keizai Shinbun, Oct. 22, 1982, at 11, col. 2.