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SOME PROBLEMS ABOUT THE NOTIFICATION RELATING TO SALE OF SECURITIES

By WATARU MATSUMOTO

Assistant Professor of Commercial Law

1. Our Securities and Exchange Law, in its Chapter II provides for the so-called securities notification system. Similar to the other part of the Law, the securities notification system follows generally the registration system provided in the United States Securities Act of 1933. But it is remarkably different from the American system.

The Securities and Exchange Law distinguishes definitely the invitation to subscribe for securities from sale of them. The former is concerned with securities to be newly issued,¹ and the latter with securities already issued.² On the contrary, there is no distinction like this in the Securities Act of 1933, but in some cases, the secondary distributions of securities already issued are dealt as well as the new issues of securities and required filing of registration statements. Comparing Haupt Case relating to filing of registration statement at the time of secondary distribution in America with sale of securities already issued in Japan, I will point out some problems about the notification of sale of securities in our country.

2. In the Matter of Ira Haupt & Company,³ the problem was whether the respondent Haupt & Company, who was a member of New York Stock Exchange and sold approximately 93,000 shares of the common stock of Park & Tilford, Inc., which Schulte interests controlled, for the accounts of Schulte interests, willfully violated Section 5 (a) of the Securities Act of 1933.⁴ Schulte was the president and director of Park & Tilford Inc. The company had 243,731 shares of common stock outstanding, of which the Schulte interests owned 225,482 shares or 92 per cent. In December 1943, during the period of wartime shortages, Schulte announced that Park & Tilford was issuing a dividend in whiskey to its shareholders at cost, and placed a standing order to sell from one to three hundred shares at every quarter or half point. Then Haupt disposed of some 93,000 shares at prices ranging from 58 to 96, during a six months period, for the Schulte interests. It is conceded that respondent Haupt’s transactions in Park & Tilford stock for the account of the Schulte interests constitute a violation of Section 5 (a) of the Securities Act of 1933 unless an exemption was applicable to such transactions. After all it was conceded that respondent’s transactions were new

¹ Article 9-paragraph 3: The term “invitation to subscribe for securities” in this Law means any solicitation of an offer to acquire securities to be newly issued, to many and unspecified person under uniform terms.
² Article 9-paragraph 4: The term “sale of securities” in this Law means any offer to sell or solicitation of an offer to buy securities outstanding to many and unspecified person under uniform terms.
⁴ Section 5 (a) of the Securities Act of 1933 prohibits to perform some specific acts for sale of securities unless a registration statement has taken effect. Article 4 paragraph 1 of our Securities and Exchange Law is equivalent to this provision.
offering of securities of Park & Tilford by an underwriter⁵ and constituted a violation of Section 5 (a) of the Securities Act of 1933.

3. When we apply the above-mentioned Haupt case to Japanese Law, it is clear that this case regards to secondary distribution of shares already issued, and that it is not invitation to subscribe for securities, but sale of securities. Regarding sale of securities the total face value of which for sale is less than ten million yen, the issuer needs not file any notification, but when the total face value for sale is more than ten million yen, the sale of securities shall not be made until the notification has taken effect.⁶⁷ Section 2 paragraph 4 of the Securities and Exchange Law provides that the term “sale of securities” means...“under uniform terms”. Therefore, if the terms are not uniform, any issuer can easily be excused from the obligation of notification relating to sale of securities. When such case as Haupt Company occurs in Japan, even if the total face value for sale of securities is more than ten million yen, we can not regard such a series of transactions as one sale, but several sales, because the terms are not uniform. Therefore, it seems that the issuer could easily exempt from filing of notification, unless the total value for one sale of securities was more than ten million yen. In the case of subscription for securities, there is a total amount provision, so, when the total amount of the total face value of securities which were subscribed within the period of one year before the present subscription and the total face value for the present subscription to the same kind of securities is more than ten million yen, the issuer must file a notification of securities with the Finance Minister (Article 2 of the Finance Ministrial Ordinance). On the contrary, there is no such provision in the case of sale of securities, and, as aforesaid, the issuer can easily exempt from the duty of filing a notification. Before the 1953 amendment of Securities and Exchange Law, there was, indeed, a total amount provision as to sale of securities. At that time, the so-called

⁵ Section 2 (11) of the Securities Act of 1933 defines underwriter as follows: “The term ‘underwriter’ means any person who...sells for an issuer in connection with, the distribution of any security,...” “As used in this paragraph the term ‘issuer’ shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer,...” In our Law, there is no phrase “the term ‘issuer’ shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer...” See, Article 2 paragraph 6 of the Securities and Exchange Law (The term “underwriter” in this Law means any person who, at the time of issuance of securities, acquires the whole or a part of securities concerned from the issuer of such securities with a view to selling same, or enters into a contract to acquire the remainder, when there is no other person than himself to acquire such securities, or who handles invitation to subscribe for or sale of securities for the issuer, or any other person who participates directly or indirectly in the invitation to subscribe for or sale of securities and receives a commission in excess of the usual and customary securities distributor’s commission, renumeration or any other consideration.

⁶ Article 4 paragraph 1: The invitation to subscribe for or sale of securities shall not be made until and unless the issuer filed a notification of securities concerned with the Finance Minister and such notification has taken effect: Provided, that, regarding invitation to subscribe for or sale of such securities the total face value of which for subscription or sale (when no-par stocks are included in the securities concerned, the issue price as far as such stocks are concerned, hereinafter the same) being less than fifty million yen and such as may be prescribed by Finance Ministrial Ordinance, the foregoing shall not apply.

⁷ Article 1 item 2 of Finance Ministrial Ordinance: Securities to which, in accordance with the proviso to Article 4 paragraph 1 of the Securities and Exchange Law, the provision of said paragraph does not apply, shall be as follows:...2. Securities of which total face value is less than ten million yen.
securities notification system did not apply to sale of securities of which total face value was less than one million yen. However if the total amount of the total face value of securities which were subscribed within the period of one year before the sale and the total face value for the sale of the same kind of securities is more than ten million yen, the issuer must file a notification of securities with the Finance Minister. It seems that this was in order to be in keeping with the system by which a notification of subscription of securities was required when the total face value was more than ten million yen. But such total amount provision is not adequate one, because a principal performer is not always the same one in the case of subscription of securities and in the case of sale of them, and because that provision is not useful for arresting refrainment of the application of notification system which is the main purpose of such provision. Therefore, there is no regulation like this after the 1953 amendment. By the way, we had a total amount provision for sales of securities before the 1953 amendment, but it has been abrogated by this amendment. The reason why such provision has been abrogated is not clear, but in any case it is a problem that there is no provision in the existing law on this point.

In the next place, even if the total face value for the sale of securities is more than ten million yen, no notification is required if a notification of subscription or sale of securities has taken effect regarding the same kind of securities in the past, because Article 4 paragraph 1 of the Securities and Exchange Law regulates subscription and sale of securities in an alternative way where "the invitation to subscribe for or sale of securities shall not be made..." And about the effective term of the notification relating to the invitation to subscribe for or sale of securities, that is how long the notification has effect, no limitation is provided. So, if an issuer company issued frequently the same kind of securities for many years, it is conceivable that the notification regarding the invitation to subscribe for or sale of securities was not filed on one occasion and it was filed on another occasion. In order to sell such securities of more than ten million yen thereafter, it is not always clear whether notification should be filed or not. Of course, as a practical matter, in the event that sale of securities is made without filing of notification which is required, any person who performs such act will be under the application of Article 187 paragraph 1 (injunction), Article 16 (compensation liability of violator), Article 198 item 1, Article 207 (penalties), Article 39 paragraph 1.

8 Article 187 paragraph 1: Whenever it shall appear to the court that it is urgent and essential and necessary and appropriate for the public interest or for protection of investors, the court may enter an order upon application of the Finance Minister, to any person who is engaged or about to engage in any acts violating this Law or any order prescribed under authority there of, to prohibit or suspend such acts.

9 Article 16: Any person who sells any security in violation of the provisions of the preceding Article (requirements for transactions; effects of notification and prospectus) shall be liable to compensate the damages sustained by a person or persons who have acquired such security due to such violation.

10 Article 198 item 1: Any person falls under any one of the following each item shall be sentenced not more than one year, or fined not more than one hundred thousand yen: (1) Any person who, with respect to any security for which notification is required by the provisions of Article 4 paragraph 1, has effectuated invitation of public subscription for such security or sold for public offering or handled such, notwithstanding that such notification has not yet taken effect:

11 Article 207: In case a representative of juridical person or an agent, an employee or other staff of a juridical or natural person violates Article 197 item 2 or 3, Articles 198 to Article 200 inclusive, Article 205 or the preceding Article with respect to business or property of juridical or natural person, the said juridical or natural person shall be fined such as stipulated in each Article in addition to the punishment of the offender.

12 Article 39 paragraph 1: The Finance Minister shall, in case a dealer comes to fall under any one item of Article 31 paragraph 1...item 7..., cancel the registration after notice and opportunity for a hearing conducted by its staff.
1 or Article 31 paragraph 1 item 7 (cancellation or denial of registration) of the Securities and Exchange Law.

4. So far as we have considered in the preceding chapter, it seems to me that firstly a total amount provision should be provided as to sale of securities as well as subscription of securities, and secondarily some restriction must be put upon the effective period of notification regarding invitation for subscription or sale of securities. But, when we investigate more thoroughly the notification system relating to invitation to subscribe for or sale of securities, the above means of settling is far from being satisfactory. Namely, in the case of subscription of securities, it is an issuer who has interests in the new issue of securities and he is compelled to file a notification. On the contrary, in the case of sale of securities, though he is compelled to do so, the person who has direct interests in the sale of securities is not an issuer but a person who is going to place on sale of securities. As a result, though a notification relating to sale of securities is required to be filed, if an issuer rejects to cooperate in filing of such notification because he does not take interest in the sale, the sale would be impossible. Therefore, a person who is going to put on sale of securities would use a means to evade the regulation relating to notification of sale, and the so-called securities notification system which was enacted in order to protect investors is apt to mislead them. Moreover, in the case of sale of securities Article 198 item 1 (penal provision) of the Securities and Exchange Law has no application to an issuer, but to a person who has performed a sale of securities or handled them, notwithstanding that notification must be filed. There is no problem when the issuer is performer of sale. But, in the event of sale of securities, usually, the performer of sale is not the issuer, and no penal provision applies to issuer and there is no means to compel filing of notification relating to sale of securities.

After all, the reason why such and other problems arise is that on the one hand the Securities and Exchange Law makes a distinction between subscription of securities and sale of them, and that on the other hand it regulates both by the same way.

5. Relating to sale of securities and notification system, there are many problems which have been above-mentioned. Therefore, it seems that the American system, which does not make any distinction between subscription of securities and sale of them, and in which secondary distribution of securities by controlling person constitutes a new offering of securities, has several advantages over the Japanese system. However, it is not always clear what is “controlling”. In any case, some problems may remain.

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13 Article 31: The Finance Minister shall, when the applicant for registration falls under any one of the following items..., deny the registration applied for after notice and opportunity for hearing:...7. A company which had been fined in accordance with any of the provisions of this Law and five years have not yet passed from the day after the completion of execution of such penalty, or the day on which the execution was not to be carried out.

14 This is clear when we consider sale of shares, because in our country it is strictly prohibited for any issuer to acquire his own shares.