The Asset Management Review

Third Edition

Editor
Paul Dickson

Law Business Research

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This article was first published in The Asset Management Review - Edition 3
(published in September 2014 – editor Paul Dickson).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-22-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

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

ADVOKATFIRMAET BA-HR DA

AL TAMIMI & COMPANY

ANDERSON MŌRI & TOMOTSUNE

ARTHUR COX

BARBOSA, MÜSSNICH & ARAGÃO

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URÍA MENÉNDEZ

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EDITOR'S PREFACE

Following several challenging years in the wake of the damage wrought by the global financial crisis, in 2013 markets showed signs that the tentative economic recovery is beginning to take hold. The asset management industry has seen some of the positive effects, with global funds under management at an all-time high. In the private equity sector, 2013 saw the highest aggregate amount of capital raised since 2008 and a record number of private equity buyout deals. With the global population becoming larger, older and richer, as well as government initiatives (such as the UK's automatic enrolment of employees into employer-sponsored pension schemes) potentially increasing funds under management even further, Bank of England Chief Economist Andrew Haldane's suggestion that we are entering an 'age of asset management' seems well justified.

The activities of the financial services industry remain squarely in the public and regulatory eye and the consequences of this focus are manifest in ongoing regulatory attention around the globe. Regulators are continuing to seek to address perceived systemic risks and preserve market stability through regulation, including, in Europe, the revised Markets in Financial Instruments package and the Alternative Investment Fund Managers Directive. Further scrutiny on a global level also appears likely. The Financial Stability Board and the International Organization of Securities Commissions recently consulted on proposed methodologies to identify global systemically important nonbank, non-insurer financial institutions (including investment funds). Industry stakeholders agree that regulatory change – in particular the volume, scope and complexity of new requirements – continues to be one of asset management's greatest challenges.

It is not only regulators who have placed additional demands on the financial services industry in the wake of the financial crisis; a perceived loss of trust has led investors to demand greater transparency around investments and risk management from those managing their funds. Investors and regulators are also demanding greater clarity on fees and commissions charged by fund managers for services provided.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with new regulatory and investor requirements and adapt to the changing geopolitical landscape. There does appear,

however, to be some cause for optimism. Confidence has begun to return across a number of areas and more positive assessments of the global economic outlook, reflected in a strong performance in equity markets over the period, raise the prospect of increased investment and returns. Although the challenges of regulatory scrutiny and difficult market conditions remain, there have also been signs of a return of risk appetite. The industry is not in the clear, but prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

This third edition of *The Asset Management Review* includes coverage of a number of additional jurisdictions, reflecting the global importance of the industry and this practice area. The publication of this edition is a significant achievement, which would not have been possible without the involvement of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Roberton and his team at Law Business Research for all their efforts in bringing the third edition into being.

The world of asset management is increasingly complex, but it is hoped that the third edition of *The Asset Management Review* will continue to be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson
Slaughter and May
London
September 2014

Chapter 16

JAPAN

Naoyuki Kabata and Takahiko Yamada[1]

I OVERVIEW OF RECENT ACTIVITY

The Japanese stock market has been steadily growing since the monetary easing policy was implemented by the government through the Prime Minister's 'Abenomics' package in the end of 2012. In January 2014, a tax exemption measure on income and capital gains arising from a particular securities investment for individuals (the Nippon individual savings account) – which is structured by reference to the individual savings account in the UK – was implemented. This measure is expected to boost investment in stocks, investment trusts, and Japan real estate investment trusts (J-REITs).

Asset management activities in Japan have also benefited, with the size of assets under management greatly expanding. The amount of assets managed by domestic discretionary investment managers and non-discretionary investment advisers has increased by more than ¥14 trillion in comparison with that during the corresponding period in 2013, and as of March 2014 the amount exceeds ¥197 trillion.[2] Also, as of March 2014, the total amount of investment trust units offered through public offerings has increased by more than ¥7.5 trillion compared with the corresponding period in 2013, while the total amount of investment corporation shares offered through public offerings has increased by approximately ¥800 billion compared with the corresponding period in 2013.[3]

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

2 According to the Japanese Investment Advisers Association (JIAA), a self-regulatory agency for business operators registered as investment management businesses (discretionary investment management services) and investment advisory businesses.

3 According to the Investment Trust Association, Japan (ITA), a self-regulatory agency for business operators registered as investment management businesses (investment trust management services and investment corporation asset management services).

On the other hand, Japan's asset management regulations have tended to be tightened in response to an increasing number of cases in which Japanese investors have suffered losses due to pernicious business operators. A scandal uncovered in April 2013 involved a business operator registered as a Type II financial instruments business under the Financial Instruments and Exchange Act of Japan (FIEA), MRI International, Inc, which solicited Japanese investments in US-established funds that primarily invest in medical account receivables. The business operator had allegedly provided Japanese investors with falsified information regarding the management of the relevant asset, and had misused the investors' funds to service interest payments to, and asset redemptions by, the investors in other funds. This resulted in the disappearance of more than ¥130 billion of investors' funds. In response to this scandal, the FIEA was amended in May 2014 to tighten the regulation of asset management activities in Japan, especially those of a Type II financial instruments business.

In addition, the Financial Services Agency of Japan (FSA) is currently contemplating a tightening of certain regulations in relation to special business activities for qualified institutional investors (QIIs) under Article 63 of the FIEA (Article 63 business) by amendments to the Cabinet Order for Enforcement of the FIEA, the Cabinet Office Ordinance on Financial Instruments Businesses, etc. and the Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc.

According to a press release issued by the FSA, the scope of non-QIIs who are permitted to invest in a fund to be solicited or managed by a business operator providing Article 63 businesses will be limited to those thought to have appropriate competence in investment (including, among others, legal entities registered as a business operators under the FIEA, business operators providing collective investment scheme management services, listed companies, joint-stock corporations incorporated under the Corporation Act of Japan whose capital amount exceeds ¥50 million, foreign companies and certain high-net-worth individuals) will be able to invest in the fund.

In response to the recent increase of insider-trading cases involving investment management companies, the monetary penalty imposed on asset managers that commit insider-trading offences in the course of managing customers' assets as investment management businesses has been increased by an amendment to the FIEA in June 2013. This amendment came into effect on 1 April 2014.

Meanwhile, to facilitate the introduction of risk money to emerging and growing companies, the May 2014 amendments to the FIEA provided regulations on crowd-funding businesses that solicit investments in the equity of a company or a partnership through the internet. This amendment is scheduled to come into effect by the spring of 2015.

Finally, the Investment Trust and Investment Corporation Act (ITICA), which regulates the establishment of investment trusts and investment corporations, was amended in June 2013. This amendment includes, among others, the easing of the regulations on an investment report to be prepared by an investment trust manager, the introduction of a rights offering of shares in an investment corporation, and the relaxation of the restrictions on holding of shares by an investment corporation. The amended ITICA will come into effect on 1 December 2014.

II GENERAL INTRODUCTION TO THE REGULATORY FRAMEWORK

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 clients' assets by exercising investment discretion (management businesses). Different regulations apply to each. The applicable regulations also vary depending on the types of assets 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.

i 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) must, in principle, be registered under the FIEA.[4] An individual and any corporation (regardless of corporate organisation) may register as an investment advisory business. To be qualified, the business operator must deposit ¥5 million with the governmental deposit office[5] and meet all the requirements for registration, such as the establishment of compliance systems through the maintenance of certain personnel structures appropriate for the running of an investment advisory business.[6]

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.[7] The business operator will also be required to prepare and maintain books and documents in relation to its investment advisory business,[8] and prepare business reports for each business year and submit them to the FSA.[9]

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.[10] 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.

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

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

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

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

8 Article 47 of the FIEA.

9 Article 47-2 of the FIEA.

10 Article 61, Paragraph 1 of the FIEA.

Advisory business regarding real properties

Conducting 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).[11] 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.[12]

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.[13] Such business operators will also be required to prepare and maintain books and documents in relation to its real properties advisory business,[14] and prepare business reports for each business year and submit them to the Ministry of Land, Infrastructure, Transport and Tourism of Japan (MLIT).[15] 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 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.

ii 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.[16] 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 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 acting as a settlor of such investment trust (investment trust management service); and

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

12 Article 6, Paragraph 1 of the Rules.

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

14 Article 27, Paragraph 1 of the Rules.

15 Article 28, Paragraph 1 of the Rules.

16 Article 28, Paragraph 4, and Article 29 of the FIEA.

d investment management businesses managing assets of a collective investment scheme, such as a partnership under the Civil Code, a silent partnership (a tokumei kumiai) under the Commercial Code, 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). After the May 2014 amendments to the FIEA come into effect in the spring of 2015, foreign companies that apply for this registration will be required to have a business office in Japan. These requirements are far more stringent than those in relation to the investment advisory business explained above.[17]

In this regard, a new category of investment management business has been introduced through amendments to the FIEA effective from 1 April 2012. This new category is the investment management business for qualified investors (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 now need 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).[18]

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).[19] Such business operators will also be required to prepare and maintain books

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

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

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

and documents in relation to its investment management business,[20] and shall prepare business reports for each business year and submit them to the FSA.[21]

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.[22]

Article 63 business exemption

A business operator intending to provide collective investment scheme management services in relation to a collective investment scheme involving fewer than 50 non-QIIs and at least one QII under Article 63 of the FIEA (Article 63 businesses) 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.[23] In this notification, it must disclose certain information, such as 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 applicant is also required to be officially certified and filed as an attachment to the notification.

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 the FIEA.[24] 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:[25]

a a business operator that delegates its entire investment authority to a discretionary investment manager registered as an investment management business under a

20 Article 47 of the FIEA.

21 Article 47-2 of the FIEA.

22 Articles 11 and 201 of the ITICA.

23 Article 63, Paragraph 1, Item 2 and Paragraph 2, and Article 63-3, Paragraph 1 of the FIEA. As explained above, the FSA is contemplating limiting the scope of this exemption.

24 Article 61, Paragraph 1 of the FIEA.

25 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, Items 10 and 13 of the Cabinet Office Ordinance on Definitions under Article 2 of the FIEA.

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:

- the 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.[26]

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.[27]

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 the implementation of transactions among its customers that would harm a particular customer's interests in favour of the interest of another customer.[28] Such business operator will also be required to prepare and maintain books and documents in relation to its real properties management business,[29] and prepare business reports for each business year to be submitted to the MLIT.[30]

Real estate specified joint enterprises

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 real estate specified joint enterprise) is, in principle, required to obtain governmental approval under the Real Estate Specified Joint Enterprise Act of Japan (RESJEA).[31]

26 Article 2, Paragraphs 5 and 8, and Article 3, Paragraph 1 of the Rules.

27 Article 6, Paragraph 2 of the Rules.

28 Article 23, Paragraph 3, Item 6 of the Rules.

29 Article 27, Paragraph 1 of the Rules.

30 Article 28, Paragraph 1 of the Rules.

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

To obtain 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.[32]

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[33] and the proper segregation of asset management duties.[34] Such business operators must also prepare and maintain books and documents relating to their real estate specified joint enterprises[35] and business reports for each business year to be submitted to the MLIT.[36]

Under the amended RESJEA effective from 20 December 2013, it is possible for a special purpose vehicle (SPV) to engage in a real estate-specified joint enterprise by filing a relatively simple notification with MLIT rather than obtaining governmental approval provided that the SPV meets certain requirements, such as delegating the entire management authority of its real properties to a business operator approved to engage in a real estate specified joint enterprise, and investors are limited to only certain categories of relatively sophisticated investors (e.g., a QII, a listed company, a joint-stock corporation incorporated under the Corporation Act of Japan whose capital amount is ¥500 million or more, and a foreign company).

Investment corporation asset management services

Investment management businesses under the FIEA primarily relate to management businesses regarding securities or derivatives. Therefore, regulations in relation to an 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 business 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.[37] 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.[38]

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

32 Article 7 of the RESJEA.

33 Article 18 of the RESJEA.

34 Article 27 of the RESJEA.

35 Article 32 of the RESJEA.

36 Article 33 of the RESJEA.

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

38 Article 199 of the ITICA.

services and regulated under the FIEA and ITICA.[39] Such a business is, however, currently not prevalent in Japan.

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) must obtain governmental approval under the Act for Regulation of Business Concerning Commodities Investment.[40]

To obtain such approval, a business operator must meet certain requirements, such as the entity requirement (i.e., it must be 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.[41]

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.[42] The business operator will also be required to prepare and maintain books and documents relating to its commodities management business.[43]

Investment corporation asset management service and investment trust management services

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.[44]

Other structures

In some cases, businesses similar to a management business are conducted by using a specified purpose company under the Act on Securitisation of Assets. However, as these

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

40 Article 2, Paragraphs 2 and 3, and Article 3 of the Act for Regulation of Business Concerning Commodities Investment.

41 Articles 3 and 6 of the Act for Regulation of Business Concerning Commodities Investment.

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

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

44 Article 223-3, Paragraphs 2 and 3 of the ITICA.

structures were originally intended for the securitisation of particular assets and not for asset management, they are not discussed in detail in this chapter.

iii Filing requirements in respect of funds

Investment trust

Before the establishment of an investment trust, certain information must be filed with the FSA in relation to the trust deeds of the investment trust.[45] 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.[46]

Investment corporation

Before the establishment of an investment corporation, certain information must be filed regarding the underlying funds of the investment corporation with the FSA.[47] 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.[48]

iv 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 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.[49]

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.[50]

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

45 Article 4, Paragraph 1 of the ITICA.

46 Article 58, Paragraph 1 of the ITICA.

47 Article 69, Paragraph 1 of the ITICA.

48 Article 220, Paragraph 1 of the ITICA.

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

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

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.[51]

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.[52]

In this regard, in relation to liquid interests in funds, solicitation of investments in the beneficial interests in an investment trust or foreign investment trust by the issuer itself, and 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).[53] After the May 2014 amendments to the FIEA come into effect (i.e., the spring of 2015), foreign companies that apply for this registration will be required to have a business office in Japan.

The May 2014 amendment also introduced the new categories of: (1) the Type I financial instruments business, which only engages in crowd-funding activities and that solicits investments in non-listed shares in a joint-stock corporation incorporated under the Corporation Act of Japan through the internet (Type I crowd-funding service); and (2) the Type II financial instruments business, which only engages in crowd-funding activities that solicits investments in non-listed interests in certain partnerships through the internet (Type II crowd-funding service). The eligibility requirements under each new category are more relaxed than those for a 'normal' Type I and Type II financial instruments business. This amendment is scheduled to come into effect by the spring of 2015. See Section VIII.ii, *infra* for details.

A business operator registered as a Type I or Type II financial instruments business will be subject to certain codes of conduct in relation to its financial instruments business, such as not delivering false information to customers[54] and not compensating customers for their losses.[55] Such business operator will also be required to prepare and maintain

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

52 Article 28, Paragraph 2, Items 1 and 2, and Article 29 of the FIEA.

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

54 Article 38, Item 1 of the FIEA.

55 Article 39 of the FIEA.

books and documents in relation to its financial instruments business,[56] and to submit business reports for each financial year to the FSA.[57]

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 under Article 63 of the FIEA.[58] This notification is essentially the same as that previously described (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.[59]

Foreign securities firm exemption

An entity 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 actions such 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, 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.

v 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 asset management activities. The Securities and Exchange Surveillance Commission of Japan (the SESC), a division of the FSA, performs on-site and off-site inspections of asset management activities based on the authority delegated to it by the Commissioner of the FSA. Each local finance bureau is also authorised to conduct inspections and supervisions

56 Articles 46-2 and 47 of the FIEA.

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

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

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

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 the wholesale market

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.[60] 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 invest in funds (e.g., a separately managed account). In Japan, most pension funds enter into discretionary investment management contracts 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 the 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.[61] 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 tightened the rules governing the sale of complex products (such as double-decker funds) to retail investors in 2012.

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.

60 Such as the Cayman Islands, Bermuda, the British Virgin Islands and Luxembourg.

61 Ibid.

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 and the ITA, conducted in March 2014:

a the total amount of assets under discretionary investment management services is more than ¥168 trillion;

b the total amount of assets of investment trusts offered by way of public offering is more than ¥80 trillion;

c the total amount of assets of investment trusts offered by way of private placement is more than ¥40 trillion;

d the total amount of assets of investment corporations offered by way of public offering is more than ¥5.8 trillion;

e the total amount of assets of investment corporations offered by way of private placement is more than ¥420 billion; and

f the total amount of assets under investment advisory businesses is more than ¥29 trillion.

As regards the spectrum of investors, Japanese institutional investors, especially pension funds, are the major players in terms of 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., more than ¥168 trillion), the total amount of assets from Japanese investors is approximately ¥140 trillion (of which the total amount of assets from Japanese pension funds is approximately ¥104 trillion), and the total amount of assets from foreign investors is approximately ¥24 trillion (as of March 2014; JIAA).

V KEY TRENDS

Since 2010, the FSA has been conducting annual fund monitoring surveys to collect information regarding asset management activities in Japan. As a result of these surveys, 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., the investment management business or Article 63 business; it should be noted that the investment advisory business is not subject to such survey) is required to submit a report stating the name and form of the fund, certain information regarding investors in the fund, the amount of assets under management, the investment target of the fund and certain other details.

In response to the recent scandals, such as the 2012 AIJ scandal (in which an investment advisory company, AIJ Investment Advisors Co, Ltd, reportedly falsified the results of its management of a number of employees' pension funds to conceal losses of

approximately ¥150 billion arising from failed investments, while continuing to solicit employees' pension funds) and the MRI scandal mentioned in Section I, *supra*, the SESC is conducting intensive inspections of business operators that provide discretionary investment management services as well as Type II financial instruments business to verify their business status and whether such operators' businesses are compliant with the relevant laws and regulations. Furthermore, according to the Securities Inspection Policy and the Programme for 2014 issued by the SESC, it will focus on examining matters that include the legal compliance of business operators engaging in investment advisory businesses, collective investment scheme management services or Article 63 businesses, following the recent increase in the number of cases involving legal violations by such business operators. The SESC will also enhance its cooperative relationships with overseas regulators and investigative authorities to facilitate its inspections of overseas business operators engaging in asset management business in Japan and Japanese business operators with overseas offices.

VI SECTORAL REGULATION

i Insurance

The management of cash received by insurance companies as, *inter alia*, insurance premiums is regulated and subject to the restrictions set out in the Insurance Business Act of Japan (IBA).[62] For instance, the type 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 and shares issued by one particular entity may not exceed more than 10 per cent of the total amount of assets of an insurance company).[63] 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 provisions requiring insurance companies to enact policies of overall asset management (including basic policies, projections and risk management plans) themselves, even if they delegate asset management to a discretionary investment manager.[64]

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 (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.[65] If a pension fund enters into a discretionary

62 Article 97, Paragraph 2 of the IBA.

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

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

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

investment management contract for its asset management, it will also be required to enter into a trust agreement with a trust bank for administration of its assets.[66]

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.[67] 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.[68] A pension fund is also subject to certain codes of conduct, such as the duty of investment diversification, under guidelines drawn up by the Ministry of Health, Labour and Welfare.

In response to the AIJ scandal (see Section V, *supra*), the regulations regarding the management of assets of a pension fund have been tightened. Pursuant to the amendments to the relevant cabinet office ordinance and guidelines in September 2012, employees' pension funds must now formulate policies regarding asset allocation and restrictions against the concentration of investments as a basic policy to prevent an excessive amount of its asset management being delegated to any one business operator (such as business operators that provide discretionary investment management services and trust banks).

iii Real property

As described in Section II.i, *supra*, management businesses in relation to real properties are 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 they 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 the 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.[69] The RESJEA and the regulations in relation to investment corporations (i.e., the FIEA and ITICA) have recently been amended. See Section II.i, *supra* and VIII.iii, *infra*.

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, *inter alia*, 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.

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

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

68 Article 136-5 of the EPIA.

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

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

VII TAX LAW

Below is a summary of the general taxation system of Japan currently in effect in relation to asset management activities. Tax treatment may vary depending on the particular status of the investor, the 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 applies 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), 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, silent partnerships, 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 on its 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 a rate 15 per cent 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 a rate of 15 per cent, 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 a rate of 15 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 a rate of 15 per cent with respect to capital gains arising from the transfer of an equity interest. 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. 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 a 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 silent partnership, with or without a permanent establishment in Japan, will in principle be subject to income tax at a rate of 20 per cent with respect to distributions of profits thereof.

VIII OUTLOOK

i Tightening of the regulation of asset management activities

As mentioned in Section I, *supra*, in response to the MRI scandal, the FIEA was amended in May 2014 to tighten the regulation of asset management activities in Japan, especially those of a Type II financial instruments business. The amendments bring some changes. For example, a foreign company intending to be registered as an investment management business or a Type II financial instrument business will be required to have a business office in Japan; and a business operator registered as a Type II financial instruments business will be prohibited from soliciting investments in interests in certain partnerships with knowing that the investors' funds are misused. The FSA is currently preparing amendments to the relevant Cabinet Order and Cabinet Office Ordinance for

setting out the details of the above regulation. These amendments are scheduled to come into effect in the spring of 2015.

ii Introduction of crowdfunding regulations

As mentioned in Section I, *supra*, regulations on crowd-funding businesses that solicit investments in the equity of a company or a partnership through the internet have been introduced by the May 2014 amendments to the FIEA to enhance the introduction of risk money to emerging and growing companies. Under the amended FIEA, a Type I crowdfunding service, which is a subcategory of Type I financial instruments businesses, may only engage in crowdfunding activities that solicit investments in non-listed shares in a joint-stock corporation incorporated under the Corporation Act of Japan through the internet. Meanwhile, a Type II crowdfunding service, which is a subcategory of Type II financial instruments businesses, may only engage in crowdfunding activities that solicit investments in non-listed interests in certain partnerships through the internet. Under these services, the amount of each offering that the registered business operator may solicit should be less than ¥100 million and the amount of investment made by each investor should not exceed ¥500,000. The eligibility requirements under each new category are more relaxed than those for a 'normal' Type I and Type II financial instruments business. For instance, business operators intending to engage only in a Type I crowdfunding service need to meet a less stringent minimum capital amount requirement (i.e., ¥10 million or more, in each case), and business operators intending to engage only in a Type II crowdfunding service need to meet a relaxed minimum capital amount requirement (i.e., ¥5 million or more, in each case). This amendment is scheduled to come into effect by the spring of 2015.

iii Investment trusts and investment corporations

As explained in Section I, *supra*, the ITICA was amended in June 2013. Pursuant to such amendments, the requirement for investment trusts to obtain a written shareholders' resolution for material changes to certain matters described in the trust deed and for mergers between two investment trusts has been eased. For instance, if a merger has only a slight impact on the profits of investors, a written shareholders' resolution passed by such investment trust for the merger will not be required. Additionally, the requirement for investment trusts to provide investment reports to investors has been relaxed. Business operators engaging in an investment trust management service will be able to provide such investment reports to investors by electronic means (e.g., posting them on their websites) and will only need to provide reports stating material matters regarding such investment trust to investors in writing. With regard to investment corporations, fundraising by way of a rights offering has been introduced. Additionally, a restriction against the holding of shares, which was regarded as an obstacle to the acquisition of real properties located offshore through an SPV, has been relaxed. These amendments will come into effect on 1 December 2014.

Insider trading regulations have also been introduced in relation to the trading of listed securities issued by J-REITs by way of an amendment to the FIEA in June 2013. This amendment came into effect on 1 April 2014.

Appendix 1

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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 (in banking and finance law) from University College London in 2004. He was also seconded to Slaughter and May in London from September 2004 to August 2005.

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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 to February 2012 as Deputy Director of 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, *inter alia*, the Financial Instruments and Exchange Act, the Investment Trust and Investment Corporation Act and the Act on Securitisation 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.

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