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Financial Law Board

**Interim Note on Rights Offerings with regard to Solicitation Rules  
under Financial Instruments and Exchange Act  
(Summary)**

## **1 Introduction**

Legal system for "rights offerings" has recently been developed. A rights offering is a means of increasing capital along with a public offering and third-party allotment, which is explained as "a method to increase capital by allocating share options to all shareholders without contributions".

Rights offering schemes are broadly classified into two types: commitment type and non-commitment type rights offerings. Of these, a commitment type rights offering is a scheme whereby share options which have not been exercised are acquired by the issuing company based on the call provisions and sold to the securities company (hereinafter referred to as a "Committed Securities Company"; the issuing company and the Committed Securities Company are collectively referred to as "Issuing Companies"), and the Committed Securities Company exercises these shares options to acquire shares and sell them in the market or to others, as they committed to do so in advance.

For rights offerings, it is said that there is strong demand among Issuing Companies to ascertain trends in shareholders' exercise of share options.

On the other hand, while a public offering of securities before submitting a notification under the Financial Instruments and Exchange Act (hereinafter referred to as the "Act") is prohibited, there is an argument over whether Issuing Companies' acts such as investigating the intentions of existing shareholders to exercise share options are permissible in terms of the prohibition on solicitation prior to submission of a notification.

## **2 Does an Allotment of Share Options without Contributions correspond to "solicitation of acquisition" under the Act?**

While a "public offering of securities" before submitting a securities registration statement is prohibited, it refers to certain types of solicitation of applications to acquire newly issued securities. There is no specific definition or standard of "solicitation" under any law or regulation; however, in academic discussions, it is said that solicitation under the Act refers to the act of increasing investor interest in certain securities and

promoting the acquisition/purchase of such securities.

The Guidelines for Disclosure of Corporate Affairs, etc published by the Financial Services Agency stipulate that "it should be noted that Allotment of Share Options without Contributions in Article 277 of the Companies Act corresponds to solicitation of acquisition of share option certificates", and therefore clearly state that Allotment of Share Options without Contributions corresponds to "solicitation of acquisition" of share option certificates. It is explained that this is because Allotment of Share Options without Contributions is considered to be substantially similar to inviting subscription for shares through shareholder allocation.

Under current business practice, we have to address the matter in accordance with the interpretation and operation stated in the Guidelines for Disclosure of Corporate Affairs, etc and it is necessary to judge the applicability of the disclosure regulations based on the premise that Allotment of Share Options without Contributions corresponds to solicitation of acquisition of share option certificates.

### **3 What kinds of acts by an Issuing Company or a Securities Company will correspond to "solicitation"?**

#### **(1) Meaning of Solicitation**

Although the Act explains that solicitation of acquisition refers to the act of increasing investor interest in certain securities and promoting the acquisition of such securities, its denotation is not crystal-clear.

In this regard, while it seems clear that the act of directly recommending the acquisition of specific newly issued securities to potential investors corresponds to solicitation of acquisition, the point at issue is what kinds of acts will constitute increasing investor interest and "promoting the acquisition of such securities" when the acquisition of securities is not directly mentioned.

First, if the content of the information provided to investors is in the nature of promoting the acquisition of securities, the provision of such information is considered to constitute solicitation of acquisition.

In addition, there is an opinion in academic discussions that making investors aware of certain securities as an investment target among many promotes the acquisition of such securities and thus constitutes solicitation of acquisition. Accordingly, if the content of the information provided to investors or the manner of conduct toward investors increases investor interest in the particular securities to be issued, such an act could be deemed as solicitation of acquisition.

## **(2) Considerations on Allotment of Share Options without Contributions**

### **A. Regarding promoting the acquisition of share options**

First, in relation to the acquisition of share options, if an Allotment of Share Options without Contributions is conducted, because existing shareholders are supposed to acquire such share options independently of their intentions, the Issuing Companies' act of checking their intentions to exercise such share options will have no effect, and thus will not be considered to constitute promoting the acquisition of share options.

### **B. Regarding promoting the acquisition of new shares**

#### **(A) Content of the information provided**

In a rights offering, shareholders have 3 options: 1) to exercise the share options; 2) to sell them in the market; or 3) to do nothing.

A shareholder is expected to choose option 1) when the shareholder judges that economic benefits such as rising stock prices and future dividends can be expected, or wants to maintain his shareholding percentage in order to exercise voting rights, despite the additional contribution burden.

Therefore, if the Issuing Companies' act of checking existing shareholders' intentions to exercise their share options, for example, relates to the economic value of the shares, such as the issuing company's excellent business results, an upward revision of earnings forecasts or dividend increases, and involves the provision of information which is difficult or impossible for general shareholders to obtain or notice unless it is provided by the Issuing Companies, such an act can be considered to constitute promoting the acquisition of new shares through the exercise of share options. However, unless it involves the provision of such information and directly promotes the exercise of share options, from the information provision perspective, it is reasonable to consider that it does not constitute promoting the acquisition of new shares. Furthermore, even if the information provided by the Issuing Companies relates to the economic value of the shares, when it is already known to the public or is publicly available, the acts of the Issuing Companies could be deemed not to result in promoting the shareholders' acquisition of new shares.

#### **(B) Manner of Conduct**

Even if the information provided along with the intention survey does not promote the acquisition of new shares, when the manner by which the Issuing Companies check

existing shareholders' intentions to exercise their share options promotes the acquisition of new shares, such intention survey may correspond to "solicitation of acquisition".

If an Allotment of Share Options without Contributions is conducted, the persons entitled to receive an allotment of share options are limited to existing shareholders, and existing shareholders are by compulsion required to decide whether or not to exercise such share options. It is reasonable to conclude that even if the Issuing Companies ask existing shareholders about their intentions to exercise their share options in such a case, this does not increase existing shareholders' interest in the issuing company's shares as an investment target.

### **(C) Summary**

As just described, we cannot deny the possibility that making contact with existing shareholders in advance could be seen as promoting the acquisition of new shares and therefore correspond to solicitation of acquisition.

However, Issuing Companies' acts of simply checking existing shareholders' intentions to exercise their share options do not make existing shareholders aware of the issuing company's shares as an investment target, and therefore, except for the case where they relate to the economic value of the shares and involve the provision of information which is difficult for general shareholders to notice unless it is provided by the Issuing Companies, it is quite possible to conclude that such acts do not correspond to solicitation of acquisition of securities.

## **4 Addendum – Deterrence of Insider Trading**

Because asking existing shareholders about their intentions to exercise share options prior to announcement of implementation of a rights offering involves the provision of unreleased information, it is also necessary to be vigilant regarding the deterrence of insider trading.

In order to deter insider trading and maintain the credibility of the securities markets, issuing companies which plan to conduct rights offerings and Committed Securities Companies which engage in underwriting are required to take action to deter insider trading when they ask existing shareholders about their intentions to exercise share options.

Note: The full text of this paper is available in Japanese only.