

## Newsletter (April 2020) | Legal Affairs

# “Effective Date of the Amended Foreign Exchange Act on Foreign Direct Investment, and Revisions of the Draft Regulations Based on the Results of Public Comments”

*NOTE: This newsletter was prepared based on its Japanese version as of April 30, 2020 to supplement and update the information contained in our separate newsletter. For a better understanding of the issues, please read together with our newsletter dated March 27, 2020 (click here).*

Our March 27, 2020 newsletter ([click here](#))<sup>1</sup> explained the details of the draft Cabinet Order, Ministerial Ordinance and Public Notice (collectively or individually, “**Draft**”). This newsletter outlines the revision of the Draft based on the results of the public comments carried out until April 12, 2020 (“**Public Comments**”) and the subsequent developments until April 30, 2020.

### 1. The Enforcement and Implementation Dates

On April 24, 2020, the Cabinet finalized the Draft which amends the former cabinet order on foreign direct investment. On the same date, the Ministry of Finance (“**MOF**”) issued a publication<sup>2</sup> called the “Revisions to the Draft on the Foreign Exchange and Foreign Trade Act” (“**Revisions**”). This publication indicates that the Draft will be promulgated on April 30, 2020, and that the Revisions and Draft will come into effect on May 8, 2020 (“**Enforcement Date**”) and will be implemented on June 7, 2020 (“**Implementation Date**”). The Revisions were indeed promulgated on April 30, 2020.

As of March, the MOF list of companies was scheduled to be published on the same date as Cabinet’s finalization. However, the list has not been published at that time, and according to the MOF, it is scheduled to be published on the Enforcement Date.

### 2. Transitional measures

Although prior filing needs to be made for an acquisition of 1% or more of the listed shares of an entity which is expected to be done on or after the Implementation Date, the MOF indicated that the filing may be made during the period from the Enforcement Date until the Implementation Date. For example, if a foreign investor (“**Foreign Investor**”) is plans to acquire shares on or after June 7, it will be able to submit a prior filing in accordance with the amended Foreign Exchange and Foreign Trade Act (“**Amended Act**”) from May 8, 2020.

### 3. Revisions in access to confidential information

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<sup>1</sup> English version was released on May 11, 2020.

<sup>2</sup> [https://www.mof.go.jp/english/international\\_policy/fdi/kanrenshiryoku02\\_20200424.pdf](https://www.mof.go.jp/english/international_policy/fdi/kanrenshiryoku02_20200424.pdf)

If a Foreign Investor does not have access to confidential information, such inability to access confidential information can be an exemption of the prior filing requirement. The “access” was defined more precisely as (a) acquire confidential information (except for when the issuing company provides it to the Foreign Investor) knowing it was confidential, (b) propose to disclose confidential information and knowing it is confidential, and (c) propose changes to the regulations and contracts related to the management of confidential information.

With respect to the above, and after reviewing the Public Comments, exceptions have been made for M&A advisory departments of security houses and banks which inevitably access confidential information and would not be eligible for exemption. The exception is that if certain measures are taken to ensure that (i) confidential information is not provided to the stock trading department; and (ii) any influence over the issuing company through the shares held by the stock trading department is prohibited, the Foreign Investor would not be deemed to have “access” to confidential information.

#### **4. Filing is valid for any acquisitions to be made during six months of the filing**

While the Draft previously required prior notification for each acquisition of 1% or more of the listed shares of an entity, it has been amended so that a Foreign Investor will be allowed to acquire shares up to the amount stated in the prior filing on multiple occasions within a six-month period from the date of approval.

#### **5. Elimination of administrative burden for prior filing and post-reporting upon acquisition of shares**

##### **(1) Prior Filing**

As mentioned in paragraph 4 above, if the prior filing is approved through the examination, a Foreign Investor can acquire shares up to the stated number of shares for a period of six months from the date of approval. The Foreign Investor does not need to make a filing on each subsequent acquisition. In addition, while a post-acquisition report was required to be submitted within 30 days of the closing of the transaction under the current law, the deadline for the reporting has now been extended to 45 days.

##### **(2) Post-acquisition Report**

When an exemption is approved, a prior filing for the acquisition is not required, but a post-acquisition report still needs to be made when the acquisition rate reaches the following threshold:

- (i) 1% or higher for the first time;
- (ii) 3% or higher for the first time;
- (iii) For each acquisition of 10% or more of shares.

However, if the threshold (i) and (ii) is reached a second time (e.g., after going below the threshold by a sale of the shares), a post-acquisition report will not be required.

In addition, the filing forms of a post-acquisition report in the cases of an exemption and non-Designated Sector have been simplified after consideration of the Public Comments. Thus, the Revisions intend to reduce some of the administrative work for a Foreign Investor.

#### **6. Other changes and the results of Public Comments**

As mentioned above, the period of the Public Comments was set until April 12 for the Draft. Although a considerable number of comments should have had been submitted by industry associations and other organizations, as of now, no

comprehensive response to all submitted comments has been published. The revisions from the Draft are limited to those discussed above, and there seems no other indications for further revisions.

**[Note: As of May 1, 2020, the comprehensive comments of the Public Comments were published on the website of MOF.]**

Incidentally, the public comment period for comments regarding factors for the MOF and examining authorities to consider for prior filings were open from April 4 to May 3, 2020.

## 7. Going Forward

The Enforcement Date and the Implementation Date have been now fixed, and the schedule for implementation of the Amended Act has been clarified. As mentioned in our previous newsletter ([click here](#)), it will be necessary for investors and companies that may potentially become Foreign Investors to prepare an internal business flow, as well as obtain external legal consultation so that they can prepare for acquiring any shares on or after June 7, respond to the appointment of officers to certain companies, and respond to voting rights promptly in accordance with the Amended Act. In addition, although the MOF list of listed companies will not be published until May 8, Japanese companies which believe that they will likely to fall under the category of the Designated Sector industries and listed on the MOF list should prepare an internal system so that they can respond timely to inquiries from Foreign Investors regarding the matters to be stated in the filing form immediately after the publication of the MOF list.

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The Sonderhoff & Einsel routinely provides advice on foreign trade regulations, including the Foreign Exchange Act, and related regulatory issues in M&A, contract drafting and amendment, negotiations, litigation & arbitration, employee training, and responses to authorities.

The information provided in this document is only general information and does not provide specific professional advice. The views expressed in this newsletter are a personal one of the author and do not constitute a legal opinion of the firm. For inquiries, please contact Naoki Watanabe at: [n-watanabe@se1910.com](mailto:n-watanabe@se1910.com).

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