

---

# THE ASSET MANAGEMENT REVIEW

---

EDITOR  
PAUL DICKSON

LAW BUSINESS RESEARCH

# THE ASSET MANAGEMENT REVIEW

---

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Asset Management Review, 1st edition  
(published in October 2012 – editor Paul Dickson).

For further information please email  
[Adam.Sargent@lbresearch.com](mailto:Adam.Sargent@lbresearch.com)

# THE ASSET MANAGEMENT REVIEW

---

Editor  
PAUL DICKSON

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE ASSET MANAGEMENT REVIEW

[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

PUBLISHER  
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER  
Adam Sargent

MARKETING MANAGERS  
Nick Barette, Katherine Jablonowska, Alexandra Wan

PUBLISHING ASSISTANT  
Lucy Brewer

EDITORIAL ASSISTANT  
Lydia Gerges

PRODUCTION MANAGER  
Adam Myers

PRODUCTION EDITOR  
Anne Borthwick

SUBEDITOR  
Caroline Rawson

EDITOR-IN-CHIEF  
Callum Campbell

MANAGING DIRECTOR  
Richard Davey

Published in the United Kingdom by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2012 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

© Copyright in individual chapters vests with the contributors  
No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2012, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-907606-45-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: +44 844 2480 112

# ACKNOWLEDGEMENTS

---

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

ALLEN & GLEDHILL LLP

ANDERSON MÖRI & TOMOTSUNE

ARTHUR COX

BA-HR

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BONELLI EREDE PAPPALARDO

CAINS ADVOCATES LIMITED

CONYERS DILL & PEARMAN LIMITED

DE BRAUW BLACKSTONE WESTBROEK NV

ELVINGER, HOSS & PRUSSEN

ENS (EDWARD NATHAN SONNENBERGS)

GANADO & ASSOCIATES ADVOCATES

GEORGIADES & PELIDES LLC

GILBERT + TOBIN

GORRISSEN FEDERSPIEL

HAIWEN & PARTNERS

HENGELER MUELLER

J SAGAR ASSOCIATES, ADVOCATES & SOLICITORS

KIM & CHANG

LENZ & STAEHELIN

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MAPLES AND CALDER

MOURANT OZANNES

NAUTADUTILH

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

SLAUGHTER AND MAY

STIKEMAN ELLIOTT LLP

URÍA MENÉNDEZ ABOGADOS, SLP

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

# CONTENTS

---

<b>Editor's Preface</b>	.....vii
	<i>Paul Dickson</i>
<b>Chapter 1</b>	EUROPEAN OVERVIEW ..... 1
	<i>Michael Sholem</i>
<b>Chapter 2</b>	AUSTRALIA..... 42
	<i>Adam Laura, Peter Reeves and Richard Francis</i>
<b>Chapter 3</b>	AUSTRIA..... 56
	<i>Michael Binder and Stefan Frank</i>
<b>Chapter 4</b>	BELGIUM..... 73
	<i>Benoît Feron and Marie-Laure De Leener</i>
<b>Chapter 5</b>	BERMUDA ..... 86
	<i>Anthony Whaley and Elizabeth Denman</i>
<b>Chapter 6</b>	CANADA ..... 97
	<i>Alix d'Anglejan-Chatillon and Jeffrey Elliott</i>
<b>Chapter 7</b>	CAYMAN ISLANDS ..... 111
	<i>Jon Fowler</i>
<b>Chapter 8</b>	CHINA..... 123
	<i>Pei Wang</i>
<b>Chapter 9</b>	CYPRUS ..... 139
	<i>Marcos Georgiades</i>
<b>Chapter 10</b>	DENMARK..... 149
	<i>Søren Fogh, Jakob Skaadstrup Andersen and Charlotte Møller</i>



<b>Chapter 11</b>	GERMANY.....	161
	<i>Thomas Paul and Christian Schmies</i>	
<b>Chapter 12</b>	HONG KONG.....	173
	<i>Jason Webber, Peter Lake and Ben Heron</i>	
<b>Chapter 13</b>	INDIA .....	188
	<i>Dina Wadia, Jay Gandhi and Swati Mandava</i>	
<b>Chapter 14</b>	IRELAND .....	201
	<i>Kevin Murphy, David O'Shea, Jonathan Sheehan and Sarah McCague</i>	
<b>Chapter 15</b>	ISLE OF MAN .....	213
	<i>Nancy Matthews and Richard Vanderplank</i>	
<b>Chapter 16</b>	ITALY .....	225
	<i>Giuseppe Rumi, Daniela Runggaldier, Riccardo Ubaldini and Michele Dimonte</i>	
<b>Chapter 17</b>	JAPAN .....	239
	<i>Naoyuki Kabata and Takahiko Yamada</i>	
<b>Chapter 18</b>	JERSEY .....	258
	<i>Jacqueline A Richomme</i>	
<b>Chapter 19</b>	KOREA .....	271
	<i>Jae Ho Baek, Kyle Park and Sae Uk Kim</i>	
<b>Chapter 20</b>	LUXEMBOURG.....	282
	<i>Jacques Elvinger and Kim Kirsch</i>	
<b>Chapter 21</b>	MALTA.....	297
	<i>Andre Zerafa and Matthew Mizzi</i>	
<b>Chapter 22</b>	NETHERLANDS.....	307
	<i>Francine Schlingmann, Joost Franken and Sacha Leeman</i>	

<b>Chapter 23</b>	NORWAY .....	320
	<i>Peter Hammerich and Markus Heistad</i>	
<b>Chapter 24</b>	PORTUGAL .....	330
	<i>Carlos Costa Andrade</i>	
<b>Chapter 25</b>	SINGAPORE .....	342
	<i>Jek-Aun Long and Danny Tan</i>	
<b>Chapter 26</b>	SOUTH AFRICA.....	353
	<i>Arabella Bennett and Johan Loubser</i>	
<b>Chapter 27</b>	SPAIN.....	368
	<i>Juan Carlos Machuca and Miriam Pich-Aguilera</i>	
<b>Chapter 28</b>	SWEDEN .....	381
	<i>Helena Rempler, Emil Boström and Jonas Andersson</i>	
<b>Chapter 29</b>	SWITZERLAND .....	393
	<i>Shelby R du Pasquier and Philipp Fischer</i>	
<b>Chapter 30</b>	UNITED ARAB EMIRATES.....	405
	<i>Stuart Walker and Ronnie Dabbasi</i>	
<b>Chapter 31</b>	UNITED KINGDOM .....	417
	<i>Paul Dickson</i>	
<b>Chapter 32</b>	UNITED STATES.....	450
	<i>Mark S Bergman, Udi Grofman, David W Mayo, Philip A Heimowitz, Patricia Vaz de Almeida, Lyudmila Bondarenko and Allison J Rekkali</i>	
<b>Appendix 1</b>	ABOUT THE AUTHORS .....	465
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...	489

## EDITOR'S PREFACE

---

2012 is an auspicious year for the first edition of *The Asset Management Review*, coming as it does in the wake of the global financial crisis and in the midst of a continuing period of economic uncertainty in the eurozone, both of which have had a significant impact on asset management activity around the globe. Many governments have spent the past few years reflecting upon the existing frameworks for regulation of their financial services industries with a view to avoiding a repetition of past regulatory failings and encouraging a more appropriate risk appetite among investors and investment managers. The products of that reflection are beginning to emerge in 2012 and it appears that in many cases, large-scale overhaul of asset management regulation and greater intervention in previously lightly regulated industry sectors are likely to be the end result.

In some countries, and particularly at the supranational level in the European Union, it appears that a greater appreciation of the systemic importance of asset management entities in the broader financial system has been another product of the financial crisis, with a corresponding increased focus on transparency and disclosure to permit national regulators to monitor their activities. As a result, the debate about the type and extent of information that funds and their managers may be required to divulge publicly looks set to be another recurring theme throughout the coming year and beyond.

While there has certainly been a rebound in asset management operations since the lows of 2008, it would be fair to say that the outlook for investment fund activity over the next year remains uncertain. The continuing volatility of equities on global stock exchanges and the ongoing turbulence in bond markets, particularly in relation to concerns about the quality of some sovereign debt, have led to changes in investment behaviour and have done little to dispel any nervousness among investors. Nonetheless, there are some bright spots in an otherwise clouded investment landscape, with new prospects opening up in emerging markets, particularly in parts of Asia and Latin America. Perhaps the best that one can say from the present vantage point is that the next 12 months look likely to feature a combination that will be familiar to any seasoned investor – that of risk and opportunity.

The publication of the first edition of *The Asset Management Review* is a significant achievement that would not have been possible without the support of the

many lawyers and law firms who have contributed so much of their valuable time, knowledge and experience to this edition. I am grateful to them all. I would also like to thank Gideon Robertson and his team at Law Business Research for all their efforts to bring this book into being.

It is hoped that *The Asset Management Review* will prove to be a useful and practical companion in the increasingly complex, globalised and regulated world of asset management as we face the impending challenges of the coming year.

**Paul Dickson**

Slaughter and May

London

September 2012

## Chapter 17

---

# JAPAN

*Naoyuki Kabata and Takahiko Yamada*<sup>1</sup>

### I OVERVIEW OF RECENT ACTIVITY

In recent years, despite asset management activities in Japan having been adversely affected by financial upheavals such as the global financial crisis in 2008 and the euro debt crisis, the amount of assets managed by domestic discretionary investment managers or non-discretionary investment advisers exceeds ¥155 trillion (as of March 2012, according to the Japan Investment Advisers Association ('the JIAA')). However, financial assets in Japanese households exceeding ¥1,400 trillion remain underutilised. The number of new retail investors having their assets managed by professional investment managers is also small. To address these problems, the Financial Services Agency of Japan ('the FSA') publicly announced certain measures on 24 December 2010, which include, among others, the provision of asset management capabilities to facilitate the safe and effective utilisation of Japanese individual assets. In addition, in order to encourage new entry into the asset management business in Japan to meet various asset management needs, revisions were made to the Financial Instruments and Exchange Act of Japan ('the FIEA') in 2011, which relaxed regulations on a certain category of investment management businesses.

Meanwhile, the recent increase in the number of cases in which Japanese investors have suffered losses due to pernicious business operators has been recognised as a social problem. In the latest case, an investment advisory company, AIJ Investment Advisors Co, Ltd, allegedly falsified the results of its asset management of a number of pension funds, and continued soliciting pension funds while concealing losses of ¥200 billion arising from failed investments. In response to this scandal, the FSA is contemplating a tightening of regulations in relation to investment management business (in particular, discretionary investment management services to pension funds) and trust banks to

---

<sup>1</sup> Naoyuki Kabata is a partner and Takahiko Yamada is an associate at Anderson Mōri & Tomotsune.

which the pension fund assets are entrusted. Asset management practices in relation to pension funds are also being reviewed by the Ministry of Health, Labour and Welfare ('the MHLW').

There have also been many recent cases in which investors have suffered losses due to the inadequacy of compliance systems within non-discretionary investment advisory companies. Accordingly, new requirements for the proper conduct of such businesses, such as the maintenance of appropriate management structures, have been added to the registration requirements of investment advisory businesses under the FIEA.

Certain regulations in relation to special business activities for qualified institutional investors ('QIIs') under Article 63 of the FIEA ('Article 63 businesses') have also been reinforced. In particular, persons intending to commence Article 63 businesses are now required to disclose in the notification to be filed with the authority ('the Article 63 notification'), the respective names of the funds managed by the applicant and the name of at least one QII involved in each fund. Information relating to such persons are also required to be officially certified and filed as an attachment to the Article 63 notification. This is a countermeasure to the frequent non-compliance of Article 63 businesses with FIEA requirements.

## II GENERAL INTRODUCTION TO THE REGULATORY FRAMEWORK

### i Regulation of asset management activities

Asset management activities in Japan are divided into two broad categories: businesses advising on values of investments or investment decisions ('advisory businesses') and businesses managing client's assets by exercising investment discretion ('management businesses'). Different regulations apply to each. The applicable regulations also vary depending on the types of assets in relation to which such businesses provide advice or manage. The marketing of investment funds is subject to separate regulations. The marketing of certain forms of funds also has certain filing requirements.

#### *Regulation of advisory businesses*

##### *Advisory business in relation to securities or derivatives*

###### *Investment advisory business*

A business operator intending to engage in the advisory business in relation to securities or derivatives ('investment advisory business') is, in principle, required to be registered under the FIEA.<sup>2</sup> An individual and any corporation (regardless of corporate organisation) may register as an investment advisory business. In order to be qualified, the business operator must deposit ¥5 million with the governmental deposit office<sup>3</sup> and meet all requirements for the registration, such as the establishment of compliance

---

2 Article 28, Paragraph 6, and Article 29 of the FIEA.

3 Article 31-2, Paragraph 1 of the FIEA.

systems through the maintenance of certain personnel structures appropriate for the running of an investment advisory business.<sup>4</sup>

A business operator registered as an investment advisory business will be subject to certain codes of conduct in relation to its investment advisory business, such as refraining from the provision of advice intended to induce its customers to enter into transactions that would harm such customers' interests in favour of the interest of another customer.<sup>5</sup> The business operator will also be required to prepare and maintain books and documents in relation to its investment advisory business,<sup>6</sup> and prepare business reports for each business year and submit them to the FSA.<sup>7</sup>

### *Exemption*

An investment adviser licensed in a foreign jurisdiction may provide non-discretionary investment advice to a Japanese investment manager registered for investment management business (explained below) without a registration under the FIEA.<sup>8</sup> It should be noted that such foreign investment adviser is still prohibited from providing investment advice to business operators registered only as investment advisory businesses.

### *Advisory business regarding real properties*

Currently, an advisory business in relation to real properties ('real properties advisory business') is not a regulated activity. A business operator intending to engage in the real property advisory business may however be registered under the Rules for Registration of real properties advisory businesses ('the Rules').<sup>9</sup> To obtain this registration, such business operator is required to have the necessary knowledge and experience for the proper conduct of the real properties advisory business.<sup>10</sup>

A business operator registered to engage in the real properties advisory business will be subject to certain codes of conduct, such as refraining from the provision of advice intended to induce its customers to enter into transactions that would harm such customers' interests in favour of the interest of another customer.<sup>11</sup> Such business operators will also be required to prepare and maintain books and documents in relation to its real properties advisory business,<sup>12</sup> and prepare business reports for each business year and submit them to the Ministry of Land, Infrastructure, Transport and Tourism of Japan ('the MLIT').<sup>13</sup> In the Japanese real properties investment market, it is often the case that real properties are traded in the form of trust beneficiary interests rather than in

---

4 Article 29-4, Paragraph 1 of the FIEA.

5 Article 41-2, Item 1 of the FIEA.

6 Article 47 of the FIEA.

7 Article 47-2 of the FIEA.

8 Article 61, Paragraph 1 of the FIEA.

9 Article 2, Paragraph 4 and Paragraph 7, and Article 3, Paragraph 1 of the Rules.

10 Article 6, Paragraph 1 of the Rules.

11 Article 23, Paragraph 1, Item 6 of the Rules.

12 Article 27, Paragraph 1 of the Rules.

13 Article 28, Paragraph 1 of the Rules.

the form of fee simple ownership. As real estate trust beneficiary interests are categorised as ‘securities’ from the regulatory perspective, a business operator intending to provide advice regarding real estate trust beneficiary interests will be required to register as an investment advisory business rather than as a real properties advisory business.

### *Regulation of management businesses*

#### *Management business regarding securities or derivatives*

##### *Investment management business*

A business operator intending to engage in the management business in relation to securities or derivatives (‘investment management business’) will, in principle, be required to be registered under the FIEA.<sup>14</sup> Under the FIEA, the investment management business is divided into the following four subcategories:

- a* investment management businesses managing assets of an investment corporation established under the Investment Trust and Investment Corporation Act of Japan (‘the ITICA’) under an asset management contract with the investment corporation (‘investment corporation asset management service’);
- b* investment management businesses managing assets of an investor under a discretionary investment management contract (‘discretionary investment management services’);
- c* investment management businesses managing assets of an investment trust established under the ITICA and act as a settlor of such investment trust (‘investment trust management service’); and
- d* investment management businesses managing assets of a collective investment scheme, such as a partnership under the Civil Code of Japan, a silent partnership (a ‘*tokumei kumiai*’) under the Commercial Code of Japan, an investment limited partnership under the Investment Limited Partnership Act of Japan, a limited liability partnership under the Limited Liability Partnership Act of Japan, or any other similar foreign entity, as a general partner of such collective investment scheme (‘collective investment scheme management service’).

To be registered as an investment management business, a business operator must meet the necessary requirements for registration, such as the entity requirement (i.e., only a joint-stock corporation incorporated under the Corporation Act of Japan, and having a board of directors and a corporate auditor or a committee, or a foreign company that is similarly organised, is eligible), the minimum capital amount and net worth requirements (i.e., ¥50 million or more, in each case) and the compliance system requirements (e.g., a personnel structure appropriate to engage in the investment management business). These requirements are far more stringent requirements than those in relation to the investment advisory business explained above.<sup>15</sup>

In this regard, a new category of investment management business has been introduced through amendments of the FIEA effective from 1 April 2012. This new

---

<sup>14</sup> Article 28, Paragraph 4, and Article 29 of the FIEA.

<sup>15</sup> Article 29-4, Paragraph 1 of the FIEA.



category is the investment management business for qualified investors ('the IMBQI'). Under this category, the registered operator can only provide services to a certain scope of relatively sophisticated investors (i.e., qualified investors) and in relation to a limited amount of assets; the aggregate amount of the managed assets by a registered operator should not exceed ¥20 billion. The eligibility requirements under this new category are more relaxed than those under 'normal' investment management businesses. For instance, business operators intending to engage in an IMBQI need now only meet relaxed entity requirements (i.e., a joint-stock corporation with a corporate auditor or committee, or a foreign company that is similarly organised), less stringent minimum capital amount and net worth requirements (i.e., ¥10 million or more, in each case) and relaxed compliance system requirements (e.g., the delegation of the compliance function to an affiliated company or a law firm is permissible).<sup>16</sup>

A business operator registered as an investment management business (including an IMBQI) will be subject to certain codes of conduct in relation to its investment management business (e.g., refraining from the implementation of investments resulting in transactions with itself or transactions involving other assets managed by the same operator).<sup>17</sup> Such business operators will also be required to prepare and maintain books and documents in relation to its investment management business,<sup>18</sup> and shall prepare business reports for each business year and submit them to the FSA.<sup>19</sup>

A business operator providing investment corporation asset management services or investment trust management services is subject to certain additional obligations under the ITICA, such as the duty to procure a third-party appraiser to investigate the asset value.<sup>20</sup>

#### *Article 63 business exemption*

A business operator intending to provide collective investment scheme management services in relation to a collective investment scheme involving less than 50 non-QIIs and at least one QII may not be required to be registered as an investment management business but instead need only file a relatively simple notification with the Local Finance Bureau of Japan.<sup>21</sup>

#### *Foreign investment management company exemption*

A business operator that is a foreign entity licensed to engage in the investment management business in its jurisdiction ('a foreign investment management company') may provide discretionary investment management services to a Japanese investment manager registered for the investment management business without registration under

---

16 Article 29-5, Paragraph 1 of the FIEA.

17 Article 42-2, Items 1 and 2 of the FIEA.

18 Article 47 of the FIEA.

19 Article 47-2 of the FIEA.

20 Article 11, Article 201 of the ITICA.

21 Article 63, Paragraph 1, Item 2 and Paragraph 2, and Article 63-3, Paragraph 1 of the FIEA.

the FIEA.<sup>22</sup> As is the case in relation to an investment advisory business, such foreign investment manager would still be prohibited from providing discretionary investment management services to a business operator registered only as an investment advisory business.

*Other exemptions*

Business operators engaging in the following businesses are exempt from registration requirements under the FIEA and from filing requirements under Article 63 of the FIEA:<sup>23</sup>

- a* a business operator that delegates its entire investment authority to a discretionary investment manager registered as an investment management business under a discretionary investment management contract and that meets other specific requirements in relation thereto; and
- b* a business operator that provides collective investment scheme management services to a foreign collective investment scheme (such as a Cayman limited partnership) meeting the following requirements:
  - Japanese investors investing in such foreign collective investment scheme consist only of QIIs;
  - the number of such Japanese investors is less than 10; and
  - the total amount of contributions from such Japanese investors is less than one-third of the total contributions of all investors in such collective investment scheme.

*Management business regarding real properties*

*Real properties management business*

Currently, engagement in the real properties management business is not regulated. A business operator intending to engage in the real properties management business may however be registered under the Rules for Registration of Real Properties Advisory Business.<sup>24</sup>

To obtain the registration, a business operator must meet requirements including the entity requirement (i.e., only a joint-stock corporation or a similarly organised foreign company with a business office in Japan), the minimum capital amount and net worth requirements (i.e., ¥50 million or more, in each case) and the compliance system requirements for the proper conduct of the real properties management business.<sup>25</sup>

A business operator registered as a real properties management business will be subject to certain codes of conduct in relation to such business, such as refraining from

---

22 Article 61, Paragraph 1 of the FIEA.

23 Article 2, Paragraph 8 of the FIEA, Article 1-8-6, Paragraph 1, Item 4 of the Cabinet Order for Enforcement of the FIEA, and Article 16, Paragraph 1, Item 10 and Item 13 of the Cabinet Office Ordinance on Definitions under Article 2 of the FIEA.

24 Article 2, Paragraph 5 and Paragraph 8, and Article 3, Paragraph 1 of the Rules for Registration of Real Properties Advisory Business.

25 Article 6, Paragraph 2 of the Rules for Registration of Real Properties Advisory Business.

the implementation of transactions among its customers that would harm a particular customer's interests in favour of the interest of another customer.<sup>26</sup> Such business operator will also be required to prepare and maintain books and documents in relation to its real properties management business,<sup>27</sup> and prepare business reports for each business year to be submitted to the MLIT.<sup>28</sup>

*Real estate specified joint enterprise*

A business operator intending to engage in the management business in relation to real properties and accepting investments via certain legal arrangements (including a partnership and a *tokumei kumiai*) ('a real estate specified joint enterprise') is, in principle, required to obtain governmental approval under the Real Estate Specified Joint Enterprise Act ('the RESJEA').<sup>29</sup>

To obtain such governmental approval, a business operator must meet certain requirements, such as the minimum capital amount requirements (i.e., ¥100 million or more) and compliance system requirements for the proper conduct of a real estate specified joint enterprise.<sup>30</sup>

Business operators approved to engage in a real estate specified joint enterprise are subject to certain codes of conduct, such as compliance with advertising regulations<sup>31</sup> and the proper segregation of asset management duties.<sup>32</sup> Such business operators are also required to prepare and maintain books and documents relating to their real estate specified joint enterprise<sup>33</sup> and business reports for each business year to be submitted to the MLIT.<sup>34</sup>

This licensing requirement under the RESJEA is applicable to an SPV accepting investments through a *tokumei kumiai* and investing in real properties in the form of fee simple ownership. As the entry requirement and continuing obligations are cumbersome and costly, it is not viable for an SPV to obtain approval under the RESJEA. This is the primary reason why real properties are frequently traded in the form of trust beneficiary interests in Japan rather than in fee simple ownership. To address this problem, however, an amendment of the RESJEA is underway (see Section VIII.i, *infra*).

*Investment management business (investment corporation asset management service)*

Investment management businesses under the FIEA primarily relate to management businesses regarding securities or derivatives. Therefore, regulations in relation to an

---

26 Article 23, Paragraph 3, Item 6 of the Rules for Registration of Real Properties Advisory Business.

27 Article 27, Paragraph 1 of the Rules for Registration of Real Properties Advisory Business.

28 Article 28, Paragraph 1 of the Rules for Registration of Real Properties Advisory Business.

29 Article 2, Paragraph 4, Item 1 and Article 3, Paragraph 1 of the RESJEA.

30 Article 7 of the RESJEA.

31 Article 18 of the RESJEA.

32 Article 27 of the RESJEA.

33 Article 32 of the RESJEA.

34 Article 33 of the RESJEA.

investment management business under the FIEA will not, in principle, be applicable to management businesses in relation to real properties. There is an exception to this principle: engagement in a management businesses regarding real properties under asset management contracts with investment corporations will be deemed to be providing investment corporation asset management services and subject to regulations under the FIEA and ITICA.<sup>35</sup> In addition, a business operator engaging in such business will be required to possess the appropriate licences or approvals in relation to real estate transaction businesses, such as governmental approval under the Building Lots and Buildings Transaction Business Act.<sup>36</sup>

A management business in relation to real properties conducted as a settlor of an investment trust will also be deemed to be providing investment trust management services and regulated under the FIEA and ITICA.<sup>37</sup> Such a business is, however, not prevalent in Japan currently.

### *Management business regarding commodities or commodity derivatives*

#### *Commodities management business*

A business operator intending to engage in management business in relation to commodities or commodity derivatives under a discretionary investment management contract ('a commodities management business') is required to obtain governmental approval under the Act for Regulation of Business Concerning Commodities Investment.<sup>38</sup>

To obtain such approval, a business operator must meet certain requirements, such as the entity requirement (i.e., only a joint-stock corporation or a similarly organised foreign company with a business office in Japan), the minimum capital amount and net worth requirements (i.e., ¥50 million or more, in principle, in each case), and compliance system requirements for the proper conduct of the commodities management business.<sup>39</sup>

Business operators approved to engage in the commodities management business will be subject to certain codes of conduct in relation to such business, such as refraining from undertaking commodity investment based on ill-founded investment decisions for the purpose of benefiting itself or a third party.<sup>40</sup> The business operator will also be required to prepare and maintain books and documents relating to its commodities management business.<sup>41</sup>

---

35 Article 223-3, Paragraph 3 of the ITICA.

36 Article 199 of the ITICA.

37 Article 223-3, Paragraph 2 of the ITICA.

38 Article 2, Paragraph 2 and Paragraph 3, and Article 3 of the Act for Regulation of Business Concerning Commodities Investment.

39 Article 3 and Article 6 of the Act for Regulation of Business Concerning Commodities Investment.

40 Article 28, Item 2 of the Act for Regulation of Business Concerning Commodities Investment.

41 Article 29 of the Act for Regulation of Business Concerning Commodities Investment.

*Investment management business (investment corporation asset management service and investment trust management service)*

Investment management businesses under the FIEA primarily relate to management businesses regarding securities or derivatives. Therefore, regulations in relation to the investment management business under the FIEA will not, in principle, be applicable to management businesses in relation to commodities or commodity derivatives. However, management businesses in relation to commodities or commodity derivatives under an asset management contract with an investment corporation, or those conducted as a settlor of an investment trust, will be deemed to be providing investment corporation asset management services or investment trust management services respectively, and therefore will be subject to regulations under the FIEA and ITICA.<sup>42</sup>

*Other structures*

There are some cases where businesses similar to a management business are conducted by using a specified purpose company under the Act on Securitization of Assets. However, as these structures were originally intended for the securitisation of particular assets and not for asset management, they are not discussed in detail in this chapter.

*Filing requirements in respect of funds*

*Investment trust*

Prior to the establishment of investment trusts, certain information is required to be filed with the FSA in relation to the trust deeds of investment trusts.<sup>43</sup> A foreign investment trust established under a foreign law, such as a mutual fund established as a Cayman unit trust, is also required to file a notification containing certain information regarding the trust deed with the FSA prior to the commencement of solicitations of its units.<sup>44</sup>

*Investment corporation*

Prior to the establishment of investment corporations, certain information is required to be filed regarding underlying funds of investment corporation with the FSA.<sup>45</sup> An investment corporation established under foreign law, such as a mutual fund established as a Cayman limited company, is also required to file a notification containing certain information about the funds with the FSA prior to the commencement of solicitations of its shares.<sup>46</sup>

*Regulation of marketing*

*Marketing of advisory business and management business*

The marketing of advisory businesses or management businesses by a business operator that conducts such businesses is not a regulated activity, as marketing is part of such

---

42 Article 223-3, Paragraph 2 and Paragraph 3 of the ITICA.

43 Article 4, Paragraph 1 of the ITICA.

44 Article 58, Paragraph 1 of the ITICA.

45 Article 69, Paragraph 1 of the ITICA.

46 Article 220, Paragraph 1 of the ITICA.

businesses. On the other hand, solicitation of customers for entry into advisory contracts or management contracts with other investment advisers or managers is a regulated activity, and requires registration as an investment advisory and agency business under the FIEA.<sup>47</sup>

*Marketing of fund interests*

*Type I financial instruments business and Type II financial instruments business*

A business operator that intends to solicit investments in the liquid interests of funds (e.g., beneficial interests in investment trusts or foreign investment trusts, and shares in investment corporations or foreign investment corporations) is, in principle, required to be registered as a Type I financial instruments business under the FIEA.<sup>48</sup>

To obtain such registration, business operators must meet certain requirements, such as the entity requirement (i.e., only a joint-stock corporation having a board of directors and a corporate auditor or committee, or a similarly organised foreign company conducting businesses similar to the Type I financial instruments business in such foreign state and with a business office in Japan), the minimum capital amount and net worth requirements (i.e., ¥50 million or more, in principle, in each case), compliance system requirements (e.g., a personnel structure appropriate to conduct Type I financial instruments business) and certain capital adequacy requirements.<sup>49</sup>

On the other hand, a business operator that intends to solicit investments in illiquid interests of funds (such as interests in certain partnerships) will be required to register as a Type II financial instruments business under the FIEA.<sup>50</sup>

In this regard, in relation to liquid interests in funds, (1) solicitation of investments in the beneficial interests in an investment trust or foreign investment trust by the issuer itself, and (2) solicitation of investments in shares in an investment corporation or foreign investment corporation by the business operator providing investment corporation asset management services to such investment corporation or the foreign investment corporation would be allowed if they are registered as a Type II financial instruments business rather than a Type I financial instruments business. This is one of the exemptions to the registration requirement of a Type I financial instruments business.

To qualify for registration as a Type II financial instruments business, a business operator must meet certain requirements, such as the minimum capital amount and net worth requirements (i.e., ¥10 million or more, in each case), and the compliance system requirements (e.g., having the appropriate personnel structure to conduct the Type II financial instruments business).<sup>51</sup>

A business operator registered as either a Type I or Type II financial instruments business will be subject to certain codes of conduct in relation to its financial instruments

---

47 Article 28, Paragraph 3, Item 2, and Article 29 of the FIEA.

48 Article 28, Paragraph 1, Item 1, and Article 29 of the FIEA.

49 Article 29-4, Paragraph 1 of the FIEA.

50 Article 28, Paragraph 2, Item 1 and Item 2, and Article 29 of the FIEA.

51 Article 29-4, Paragraph 1 of the FIEA.

business, such as refraining from the delivery of false information to customers<sup>52</sup> and refraining from compensating customers for their losses.<sup>53</sup> Such business operator will also be required to prepare and maintain books and documents in relation to its financial instruments business,<sup>54</sup> and business reports for each business year to be submitted the FSA.<sup>55</sup>

#### *Article 63 business*

If a business operator intends to solicit investments in a collective investment scheme involving less than 50 non-QIIs and at least one QII, such business operator will not be required to be registered as a Type II financial instruments business and need only file a relatively simple notification with the Local Finance Bureau of Japan under Article 63 of the FIEA.<sup>56</sup> This notification is essentially the same as that described Section II.i, *supra*, with the only difference (being the description of business category in the notification).

A business operator filing a notification in relation to an Article 63 business will, in relation to such business, be prohibited from delivering false information to its customers and, in principle, from compensating customers for any losses sustained.<sup>57</sup>

#### *Foreign securities firm exemption*

An entity that is licensed to deal with securities business in its own jurisdiction ('a foreign securities firm') is permitted to make solicitations of securities (including liquid and illiquid interests in funds) to certain categories of financial institutions including banks, insurance companies, securities brokers registered as a Type I financial instruments firm, trust companies and discretionary investment managers registered for an investment management business. This solicitation, however, may only be conducted from outside Japan (i.e., a foreign securities firm may not engage in solicitations involving such actions as the delivery of prospectuses and application forms in Japan).

#### *Disclosure requirement*

If the solicitation of investments in funds is by way of a public offering, the fund will be required under the FIEA to file a securities registration statement with the Local Finance Bureau of Japan, which is a relatively cumbersome and costly procedure. If the offer is made by a private placement, the issuer will not be required to do so.

## **ii Overview of regulators**

The principal regulator of asset management activities in Japan is the FSA, which has the authority to enact and coordinate all relevant laws and regulations in relation to asset management activities, and also to inspect and supervise business operators conducting

---

52 Article 38, Item 1 of the FIEA.

53 Article 39 of the FIEA.

54 Article 46-2 and Article 47 of the FIEA.

55 Article 46-3, Paragraph 1, and Article 47-2 of the FIEA.

56 Article 63, Paragraph 1, Item 1 and Paragraph 2, and Article 63-3, Paragraph 1 of the FIEA.

57 Article 63, Paragraph 4, and Article 63-3, Paragraph 3 of the FIEA.

asset management activities. The Securities and Exchange Surveillance Commission of Japan, a division of the FSA, performs on-site and off-site inspection of asset management activities based on the authority delegated to it by the Commissioner of the FSA. Each Local Finance Bureau of Japan is also authorised to conduct inspections and supervisions of business operators conducting asset management activities and examinations of disclosure documents.

The MLIT has authority to regulate asset management activities related to real properties. The Ministry of Economy, Trade and Industry and the Ministry of Agriculture, Forestry and Fisheries also have respective authority to regulate asset management activities regarding commodities or commodity derivatives, depending on the type of commodities involved.

### III COMMON ASSET MANAGEMENT STRUCTURES

#### i Common structure for wholesale market

In practice, investment trusts, foreign investment trusts, investment corporations and foreign investment corporations that are open-ended and invest primarily in securities or derivatives are frequently utilised asset management structures in relation to wholesale investors in Japan. Most foreign investment trusts and foreign investment corporations are established in tax havens.<sup>58</sup> In many cases, solicitations of units or shares in these structures are conducted by way of a private placement.

A collective investment scheme is also a commonly used structure for specific purposes. For instance, it is common in the area of real estate investments to use an SPV accepting investment under the *tokumei kumiai* and investing such asset delivered under the *tokumei kumiai* in real estate trust beneficial interests. Partnerships and investment limited partnerships are frequently used in relation to private equity funds.

Some institutional investors may prefer to simply delegate the management of their assets to a business operator registered as an investment management business under a discretionary investment management contract rather than to invest in funds (e.g., a separately managed account). In Japan, most pension funds enter into discretionary investment management contract with a business operator registered as an investment management business, which gives investment instructions to the trust bank that holds the assets of the pension fund under a trust arrangement.

#### ii Common structure for retail market

Open-ended investment trusts and foreign investment trusts are commonly used asset management structures for retail investors in Japan. Most foreign investment trusts are established in tax havens.<sup>59</sup> Offerings of such investment trusts and foreign investment trusts targeting the retail market are made by way of a public offering. In this regard, it should be noted that the FSA has recently tightened the rules governing the sale of complex products (such as double-decker funds) to retail investors.

---

58 Such as the Cayman Islands, Bermuda, the British Virgin Islands and Luxembourg

59 Ibid.



A closed-ended investment corporation investing in real estate-related assets is also a commonly used structure in relation to retail investors. This structure is known as 'a J-REIT', and shares in most J-REITs are listed on stock exchanges in Japan.

Discretionary investment management contracts are also used by high-net-worth individuals in Japan, such as through separately managed accounts or private banking services.

#### IV MAIN SOURCES OF INVESTMENT

While detailed statistics regarding the asset management market in Japan are not available, according to recent surveys by the JIAA, a self-regulatory agency for business operators registered as investment management businesses (discretionary investment management services) and investment advisory businesses, and surveys by the Investment Trusts Association, Japan ('ITA'), a self-regulatory agency for business operators registered for investment management businesses (investment trust management services and investment corporation asset management services):

- a* the total amount of assets under discretionary investment management services is approximately ¥131 trillion (as of March 2012; JIAA);
- b* the total amount of assets of investment trusts offered by way of public offering is more than ¥58 trillion (as of June 2012; ITA);
- c* the total amount of assets of investment trusts offered by way of private placement is more than ¥28 trillion (as of June 2012; ITA);
- d* the total amount of assets of investment corporations offered by way of public offering is more than ¥4 trillion (as of June 2012; ITA);
- e* the total amount of assets of investment corporations offered by way of private placement is approximately ¥58 billion (as of June 2012; ITA); and
- f* the total amount of assets under investment advisory businesses is approximately ¥26 trillion (as of March 2012; JIAA).

With regard to the spectrum of investors, Japanese institutional investors, especially pension funds, are the major players in terms of the investment volume. Foreign institutional investors and offshore funds have also invested considerable amounts of cash in asset management funds in Japan. For instance, among the total amount of assets managed under discretionary investment management services stated above (i.e., approximately ¥131 trillion), the total amount of assets from Japanese investors is approximately ¥106 trillion (of which the total amount of assets from Japanese pension funds is approximately ¥79 trillion), and the total amount of assets from foreign investors is approximately ¥20 trillion (as of March 2012; JIAA).

#### V KEY TRENDS

Although finance regulations are facing close scrutiny globally following the recent financial crisis, the tightening of regulations in relation to asset management activities to address post-global financial crisis issues has not yet been implemented to a great extent in Japan. The FSA, however, revised the Comprehensive Guidelines for Supervision of

Financial Instruments Business Operators, etc., in 2010; they now include conducting an annual Fund Monitoring Survey in order to help the collection of information regarding asset management activities by the FSA. Under the Fund Monitoring Survey, a business operator engaging in the solicitation of interests in funds (i.e., Type I or Type II financial instruments business, or Article 63 business) or in the asset management of funds (i.e., investment management business or Article 63 business) is required to submit a report stating the name and form of the fund, certain information regarding investors, the amount of assets managed, the investment target of the fund and certain other details. In addition, certain relevant self-regulatory agencies, namely, the Japan Securities Dealers Association, the JIAA and the ITA, have respectively enacted new internal regulations for the purpose of protecting retail investors.

## **VI SECTORAL REGULATION**

### **i Insurance**

The management of cash received as insurance premiums, etc., by insurance companies is regulated and subject to the restrictions set out in the Insurance Business Act of Japan ('the IBA').<sup>60</sup> For instance, the types of investment that can be made by an insurance company is restricted under the IBA, including the acquisition of securities or real properties, contributions in a partnership and entry into derivative transactions. The amount of assets that can be managed by an insurance company is also limited under the IBA (e.g., the total amount of bonds, shares, etc., issued by one particular entity may not exceed more than 10 per cent of the total amount of assets<sup>61</sup> of an insurance company). In addition, an insurance company is required to have in place an appropriate risk management system in relation to the management of its assets under the Comprehensive Guidelines for Supervision of Insurance Companies, which include such provisions as requiring insurance companies to enact policies of overall asset management (including basic policies, projections and risk management plans) by itself, even if it delegates asset management to a discretionary investment manager.<sup>62</sup>

### **ii Pension funds**

The management of assets held by pension funds is regulated and subject to restrictions set out in the Employees Pension Insurance Act of Japan ('the EPIA'). For example, methods of asset management are restricted under the EPIA, which includes entrustment of a fund's assets to a trust bank, execution of a discretionary investment management contract and trade of interests in investment funds.<sup>63</sup> If a pension fund enters into a discretionary investment management contract for its asset management, it will also be required to enter into a trust agreement with a trust bank for its administration of assets.<sup>64</sup>

---

60 Article 97, Paragraph 2 of the IBA.

61 Article 97-2, Paragraph 2 of the IBA.

62 II-2-6-6 of the Guidelines.

63 Article 136-3, Paragraph 1 of the EPIA.

64 Article 130-2, Paragraph 2 of the EPIA.

A pension fund is also required to draft a basic policy setting out the purpose of its asset management, and to conduct its asset management in accordance with such policy.<sup>65</sup> A discretionary investment manager and a trust bank involved in a pension fund scheme are required to conduct their businesses with loyalty to such pension fund, in compliance with the laws and regulations and such contracts under the EPIA.<sup>66</sup> A pension fund is also subject to certain codes of conduct, such as the duty of investment diversification under guidelines drawn up by the MHLW.

As mentioned in Section I, *supra*, it should be noted that, in response to the scandal in which a business operator managing pension fund assets failed to disclose losses from failed investments amounting to approximately ¥200 billion, the relevant authorities are discussing the tightening of the regulations regarding the management of assets of a pension fund. See Section VIII.iii, *infra*, for details.

### iii Real property

As described in Section II.i, *supra*, management businesses in relation to real properties would be subject to the RESJEA and regulations in relation to real properties management businesses and investment corporation asset management services depending on the form of funds or management of assets. Additionally, a business operator providing investment corporation asset management services to listed J-REITs will also be subject to certain listing rules of the stock exchanges on which the J-REITs are listed. For instance, the Securities Listing Regulations of the Tokyo Stock Exchange, on which most J-REITs are listed, require that the ratio of amount of real properties shall be 70 per cent or more of the total amount of the assets of a listed J-REIT, and a listed J-REIT must be closed-ended.<sup>67</sup>

### iv Hedge funds

While there is no particular definition of ‘hedge fund’ under Japanese laws and regulations, funds seeking absolute returns through hedging risk by using, among others, leverage, derivative transactions and long-short strategies, are generally referred to as hedge funds. In any case, no regulation in Japan specifically addresses hedge funds. Hedge funds are subject to the same regulations as funds of other purposes, depending on the form and the type of investments of the relevant hedge fund.

### v Private equity

Partnerships and investment limited partnerships are frequently used forms for private equity funds. In most cases, the general partners conduct solicitations of partnership interests and asset management of such partnerships as Article 63 businesses without being registered as an investment management business. Investment limited partnerships are further subject to certain limitations in their conduct of business under the Investment Limited Partnership Act. In particular, the shares, loans and other assets that may be

---

65 Article 136-4, Paragraph 1 of the EPIA.

66 Article 136-5 of the EPIA.

67 Article 1205 of the Securities Listing Regulations of the Tokyo Stock Exchange.

acquired by investment limited partnerships are restricted primarily to those of Japanese legal entities.

## VII TAX LAW

The following is a summary of the general taxation system of Japan currently in effect in relation to asset management activities. Please note that tax treatment may vary depending on the particular status of the investor, structure of the fund and such other circumstances, and may be affected by subsequent changes in any relevant tax treaties, tax laws or tax authority decisions.

### i Taxation of investment funds

#### *Investment trusts and foreign investment trusts*

A securities investment trust (i.e., an investment trust whose amount of investment in securities exceeds 50 per cent of the total amount of the trust property thereof, and is managed under instructions from a settlor) and a publicly offered investment trust (i.e., an investment trust whose beneficial interests are promoted by way of a public offering (the same shall apply to all references to publicly offered investment trusts hereunder)) will not be subject to taxation with respect to any profits gained through the management of trust property.

On the other hand, trustees of investment trusts other than securities investment trusts and publicly offered investment trusts (rather than the trusts themselves) will be subject to corporation tax with respect to profits gained through the management of trust property. If, however, such investment trusts meet certain requirements (including that solicitations of its beneficial interests are via private placements to QIIs only, the amount of its beneficial interests to be solicited in Japan exceeds 50 per cent of the total amount thereof and the amount of distribution in a single business year exceeds 90 per cent of the total amount of its distributable profit in such business year) the amount of distribution will be included in the amount of loss when calculating the amount of income for such business year. As a result, the tax imposed on the gained profit will be minimised.

Under Japanese tax laws, a foreign investment trust will not be subject to taxation with respect to profits gained through the management of trust property. However, in the case of foreign investment trusts similar to investment trusts not falling under a securities investment trust or publicly offered investment trust, if the number of its beneficial interests held directly and indirectly by residents or domestic corporations in Japan exceeds 50 per cent of the total number of its beneficial interests, such residents or domestic corporations in Japan holding directly or indirectly 10 per cent or more of the total number of its beneficial interests will be subject to income or corporation tax in proportion to the amount of beneficial interests held (as opposed to the foreign investment trust itself) with respect to profits gained through the management of trust property.

*Investment corporations and foreign investment corporations*

Investment corporations will, in principle, be subject to corporation tax with respect to profits gained through the management of assets thereof. If, however, an investment corporation meets certain requirements (including that its issued equity interests are held by 50 investors or more or by financial institutions only (e.g., securities companies, banks, insurance companies and other such entities), the amount of its equity interests to be solicited in Japan exceeds 50 per cent of the total amount thereof and the amount of distribution in a single business year exceeds 90 per cent of the total amount of its distributable profits in such business year), the amount of distribution will be included in the amount of loss when calculating the amount of income for such business year. As a result, the tax imposed on the gained profit will be minimised.

Under Japanese tax laws, Foreign investment corporations will be subject to corporation tax as a foreign corporation with respect to income obtained from sources in Japan (e.g., profits gained through managing assets located in Japan).

*Collective investment schemes*

Partnerships, *tokumei kumiai*, investment limited partnerships and limited liability partnerships will not be subject to taxation with respect to profits gained through the management of assets thereof.

Under Japanese tax laws, a foreign entity similar to the above will not, in principle, be subject to taxation with respect to profits gained through the management of assets thereof. There is however a possibility that such foreign entity will be deemed a foreign corporation by tax authorities due to that foreign entity's circumstances. In such event, the entity will be subject to corporation tax with respect to income from sources in Japan.

**ii Taxation of investment managers**

An investment manager that is a corporation will be subject to corporation tax, and an investment manager who is an individual will be subject to income tax, with respect to any management fees and other similar compensation received.

**iii Taxation of overseas investors**

A non-resident investor or a foreign corporate investor ('an overseas investor') will, in principle, be subject to income tax or corporation tax as follows with respect to income obtained from sources within Japan.

*Investors in investment trusts*

An overseas investor investing in an investment trust will currently, in principle, be subject to income tax at the rate of 7 per cent (in the case of equity investment trusts) or 15 per cent (in the case of bond investment trusts) with respect to distributions made by an investment trust.

In addition, overseas investors investing in investment trusts will currently, in principle, be subject to income tax or corporation tax at the rate of 7 per cent (in the case of equity investment trusts) or 15 per cent (in the case of bond investment trusts), with respect to capital gains from cancellation or redemption of beneficial interests.

### *Investors in investment corporations*

Currently, an overseas investor investing in an investment corporation will, in principle, be subject to income tax at the rate of 7 per cent with respect to distributions made by the investment corporation.

In addition, a non-resident individual investor investing in an investment corporation will currently, in principle, be subject to income tax at the rate of 7 per cent with respect to capital gains arising from the transfer of an equity interest. On the other hand, capital gains of foreign corporate investors investing in investment corporations arising from the transfer of an equity interest will currently, in principle, be included in the amount of profit in the business year to which the date of such execution of transfer occurs and be subject to corporation tax. Please note that the tax rate will be affected by the investment target of such investment corporation, the presence or absence of a permanent establishment in Japan maintained by such investor, and certain other circumstances.

### *Investors in collective investment schemes*

Under Japanese tax laws, an overseas investor investing in a partnership, investment limited partnership or limited liability partnership will currently, in principle, be subject to income tax at the rate of 20 per cent with respect to distributions of profits thereof, if such investor is deemed to maintain a permanent establishment in Japan by the relevant tax authorities. However, in the case of an investment limited partnership, if an overseas investor meets certain requirements (including that such investor is a limited partner and such investor is not the direct executor of the business of such investment limited partnership), such investor may be deemed not to maintain a permanent establishment in Japan if it files an application in relation thereto with the tax authority.

On the other hand, an overseas investor investing in a *tokumei kumiai*, with or without a permanent establishment in Japan, will currently, in principle, be subject to income tax at the rate of 20 per cent with respect to distributions of profits thereof.

## **VIII OUTLOOK**

### **i Real estate specified joint enterprises**

The MLIT is currently working towards the amendment of the RESJEA and the relevant regulations that enable an SPV to engage in a real estate specified joint enterprise more easily. It will be expected that it will be allowable to set up a bankruptcy remote structure in a real estate specified joint enterprise utilising an SPV if it delegates its entire investment authority to a business operator approved under the RESJEA.

### **ii Investment trusts and investment corporations**

The FSA is currently working towards the amendment of the ITICA applicable to investment trusts and investment corporations. According to a press release issued by the FSA in relation to the regulation of investment trusts, the issuance of different classes of beneficial interests in the same investment trust will be allowed, and the matters to be described in an investment report will be reviewed. In relation to the regulation of investment corporations, a rights offering will be introduced, and the restriction on

holding of shares, which is currently regarded as an obstacle to the acquisition of real properties located offshore through a SPV, will be reviewed.

**iii Pension funds**

As mentioned in Section I, *supra*, in response to the loss of approximately ¥200 billion of pension fund assets incurred due to a pernicious business operator, a tightening of regulations with regard to investment management businesses (in particular, the provision of discretionary investment management services to pension funds) and to the trust banks to which the pension funds' asset are entrusted is being discussed in the FSA. In fact, the FSA has just published a summary of the proposal for the revision of the regulations in relation to investment management business on 4 September 2012, in respect of which comments from the public are being sought. This proposal includes, among others, the expansion of the scope of the items disclosed in investment reports to be delivered to investors, enhancement of the role of trust banks involved in pension structures and the strengthening of penalties imposed for misconduct by discretionary investment managers. The regulations on asset management by pension funds in the MHLW are also being reviewed.

## Appendix 1

---

### ABOUT THE AUTHORS

#### **NAOYUKI KABATA**

##### *Anderson Mōri & Tomotsune*

Mr Naoyuki Kabata is a partner at Anderson Mōri & Tomotsune and advises on an extensive range of financial transactions and financial regulatory matters, including securitisation, asset management and investment funds, derivatives, real estate investment, project finance, private finance initiative and leveraged buyouts. Mr Kabata has also assisted both domestic and international clients in general corporate matters, such as corporate acquisition and turnaround, licensing transactions and intellectual property.

He graduated from Tokyo University in 1996 and received his LLM (banking and finance law) from University College London in 2004. He was also seconded with Slaughter and May in London from September 2004 to August 2005.

He has been a member of Dai-ni Tokyo Bar Association in Japan since 1998. He speaks Japanese and English.

#### **TAKAHIKO YAMADA**

##### *Anderson Mōri & Tomotsune*

Mr Takahiko Yamada has been engaged in a broad range of matters at Anderson Mōri & Tomotsune as an associate since he joined the firm in 2006. His practice areas are mainly financial regulation, asset management and investment funds, real estate investment and financial transactions. In addition to his professional experience at Anderson Mōri & Tomotsune, he served on secondment from July 2009 through February 2012 as Deputy Director within the Financial Markets Division, Planning and Coordination Bureau of the Financial Services Agency of Japan, where he was responsible for all aspects of law and regulations governing investment management business, including among others the Financial Instruments and Exchange Act, the Investment Trust and Investment Corporation Act and the Act on Securitization of Assets, and also participated in the development of new legislation.

Mr Yamada received his LLB from Keio University in 2004 and has been a member of the Dai-ni Tokyo Bar Association in Japan since 2006.



**ANDERSON MŌRI & TOMOTSUNE**

Izumi Garden Tower, 6-1

Roppongi 1-chome

Minato-ku

Tokyo 106-6036

Japan

Tel: +81 3 6888 1119/5861

Fax: +81 3 6888 3119/6861

naoyuki.kabata@amt-law.com

takahiko.yamada@amt-law.com

www.amt-law.com