

*Amendments to the FIEA strengthen the regulation of  
the investment fund industry in Japan with regard to the  
“Specially Permitted Businesses for QII”*

On May 25, 2011, the bill for “the amendment of the Financial Instruments and Exchange Act, etc. for strengthening the foundations for the financial markets and the financial industry” (the “**Amendment**”) was enacted. As a result of the Amendment, the regulation of the investment fund industry in Japan, which is primarily dealt with in the Financial Instruments and Exchange Act (Act No. 25 of 1948, “**FIEA**”), has been strengthened. The Amendment affects not only those who plan to establish an investment fund business in Japan but also those who already operate an investment fund business. The effective date of the Amendment is currently scheduled for **April 1, 2012**. Some investment funds will be subject to an obligation to submit a re-registration filing, which is due **by the end of June, 2012**.

## 1 Overview

### 1.1 Who will be subject to the Amendment?

All entities which are operating or will operate an investment fund business in accordance with Article 63 of the FIEA will be subject to the Amendment. Typically, this means investment funds which are organized in the form of a partnership-type investment fund, such as a Cayman Limited Partnership, and which have Japanese investors. Operating an investment fund business in accordance with Article 63 of the FIEA is extensively utilized by both Japanese domiciled entities and foreign entities. It is known as a “*Tekikaku Kikan Toushika Tou Tokurei Gyomu*”, which is officially translated by Japan’s Financial Service Agency (“**JFSA**”) to mean “Specially Permitted Businesses for Qualified Institutional Investor, etc.” (“**SPB-QII**”).

### 1.2 What does the Amendment require you to do?

In brief, the Amendment requires the following to be done.

#### (i) Additional requirements for SPB-QII filing

After the enforcement of the Amendment, the SPB-QII filing document must include (a) the name of the Japanese Qualified Institutional Investors (“**QII**”) and (b) the name of the funds. Also, the commercial registration or equivalent documents must be attached to the filing document. For details, please see 3 below.

#### (ii) Retrospective application

All entities, who have already registered with the JFSA<sup>1</sup> as an SPB-QII operator, must submit an additional notification to the JFSA by the end of June, 2012. For details, please see 4 below.

<sup>1</sup> More precisely, the Local Finance Bureau (“**LFB**”). In this newsletter, however, we consolidated the expression to JFSA, as the LFB acts on behalf of the JFSA in the context of an SPB-QII scheme.

## 2 Back to basics—what is the SPB-QII scheme?

### 2.1 General Rule

In Japan, an entity that acts as a general partner of a partnership and intends to offer its partnership interests in Japan must be licensed as a “Type II Financial Instruments Business” (“**Type II FIB**”) with the JFSA. If more than half of the assets under its management consist of securities (e.g., stocks, notes, partnership rights or unit trusts) or derivatives, then the entity must be licensed as an “Investment Management Business” with the JFSA.

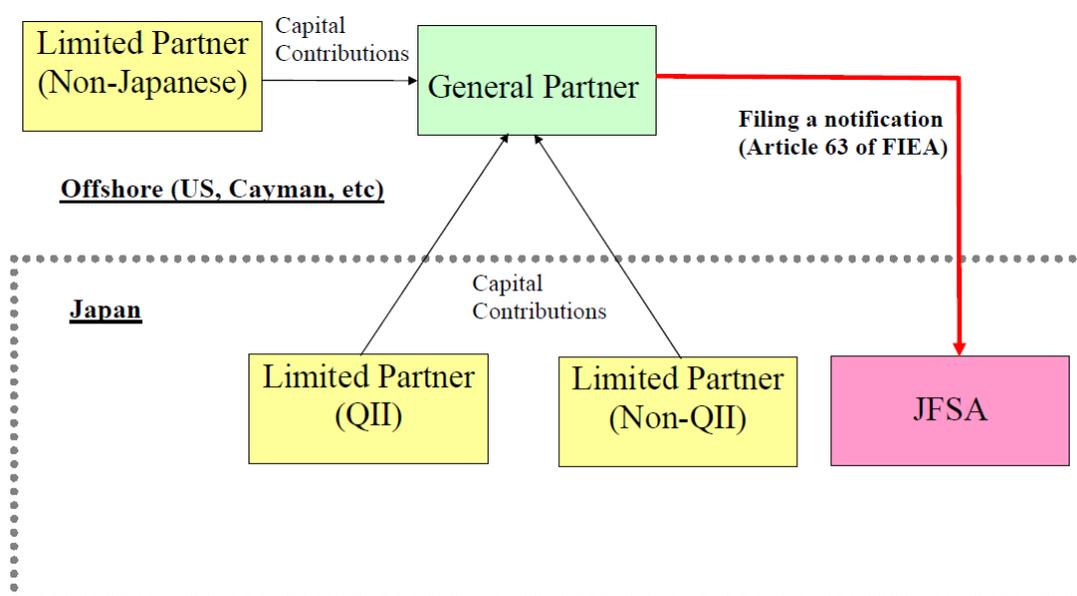
Both a Type II FIB and an Investment Management Business are subject to strict licensing provisions. Even if the entity successfully obtains a license, it must abide by the regulations of the FIEA and will be subject to continuous inspection by the JFSA and the Securities and Exchange Surveillance Commission. As a result, being licensed in this manner to set up an investment fund is not an option in most cases.

### 2.2 Exemption through the SPB-QII scheme

Although there are some exemptions in the FIEA to legitimately avoid the aforementioned license requirement, one of the most common approaches is the SPB-QII scheme. To meet the requirements of the SPB-QII scheme, the investment fund which the entity plans to establish must fulfill all of the following three requirements.

- (i) The fund must have at least one QII as its investor. QIIs include banks, securities firms, investment management firms, insurance firms and so forth.
- (ii) The non-QII investors of the fund must number less than 50.
- (iii) The fund operating entity must have filed a statutory notification with the competent JFSA.

In addition, the fund entity must abide by several regulations stated in the FIEA and JFSA official guidelines regarding the legitimate operation of the SPB-QII scheme. Please refer the chart below outlining the SPB-QII scheme.



## 2.3 Advantages of the SPB-QII scheme

The advantages of the SPB-QII scheme are as follows.

- (i) No burdensome license as described in 2.1 is required as the fund manager only has to file a simple notification with the JFSA.
- (ii) Most restrictions imposed on a licensed fund manager are not applicable to an SPB-QII operator. For instance, the duty to keep statutory records, risk explanation procedures and so forth, which the licensed operator must abide by, are not applicable.

## 3 What are the details of the Amendment?

### 3.1 Before and after the amendment

The situation before and after the Amendment are set-out below.

| Items   | Before Amendment | After Amendment  |
|---|------------------|--|
| Description of the QII's name in the SPB-QII filing                                 | Unnecessary      | The name of at least <u>ONE</u> QII for <u>each fund</u> is required in the SPB-QII filing <sup>2</sup> . For instance, if the fund manager, namely the general partner, runs three funds by way of SPB-QII scheme, the name of at least one QII of each fund must be described in the filing document. That means the filing document will express at least three QII's name in it. |
| Description of the fund's name in the SPB-QII filing                                | Unnecessary      | Each fund's name is necessary. For instance, if the fund manager, namely the general partner, runs three funds by way of SPB-QII scheme, the name of those three funds must be contained in the filing document. <sup>3</sup>  |
| Submission of the General Partner's corporate registration or equivalent documents. | Unnecessary      | Necessary <sup>4</sup> .   |

Please note that the names of QIIs, which are contained in the filing, are NOT to be disclosed to the public, in principle.

<sup>2</sup> Article 238, Item 2 and 3 of the Cabinet Office Ordinance Concerning the Financial Instruments and Exchange Business etc. ("Ordinance")

<sup>3</sup> Article 238, Item 2 and 3 of the Ordinance

<sup>4</sup> Article 236, Paragraph 3 of the Ordinance

### 3.2 Exclusion of Confidentiality

As mentioned above, the name of a QII will be required to be included in the filing document. This means, as a matter of practice, an entity, which plans to operate an investment fund business in Japan after the Amendment has become effective, should include certain exclusions in the confidentiality provisions with its investors that will enable it to disclose the investor's names to the JFSA.

### 4 Does this Amendment apply retrospectively to funds?

Yes. Therefore, it is very important that investment funds which have previously completed their SPB-QII filing in Japan submit an updated registration by the end of June, 2012. As stated above, the updated registration must include (i) the name of at least one QII for each fund, (ii) the name of each fund and (iii) the corporate registration of the General Partner. In relation to item (i), the consent of the QII to be named in the registration may have to be obtained in advance.

### 5 What is the reason for this Amendment?

After the initial enforcement of the SPB-QII in 2007, the JFSA found quite a few breaches of the SPB-QII regulations by SPB-QII scheme operators. The Amendment aims to strengthen the regulation of SPB-QIIs so that the JFSA will be able to monitor these business operators more effectively.

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### Contact Information:

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