

CY Japan Legal Update

June 1, 2020

Amendments to Foreign Exchange and Foreign Trade Act

Ms. Yoko Maeda, Partner
Mr. Kiyoshi Nakayama, Associate

On November 22, 2019, amendments to the Foreign Exchange and Foreign Trade Act, as amended (the “FX Act”) was enacted. The amended FX Act and relevant rules and regulations have been in force since May 8, 2020 and will be fully implemented from June 7, 2020¹. According to a press release by the Minister of Finance, the amendments aim to (i) further promote foreign direct investment (“FDI”) conducive to sound economic growth; and (ii) ensure minimal review of FDI that could pose risks to national security.² Below we summarize the major changes brought about by amendments and discuss the impact of the changes.

1. Summary of the Major Changes

The Following are the summary of the major changes to the FX Act:

(Chart1. The comparison of the FX Act before and after amendment)

Area	Before Amendment	After Amendment
Threshold for prior notification regarding the acquisition of listed company’s stocks	10%	1%
Prior notification for certain actions	Prior notification is required for the consent given for a substantial modification to an investee company’s business purpose	Adds following actions: <ul style="list-style-type: none"> ● Becoming board members of the investee company ● Proposing transfer or disposition of investee company’s business activities in the designated business sectors
Exemption for prior notification for stock purchases	N/A	Foreign investors who comply with certain conditions are exempted from prior notification for stock purchases.
Scope of “Foreign Investor”	Includes companies located in Japan with 50% or more ownership of foreign investors, as well as direct subsidiaries of such companies.	Includes companies with a total of 50% or more of the voting rights directly or indirectly held by non-resident individuals or foreign companies.

¹ This article was written on Jun [1], 2020.

² Available at the following link

https://www.mof.go.jp/english/international_policy/fdi/kanrenshiryoku01_20200424.pdf

- **Threshold for Prior-Notification**
Under the former FX Act, the foreign investors must file a notification to the Japanese government before acquiring no less than 10% of equities in a Japanese listed company that is engaged in certain businesses. Under the amended FX Act, the 10% threshold for prior-notification was lowered to 1%.
- **Prior notification for Certain Actions**
The amended FX Act added the following actions that require foreign investors to submit a prior notification to the Japanese government and go through examination:
 - Voting at the shareholders’ meeting for nomination of the foreign investor itself or its closely related person³ as a board member of the investee company;
 - and
 - Voting at the shareholders’ meeting for a proposal made by those foreign investors to transfer or dispose the investee company’s business activities in the designated business sectors.
- **Exemption for Prior-Notification for Stock Purchases**
Under the amended FX Act, roughly two types of exemption schemes were introduced: a blanket exemption and a regular exemption. A summary of the exemption schemes, which apply to investments to listed companies are showed in a chart 2.

(Chart2. Summary of Exemption for Prior-Notification)

	Blanket Exemption	Regular Exemption
Types of investors	Foreign financial institutions	General investors and certified Sovereign Wealth Funds and Public Pension Funds (SWFs)
Content of the exemption for prior-notification	Regardless of business sector, as long as Exemption Conditions (explained below) are met.	(i) Investment in designated business sectors other than core sectors ⁴ Regardless of business sector, as long as exemption conditions are met. (ii) Investment in core sectors Investment under 10% as long as Exemption Conditions and Additional Exemption Conditions (explained below) are met.
Post-investment report	Investment not less than 10%	Investment not less than 1%

In the chart 2, the “Exemption Conditions” are as follows:

A) Investors or their closely-related persons will not become board

members of the investee company.

B) Investors will not propose to the general shareholders’ meeting transfer or disposition of investee

³ Closely related persons refer to certain persons who have a permanent economic relationship, relative relationship or other special relationship with those who conduct FDI.

⁴ Core sectors refer to weapons, aircrafts, nuclear facilities, space and dual-use technologies, and the like.

company's business activities in the designated business sectors.

- C) Investors will not access non-public information about the investee company's technology in relation with business activities in the designated business sectors.

The following are the "Additional Exemption Conditions" in the chart 2 :

- D) Regarding business activities in core sectors, investors will not attend the investee companies' executive board or committees that make important decisions in these activities
- E) Regarding business activities in core sectors, investors will not make proposals, in a written form, to the executive board of the investee companies or board members requiring their responses and/or actions by certain deadlines

On May, 8, 2020, the Ministry of Finance published a list classifying all the listed companies in Japan into the following categories regarding prior-notification requirements:

- (i) Companies conducting business activities only in non-designated business sectors (subject to post-investment report only)
- (ii) Companies conducting business activities in designated business sectors other than core sectors
- (iii) Companies conducting business activities in core sectors

Designated business sectors include not only weapons, aircraft, nuclear facilities,

electricity, etc., but also broader sectors such as cybersecurity, telecommunications, agriculture, forestry and fisheries. As a result, more than half of the listed companies are classified as (ii) or (iii) above.

2. Background of the Amendment

The report issued by Industrial Structure Council under the Ministry of Economy, Trade and Industry, on October 8, 2019, pointed out that Japanese FDI rules should be reviewed amid the global trend to strengthen FDI controls from the national security viewpoint.⁵ The United States strengthened the examination procedures for FDI by adopting the Foreign Investment Risk Review Modernization Act of 2018 in August 2018. The European Union also introduced a new regulation, which reinforces investment controls entered into force in April 2019.

Although the Japanese government recognizes the necessity of promoting in-bound investment, it is concerned that the increase of foreign investments in businesses related to Japan's critical technologies will raise the security issues. From such viewpoint, while strengthening in-bound FDI controls, exemptions for across-the-board prior notification obligation were introduced.

3. Effects on the Investment Process

The amendment of FX Act will impact the process of investment by foreign investors in following points:

- Broad range of foreign investors must consider whether an investment requires prior-notification

⁵ Available at the following link

https://www.meti.go.jp/shingikai/sankoshin/tsusho_boeki/anzen_hosho/pdf/20191008001_03.pdf

As the prior-notification for stock purchases was expanded, broader range of foreign investors must consider whether an investment requires prior-notification. If prior-notification is required, the foreign investor must notify the Japanese government of certain matters through the Bank of Japan. Foreign investors must not carry out the investment until the end of a certain period after the Bank of Japan received prior-notification. In principle, the prohibited period is 30 days, but it usually shortened to two weeks. This period should be taken into consideration when scheduling the investment required prior-notification.

- Foreign investors must consider whether the exemption scheme is applicable to the investment

As stated above, when considering whether the exemption scheme is applicable to an individual investment, attributes of the foreign investors, the nature of the business to be invested, and the sufficiency of the exemption conditions should be considered. As the classification list of listed companies has been published, certain predictability is secured. It should be noted that even if the exemption scheme is applicable to an investment, a post-investment report must be filed in certain cases.

4. Conclusion

The amendments to the FX Act which reinforce investment controls are in line with global trends. It will give significant influence on the process of investment by foreign investors, because the amended FX Act has lowered the prior notification threshold regarding the acquisition of listed company's

stock from 10% to 1%. Although exemption for prior notification has been introduced, the schemes are complicated. Foreign investors should pay attention to the future implementation of the amended FX act in Japan.

City-Yuwa Partners, Tokyo

[Yoko Maeda](#), Partner
yoko.maeda@city-yuwa.com

[Kiyoshi Nakayama](#), Associate
kiyoshi.nakayama@city-yuwa.com