tative action because of a loss of standing to commence a representative action, it
would be permissible to bring §429 (1) action.

Significance and Problems of an Information Disclosure System
for Internal Control
— with the Focus on Management’s Liability in relation to
Certification under the U.S. SOX Act —

Yu UMEMURA

In Japan, the Financial Instruments and Exchange Act, which was enacted in
2006, obligated listed and other specified companies to submit an internal control
report and thereby has introduced a scheme similar to the U.S. SOX Act.

Basically the proper functioning of five internal control components (i.e. control
environment, risk assessment, control activities, information and communication,
and monitoring) enables an evaluation that an internal control system is judged
to be effective, and the determination on the system’s effectiveness is not influ-
enced by whether an external report has been filed or not. The COSO report, how-
ever, points out that an external report has such a function that makes “a
management anticipating issuance of a report on internal control might look more
closely at the entity’s system and initiate improvements to it.”

In order for an information disclosure scheme concerning an internal control
system to perform the above function properly, it needs to be legally endorsed by
the liability of the concerned parties by disclosure that a company which pre-
sent its internal control system as “effective” is truly equipped with an effective inter-
nal control system.

With the above awareness of the issues, this report examines how the certifica-
tion scheme established under the SOX Act can change the liability of the man-
agement while referring to the history of the management certification. The
significance of the management certification is elucidated by considering its im-
pact on the fiduciary duties of directors in accordance with the corporation law as
well.

In light of these issues, reference is made to the suggestion for the Japanese ver-
sion of the SOX Act. Among many points of difference that exist between the U.S.
and Japanese versions, one of major point of difference is the fact that there is no
counterpart to the concept of “disclosure control and procedures” pursuant to Ar-
ticle 302 of the SOX Act in Japan and that the internal control prescribed by
Japan’s Financial Instruments and Exchange Act is limited to financial reports.

In recent years, however, not a small number of corporate fraud cases in Japan
have arisen in areas that are not covered by internal control concerning financial
reports, and the importance of ensuring the reliability of risk information has been
pointed out. In addition, there is a growing importance of environmental informa-
tion for investors under the backdrop of stricter legal regulation entailed by the
aggravation of global environmental problems.

If the reliability of such non-financial information is important for an investment judgment and thus contributes to the purpose of the Financial Instruments and Exchange Act to enhance the reliability, transparency, and efficiency of markets by ensuring fair and smooth price making and other functions of the market, internal control regulations focusing only on financial reports must be described as one-sided. It will be shown that this is one of problems for the Japanese version of the SOX Act.

Corporate Scandals and Civil Liabilities of Directors: The Duty to Establish a Compliance System

Kengo MINAMI

This article deals with civil liabilities of directors involved in corporate scandals, with special focus on the directors' duty to establish a compliance system.

In general, directors of corporations have a duty to monitor their subordinates. However, directors of large corporations cannot physically monitor all subordinates at all times. In many cases, directors are not liable for unlawful acts by their subordinates, because they cannot reasonably be expected to be aware of them. Rather, what is required for directors to do is to establish and operate a corporate compliance system. In other words, directors may be liable if they do not establish a compliance system that prevents their subordinates from acting illegally. This has been a widely shared view among scholars as well as jurisprudence in the field of corporate law.

Despite this the wide recognition of the duty to establish a compliance system, in most cases, directors are found not liable for the failure to do so. The reason is that the director has discretion with regard to ways and means to establish a compliance system. That is to say, the content of the compliance system is the “business judgment” of directors. Thus, the opening question that this article focuses on is the relation between the “business judgment rule” and “duty to establish a compliance system”.

This article also discusses the duty of directors to respond to illegal acts by their subordinates that have already occurred. How should they react afterward?

In the United States, especially in the state of Delaware, directors are waived from the duty to establish a compliance system in these circumstances. The Delaware Supreme Court, in Graham v. Allis-Chalmers in 1963 denied that that duty existed; nevertheless, scholars kept insisting that it did, as social and economic environments changed. Then, in 1996, the Delaware Chancery Court affirmed the duty in the Caremark case, in which the court found that the duty of boards of directors was to “exercise a good faith judgment that the corporation’s information and reporting system [was] in concept and design adequate to assure the board that appropriate information [would] come to its attention in a timely manner as