

February 2016

## Enhancement of Regulations of Investment Funds That Operate under Exemption for Specially Permitted Business for Qualified Institutional Investors, etc.

Kunihiko Morishita / Kazuaki Nagai / Koichi Miyamoto

The amendments to the Financial Instruments and Exchange Act (the “Amendments”), which include enhanced regulations of investment funds that operate under exemption for specially permitted business for qualified institutional investors, etc. (the “SPBQIs”), will come into effect on March 1, 2016.

### I. Outline of Amendments<sup>1</sup>

#### 1. Tightening of Requirements for SPBQIs and Expansion of Disclosure Scope

- (1) Tightening the Scope on the Definition of “Investors Other than Qualified Institutional Investors” Who Are Able to Invest in Funds
  - ✓ The existing persons who have filed a notification for SPBQIs (“SPBQI Notifier(s)”) which manage the funds, on the effective date, that are contributed by investors, in respect of the said fund interests solicited prior to the effective date pursuant to the notification of the SPBQIs, the said SPBQI Notifiers may continue to conduct SPBQIs with the same investor composition as before until the termination of SPBQIs that relates to the said fund interests. However, if new or additional solicitation of offers to acquire fund interests is commenced on or after the effective date, the SPBQI Notifiers must satisfy the investor requirements under the Amendments.
  - ✓ On or after the effective date, if there is a SPBQI Investor (as defined below) which is only eligible under the Special Provisions for Venture Funds (as defined below), whether the Special Provisions for Venture Funds may be used will be subject to consideration.

<sup>1</sup> Act: the Financial Instruments and Exchange Act of Japan (Act No. 25 of 1948, as amended)  
Order: the Order for the Enforcement of the Financial Instruments and Exchange Act  
Ordinance: the Cabinet Office Ordinance on Financial Instruments Business, etc.  
With respect to the provisions of the current Act, please refer to the URL below.  
<http://www.japaneselawtranslation.go.jp/law/detail/?id=1911&vm=04&re=02>

## (2) Disqualified Cases in relation to SPBQIIs

- ✓ Where all of the QIIs are in the form of LPS (as defined below) or Closely Related Persons (as defined below) are investing in the fund, it is necessary to consider whether SPBQIIs will fall within the scope of “Disqualified Cases in relation to SPBQIIs.”
- ✓ The existing SPBQII Notifiers which manage the funds, on the effective date, that are contributed by investors, in respect of the said fund interests solicited prior to the effective date pursuant to the notification of the SPBQIIs, the said SPBQII Notifiers may continue to conduct SPBQIIs until the termination of the SPBQIIs that relates to the said fund interests. However, if new or additional solicitation of offers to acquire fund interests is commenced on or after the effective date, the existing SPBQII Notifiers must be careful not to fall under the abovementioned cases under the Amendments.

## (3) Disqualifying Requirements with Regard to Notifier

- ✓ Foreign corporations and foreign individuals must note that it is necessary to designate a representative or agent in Japan, as the case may be.

## (4) Expansion and Disclosure of Information Stated in the Notification

- ✓ The existing SPBQII Notifiers must file a notification pursuant to the new form under the Amendments within 6 months from the effective date (by August 31, 2016) and make the said notification available for public inspection or publish them on the Internet.
- ✓ In particular, SPBQII Notifiers who are not based in Japan must consider methods such as disclosure through their website.

## (5) Expansion of Supporting Documents

- ✓ The existing SPBQII Notifiers must submit a notification as provided in (4) above accompanied by new supporting documents in this (5) within 6 months from the effective date (by August 31, 2016).

## (6) Obligations to prepare and disclose statutory documents

- ✓ Because there is no grace period for preparing the statutory books and records, the existing SPBQII Notifiers must also prepare and keep with them in relation to its SPBQIIs on and after the effective date. Furthermore, the existing SPBQII Notifiers must prepare and submit business reports, as well as prepare and disclose explanatory documents, for business years commencing on or after the effective date.
- ✓ As for the public inspection of explanatory documents, SPBQII Notifiers who are not based in Japan must consider methods such as disclosure through their website.

## (7) Expansion of Reason for Notification regarding Certain Material Matters

- ✓ Because there are no grace period in place with respect to above, if a reason for notification under the Amendments arises on or after the effective date, SPBQII Notifiers will be required to file a notification with the authority without delay.

## 2. Enhancement of Regulation of Activities of SPBQII Notifiers

- ✓ Because there is no grace period in place for expansion of conduct control, it is necessary to note that such expansion will be implemented immediately as of the effective date.

## 3. Enhancement of Enforcement by Authority

- (1) Administrative sanction/request for report/inspection
- (2) Expansion of scope of injunction
- (3) Enhancement of criminal penalties

## 4. Others

Because, after the Amendments are implemented, the administrative workload is expected to be increased for SPBQII Notifiers, it is advisable that the existing SPBQII Notifiers who virtually abolished its SPBQIIs consider filing a notification of abolishment of SPBQIIs by the end of the grace period (by August 31, 2016) at the latest.

# II. Details of Amendments

## 1. Tightening of Requirements for SPBQIIs and Expansion of Disclosure Scope

- (1) Tightening the Scope on the Definition of “Investors Other than Qualified Institutional Investors” Who Are Able to Invest in Funds

- (i) Scope of SPBQII Investors

Under the current Act, an investment fund is required to have at least one qualified institutional investor (as defined in the Act; “QII”) and not more than 49 investors other than QIIs in order to rely on the exemption for SPBQIIs.<sup>2</sup> The Act currently imposes no special requirements or qualifications in respect of non-QIIs.<sup>3 4</sup>

Following the Amendments, the definition of “investors other than QIIs” will be limited to certain investors which have the ability to make investment decisions and persons that closely related to the operator of the fund (“SPBQII Investor(s)”). The scope of SPBQII Investors is as follows.<sup>5</sup>

- 1 The Japanese national government;
- 2 The Bank of Japan;
- 3 A local government;

<sup>2</sup> Article 63, Paragraph 1 of the current Act, and Article 17-12, Paragraph 2 of the current Order

<sup>3</sup> Article 17-12, Paragraph 1 of the current Order

<sup>4</sup> Investors other than QIIs must not, however, be disqualified investors, such as certain SPCs or operators of *tokumei kumiai* (Article 235 of the current Ordinance).

<sup>5</sup> Article 17-12, Paragraph 1 of the Order and Article 233-2 of the Ordinance

- 4 A Financial Instruments Business Operator, etc ;
- 5 A Fund Asset Manager<sup>6</sup>;
- 6 An officer or employee of the relevant Fund Asset Manager;
- 7 A parent company, a subsidiary or a subsidiary of the parent company of the relevant Fund Asset Manager;
- 8 A person to whom all or a part of the investment authority of the fund assets has been delegated by the relevant Fund Asset Manager (including those to whom the said authority has been re-delegated by the said person<sup>7</sup>);
- 9 A person who has concluded an investment advisory contract with the relevant Fund Asset Manager or a person who has concluded an investment advisory contract with the said person (sub-advisor);
- 10 An officer or employee of items 7 to 9 above;
- 11 A Fund Asset Manager (an individual) and a relative of items 6, 8 to 10 above;
- 12 A publicly listed company;
- 13 A corporation with stated capital of JPY 50 million or more;
- 14 A corporation with net assets of JPY 50 million or more;
- 15 A special corporation or incorporated administrative agency;
- 16 *Tokutei Mokuteki Kaisha*;
- 17 A corporate pension fund that is expected to have at least JPY 10 billion of investment-like financial assets;
- 18 A foreign corporation;
- 19 An individual that is expected to have at least JPY 100 million of investment-like financial assets and for which 1 year has elapsed since opening of a securities account;
- 20 An individual that is expected to have at least JPY 100 million of investment-like financial assets as an operating partner;
- 21 A certain public interest incorporated association or public interest incorporated foundation that is engaging in businesses for public interest purposes related to regional development or industrial development;
- 22 A certain surviving employees' pension fund that is expected to have at least JPY 10 billion of investment-like financial assets;
- 23 A foreign person equivalent to a corporate pension fund or surviving employees' pension fund that is expected to have at least JPY 10 billion of investment-like financial assets;
- 24 A corporation that is expected to have at least JPY 100 million of investment-like financial assets;
- 25 A corporation that is expected to have at least JPY 100 million of investment-like financial assets as an operating partner;
- 26 A subsidiary or affiliate of item 4 (only corporations) or 12 to 14 above;
- 27 A certain asset management company (which is (i) a company wherein 70% or more of the total book value of the assets is expected to be the sum of (a) the book value of Specified Assets (as defined in the Ordinance) and (b) the amount that will not be included in deductible expenses in the calculation

<sup>6</sup> Typically, a general partner of the fund could fall under this.

<sup>7</sup> The Financial Services Agency's "Summary of Comments and the Financial Services Agency's Responses to Comments" dated February 3, 2016 (<http://www.fsa.go.jp/news/27/20160203-1/00.pdf>) ("Responses to Public Comments"), page 10, No. 38

of the said asset management company's income under the Corporation Tax Act (Act No. 34 of 1965, as amended) out of the surplus dividend and salary paid to the representative of the said asset management company and persons connected to the said representative during a five year period; and (ii) a company whose assets are held and managed for the representative);

- 28 A foreign issuer of fund interests (limited to cases where the investors are limited to QIIs, issuers of fund interests or SPBQII Investors); or
- 29 A company wherein the aggregate amount of the income from management of Specified Assets is expected to account for 75% or more of the total income amount (a company whose assets are held and managed for a person falling under items 21 to 28 above).

The investor requirements must be satisfied at the time of solicitation of offers to acquire the fund interests, and even if the said requirements cease to be satisfied after commencement of management of the fund, a SPBQII Notifier may continue to manage the fund.<sup>8</sup>

(ii) Special Provisions for Venture Funds

✓ Expansion of Scope of SPBQII Investors

If a fund satisfies the requirements of a venture fund (see below), the following persons will also be permitted to act as a SPBQII Investor<sup>9</sup> ("Special Provisions for Venture Funds").

- 30 An officer of a publicly listed company;
- 31 An officer of a corporation with stated capital or amount of net assets of JPY 50 million or more which submits an annual securities report;
- 32 An officer of a corporation which falls under the requirement in item 25 above;
- 33 A person who fell under any of the requirements in items 30 to 32 above within the last 5 years;
- 34 A person who acquired fund interests issued by the same issuer of the said fund interests as a person who fell under items 33 or 34 above within the last 5 years;
- 35 A person who was a corporation that fell under the requirement in item 25 above within the last 5 years;
- 36 A person who engaged in business related to establishment of a company, offering of shares or share options, implementation of new business activity, M&A, listing of shares on a financial instruments exchange, preparation of a business strategy, preparation of a balance sheet or a profit and loss statement or management of a shareholders meeting or a board of directors as an officer, employee<sup>10</sup> or consultant. for a duration of 1 year or more and for which 5 years has not passed since the day of he/she last engaged in such business;
- 37 A person who is listed as one of the top 50 shareholders in a securities registration statement (which is submitted by companies who wish to list their shares) that was submitted within the last 5 years;

<sup>8</sup> Responses to Public Comments, page 1, Nos. 1 to 3

<sup>9</sup> Article 17-12, Paragraph 2 of the Order and Article 233-3 of the Ordinance

<sup>10</sup> Limited to a person who engaged in the said business by displaying a particularly specialized skill which is essential for the continuation of the said business

- 38 A person who is listed as one of the top 10 shareholders in a securities registration statement other than item 37 above or an annual securities report that was submitted within the last 5 years;
- 39 A Certified Support Organization for Business Innovation;
- 40 A company or subsidiary or affiliate of such company where an individual who falls under one of items 30 to 39 above (excluding 35) holds more than 50% of the voting rights of all shareholders;
- 41 A company where an individual who falls under one of items 30 to 39 above (excluding 35) holds at least 20% but no more than 50% of the voting rights of all shareholders; and
- 42 A subsidiary or affiliate of a company which falls under one of items 30 to 39 above.

✓ Requirements of a Venture Fund

Special Provisions for Venture Funds will only apply to the fund that satisfies the following requirements.<sup>11</sup>

(A) The fund business:

- (a) That invests more than 80% of the amount contributed by investors less cash and deposits in unlisted shares or share options (including those related to a foreign issuer); and
- (b) Does not, in principle, borrow funds or guarantee obligations.

Exception: If the sum of the following amounts does not exceed 15% of the amount contributed by investors:

- Amount of borrowings of funds where the borrowing period is not more than 120 days;
- Amount of guarantee of obligations where the guarantee period is not more than 120 days; and
- Amount of guarantee in the case of guaranteeing the obligation of an issuer (including foreign issuer) of unlisted shares or share options in which the fund invested.

(B) Unless there are any unavoidable circumstances, the investors may not redeem the fund interests at the investor's request.

(C) The items listed in Article 239-2, Paragraph 1 of the Ordinance are stipulated in the fund contract;

(D) A document stating that the fund has met the requirements listed in (A) to (C) is delivered to the investors by the conclusion of the fund contract.

✓ Obligation to Submit a Copy of the Contract

SPBQIIs in accordance with the Special Provisions for Venture Funds falls within the scope of "businesses for which protection of investors are specifically required" under the Act. In order to operate such SPBQIIs, SPBQII Notifier must stipulate the items that are listed in Article 239-2, Paragraph 1 of the Ordinance in their fund contract and submit a copy thereof to the authority after filing the notification of the SPBQIIs within 3 months from the date of filing<sup>12</sup> (the deadline can be extended by 3 months only once).<sup>13</sup> If a

<sup>11</sup> Article 17-12, Paragraph 2 of the Act and Article 233-4 of the Ordinance

<sup>12</sup> In the case that a notification of change to use of Special Provisions for Venture Funds is filed, within 3 months from the

contract cannot be concluded within the time frame above, the SPBQII Notifier must file a notification to that effect after the expiration of the time frame without delay.<sup>14</sup>

If there is a change in the items that are set forth under Article 239-2, Paragraph 1 of the Ordinance with regard to the said contract, a copy of the contract pertaining to the said change, accompanied by a document stating the content, date and reason for the change, must be submitted to the authority without delay after the change takes place.<sup>15</sup>

If the said contract is made in English, there is no need to attach the Japanese translation to it. However, if the contract is made in a foreign language other than English, a Japanese or English translation must be attached.<sup>16</sup>

#### ✓ Easing of Requirements for Transaction Between Related Funds

When Special Provisions for Venture Funds are used, the requirements for sales and purchases between the funds that the same general partner manages are eased in certain cases.<sup>17</sup>

### **Practical Points**

On and after the effective date, it is necessary to consider whether the investor requirements under the Amendments have been met. If solicitation of offers to acquire fund interests has been completed and the existing SPBQII Notifiers which manage the funds, on the effective date, that are contributed by investors, in respect of the said fund interests solicited prior to the effective date pursuant to the notification of the SPBQIIs, the said SPBQII Notifiers may continue to conduct SPBQIIs with the same investor composition as before until the termination of SPBQIIs that relates to the said fund interests.<sup>18</sup> However, if new or additional solicitation of offers to acquire fund interests is commenced on or after the effective date,<sup>19</sup> the SPBQII Notifiers must satisfy the investor requirements under the Amendments.

Additionally, on and after the effective date, if there is a SPBQII Investor which is only eligible under the Special Provisions for Venture Funds, whether the Special Provisions for Venture Funds may be used will be subject to consideration.

#### (2) Disqualified Cases in relation to SPBQIIs

SPBQIIs will be disqualified in “a case where there is a risk that problems will arise in protecting investors.”<sup>20</sup>

---

date of change after the notification of change is filed

<sup>13</sup> Article 63, Paragraph 9 of the Act and Article 17-13-2 of the Order and Article 239-2, Paragraphs 1 to 5 of the Ordinance

<sup>14</sup> Article 63, Paragraph 9 of the Act and Article 239-2, Paragraph 6 of the Ordinance

<sup>15</sup> Article 63, Paragraph 10 of the Act and Article 239-2, Paragraph 7 of the Ordinance

<sup>16</sup> Article 63, Paragraph 10 of the Act and Article 239-2, Paragraph 8 of the Ordinance

<sup>17</sup> Article 42-2, Item 2 of the Act and Article 129, Paragraph 1, Items 3 and 4 of the Ordinance

<sup>18</sup> Article 2, Paragraph 1 of the Supplementary Provisions of the Act

<sup>19</sup> The capital call will not be regarded as new or additional offers to acquire fund interests (Responses to Public Comments, page 3 and below, Nos. 13 and 14); hereinafter the same.

<sup>20</sup> Article 63, Paragraph 1 of the Act

Specifically, either of the following events falls within “a case where there is a risk that problems will arise in protecting investors”<sup>21</sup>

- (i) All of the QIIs are in the form of investment limited partnerships (*toshi jigyo yugen sekinin kumiai*) under the Limited Partnership Act for Investment (Act No. 90 of 1998)<sup>22</sup> (“LPS”) (provided, however, that if the total amount of the investment assets less amount of borrowings is expected to be JPY 500 million or more, such LPS will be excluded from this); or
- (ii) The amount of contributions of the closely related persons of the Fund Asset Manager and the SPBQII Investors who can only be eligible under the Special Provisions for Venture Funds<sup>23</sup> (“Closely Related Persons”) account for half or more of the total amount of funds contributed by investors.

The above requirements must be satisfied continuously throughout the period during which SPBQII Notifiers continue the SPBQIIs, unlike the case of the investor requirement as stated in (1) above.<sup>24</sup>

### **Practical Points**

On and after the effective date, SPBQII Notifiers must be careful not to fall under the abovementioned cases. If solicitation of offers to acquire fund interests has been completed and the existing SPBQII Notifiers which manage the funds, on the effective date, that are contributed by investors, in respect of the said fund interests solicited prior to the effective date pursuant to the notification of the SPBQIIs, the said SPBQII Notifiers may continue to conduct SPBQIIs until the termination of the SPBQIIs that relates to the said fund interests.<sup>25</sup> However, if new or additional solicitation of offers to acquire fund interests is commenced on or after the effective date, the existing SPBQII Notifiers must be careful not to fall under the abovementioned cases under the Amendments.

### **(3) Disqualifying Requirements with Regard to Notifier**

Similar to the case with registration procedures for Financial Instruments Businesses, SPBQII Notifiers who meet certain disqualification criteria will not be permitted to operate SPBQIIs.<sup>26</sup> Grounds for disqualification include (i) SPBQII Notifiers having been subjected to criminal or administrative sanctions in the past, etc. or its officers or employees belong to organized crime group, (ii) the lack of a representative in Japan (where the SPBQII Notifier is a foreign corporation; hereinafter the same) or agent in Japan (where the SPBQII Notifier is a foreign individual; hereinafter the same), and (iii) the lack of a so-called mutual guarantee from the government in the country(ies) where the SPBQII Notifier’s principal business office or the offices of the relevant SPBQIIs

<sup>21</sup> Article 234-2 of the Ordinance

<sup>22</sup> [http://www.meti.go.jp/policy/economy/keiei\\_innovation/sangyokinvyu/pdf/41201LPActforInvestment.pdf](http://www.meti.go.jp/policy/economy/keiei_innovation/sangyokinvyu/pdf/41201LPActforInvestment.pdf)

<sup>23</sup> Specifically, persons falling under items 7 to 11 or 30 to 42 of the SPBQII Investors; provided, however, that such person shall be excluded if he/she falls under either QIIs or items 1 to 5 or 12 to 29 above of SPBQII Investors, or if he/she is an officer, employee or parent company of the Fund Asset Manager.

<sup>24</sup> Responses to Public Comments, page 40 and below, Nos. 134 to 145, page 47 and below, No. 162

<sup>25</sup> Article 2, Paragraph 1 of the Supplementary Provisions of the Act

<sup>26</sup> Article 63, Paragraph 7 of the Act



are located.<sup>27</sup>

### **Practical Points**

On or after the effective date, SPBQII Notifiers must be careful not to fall under the disqualifying requirements under the Amendments. If solicitation of offers to acquire fund interests has been completed and the existing SPBQII Notifiers which manage the funds, on the effective date, that are contributed by investors, in respect of the said fund interests solicited prior to the effective date pursuant to the notification of the SPBQIIs, the said SPBQII Notifiers may continue to conduct SPBQIIs until the termination of the SPBQIIs that relates to the said fund interests.<sup>28</sup> However, if new or additional solicitation of offers to acquire fund interests is commenced on or after the effective date, the existing SPBQII Notifiers must be careful not to fall under the disqualifying requirements under the Amendments.

Particularly, SPBQII Notifiers who are foreign corporations or foreign individuals must note that it is necessary to designate a representative or agent in Japan, as the case may be. The representative or agent in Japan is expected to be the contact person of the Japanese regulator and must reside in Japan. According to the Responses to Public Comments, , a representative or agent in Japan does not necessarily have to be an officer or employee of the SPBQII Notifier, and an external agent, as an individual or a corporation, (an attorney, a certified public accountant or a placement agent etc.) may be designated as the representative or agent in Japan.<sup>29</sup>

#### **(4) Expansion and Disclosure of Information Stated in the Notification**

On or after the Amendments, the information to be stated in the notification which a person needs to file with the regulator to rely on the exemption for SPBQIIs will be expanded.<sup>30</sup> The information to be stated in the notification under the Amendments is as follows (Amended portions have been underlined).

- 1 The trade name or name;
- 2 The amount of stated capital or total amount of contributions;
- 3 The names of its officers;
- 4 The names of important employees<sup>31</sup>;
- 5 The business category;
- 6 The name and location of the principal business office or principal office;
- 7 The name and location of the business office or office at which SPBQIIs will be conducted;
- 8 The type of business which the notifier otherwise engages in;
- 9 The telephone number of the principal business office or principal office and the telephone number of the

<sup>27</sup> If the government is participating in IOSCO Multilateral MOU, (iii) will not be applicable.

<sup>28</sup> Article 2, Paragraph 1 of the Supplementary Provisions of the Act

<sup>29</sup> Responses to Public Comments, page 90 and below, Nos. 324 to 348

<sup>30</sup> Article 63, Paragraph 2, Item 7 of the Act and Article 238 of the Ordinance

<sup>31</sup> Employees who control compliance supervisory activities (or have been delegated said authority) and employees who control asset management division (or who make investment decisions based on analysis on values of financial instruments) fall within important employees.

- business office or office at which the SPBQIIs will be conducted and the website of the notifier;
- 10 The name and category of the fund;
- 11 The description of the fund business;
- 12 The trade name or name, category and number of the QIIs;
- 13 If the notifier conducts a private placement of the fund interests with a person other than a QII or if the said person contributes funds, to that effect;
- 14 If the notifier conducts a private placement of the fund interests with a SPBQII Investor only eligible under the Special Provisions for Venture Funds or if the said SPBQII Investor contributes funds, to that effect;
- 15 In the case of 14, the name of the certified public accountant or auditing firm which will conduct the audit of the financial statements of the fund business;
- 16 In the case of a foreign corporation, the location or address and telephone number of the representative in Japan; and
- 17 In the case of an individual residing outside of Japan, the trade name or name, location or address and telephone number of his/her agent in Japan.

The notification may be prepared in English as is the case under the current Act.<sup>32</sup>

Furthermore, certain information stated in the notification (excluding the trade name or name of the QIIs, the location or address and telephone number of the representative in Japan, and the trade name or name, location or address and telephone number of the agent in Japan) is to be kept at the authority and made available for public inspection or published on the Internet.<sup>33</sup>

Also, the SPBQII Notifier itself is required to either keep the document stating the relevant matters at its principal business office or principal office and all business offices or offices at which the SPBQIIs is conducted and make them available for public inspection or publish them on the Internet.<sup>34</sup> The said document may be prepared in English.<sup>35</sup>

### **Practical Points**

On and after the effective date, a notification must be filed pursuant to the new form under the Amendments and made available for public inspection or published on the Internet. Furthermore, the existing SPBQII Notifiers must file a notification pursuant to the new form under the Amendments within 6 months from the effective date (by August 31, 2016) and make the said notification available for public inspection or publish them on the Internet.<sup>36 37</sup> In addition, if a change to the information stated in the notification occurs before the existing SPBQII Notifier files a notification pursuant to the new form under the Amendments, the notification of change may be filed using the current form.<sup>38</sup>

<sup>32</sup> Article 236, Paragraph 2 of the Ordinance

<sup>33</sup> Article 63, Paragraph 5 of the Act and Article 238-4 of the Ordinance

<sup>34</sup> Article 63, Paragraph 6 of the Act and Article 238-5, Paragraphs 1 and 2 of the Ordinance

<sup>35</sup> Article 238-5, Paragraph 3 of the Ordinance

<sup>36</sup> Article 3, Paragraph 1 of the Supplementary Provisions of the Act

<sup>37</sup> Failure to submit a document stating the matters for notification or any false statements on the said document are subject to penal provisions (including dual liability) (Article 8 of the Supplementary Provisions of the Act).

<sup>38</sup> Article 6 of the Supplementary Provisions of the Ordinance

It should be noted that storing the notification at an overseas business office or at the location of the representative or agent in Japan will not enable the readiness and constant availability to investors and it therefore cannot be acknowledged as public inspection.<sup>39</sup> Thus, SPBQII Notifiers who are not based in Japan must consider methods such as disclosure through their website.

#### (5) Expansion of Supporting Documents

Under the current Act, SPBQII Notifiers who are corporations were required to file a certificate of corporate registration as a supporting document of the notification.<sup>40</sup> Supporting documents after the Amendments (in the case that the notifier is a corporation) are as follows.<sup>41</sup>

- 1 A written pledge by the notifier stating that it does not fall under disqualifying requirements, the articles of incorporation and certificate of corporate registration;
- 2 Resumes of officers and important employees;
- 3 Residence certificates of officers and important employees;<sup>42</sup>
- 4 If officers and important employees provided their names before marriage, documents certifying their names before marriage;
- 5 Identification and certification of non-registration of officers and important employees;<sup>43</sup>
- 6 A written pledge by the officers and important employees that they do not fall under the disqualifying requirements;
- 7 If all the QIIs are LPS, documents certifying the (i) total amount of asset under management of the LPS; and (ii) amount of borrowings of the said QIIs; and
- 8 Documents certifying that (i) the total amount of funds contributed by investors and (ii) amount of funds contributed by Closely Related Persons.

Supporting documents may be prepared in English.<sup>44</sup>

#### **Practical Points**

On and after the effective date, the notification must be accompanied by the supporting documents under the Amendments. Furthermore, the existing SPBQII Notifiers must submit a notification as provided in (4) above accompanied by new supporting documents in this (5) within 6 months from the effective date (by August 31, 2016).<sup>45 46</sup>

<sup>39</sup> Responses to Public Comments, page 84, No. 306 and page 85 and below, Nos. 308 to 312

<sup>40</sup> Article 63, Paragraph 2 of the current Act and Article 236, Paragraph 3 of the current Ordinance

<sup>41</sup> Article 63, Paragraph 3 of the Act and Article 238-2, Paragraph 1 of the Ordinance

<sup>42</sup> Foreign citizens residing outside of Japan would instead submit an affidavit notarized by a notary public.

<sup>43</sup> Foreign citizens would instead submit an affidavit notarized by a notary public.

<sup>44</sup> Article 238-2, Paragraph 2 of the Ordinance

<sup>45</sup> Article 3, Paragraphs 2 and 3 of the Supplementary Provisions of the Act

<sup>46</sup> False statements in the supporting documents are subject to penal provisions (including dual liability) (Article 8 of the Supplementary Provisions of the Act).

## (6) Obligations to prepare and disclose statutory documents

It will be necessary for SPBQII Notifiers to prepare and keep their statutory books and records with respect to its SPBQII for a certain period.<sup>47</sup> Statutory books and records may be in prepared English.<sup>48</sup>

Furthermore, each business year, SPBQII Notifiers must prepare a business report and submit it to the authority within 3 months after the end of each business year.<sup>49</sup> The business report may be prepared in English.<sup>50</sup>

Additionally, each business year, the SPBQII Notifiers must prepare an explanatory document (i.e. a document a part of which is same as business report) and make them available for public inspection by, for example, keeping them at its principal business office or principal office and all business offices and offices at which the SPBQII is conducted or publishing them on the Internet for a duration of 1 year from 4 months after the end of each business year.<sup>51</sup> The explanatory documents may be prepared in English.<sup>52</sup>

### **Practical Points**

Because there is no grace period for preparing the statutory books and records, the existing SPBQII Notifiers must also prepare and keep with them in relation to its SPBQII on and after the effective date. Furthermore, the existing SPBQII Notifiers must prepare and submit business reports, as well as prepare and disclose explanatory documents, for business years commencing on or after the effective date.<sup>53</sup>

It should be noted that as for the public inspection of explanatory documents, storing them at an overseas business office or at a location of the representative or agent in Japan will not enable the readiness and constant availability to the investors and it therefore cannot be acknowledged as public inspection.<sup>54</sup> Thus, SPBQII Notifiers who are not based in Japan must consider methods such as disclosure through their website.

## (7) Expansion of Reason for Notification regarding Certain Material Matters

Under the current Act, suspension, resumption and discontinuation of SPBQII are stipulated as the reasons for notification. Under the Amendments, if any of the following events occurs, a notification to the regulator will also be required: falling within disqualifying requirements, changes to the articles of incorporation, problematic conducts, litigations and administrative sanction outside of Japan.<sup>55</sup>

<sup>47</sup> Article 63-4, Paragraph 1 of the Act and Article 246-2 of the Ordinance

<sup>48</sup> Article 246-2, Paragraph 2 of the Ordinance

<sup>49</sup> Article 63-4, Paragraph 2 of the Act and Article 246-3 of the Ordinance

<sup>50</sup> Article 246-3, Paragraph 2 of the Ordinance

<sup>51</sup> Article 63-4, Paragraph 3 of the Act and Article 246-5 of the Ordinance

<sup>52</sup> Article 246-5, Paragraph 2 of the Ordinance

<sup>53</sup> Article 6 of the Supplementary Provisions of the Act

<sup>54</sup> Responses to Public Comments, page 84, No. 306 and page 85, Nos. 308 to 312

<sup>55</sup> Article 63-2, Paragraph 3, Item 3 of the Act and Article 241-2 of the Ordinance

Because there are no grace period in place with respect to above, if a reason for notification under the Amendments arises on or after the effective date, SPBQII Notifiers will be required to file a notification with the authority without delay.

## 2. Enhancement of Regulation of Activities of SPBQII Notifiers

The current Act only prohibits SPBQII Notifiers from providing false information<sup>56</sup> or compensating their investors for losses suffered<sup>57</sup>. Under the provisions of the Amendments, SPBQII Notifiers will be subjected to a broader range of regulations, including the following<sup>58</sup>

- duty of good faith<sup>59</sup>
- prohibition for allowing a third party to use SPBQII Notifier's name<sup>60</sup>;
- advertising regulations<sup>61</sup>;
- duty to deliver documents prior to the conclusion of contracts<sup>62</sup>;
- duty to deliver documents upon the conclusion of contracts<sup>63</sup>;
- prohibition against provision of false information<sup>64</sup>;
- prohibition against provision of conclusive investment assessments, etc.<sup>65</sup>;
- matters specified by the Cabinet Office Ordinance<sup>66</sup>;
- prohibition against compensation of investors for losses suffered<sup>67</sup>;
- the principle of suitability<sup>68</sup>;
- prohibition against sale and purchase of interests in funds, etc. where segregation of investment assets is not assured<sup>69</sup>;
- prohibition for offering interests in funds, where subscription proceeds are proposed to be used for purposes other than investments<sup>70</sup>
- duty of loyalty and due care of a prudent manager<sup>71</sup>;
- prohibition against acts that investment managers are generally not permitted to engage in<sup>72</sup>;
- segregation of assets<sup>73</sup>; and
- duty to deliver management reports<sup>74</sup>.

---

<sup>56</sup> Article 38, Paragraph 1 of the Act

<sup>57</sup> Article 39 of the Act

<sup>58</sup> Article 63, Paragraph 11 of the Act

<sup>59</sup> Article 36, Paragraph 1 of the Act

<sup>60</sup> Article 36-3 of the Act

<sup>61</sup> Article 37 of the Act

<sup>62</sup> Article 37-3 of the Act

<sup>63</sup> Article 37-4 of the Act

<sup>64</sup> Article 38, Item 1 of the Act

<sup>65</sup> Article 38, Item 2 of the Act

<sup>66</sup> Article 38, Item 8 of the Act

<sup>67</sup> Article 39 of the Act

<sup>68</sup> Article 40 of the Act

<sup>69</sup> Article 40-3 of the Act

<sup>70</sup> Article 40-3-2 of the Act

<sup>71</sup> Article 42 of the Act

<sup>72</sup> Article 42-2 of the Act

<sup>73</sup> Article 42-4 of the Act

<sup>74</sup> Article 42-7 of the Act

As with the case of financial instruments business operators, SPBQII Notifiers will be exempted from compliance with certain regulations if investors in the relevant funds are Specified Investors (*tokutei toshika*; which is defined in the Act as a broader category of professional investors than QIIs)<sup>75</sup> pursuant to Article 45 of the Act. Although Article 45 of the Act does not apply to duty to deliver management reports, if the counterparty to the contract for SPBQIIs is a Specified Investor, the delivery obligation will be exempted.<sup>76</sup>

### **Practical Points**

Because there is no grace period in place for expansion of conduct control, it is necessary to note that such expansion will be implemented immediately on the effective date. Furthermore, a person who is a professional investor but also can apply to be treated as a non-professional investor may continue to be treated as a professional investor until such application is made and accepted.<sup>77</sup>

### **3. Enhancement of Enforcement by Authority**

#### **(1) Administrative sanction/request for report/inspection**

Under the current Act, SPBQII Notifiers are not subject to administrative sanctions. The Amendments will, however, introduce some administrative sanctions (such as business improvement orders, business suspension orders and revocation of registration) in respect of SPBQII Notifiers.<sup>78</sup>

Additionally, the Amendments will empower the relevant authority to request report(s) from or inspect SPBQII Notifiers, if such reports or inspections are deemed necessary and appropriate from the perspective of public interest or for the protection of investors<sup>79</sup>.

#### **(2) Expansion of scope of injunction**

Under the current Act, the court may, at the petition of the relevant authority, if the court finds it urgently necessary or necessary and appropriate for the sake of public interest and for the protection of investors, issue an urgent suspension order against any person that has acted or attempts to act in violation of the Act (or an order issued pursuant thereto), in order to prohibit or stay such act.<sup>80</sup>

In addition, under the Amendments, if SPBQII Notifiers's businesses are grossly inappropriate and incur damage to the investors (or such that there is likelihood of such damage being incurred), offerings (but not management) of interests in the relevant funds may, where it is urgently necessary to avoid further damage to

---

<sup>75</sup> Article 34 through Article 34-5 of the Act

<sup>76</sup> Article 134, Paragraph 5, Item 4 of the Ordinance

<sup>77</sup> Responses to Public Comments, page 136, No. 495

<sup>78</sup> Article 63-5 of the Act

<sup>79</sup> Article 63-6 of the Act

<sup>80</sup> Article 192 of the current Act

investors, be banned or suspended by a court.<sup>81</sup>

### (3) Enhancement of criminal penalties

Under the current Act, persons who fail to make a notification for SPBQII or who make notifications containing false information for SPBQII are punishable by imprisonment with penal labor for a term not exceeding for one year, a fine not exceeding the amount of three million yen, or both.<sup>82</sup> Under the Amendments, such penalties will be enhanced to imprisonment with penal labor for a term not exceeding five years, a fine of not exceeding five million yen, or both. Additionally, persons who make false statements in attachments to notifications will be also subject to penalties.<sup>83</sup> Furthermore, other criminal penalties with respect to SPBQII have been enhanced.<sup>84, 85</sup>

## 4. Others

As stated above, after the Amendments are implemented, it is expected that the administrative workload will increase for SPBQII Notifiers, including the existing SPBQII Notifiers. Specifically, they will have to submit and disclose a notification under a new form and prepare statutory books and records, business reports and explanatory documents. Accordingly, it is advisable that the existing SPBQII Notifiers who virtually abolished its SPBQII (e.g. those who have not filed a notification of abolishment of SPBQII despite having already completed acts of solicitation and having failed to obtain contributions from investors in Japan or having redeemed all fund interests contributed by investors in Japan) consider filing a notification of abolishment of SPBQII by the end of the grace period (by August 31, 2016) at the latest.

---

<sup>81</sup> Article 192, Paragraph 1, Item 2 of the Act

<sup>82</sup> Article 198-6, Item 7 of the current Act

<sup>83</sup> Article 197-2, Item 10-8 of the Act

<sup>84</sup> Article 197-2, Item 10-9, Article 198-5, Article 198-6, Article 205-2-3 and Article 208 of the Act

<sup>85</sup> Under Article 207 of the Act, companies the directors or officers of which are guilty of a criminal offence committed in the course of carrying out his or her duties in the company will also be fined. Article 207 of the current Act will remain unchanged under the provisions of the Act.

- 
- This law bulletin is published as a general service to clients and friends and does not constitute legal advice. Should you wish to receive further information or advice, please contact the authors as follows.
  - Authors:  
Kunihiko Morishita([kunihiko.morishita@amt-law.com](mailto:kunihiko.morishita@amt-law.com))  
Kazuaki Nagai([kazuaki.nagai@amt-law.com](mailto:kazuaki.nagai@amt-law.com))  
Koichi Miyamoto([koichi.miyamoto@amt-law.com](mailto:koichi.miyamoto@amt-law.com))
  - If you wish to subscribe or unsubscribe to this newsletter, kindly contact us at [finlaw-newsletter@amt-law.com](mailto:finlaw-newsletter@amt-law.com).
  - Previous issues of our newsletters are available on the website of Anderson Mori & Tomotsune. <http://www.amt-law.com/en/bulletins2.html>