

Tightening of Japanese regulatory exemption for marketing and management of investment funds targeted at qualified institutional investors

On 3 February 2016, the regulations and ordinances for the enforcement of the amendment of the Financial Instruments and Exchange Act of Japan were published. This amendment made significant changes to the regulatory framework for a fund that would be marketed to Japanese investors under the framework of the QII Fund Exemption.

For non-Japanese fund managers who may carry out marketing of fund interests to Japanese investors or manage assets of a fund involving Japanese investors in reliance on the QII Fund Exemption, the amended QII Fund Exemption requires, among other things, (i) appointment of a representative in Japan, (ii) submission of additional information and items in the statutory notification and its attachments, and (iii) establishment of the compliance system for the conduct requirement, record keeping and reporting requirements, as well as disclosure requirements. The non-Japanese fund managers who have already engaged in the marketing and/or management in reliance on the QII Fund Exemption on or before 29 February 2016 must meet the foregoing requirements (i) and (ii) on or before 1 September 2016 and (iii) before or immediately after 1 March 2016.

The amendment tightened the requirements for use of the QII Fund Exemption and added administrative burden for non-Japanese fund managers who contemplate to do the marketing and/or management of funds in reliance on the QII Fund Exemption. The non-Japanese fund managers should carefully consider the requirements of the QII Fund Exemption after the Amendment and ensure that the existing and future marketing and/or management of funds involving Japanese investors comply with the modified framework of the QII Fund Exemption or otherwise comply with the FIEA.

Amendment of the Financial Instruments and Exchange Act and the Regulations and Ordinances for its Enforcement

On 3 June 2015, the bill to amend the Financial Instruments and Exchange Act of Japan (Act No. 25 of 1948, as amended) (the FIEA) was enacted and promulgated (the Amendment). The Amendment reflects the recommendation of the Report by the Working Group for the Investment Management published by the Japanese Financial Services Agency (the JFSA) on 28 January 2015. The Amendment made significant changes to the regulatory framework for a fund structured under the regime of the Specially Permitted Business for Qualified Institutional Investors, etc. (*Tekikaku Kikan Touseika Tou Tokurei Gyomu*) (the Specially Permitted Business). On 3 February 2016, the regulations and ordinances for enforcement of the Amendment were published by the JFSA after public consultation from 20 November 2015 to 21 December 2015 (the Regulations), together with the Amended Supervisory Guidelines for the Financial Instruments Business Operators, etc. (the Supervisory Guidelines).

The Amendment came into force on 1 March 2016, while there are some grandfathering provisions.

Background

Regulatory Scheme before the Amendment

In Japan, a general partner of a partnership who intends to market its partnership interests in Japan or to Japanese investors must in principle be registered as a Type II Financial Instruments Business Operator for its offering of the partnership interests. In addition, a general partner of a partnership who intends to manage the partnership's assets must in principle be

registered as a Financial Instruments Business Operator engaging in the Investment Management Business for the management of its securities and derivatives transactions where Japanese investors are involved as partners.

Although there are some exemptions under the FIEA to legally avoid the licensing requirements described above, one of the most commonly used exemptions has been the exemption for the Specially Permitted Business under Article 63 of the FIEA (the QII Fund Exemption). Under Article 63 of the FIEA before the Amendment, a general partner that satisfies the following requirements was able to engage in the self-offering of limited partnership interests and the self-management of the fund's assets without registration as a Financial Instruments Business Operator (the FIBO), by filing a statutory notification prescribed under the FIEA and the relevant cabinet order (the Statutory Notification) to the relevant authority, which is the Kanto Local Finance Bureau of the Ministry of Finance (the KLFB):

- The investors in the fund include at least one Qualified Institutional
- Investor (QII) as defined in the FIEA and the ordinances thereunder such as banks, securities firms, investment management firms, insurance companies and so forth;
- The number of the Japanese investors other than QII who have acquired the partnership interests is 49 or less;
- Certain transfer restrictions relating to the partnership interests should be imposed on the QII and non-QII investors; and
- Prior to any offering to Japanese investors, the Statutory Notification (including its attachments) should be filed with the KLFB.

The general partner of a fund which engages in the Specially Permitted Business (the SPB Operator) was not generally subject to the regulations imposed on a FIBO under the FIEA nor to an administrative order such as the business improvement order or the business suspension order under the FIEA.

Issues with the Scheme for the Specially Permitted Business

The QII Fund Exemption scheme has been widely used by both Japanese and non-Japanese fund managers. However, some non-QII investors have suffered damage caused by certain fund managers' fraudulent fund management which raised a social concern. By the Amendment, the regulator aims to achieve more protection of investors in the fund operated under the

QII Fund Exemption framework as well as to facilitate the financing of the developing business sectors through strengthening confidence in the Specially Permitted Business scheme. The key elements of the Amendment include: (1) keeping the current notification scheme, rather than adopting a registration scheme, (2) tightening the requirements for the SPB Operator as well as for the QII and non-QII investors in a fund operated under the QII Fund Exemption, (3) strengthening the regulations applicable to the SPB Operator, and (4) strengthening the enforcement measures, as described below.

Enhancement of the Statutory Notification Requirement

Increasing Items to Be Described in the Statutory Notification and its Attachments

The Amendment does not change the notification scheme of the QII Fund Exemption. However, the Amendment increases the items to be described in the Statutory Notification and its attachments as follows:

- In addition to the items required under the FIEA before the Amendment, the Amendment added the items to be described in the Statutory Notification, including the following:
 - telephone number and website address of the main business office and the office that engages in the Specially Permitted Business;
 - types of its fund interests;
 - details of its investments;
 - trade names, names, categories and number of all QII investors; and
 - certain matters when the SPB Operator engages in its business under the Special Provisions for the Venture Capital Funds.
- The Amendment requires the SPB Operator to submit the following as attachments to the Statutory Notification:
 - a signed statement that certifies that the applicant or the director of the applicant does not fall into the category of entities or persons that would be prohibited to engage in the Specially Permitted Business;
 - the articles of association and a certificate of matters registered in the corporate registry, where the SPB Operator is a company;
 - a curriculum vitae and a certificate of the addresses of the officers and the key employees of the SPB Operator;

- an official certificate that the directors and the key employees are not an adult ward, a person under curatorship, etc.;
 - an affidavit from the key employees and the officers that he/she will not fall in the current or former members of organized crime groups under the Act on Prevention of Unjust Acts by Organized Crime Group Member (the Gangs, etc.);
 - if the QII investors are Investment Business Limited Partnerships established under the Japanese Limited Partnership Act for Investment, the amounts of their total assets and borrowings; and
 - the total amount of invested money of the fund, the total amount of the invested money from persons who have close relationship with the SPB Operator and from investors who have sufficient expertise and experience.
- The SPB Operator that has already submitted the Statutory Notification on or before 29 February 2016 is required to notify the KLFB of the additional items and submit the attachments described above by 1 September 2016 in accordance with the published format.
 - The Statutory Notification and its attachments listed above can be described in English with some exceptions. In addition, the Statutory Notification can be submitted as the electric data such as a CD rom.

In addition, the Amendment strengthens the disclosure requirements. All items described in the Statutory Notification (except a few exempted items) should be disclosed by the SPB Operator by either of (i) making the document describing such items available for viewing at all of its business offices, or (ii) publishing it on its website.

Tightening of the Requirements for the SPB Operator and Investors

Prohibition to Engage in the Specially Permitted Business

Before the Amendment, there was no provision for prohibition to engage in the Specially Permitted Business.

The Amendment introduced a negative list which sets out circumstances where a person will be prohibited from engaging in the Specially Permitted Business, which include the following situations:

- Where that person was ordered to abolish his Specially Permitted Business within the past five

years or otherwise falls into the category of the entity that would be refused registration as a FIBO. As for the SPB Operator who has already submitted the Statutory Notification on or before 29 February 2016, there is a five-year grandfathering period;

- Where the officers and/or the key employees of that person are the Gangs, etc.;
- Where that person is a foreign person and does not appoint a representative in Japan (the representative will not be required to have a residence in Japan). As for the SPB Operator who has already submitted the Statutory Notification on or before 29 February 2016, there is a six-month grandfathering period; or
- Where that person is a foreign person and the financial regulators of the country where that person's main office or business office to engage in the Specially Permitted Business do not guarantee that they will cooperate with investigatory requests from the Japanese financial regulators (through a multilateral or bilateral arrangement).

Tightening of the Requirements for the QII Investors

Under the FIEA before the Amendment, the only requirement with respect to the QII investors to enjoy the benefit of the QII Fund Exemption was that there should be one or more QII investors.

For the purpose of ensuring the investor protection, the Amendment strengthened the requirements with respect to the QII investors which now include the following:

- If all QII investors are Investment Business Limited Partnerships established under the Japanese Limited Partnership Act for Investment, they should satisfy the minimum asset requirement (e.g. the amount of the total assets under management excluding the borrowings is no less than ¥500m); and
- If all QII investors are subsidiaries of the SPB-QII Operator, this would be viewed as the SPB Operator not appropriately engaging in the relevant business.

Tightening of the Requirements for the Non-QII Investors

Under the FIEA before the Amendment, the requirements with respect to non-QII investors to enjoy the benefit of the QII Fund Exemption were that (i) the number of non-QII investors who invest in the fund should be no more than 49 and (ii) any of the non-QII investors should not fall within investors listed

as non-eligible investors under the FIEA (such as a vehicle of a collective investment scheme).

The Amendment aims to strengthen the eligibility requirements of non-QII investors. Under the Regulations, only specified categories of investors (at the time of private placement of the fund interest) can make an investment as non-QII investors in a fund operated under the QII Fund Exemption, which categories include the following:

- Japanese local governmental authorities;
- The Bank of Japan;
- Financial Instruments Business Operators and registered banks;
- Entities that engage in self-offering of fund interests and/or self-management of fund assets;
- Persons or entities which are closely affiliated with the SPB Operator (such as the parent company or subsidiaries of the SPB Operator, advisors or investment managers for the SPB Operator, employees or directors of these companies);
- Publicly-traded companies;
- Corporations whose net assets or capital is no less than 50 million yen;
- Subsidiaries and affiliates of (c), (f) or (g);
- Corporations established under the specified law;
- Specified Purpose Companies (*Tokutei Mokuteki Kaisha*) (TMK) under the Act on Securitisation of Assets of Japan;
- Pension funds and foreign pension funds whose monetary assets for investment listed in the ordinance are no less than 10 billion yen;
- Foreign corporations;
- Individual persons whose monetary assets for investment listed in the ordinance are no less than ¥100m and who opened accounts for securities transactions more than one year before, and corporations whose monetary assets for investment listed in the ordinance are no less than ¥100m;
- Certain asset management companies; and
- General partners of a limited partnership, etc. whose monetary assets for investment are no less than ¥100m.

To facilitate the funding of the developing business sectors, the eligibility requirements for the non-QII investors for certain venture capital funds or private equity funds that satisfy certain requirements

described below are broader than for other funds (the Special Provisions for Venture Capital Funds).

For the Special Provisions for Venture Capital Funds to apply, the fund should satisfy the following requirements:

- More than 80 per cent of its assets should be invested in stocks, warrants or convertible bonds issued by unlisted companies;
- The amount of borrowings and guarantees should be within 15 per cent of its assets and the term of the borrowings and guarantees should be within 120 days;
- Except for exceptional cases, the fund should not be redeemed before the scheduled redemption date;
- The matters listed in the ordinances should be prescribed in the relevant agreements; and
- The documents that prescribe (a) to (d) above should be delivered to each investor at or before the time the investor enters into the agreement for investment.

When the fund satisfies the requirements above, certain investors who have sufficient expertise and experience for investment will be eligible to invest in the fund as Non-QII investors, such investors to include the following:

- Current or former officers of publicly traded companies;
- Current or former officers of general partners of limited partnerships, etc. whose monetary assets for investment listed in the ordinance are no less than ¥100m;
- Persons who are listed as certain major stockholders of the listed companies; and
- Other persons listed in the cabinet order who have sufficient expertise and experience for investment.

Furthermore, when the SPB Operator engages in its business in accordance with the Special Provisions for the Venture Capital Funds, it is required to describe the specified matters in the agreement related to the fund and to submit a copy of the agreement to the regulators.

For the eligibility of the investors, the SPB Operator should note that the SPB Operator is not allowed to engage in the business in case where 50 per cent or more of the total amount of investment is from (i) persons or entities which are closely affiliated with the SPB Operator (excluding officers, employees or parent company of the SPB Operator), or (ii) certain investors

who has sufficient expertise and experience for investment to be eligible to invest in the fund as Non-QII investors.

Expanding the regulations applicable to the SPB Operator

Expanding the Conduct Requirements Applicable to the SPB Operator

Under the FIEA before the Amendment, the SPB Operator was prohibited from (i) providing a customer with false information in its marketing or (ii) compensating for loss of the customer. However, the

SPB Operator were not subject to other requirements applicable to a FIBO.

Article 63.11 of the FIEA after the Amendment requires that the SPB Operator be subject to the additional conduct requirements as described in the table below. Please note that, similar to the regulation for a FIBO, the Amendment also adopts the provisions that certain requirements will not apply in case where the client is a Professional Investor, who is a certain sophisticated investor defined under the FIEA.

Provision of the FIEA	Provision to be applied to the SPB Operator before the Amendment	Provision to be applied to the SPB Operator after the Amendment	Provision to be applied to the SPB Operator where the customer is a Professional Investor
Duty to notify the applicable Professional Investor that he can be treated as Non-Professional Investor (Article 34)	X	O	O
Duty of good faith to the customers (Article 36.1)	X	O	O
Prohibition of name lending (Article 36-3)	X	O	O
Regulation on advertising (Article 37)	X	O	X
Delivery of document prior to conclusion of contract (Article 37-3)	X	O	X
Delivery of document upon conclusion of contract (Article 37-4)	X	O	X*
Prohibition on providing a customer with false information (Article 38 (1))	O	O	O
Prohibition on providing a customer with conclusive evaluation on uncertain matters (Article 38 (2))	X	O	O
Other matters specified in the Cabinet Order (Article 38 (8))	X	O	O
Prohibition on compensation for loss, etc. (Article 39)	O	O	O
Principle of suitability (Article 40 (1))	X	O	X
Prohibition on sales and purchase of the Financial Instruments etc. where segregation of the assets is not ensured (Article 40-3)	X	O	O
Prohibition on solicitation in case of diversion of the invested money in the fund (Article 40-3-2)	X	O	O
Duty of good faith and loyalty for the Investment Management Business (Article 42)	X	O	O
Prohibited act for the Investment Management Business (Article 42-2)	X	O	O
Segregation of the investment assets from the assets of the SPB Operator and other investment (Article 42-4)	X	O	O
Delivery of investment report (Article 42-7)	X	O	X*

(*in case where certain requirements are satisfied)

The SPB Operator should check its internal policies whether they satisfy the conduct requirements described above. In addition, the SPB Operator should note that its internal policies should also satisfy the requirements prescribed under the Supervisory Guidelines, such as obtaining and maintaining the client information, appropriate explanation to non-QII

investors of the information about its fund including the basic structure and risk.

Record Keeping, Report and Disclosure of the Required Documents

The Amendment requires the SPB Operator to undertake the following:

- Prepare and keep the books and records designated by the FIEA related to its business for the number of years prescribed in the FIEA and the Regulations. The books and records can be prepared and kept in English.

Self-offering/Self-Management	Examples of Documents for Record Keeping/Retention Period
Common Requirements	Documents delivered related to change in status of Professional Investors and non-Professional Investors Documents to be delivered prior to or upon conclusion or amendment of contract 5 years retention period
Self-offering	Record of transactions for the offering of fund interests Accounting books for the customers 10 years retention period
Self-Management	Agreements related to the investment management of its assets Investment report for its assets Detailed statement of the investment management 10 years retention period

- Prepare and submit the business report to the regulator in accordance with the designated format generally within three months from the end of each business year (there are provisions for extension of the due date for the foreign SPB Operator). The business report can be prepared in English; and
- Prepare and publicly disclose the explanatory documents in accordance with the designated format generally within four months from the end of each business year (there are provisions for extension of the due date for the foreign SP Operators). The explanatory documents can be prepared in English.

Enhanced Enforcement Powers

Administrative Order and Inspection

Although the FIEA before the Amendment did not subject the SPB Operator to the same administrative enforcement measures as applicable to a FIBO, the FIEA after the Amendment subjects the SPB Operator to the following administrative enforcement measures:

- Order to improve business operation, order to suspend all or part of its business, and/or order to abolish the business;
- Order to report and to submit materials to the regulator; and
- On-site inspection.

Immediate Suspension Order by the Court

Under the FIEA before the Amendment, the court could order suspension of, or prohibit, an act that infringes the FIEA, or issue an order under the FIEA to a person that infringes or will infringe the FIEA or an order made under the FIEA. The Amendment adds cases where the court can issue a suspension order even if there is no clear infringement of the FIEA or an order made under the FIEA; the court can order immediate suspension of sale and solicitation activities by the SPB Operator when the business is particularly inappropriate and the investor's interest is infringed significantly and there are immediate needs to prevent further loss of the investors.

Criminal Provision

The Amendment increased the penalty for a violation of the FIEA and the administrative order under the FIEA. For instance, under the FIEA after the Amendment, the failure to file the notification or false filing of the notification will be punished by imprisonment of up to five years and the fine of up to ¥5m.

Expected Timeframe

The Amendment and the Regulation has taken effect on 1 March 2016. The conduct requirements of the Amendment described under the heading "Expanding the Conduct Requirements Applicable to the SPB Operator" above will be enforced immediately after such date.

The Amendment prescribes some grandfathering provisions which include:

The SPB Operator engaging in the investment management of a fund under the QII Fund Exemption on or before 29 February 2016 can continue to

manage the fund for the fund interests solicited before 1 March 2016, even if it does not satisfy the eligibility requirements for investors under the FIEA after the Amendment. However, please note that even in such case, the SPB Operator should follow other requirements such as the notification requirements described under the heading "Enhancement of the Statutory Notification Requirement" above, the conduct requirements described under the heading "Expanding the Conduct Requirements Applicable to the SPB Operator" above, and the record keeping requirements described under the heading "Record Keeping, Report and Disclosure of the Required Documents" above. For fund interests newly solicited after 1 March 2016, the SPB Operator can engage in its marketing and investment management activities only in accordance with all of the requirements under the FIEA after the Amendment.

The SPB Operator that has already submitted the Statutory Notice to engage in the Specially Permitted Business on or before 29 February 2016 should submit the additional items or the additional attachments described in paragraph (b) of the "Increasing Items to Be Described in the Statutory Notification and its Attachment" above within six months of the effective date of the Amendment, i.e. by 1 September 2016.

Ramification for non-Japanese fund managers

The Amendment affects the broad range of Japanese and non-Japanese fund managers who conduct or aim to conduct the marketing or investment management under the QII Fund Exemption.

When the SPB Operator continues its business under the provisions for the Specially Permitted Business,

the SPB Operator should review and/or prepare its internal rules, prepare and keep the required documents, and prepare for the submission and disclosure of the business report and explanatory report.

In addition, the SPB Operator should structure its newly solicited funds in compliance with the eligibility requirements under the FIEA after the Amendment.

Non-Japanese fund managers who may carry out marketing of fund interests to Japanese investors or manage assets of a fund involving Japanese investors in reliance on the QII Fund Exemption, should note that the SPB Operator must (i) appoint a representative in Japan, (ii) submit additional information and items in the Statutory Notification and its attachments, and (iii) establish the compliance system for the conduct requirement, record keeping and reporting requirements, and disclosure requirements. The non-Japanese fund managers who have already engaged in the marketing and/or management in reliance on the QII Fund Exemption on or before 29 February 2016 must meet the foregoing requirements (i) and (ii) on or before 1 September 2016 and (iii) before or immediately after 1 March 2016.

If a non-Japanese fund manager considers that the compliance with the FIEA after the Amendment is difficult or too burdensome, it may need to consider whether they may still be able to be exempted from the registration requirements as a FIBO, such as by limiting and controlling the number of and/or investments by the Japanese investors, or wholly entrusting the offering or management to a registered FIBO.

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