

FINANCIAL SERVICES COMPLIANCE

Japan



Financial Services Compliance

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the regulatory framework; registration and authorisation regimes; enforcement; compliance programmes; cross-border regulation and international standards; and other recent trends.

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REGULATORY FRAMEWORK

Regulatory authorities

What national authorities regulate the provision of financial products and services?

Financial products and services in Japan fall principally under the regulatory oversight of the Financial Services Agency of Japan (JFSA). The JFSA is authorised to propose and coordinate laws and regulations relating to the provision of financial products and services, and to inspect and supervise business operators providing such products and services.

The Securities and Exchange Surveillance Commission of Japan (SESC), a sub-division of the JFSA, is delegated with the authority to perform both on- and off-site inspections of business operators providing financial products and services. Local finance bureaux (LFBs) in Japan are similarly authorised to inspect and supervise such business operators operating within the ambit of their jurisdiction and to review disclosure documents (such as securities registration statements; annual, semi-annual and quarterly securities reports; and large shareholding reports) submitted to them under the Financial Instruments and Exchange Act of Japan (FIEA).

Products and services that are linked to commodities and commodities derivatives are regulated by the Ministry of Economy, Trade and Industry of Japan and the Ministry of Agriculture, Forestry and Fisheries of Japan, depending on the type of commodities involved. As a practical matter, however, such products and services generally are not considered financial products and services. Accordingly, this chapter does not discuss the regulatory framework surrounding such products and services in detail.

Law stated - 09 January 2022

What activities does each national financial services authority regulate?

Activities regulated by the JFSA are generally those governed by the FIEA. The FIEA categorises these activities into four types of business (each a Financial Instruments Business):

- Type I Financial Instruments Business (Type I Business);
- Type II Financial Instruments Business (Type II Business);
- Investment Advisory and Agency Business (IAA Business); and
- Discretionary Investment Management Business (DIM Business).

Type I Business includes the following activities:

1. sale and purchase of, or dealing in, exchange-traded derivatives related to Type I Securities (as defined below);
2. provision of intermediary, brokerage and proxy services in respect of the activities described in (1);
3. provision of consignment services in respect of the activities covered under (2);
4. provision of brokerage services for the clearing of Type I Securities;
5. secondary distribution of Type I Securities;
6. dealing in public offerings, private placements or secondary distributions of Type I Securities;
7. securities underwriting;
8. acting as principal or provision of intermediation, brokerage or proxy services in over-the-counter (OTC) derivatives transactions; and
9. acceptance of fund, securities or certificate deposits from customers in connection with any securities-related business, and transfer of bonds and other instruments into customers' accounts.

Type II Business includes the following activities:

1. sale and purchase of, or dealing in, exchange-traded derivatives related to Type II Securities (as defined below);
2. provision of intermediary, brokerage and proxy services in respect of the activities described in (1);
3. provision of consignment services in respect of the activities described in (2);
4. provision of brokerage services for the clearing of Type II Securities;
5. secondary distributions of Type II Securities;
6. dealing in public offerings, private placements or secondary distributions of Type II Securities;
7. public offerings or private placements (as the issuer) of certain securities related to investment funds; and repurchase of such issued securities, for purposes other than the resale of such securities;
8. dealing in exchange-traded derivatives that are not related to securities;
9. providing intermediary, brokerage and proxy services in respect of the activities described in (8);
10. providing consignment services in respect of the activities described in (9); and
11. providing brokerage services for the clearing of non-securities related transactions.

IAA Business includes the following activities:

- provision of non-discretionary investment advice in relation to securities or derivative transactions, for which advisory fees are payable based on a non-discretionary investment advisory contract; and
- provision of intermediary or agency services for the execution of a non-discretionary investment advisory contract or DIM contract.

DIM Business includes the following activities in relation to investment in securities or derivative transactions:

- managing the assets of an investment corporation established under the Investment Trusts and Investment Corporations Act of Japan (ITICA) based on an asset management contract with the investment corporation;
- managing the assets under a DIM contract;
- managing the assets of an investment trust established under the ITICA and acting as a settlor for such investment trust; and
- managing the assets of a collective investment scheme (such as a limited partnership established under the laws of Japan or any other jurisdiction) as a general partner of such a scheme.

Law stated - 09 January 2022

What products does each national financial services authority regulate?

The JFSA regulates products related to securities and derivative transactions.

Securities are defined in the FIEA as comprising:

- liquid securities, including but not limited to bonds, stocks, beneficial interests in investment trusts established under the ITICA or the laws of any other jurisdiction, shares in investment corporations established under the ITICA or the laws of any other jurisdiction and security tokens that constitute electronically recorded transferable rights (Type I Securities); and

- illiquid securities, including but not limited to interests in partnerships established under the laws of Japan or any other jurisdiction (Type II Securities).

Derivatives are defined in the FIEA as comprising:

- exchange-traded derivatives; and
- OTC derivatives transactions, which cover a broad range of derivative transactions (such as transactions involving foreign exchange (FX), currency, interest rate, credit and cryptoassets), but exclude:
 - physically settled FX forward and FX swap transactions; and
 - OTC derivative transactions that are not linked to financial instruments.

However, certain commodities derivatives are regulated under the Commodities Futures and Exchange Act .

Further, high-frequency traders (including foreign traders) conducting regulated algorithmic trading (including both the sale and purchase of securities and exchange-traded derivatives) at local financial instruments exchanges or proprietary trading system markets based in Japan are subject to registration requirements. Prerequisites for such registration do not include the establishment of an office in Japan. However, having a representative or agent in Japan is necessary. Local securities firms are prohibited from accepting orders from unregistered high-frequency traders.

Law stated - 09 January 2022

Authorisation regime

What is the registration or authorisation regime applicable to financial services firms and authorised individuals associated with those firms? When is registration or authorisation necessary, and how is it effected?

Registration requirements

A business operator wishing to engage in the Financial Instruments Business is, in principle, required under the FIEA to be registered as a financial instruments business operator (FIBO) beforehand. To successfully register as a FIBO, a business operator has to meet certain conditions, including but not limited to:

- having a business office and representative in Japan (inapplicable to an IAA Business);
- meeting minimum capital and net worth requirements (specifically, at least ¥50 million (or more, in certain cases) in respect of Type I Business, at least ¥10 million in respect of a Type II Business and ¥50 million (or less, where certain conditions apply) in respect of a DIM Business, but inapplicable to an IAA Business); and
- meeting certain internal system requirements, such as having an appropriate organisational structure in place.

Applications for FIBO registration have to be filed with the relevant LFB. In practice, applicants are generally required to consult with the relevant LFB to discuss the details of their proposed businesses, the appropriateness of their organisational structure and internal business rules, and other matters, and to obtain informal regulatory approval for filing before submitting a formal application. Assuming this informal consultation process (which may take a few months) is observed, two months will typically be required from the date of submission of a formal application to the date of completion of registration, unless amendments to the application forms or supporting documents are necessary, in which case more time would be needed.

Foreign entities engaging in a business similar to an IAA Business, a DIM Business or certain Type II Businesses in its home jurisdiction, and certain entities and persons associated therewith (such as its parent and subsidiaries) may receive English-language support in their applications for registration as an IAA Business, a DIM Business and the relevant Type II Business from the Financial Market Entry Office (kyoten kaisetsu support office) (FMEO). The FMEO was jointly established by the JFSA and LFBs in January 2021 to handle registration (including the aforementioned informal consultation process) and supervision of foreign asset management firms that are new to the Japanese market. The FMEO functions as a single point of contact with the capacity to conduct communications in English. Foreign entities (or their local affiliates in Japan, as applicable) may, with the support of the FMEO, prepare and file applications for registration as an IAA Business, a DIM Business and the relevant Type II Business in English.

Exemption from registration requirements

Under the FIEA, business operators who satisfy certain requirements are permitted to engage in certain Financial Instruments Businesses without registration as a FIBO. The main registration exemptions are discussed below.

Article 63 business exemption

Registration exemptions are available under article 63 of the FIEA to general partners of partnerships with:

- at least one qualified institutional investor (such as a FIBO engaging in a Type I or DIM Business, a bank or an insurance company); and
- less than 50 eligible non-qualified institutional investor investors (which are limited to persons such as the general partner itself, a parent or a subsidiary of the general partner, officers and employees of the general partner, its parent or subsidiary, and certain high-net-worth individuals).

Specifically, such general partners may:

- solicit Japan residents for investments in interests in their partnerships without registration as a Type II Business; and
- manage the assets of their partnerships for investors resident in Japan without registration as a DIM Business.

However, an article 63 notification has to be filed with the relevant LFB before the commencement of any investment solicitation activities.

Foreign investor exemption

A general partner that satisfies certain requirements (including but not limited to having an appropriate organisational structure and having an office in Japan) may:

- solicit investments in partnership interests from foreign investors and others – including certain Japan residents, such as qualified institutional investors – without registration as a Type II Business; and
- manage the assets of such a partnership without registration as a DIM Business by filing the requisite notification with the relevant LFB before commencing investment solicitation activities.

To qualify for this exemption, a general partner must ensure that more than 50 per cent of the money invested in the partnership is sourced from residents outside Japan.

De minimis exemption

A general partner of a partnership established under the laws of a foreign jurisdiction is permitted to manage the assets of such a partnership, without registration as a DIM Business or filing an article 63 notification, if all of the following conditions are met:

- all the Japan-resident investors who have directly and indirectly invested in the partnership are qualified institutional investors;
- the partnership has fewer than 10 Japan-resident investors; and
- the total partnership contributions from such Japan-resident investors is less than one-third of the total contributions from all investors in the partnership.

Foreign securities firm exemption

A foreign entity engaging in the securities business in a foreign jurisdiction in accordance with the laws of the relevant foreign jurisdiction is permitted, without registration as a Type I or Type II Business, to engage in certain securities-related activities, provided such activities are carried on from offices outside Japan and with limited categories of counterparties.

Foreign investment adviser and manager exemption

A foreign entity licensed to engage in a non-discretionary investment advisory business or a discretionary investment management business in its home jurisdiction is permitted, without registration as an IAA Business or DIM Business, to provide a FIBO engaging in the DIM Business with non-discretionary investment advisory services or discretionary investment management services.

However, such foreign investment advisers and managers are still prohibited from providing non-discretionary investment advisory services and DIM services to FIBOs registered to engage in the IAA Business.

Temporary foreign investment manager exemption

A foreign entity licensed to engage in a discretionary investment management business in the prescribed jurisdictions (ie, the United States, the United Kingdom, Australia, Singapore, Switzerland, Germany, France and Hong Kong) who satisfies certain requirements (including but not limited to having operations in any of the aforementioned jurisdictions for over three years, having an appropriate organisational structure and having an office in Japan) is permitted, without registration as a DIM Business, to provide foreign investors and others (including FIBOs engaging in the DIM Business) with certain discretionary investment management services through its local office in Japan for up to five years by filing the requisite notification with the relevant LFB. To qualify for this exemption, no more than 50 per cent of the assets under management must be invested in Japanese stocks, among others, with voting rights.

A foreign entity that has filed the aforementioned notification may also solicit the following from foreign investors and others:

- investments in interests in foreign investment trust;
- foreign investment corporations; and

- foreign collective investment schemes (such as limited partnerships established under the laws of foreign jurisdictions) that will be managed by the relevant foreign entity without registration as a Type I or Type II Business.

This exemption was introduced as a temporary measure that will be available until 21 November 2026 and the aforementioned notification must be filed by that date.

Non-securities related OTC derivatives exemption

A person will not be deemed to be engaging in the Financial Instruments Business merely by acting as a principal or providing intermediation, brokerage or proxy services in non-securities-related OTC derivative transactions (except in cases where such derivative transactions are subject to certain statutory requirements) where the counterparties are limited to:

- Type I Business FIBOs;
- financial institutions registered to conduct securities-related business under the FIEA;
- qualified institutional investors;
- stock corporations with paid-up capital of at least ¥1 billion; and
- an overseas equivalent of any of the above.

Registration as sales representatives

Under the FIEA, the officers and employees of a FIBO who engage in marketing activities such as the sale and purchase of Type I Securities – or dealing in the public offering, private placement or secondary distribution of Type I Securities – are required to be registered as sales representatives with the Japan Securities Dealers Association (JSDA), a self-regulatory body delegated with the authority to handle registration affairs by the JFSA. Persons seeking to be registered as sales representatives are required to pass a qualification examination administered by the JSDA.

Law stated - 09 January 2022

Legislation

What statute or other legal basis is the source of each regulatory authority's jurisdiction?

The JFSA, the SESC and LFBs derive their regulatory authority over financial instruments businesses from the FIEA, and cabinet orders and ordinances issued thereunder (together with the FIEA: the FIEA Regulations).

Law stated - 09 January 2022

What principal laws and financial service authority rules apply to the activities of financial services firms and their associated persons?

The financial services industry in Japan is principally regulated by:

- the FIEA Regulations; and
- the Comprehensive Guidelines for Supervision of FIBOs, etc (the Supervisory Guidelines), issued by the JFSA.

The Supervisory Guidelines set forth the supervisory and inspection principles adopted by the relevant regulator toward FIBOs and the like. Accordingly, FIBOs and persons associated therewith are compelled, as a matter of practice, to comply with the Supervisory Guidelines.

Additionally, FIBOs and persons associated therewith are required to comply with the Civil and Criminal Codes of Japan.

Law stated - 09 January 2022

Scope of regulation

What are the main areas of regulation for each type of regulated financial services provider and product?

The main areas of FIEA Regulations in respect of FIBOs relate to:

- continuing registration requirements;
- codes of conduct; and
- the requirement to maintain proper books and records.

These are briefly discussed in turn, as follows.

To maintain the validity of their registrations:

- FIBOs registered as Type I Businesses are required to maintain both capital and net worth of at least ¥50 million (or more, in certain cases), respectively, as well as keep their capital adequacy ratios at 120 per cent or more;
- FIBOs registered as Type II Businesses are required to maintain capital of at least ¥10 million; and
- FIBOs registered as DIM Businesses are required to maintain both capital and net worth of ¥50 million (or less, where certain conditions apply), respectively.

These continuing registration requirements have been put in place to ensure the continued financial soundness of the registered FIBOs.

All FIBOs are also required to adhere to certain codes of conduct that seek to protect the interests of investors, including but not limited to the duty of loyalty, the duty of care of a good manager and the prohibition against compensating customers for their losses, as applicable to the services provided by the FIBOs.

Additionally, all FIBOs are required to prepare and maintain books and other records on their Financial Instruments Business, based on which their annual business reports will be prepared and submitted to the regulator.

These regulations do not apply to business operators relying on certain exemptions in the authorisation regime. However, a general partner who files an article 63 notification with the regulator is subject to certain codes of conduct in relation to the business within the scope of the article 63 business exemption, including but not limited to refraining from:

- engaging in transactions between funds that are managed by the same general partner; and
- compensating customers for their losses.

Such a general partner is also required to prepare and maintain books and records on its business under the article 63

business exemption, based on which its annual business reports will be prepared and submitted to the regulator.

Law stated - 09 January 2022

Additional requirements

What additional requirements apply to financial services firms and authorised persons, such as those imposed by self-regulatory bodies, designated professional bodies or other financial services organisations?

The self-regulatory bodies in Japan's financial services industry include:

- the JSDA;
- the Type II Financial Instruments Firms Association;
- the Japan Investment Advisers Association; and
- the Investment Trusts Association.

These organisations regulate the activities of their members and registration as a FIBO under the FIEA is generally a prerequisite of membership in these organisations. A FIBO is not legally obliged to be a member of any such organisation. In practice, however, FIBOs (other than those engaging in the IAA Business) are required to establish internal business rules that are in line with the rules and regulations established by a self-regulatory body. Driven by their need to establish appropriate alternative dispute resolution measures, FIBOs also find it necessary to join self-regulatory bodies, membership of which gives them the right to utilise the facilities of the Financial Instruments Mediation Assistance Center of Japan.

The rules imposed by such self-regulatory bodies mainly regulate the conduct of FIBOs from the perspective of investor protection. The rules of a self-regulatory body only apply to its members. Such rules do not have the force of law and violations would not necessarily result in official sanctions by the JFSA.

Law stated - 09 January 2022

ENFORCEMENT

Investigatory powers

What powers do national financial services authorities have to examine and investigate compliance? What enforcement powers do they have for compliance breaches? How is compliance examined and enforced in practice?

The Financial Instruments and Exchange Act of Japan (FIEA) gives the Financial Services Agency of Japan (JFSA) the power, when necessary and appropriate for the public interest or protection of investors, to order a financial instruments business operator (FIBO) to submit reports or materials on the business and assets of the FIBO, and to inspect the FIBO's business operations, assets, books of accounts and other documents. The Securities and Exchange Surveillance Commission of Japan (SESC) is also empowered to perform on- and off-site inspections of a FIBO. Similarly, local finance bureaux (LFBs) have the right to conduct inspections of FIBOs and to provide them with regulatory supervision. Where a FIBO is deemed to have misconducted itself based on the findings in such inspections, the JFSA may impose administrative sanctions on the FIBO for the purpose of remedying such misconduct.

Law stated - 09 January 2022

Disciplinary powers

What are the powers of national financial services authorities to discipline or punish infractions?
Which other bodies are responsible for criminal enforcement relating to compliance violations?

The FIEA empowers the JFSA to impose administrative sanctions on FIBOs that violate applicable statutory requirements. However, the JFSA, the SESC and LFBs do not have the power to impose criminal sanctions on financial business operators. Criminal sanctions are instead imposed by the Public Prosecutors Office through criminal procedures.

Law stated - 09 January 2022

Tribunals

What tribunals adjudicate financial services criminal and civil infractions?

Japanese law does not provide for a separate tribunal for the adjudication of crimes or civil infractions related to financial services. Such wrongdoings are adjudicated by ordinary courts of law.

Law stated - 09 January 2022

Penalties

What are typical sanctions imposed against firms and individuals for violations? Are settlements common?

FIBOs that violate applicable laws and regulations would typically be subject to administrative sanctions imposed by the JFSA for the purpose of remedying the relevant violation. Where the violation is serious and malicious, the FIBO may have its registration revoked or be ordered to suspend all or part of its business for a period not exceeding six months. Depending on the nature of its violation, a FIBO may also be subject to criminal sanctions.

A non-exempt financial service business operator that operates without registration as a FIBO is punishable with a fine not exceeding ¥500 million. Additionally, the responsible officers and employees of such business operators are punishable with imprisonment for a term not exceeding five years or a fine not exceeding ¥5 million, or both.

Japanese law does not provide for a system of settlement in respect of violations of the FIEA. In practice, when determining the appropriate administrative action to take, the JFSA will take into account any voluntary remedial efforts made by the FIBO (based on prior consultation with the JFSA) before imposing any administrative sanctions.

Law stated - 09 January 2022

COMPLIANCE PROGRAMMES

Programme requirements

What requirements exist concerning the nature and content of compliance and supervisory programmes for each type of regulated entity?

Every financial instruments business operator (FIBO) is required to establish internal compliance programmes that are in line with the Comprehensive Guidelines for Supervision of FIBOs, etc (the Supervisory Guidelines). Such compliance programmes involve the following (among others):

- establishment of a concrete plan for the implementation of a legal compliance system;
- development and implementation of a compliance manual on the applicable code of conduct;
- provision of compliance training for staff;
- periodic review of the effectiveness of the compliance programme; and
- periodic assessment of the compliance programme by way of internal audit.

Further, a FIBO is required to put a corporate governance framework in place that enables its chief and other compliance officers to perform their compliance functions independently from the influence of departments that handle business operations. Typically, legal and compliance risks will be subject to the review of the legal and compliance department.

Law stated - 09 January 2022

Gatekeepers

How important are gatekeepers in the regulatory structure?

Every FIBO is required to establish a system of proper checks and balances. As the effectiveness of such a system rests with the gatekeepers, their independence from the influence of departments that handle business operations is essential to their ability to perform their gatekeeping functions effectively.

An independent internal audit department will usually also be established to audit the business activities of the FIBO and to assess the effectiveness of the FIBO's internal control functions. An internal audit department would usually report directly to the FIBO's board of directors.

Law stated - 09 January 2022

Directors' duties and liability

What are the duties of directors, and what standard of care applies to the boards of directors of financial services firms?

- The duty of loyalty requires the director to comply with applicable laws, the corporation's constitutional documents, and board and shareholder resolutions, and to perform his or her duties faithfully for the benefit of the corporation.
- The duty of care of a good manager requires the director to abide by the terms of his or her mandate and to perform his or her duties with the care of a good manager.
- The duty of monitoring and supervision, applicable to the board of directors as a whole, requires the board to monitor and supervise directors in the performance of their duties. As part of this duty, the board will make suggestions and take action to prevent any director from engaging in any illegal or other activity that may be detrimental to the corporation.
- The duty of reporting requires a director to report to the board of directors upon discovery of any fact that may be detrimental to the corporation.

A director who breaches any of his or her duties is liable to the corporation for the resulting damages sustained by the corporation. Directors who are deemed jointly in breach will be jointly and severally liable.

The Companies Act of Japan provides for criminal fines of up to ¥10 million or penal servitude for periods of up to 10

years in cases of serious and deliberate breaches of trust against the corporation and causing damages to the corporation. Further, non-penal administrative fines in amounts not exceeding ¥1 million are, in principle, assessable for failure by directors to discharge certain obligations stipulated in the Companies Act.

Non-director senior managers do not assume the duties of directors as described above. The scope of the duties of each senior manager will be governed by the contract between the corporation and the senior manager. If the relevant contract is an employment contract, the senior manager would assume the duties as an employee (subject to applicable labour laws).

Law stated - 09 January 2022

When are directors typically held individually accountable for the activities of financial services firms?

A director would typically be held individually accountable if any violation of applicable laws and regulations is attributable to such a director, such as where the director has authorised any falsification of accounts or entry into fraudulent transactions.

Japanese courts are generally understood to have demonstrated in judicial precedents to date that directors are recognised as being vested with broad discretion in the performance of their duties and, accordingly, that judicial post-factum intervention should not be excessive. As a result, Japanese courts tend not to hold directors individually liable for business decisions made in accordance with the following principles:

- when, in making decisions, the board has used efforts to avoid mistakes through adequate preliminary investigations and consultation with professionals, as necessary;
- the relevant decision made by the director was not materially unreasonable in light of the standard of care of a good manager typically expected of managers in the same industry; and
- the board has sought to avoid violation of applicable laws, the corporation's constitutional documents and internal rules through consultation with legal counsel or others.

Non-director senior managers could also be held individually accountable under similar circumstances. However, it is usually more difficult to establish individual accountabilities of a senior manager than a director, as a result of differences in the scope and nature of their duties.

Law stated - 09 January 2022

Private rights of action

Do private rights of action apply to violations of national financial services authority rules and regulations?

Whether a person is permitted to institute legal action against a FIBO for violation of applicable Financial Services Agency of Japan (JFSA) rules depends on the circumstances of each case. In this regard, the Supreme Court held in a decision dated 14 July 2005 that a breach of the principle of suitability under the FIEA does not automatically lead to tort liability under private law, but added that tort liability may result where securities transactions that deviate significantly from this principle are solicited and entered into. Accordingly, a FIBO may be subject to private rights of action in limited circumstances.

Additionally, a FIBO that breaches its duty to explain the nature of the relevant financial product to its customers pursuant to the Act on Provision of Financial Services (APFS) is subject to private causes of action. In such cases, the burden of disproving causality between the violation of the duty of explanation and the loss incurred by the customer

will be sustained by the FIBO pursuant to the APFS.

Law stated - 09 January 2022

Standard of care for customers

What is the standard of care that applies to each type of financial services firm and authorised person when dealing with retail customers?

FIBOs and their staff are required to provide financial services to their customers in good faith, in accordance with the principle of fairness. The APFS also requires a FIBO, before selling a financial product to a customer, to explain the nature of the product, the risks involved in purchasing such product and key aspects of the structure of the transaction.

Law stated - 09 January 2022

Does the standard of care differ based on the sophistication of the customer or counterparty?

Yes, FIBOs are exempt from compliance with some of the key provisions on conduct in the Financial Instruments and Exchange Act of Japan (FIEA) (such as the principle of suitability, the requirement to deliver written statutory disclosures to customers and advertising regulations) where the counterparties are professional investors. Professional investors include qualified institutional investors, listed stock corporations, stock corporations with stated capital of at least ¥500 million, special purpose companies established pursuant to the Act on Securitization of Assets of Japan (known as TMKs) and foreign corporations. Individuals with trading experience of at least one year, and net and invested assets of at least ¥300 million, as well as other corporations, may apply to change their status from general investors to professional investors.

On the other hand, FIBOs have to follow the principle of suitability when marketing financial instruments to non-professional investors. The principle of suitability requires FIBOs to adjust their manner of solicitation as appropriate in light of the customer's sophistication (as determined from the customer's knowledge, experience, assets and purpose for purchasing the product, among other factors).

Further, the degree of a FIBO's duty to explain the nature of a financial product under the FIEA is generally understood to vary, depending on the level of sophistication of the relevant customer or counterparty. For example, the FIEA prohibits a FIBO from selling financial products or otherwise providing financial services to a customer without first providing sufficient explanation through delivery of a statutory pre-contract disclosure document in such a manner and to such an extent necessary for the customer to understand the nature of the relevant product, in light of the customer's sophistication (as determined from the factors mentioned above).

Finally, the duty of a FIBO under the APFS to explain the nature of a financial product, among other things, does not apply where the customer is a professional investor.

Law stated - 09 January 2022

Rule-making

How are rules that affect the financial services industry adopted? Is there a consultation process?

National law

Bills affecting the financial services industry are usually prepared by the Strategy Development and Management Bureau and the Policy and Markets Bureau of the JFSA. In preparing a major bill, the JFSA customarily seeks the advice

of the Financial System Council, a statutory advisory body. The final bill is often consistent with the advice of, and supported by a report issued by, the Financial System Council. A bill that is approved by the Diet will become national law.

Subordinate regulation

Under certain laws, such as the FIEA, responsibility for preparing subsidiary legislation (such as cabinet orders and ordinances) that affects the financial services industry is delegated to the JFSA. When preparing subsidiary legislation, the JFSA will, in most cases, commence a public consultation process requesting members of the public to provide feedback on the JFSA's proposals. Upon finalising the relevant subsidiary legislation, the JFSA will usually also publish its response to the public feedback it has received.

Guidelines

The JFSA is also tasked with establishing supervisory guidelines, and questions and answers (collectively, guidelines) that affect the financial services industry. These guidelines are not statutes and accordingly have no force of law. Instead, they seek to clarify the JFSA's interpretation of the relevant statutes, and the manner in which regulators will exercise their supervisory and inspection powers under the law. When the JFSA proposes to amend any supervisory guidelines, it will usually also commence a public consultation process to obtain public feedback on the JFSA's proposals.

Self-regulatory rules

The Japan Securities Dealers Association and other self-regulatory organisations sometimes also initiate public consultations when proposing to amend their own rules.

Law stated - 09 January 2022

CROSS-BORDER ISSUES

Cross-border regulation

How do national financial services authorities approach cross-border issues?

Foreign securities firms are generally prohibited under the Financial Instruments and Exchange Act of Japan (FIEA) from engaging in any securities-related business with a person located in Japan. 'Foreign securities firm' is defined in the FIEA as an entity that:

- is based outside Japan;
- is not a financial instruments business operator (FIBO) or a financial institution regulated in Japan (that is to say, not licensed or registered in Japan under the FIEA or any other relevant Japanese financial regulatory regime); and
- engages in a securities-related business outside Japan in accordance with the relevant laws of the relevant foreign jurisdiction.

The FIEA provides certain exemptions permitting foreign securities firms to conduct limited types of securities-related businesses from outside Japan with a person located in Japan, including situations where the counterparty located in

Japan is a certain FIBO or financial institution. Additionally, a foreign securities firm is also permitted to engage in a securities-related transaction outside Japan with a person located in Japan if the transaction:

- involves no solicitation from the foreign securities firm; and
- the Japan-resident person places a transaction order with the foreign securities firm or the relevant transaction is conducted through the agency or intermediation of a Type I FIBO (ie, a local securities firm).

However, care should be taken when relying on this exemption. This is because the Financial Services Agency of Japan generally takes a broad interpretation of the concept of solicitation, such that solicitation would be deemed to have occurred if a foreign securities firm advertises its securities-related activities on its website.

In addition, a foreign entity acting outside Japan may be permitted, without registration as an Investment Advisory and Agency Business or Discretionary Investment Management Business (DIM Business), to provide a Japanese FIBO engaging in the DIM Business with non-discretionary investment advisory service or discretionary investment management service.

Other than the foregoing, the FIEA provides no clear exemptions in most cross-border situations. Where no clear exemption applies, whether a person acting outside Japan is required to be registered as a FIBO under the FIEA when transacting with a Japanese resident will be determined on a case-by-case basis.

Law stated - 09 January 2022

International standards

What role does international standard setting play in the rules and standards implemented in your jurisdiction?

International standards on financial services and products are sometimes reflected in Japanese laws and regulations. Given the informal and non-binding nature of international standards, however, implementation of such standards in Japan may be attenuated by the rule-making process in Japan.

Law stated - 09 January 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any other current developments or emerging trends that should be noted?

The Financial Market Entry Office (FMEO) was jointly established by the Financial Services Agency of Japan and local finance bureaux in January 2021 to handle registration (including the informal consultation process) and supervision of foreign asset management firms that are new to the Japanese market. The FMEO functions as a single point of contact with the capacity to conduct communications in English. Foreign entities (or their local affiliates in Japan, as applicable) may, with the support of the FMEO, prepare and file applications for registration as an Investment Advisory and Agency Business, a Discretionary Investment Management Business and the relevant Type II Financial Instruments Business in English. The FMEO also serves as a contact point for inquiries on the relevant procedures under Japanese financial laws and regulations in connection with the establishment of a business presence in Japan by foreign financial business operators.

Law stated - 09 January 2022

Jurisdictions

	Australia	Herbert Smith Freehills LLP
	Brazil	Pinheiro Neto Advogados
	Egypt	Soliman, Hashish & Partners
	Hong Kong	Davis Polk & Wardwell LLP
	Indonesia	ABNR
	Ireland	Dillon Eustace LLP
	Japan	Anderson Mōri & Tomotsune
	Luxembourg	AKD
	Netherlands	Baker McKenzie
	Russia	EMPP
	Switzerland	Lenz & Staehelin
	United Kingdom	Davis Polk & Wardwell LLP
	USA	Davis Polk & Wardwell LLP