

**International  
Comparative  
Legal Guides**



Practical cross-border insights into alternative investment funds work

**Alternative Investment Funds  
2022**

**10<sup>th</sup> Edition**

Contributing Editor:

**Gus Black**  
Dechert LLP

**ICLG.com**

# Industry Chapter

1

**The State of Play for the Alternative Investment Industry in 2022**  
Jack Inglis, AIMA

# Expert Analysis Chapters

5

**The Retailisation of Private Equity**  
Thiha Tun, Sabina Comis, Angelo Lercara & Richard Horowitz, Dechert LLP

11

**Fund Finance: The Transition to 2022**  
Michael C. Mascia, Cadwalader, Wickersham & Taft LLP

14

**The Evolution of Liquidity Solutions in Private Markets**  
Jeremy Elmore & Sacha Gofton-Salmond, Travers Smith LLP

20

**Bringing Foreign Investment Funds into Japan**  
Yasuzo Takeno & Fumiharu Hiromoto, Mori Hamada & Matsumoto

# Q&A Chapters

25

**Andorra**  
Cases&Lacabra: Miguel Cases Nabau & Laura Nieto

32

**Brazil**  
Lefosse Advogados: André Mileski & Gustavo Paes

41

**Cayman Islands**  
Maples Group: Grant Dixon, Andrew Keast & Stephen Watler

50

**Chile**  
Carey: Cristián Eyzaguirre, Francisco Guzmán & Andrés Latorre

57

**Cyprus**  
Patrikos Pavlou & Associates LLC:  
Angelos Onisiforou & Angeliki Epaminonda

65

**England & Wales**  
Travers Smith LLP: Jeremy Elmore & Emily Clark

78

**Finland**  
Waselius & Wist: Olli Kiuru

86

**Germany**  
Hengeler Mueller Partnerschaft von Rechtsanwälten  
mbB: Christian Schmies & Charlotte van Kampen

92

**Hong Kong**  
Deacons: Taylor Hui, Fiona Fong & Siew Tin Tee

102

**Ireland**  
Dillon Eustace: Brian Kelliher & Richard Lacken

117

**Italy**  
LEXIA Avvocati: Angelo Messore, Francesco Dagnino & Alessandro Dagnino

126

**Japan**  
Anderson Mōri & Tomotsune: Koichi Miyamoto & Takahiko Yamada

136

**Luxembourg**  
GSK Stockmann: Dr. Marcus Peter,  
Corinna Schumacher & Katharina Schiffmann

146

**Scotland**  
Brodies LLP: Andrew Akintewe

155

**Singapore**  
CNPLaw LLP: Amit R. Dhume & Abel Ho

165

**Spain**  
Cases&Lacabra: Miguel Cases Nabau & Araceli Leyva

173

**Switzerland**  
Bär & Karrer Ltd.: Daniel Flühmann & Peter Ch. Hsu

183

**USA**  
Dechert LLP: Karen L. Anderberg & Adrienne M. Baker

# Japan

Anderson Mōri & Tomotsune



Koichi Miyamoto



Takahiko Yamada

## 1 Regulatory Framework

### 1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

The Financial Instruments and Exchange Act (Act No. 25 of 1948; the “FIEA”) and the regulations promulgated thereunder primarily govern the marketing, investment management and disclosure of Alternative Investment Funds in Japan.

Alternative Investment Funds which are categorised as investment trusts or investment corporations are also subject to the Investment Trusts and Investment Corporations Act (Act No. 198 of 1951; the “ITICA”) and the regulations promulgated thereunder as well as rules of the Investment Trusts Association, Japan (“ITA”), which is a self-regulatory body for investment managers of investment trusts and investment corporations.

A person engaging in the business of marketing interests in investment trusts or investment corporations is required to be licensed as a Type I Financial Instruments Business Operator (“Type I FIBO”) and a person engaging in the business of marketing interests in a collective investment scheme such as a limited partnership (“CIS”) is required to be licensed as a Type II Financial Instruments Business Operator (“Type II FIBO”) in accordance with the FIEA by the Financial Services Agency of Japan (“FSA”), unless some relevant exemption applies.

A person engaging in the business of discretionary investment management of Alternative Investment Funds is required to be licensed as an investment manager (“Investment Manager”) and a person engaging in the business of non-discretionary investment advisory to Alternative Investment Funds is required to be licensed as an investment adviser (“Investment Adviser”) in accordance with the FIEA by the FSA, unless some relevant exemption applies.

If interests in Alternative Investment Funds are publicly offered in Japan, certain disclosure requirements including the filing of a securities registration statement, annual securities report and other relevant documents will be triggered under the FIEA.

Please note that if an Alternative Investment Fund is categorised as a CIS which directly (i.e. not indirectly through SPVs or REITs) invests in real estate, the Act on Specified Joint Real Estate Ventures (Act No. 77 of 1994; the “SJREVA”) will be applicable instead of the FIEA. We have, however, omitted an explanation of Alternative Investment Funds which fall under this category in the interest of brevity.

### 1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

As noted in question 1.1 above, a person engaging in the business of discretionary investment management, or non-discretionary investment advisory for Alternative Investment Funds is, in principle, under the FIEA, required to be licensed as an Investment Manager or an Investment Adviser respectively by the FSA. However, if both the Alternative Investment Funds and its managers or advisers are domiciled outside Japan, then such managers or advisers will be exempted from such licensing requirements.

It should be noted that if the Alternative Investment Fund is structured as a CIS which invests more than 50% of its assets in securities or derivative transactions, and if any Japanese investor invests in such a CIS, the sponsor (e.g. general partner) of the CIS is, in principle, required to be licensed as an Investment Manager by the FSA unless it delegates all of its investment authority to a locally licensed Investment Manager and meets certain requirements under the FIEA. There are, however, several exemptions to this general principle, which we set out below.

- The general partner will be exempted from the licensing requirement as an Investment Manager if:
  - (i) Japanese investors in the CIS consist of (a) one or more qualified institutional investors as defined under the FIEA (“QIIs”), and (b) not more than, if any, 49 eligible investors other than QIIs as set forth in the FIEA;
  - (ii) none of such QIIs and eligible investors other than QIIs are certain unqualified investors as set forth in the FIEA; and
  - (iii) the general partner has submitted a Form 20 under Article 63 of the FIEA to the relevant Local Finance Bureau prior to the commencement of the management of the assets of the CIS.
- The general partner will be exempted from the licensing requirement as an Investment Manager if:
  - (i) all of the direct investors (i.e., Japanese investors who directly hold interests in the CIS) are either (a) QIIs, or (b) those who satisfy the requirements under Article 63 exemption as summarised above;
  - (ii) if there are indirect investors (i.e., Japanese investors which indirectly invest in the CIS through a Japanese CIS which directly invest in the said CIS) in the CIS, such indirect investors must be QIIs;
  - (iii) the number of Japanese investors in the CIS (including indirect investors) is not more than nine; and
  - (iv) the aggregate amount of investment in the CIS by direct investors is not more than 1/3 of the aggregate amount of all investors’ investment in the CIS.

QIIs include: banks; insurance companies; financial instruments business operators registered as Type I financial instruments businesses or discretionary investment management businesses; investment corporations and foreign investment corporations stipulated under the ITICA; the Government Pension Investment Fund; and investment limited partnerships stipulated under the Limited Partnership Act for Investment (Act No. 90 of 1998; the “Limited Partnership Act”). Whether a prospective investor is a QII can be ascertained by looking up the names of the QIIs that are enlisted on the FSA’s website.

### 1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Alternative Investment Funds themselves are not required to be licensed or authorised by a regulatory body. However, in the case of public offering, filing of a securities registration statement is required. Further, if the Alternative Investment Fund is an investment trust or an investment corporation, a notification of an investment trust or investment corporation will be required. For details, please refer to question 3.4.

### 1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs hedge)) and, if so, how?

The regulatory regime does not distinguish between open-ended and closed-ended Alternative Investment Funds; provided that in the case of public offering, different rules established by the Japan Securities Dealers Association (“JSDA”) (which is one of the self-regulatory bodies in Japan) will apply.

Also, the regulatory regime does not distinguish strategies of Alternative Investment Funds except for CIS’s direct real estate investment as noted in question 1.1 above.

The regulatory regime differs depending on the legal structure of the Alternative Investment Funds (i.e. Investment Trusts, Investment Corporations or CIS).

### 1.5 What does the authorisation process involve for managers and, if applicable, Alternative Investment Funds, and how long does the process typically take?

Before submitting a formal application for the grant of a licence of an Investment Manager and/or an Investment Adviser, an applicant would be expected to first conduct informal discussions with the relevant Local Finance Bureau concerning the draft application. The duration of this discussion stage will depend on the scope and organisational structure of the applicant’s business and the extent to which the relevant application documents have been prepared (including the extent to which the relevant information has been gathered). Once the relevant Local Finance Bureau and the FSA are satisfied with the draft application, a formal application can be submitted. Thereafter, the FSA may seek clarifications or supplements to the formal application. Only after there are no more questions or requests from the regulator will the application be accepted.

The time required for procuring a licence of an Investment Manager and/or an Investment Adviser under the FIEA varies on a case-by-case basis. In general, the process time required for procuring a licence of an Investment Adviser is less than that for the licence of an Investment Manager. In principle, the licence

of an Investment Advisor or an Investment Manager, as the case may be, will be issued within two months from the date of filing the formal application.

### 1.6 Are there local residence or other local qualification or substance requirements for managers and/or Alternative Investment Funds?

The table below summarises the requirements for a licence of an Investment Manager and an Investment Adviser under the FIEA.

Requirements	Investment Manager	Investment Adviser
Local presence in Japan	Required	Not required
Local representative in Japan	Required (if it is a foreign company)	Not required
Minimum stated capital and net assets requirements	Minimum stated capital: JPY 50 million Minimum net assets: JPY 50 million	None
Organisational requirements	The applicant must be a joint stock company ( <i>Kabushiki Kaisha</i> ) with a board of directors and a corporate auditor or such committees as prescribed in the Companies Act of Japan (Act No. 86 of 2005; “Companies Act”), or an equivalent foreign company	None
Staff requirements	Key requirements are as follows: <ul style="list-style-type: none"> <li>■ Those managing assets of investors must have sufficient knowledge and experience with respect to assets under management</li> <li>■ There must be separate personnel employed with sufficient knowledge and experience to be in charge of compliance and regulatory matters which is independent of the investment management division</li> </ul>	Key requirements are as follows: <ul style="list-style-type: none"> <li>■ Those providing investment advice based on an analysis of the value, etc. of securities and other financial instruments must have sufficient knowledge and experience to provide such advice</li> <li>■ There must be separate personnel employed with sufficient knowledge and experience to be in charge of compliance and regulatory matters</li> </ul>

### 1.7 What service providers are required?

If the Alternative Investment Funds are structured as investment trusts under the ITICA (“Japanese Investment Trusts”) or investment corporations under the ITICA (“Japanese Investment

Corporations”), then the authority to manage investments must be delegated to a locally licensed Investment Manager pursuant to the ITICA. Further, if the Alternative Investment Funds are structured as Japanese Investment Corporations, they are also required to appoint a custodian and an administrator. There are no such requirements for foreign investment trusts, foreign investment corporations or CIS under Japanese laws.

**1.8 What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?**

If foreign managers or advisers are licensed as Investment Managers or Investment Advisers under the FIEA, they must comply with certain codes of conduct for protection of investors under the FIEA. If foreign managers or advisers are not licensed as Investment Managers or Investment Advisers under the FIEA, no such regulations apply. For details, please refer to question 4.1.

**1.9 What relevant co-operation or information sharing agreements have been entered into with other governments or regulators?**

The Asia Region Fund Passport (“ARFP”) formally launched on 1 February 2019 is an international initiative enabling cross-border offerings of eligible investment funds to retail investors, with investor protection in economies participating in the ARFP. Initial participating economies are Australia, Japan, the Republic of Korea, New Zealand, and Thailand.

Under the ARFP, a fund may be “exported” to another participating economy if that fund complies with the regulations of the home economy in which the fund is registered, applicable regulations relating to the offer in the host economy and the ARFP passport rules.

## 2 Fund Structures

**2.1 What are the principal legal structures used for Alternative Investment Funds (including reference where relevant to local asset holding companies)?**

The principal legal structure used for Alternative Investment Funds is Japanese Investment Trusts formed under the ITICA. Japanese Investment Trusts are formed by entering into a trust agreement between an Investment Manager and a trustee whereby investors will acquire divided beneficiary interests from such trusts.

Japanese real estate trusts (“J-REITs”), however, are structured as Japanese Investment Corporations under the ITICA.

Alternative Investment Funds structured as foreign investment trusts or foreign investment corporations are also offered to Japanese investors.

CIS – more specifically, Japanese and foreign limited partnerships – are commonly used for private equity funds. Typically, a Japanese limited partnership (*toshi jigyo yugen sekinin kumiai*) is formed pursuant to the Limited Partnership Act (“Japanese Limited Partnership”). A Japanese Limited Partnership must consist of at least two partners: a general partner as a sponsor of the partnership; and a limited partner as an investor in the partnership.

Asset holding companies are commonly structured as joint stock companies (*Kabushiki Kaisha*).

**2.2 Do any of the legal structures operate as an umbrella structure with several sub-funds, and if yes, is segregation of assets between the sub-funds a legally recognised feature of the structure?**

There are no specific legal structures operating as an umbrella structure with several sub-funds in Japan.

**2.3 Please describe the limited liability of investors in respect of different legal structures and fund types (e.g. PE funds and LPACs).**

The liability of investors who hold interests in Japanese Investment Trusts, Japanese Investment Corporations and Japanese Limited Partnerships is limited to the amount of money invested by such investors.

It is possible for a Japanese Limited Partnership to operate on a capital call model where a limited partner owes obligations to make capital contributions up to the amount of its capital commitment in the limited partnership agreement.

**2.4 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?**

As noted in question 1.6 above, it is a legal requirement for an Investment Manager to be a joint stock company (*Kabushiki Kaisha*) with a board of directors and a corporate auditor or such committees as prescribed in the Companies Act or an equivalent foreign company with a branch office in Japan.

There is no legal organisational requirement for an Investment Adviser; however, it is common for an Investment Adviser to be structured as a joint stock company (*Kabushiki Kaisha*) or a foreign company with a branch office in Japan.

**2.5 Are there any limits on the manager’s ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?**

There are no legal limitations on the manager’s ability to restrict redemptions unless the constitutional documents of the Alternative Investment Funds restrict redemptions; provided that a limited partner of a Japanese Limited Partnership may withdraw if there are unavoidable grounds regardless of the restrictions under the limited partnership agreement.

**2.6 Are there any legislative restrictions on transfers of investors’ interests in Alternative Investment Funds?**

There are no legislative restrictions on transfer of investors’ interests in Alternative Investment Funds unless the constitutional documents of the Alternative Investment Funds restrict such transfers.

As noted in question 3.3 below, if Alternative Investment Funds are marketed to Japanese investors by way of a private placement, certain transfer restrictions must be imposed. Further, as noted in question 1.1 above, if the sponsor (e.g. general partner) of the CIS relies on certain exemptions from the licensing requirement, the transfers that result in not meeting the exemption requirements cannot be carried out.

**2.7 Are there any other limitations on a manager’s ability to manage its funds (e.g. diversification requirements, asset stripping rules)?**

Please refer to section 4 below.

**2.8 Does the fund remunerate investment managers through management/performance fees or by a combination of management fee and carried interest? In the case of carried interest, how is this typically structured?**

The fund remunerates the investment managers through management fees.

In addition to management fees, a hedge fund structured as an investment trust commonly sets out a high-water mark, pursuant to which a certain percentage of the amount exceeding the high-water mark will be paid to the investment manager as a performance fee.

A private equity fund structured as a Japanese Limited Partnership typically provides for a performance fee/carried interest, which is paid to the general partner at a certain percentage of the residual amount after distributing the amount equal to the total contribution or total commitment to limited partners from the distributable proceeds. Buy-out funds typically set out a waterfall, which includes a hurdle-rate (by which limited partners receive preferred returns) and a general partner catch-up.

### 3 Marketing

**3.1 What legislation governs the production and use of marketing materials?**

In Japan, the FIEA and the regulations promulgated thereunder primarily govern the production and offering of marketing materials of Alternative Investment Funds.

**3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?**

If interests in an Alternative Investment Fund are to be publicly offered, an offering memorandum (which should include but not be limited to, the investment objectives, the investment policy, the investment restrictions, the investment risks, all of the costs borne by investors and an outline of the investment management company) is, in principle, required to be delivered to investors.

In the case of private placement, an offering memorandum or any other marketing material is not legally required to be delivered to investors. However, it is common practice in Japan to provide investors with a private placement memorandum including a description of the transfer restrictions applicable to interests in an Alternative Investment Fund voluntarily. A private placement refers to an offering: (i) with respect to interests of investment trusts or investment corporations only to (a) an unlimited number of QIIs, and (b) fewer than 50 persons (excluding QIIs) subject (in both instances) to certain conditions including restrictions on transferability of interests of the fund; and (ii) with respect to interests of a CIS, resulting in fewer than 500 persons (including QIIs) subscribing to such interests.

**3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?**

If interests in an Alternative Investment Fund are publicly offered, a securities registration statement including more detailed information in relation to the Alternative Investment Fund than those required to be described in an offering memorandum needs to be filed with the FSA prior to commencement of marketing of interests in the Alternative Investment Fund pursuant to the FIEA.

If marketing of interests in an Alternative Investment Fund is made by way of a private placement, no registration with the FSA is required under the FIEA (please note, however, that in the case of investment trust or investment corporation, filing of a notification under the ITICA is required as mentioned below).

In addition, if the Alternative Investment Fund is categorised as an investment trust, regardless of the type of marketing (i.e., even in the case of private placement), a notification of investment trust needs to be filed with the regulator prior to its establishment (in the case of those established under Japanese law) or commencement of solicitations of its units (in the case of those established under foreign law) pursuant to the ITICA. If the Alternative Investment Fund is categorised as an investment corporation, regardless of type of solicitation (i.e., even in the case of private placement), a notification of investment corporation needs to be filed with the regulator prior to its establishment (in the case of those established under Japanese law) or commencement of solicitations of its shares (in the case of those established under foreign law) pursuant to the ITICA.

**3.4 What restrictions (and if applicable, ongoing regulatory requirements) are there on marketing Alternative Investment Funds?**

An Investment Manager and a business operator who filed a Form 20 with the regulator pursuant to Article 63 of the FIEA (“Article 63 business operator”) (i.e., a general partner of a CIS) are, when marketing Alternative Investment Funds, subject to certain codes of conduct for protection of investors, such as refraining from the delivery of false information to investors and refraining from compensating investors for their losses. If interests in Alternative Investment Funds are marketed to investors who are not categorised as Professional Investors (*tokutei toushika*) as defined in the FIEA, more stringent codes of conduct for protection of investors, such as delivery of statutory documents and advertisement regulations, apply to such marketing activities. Professional Investors include QIIs, listed companies, joint stock companies (*Kabushiki Kaisha*) whose stated capital is expected to amount to 500 million yen or more, financial instruments business operators (other than those who are categorised as QIIs) and foreign entities.

**3.5 Is the concept of “pre-marketing” (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?**

Under Japanese law, there is no concept of pre-marketing or equivalent conduct in the context of marketing of interests in Alternative Investment Funds. Pre-marketing activities are not regulated unless such activities amount to solicitation of interests in Alternative Investment Funds.

Please note that the FIEA has no clear definition of “solicitation”, and it is a matter of factual observation made by considering all circumstances to determine whether an activity falls within the purview of the term “solicitation”. However, generally speaking, providing information about a specific fund would amount to an act of “solicitation”. According to the policies of the FSA, the concept of “solicitation” is construed very broadly.

**3.6 Can Alternative Investment Funds be marketed to retail investors (including any specific treatment for high-net-worth individuals or semi-professional or similar categories)?**

Alternative Investment Funds can be marketed to retail investors. However, if such marketing is implemented by way of a private

placement, the number of investors (excluding QIIs) solicited to invest in Alternative Investment Funds must be fewer than 50 (in the case of interests of investment trusts or investment corporations) or the number of investors (including QIIs) investing in Alternative Investment Funds must be fewer than 500 (in the case of interests in CISs), as mentioned in question 3.3 above.

It should be noted, however, that if the sponsor (e.g. general partner) of a CIS relies on certain exemptions from the licensing requirement, the type and number of investors may be restricted to meet the requirements of such exemptions as noted in question 1.1 above.

### 3.7 What qualification requirements must be met in relation to prospective investors?

Where interests in Alternative Investment Funds are marketed by way of a private placement only to QIIs, it must be ensured that the prospective investor is categorised as a QII.

It should be noted, however, that if the sponsor (e.g. general partner) of a CIS relies on certain exemptions from the licensing requirement, the type and number of investors may be restricted to meet the requirements of such exemptions as noted in question 1.1 above.

### 3.8 Are there additional restrictions on marketing to public bodies such as government pension funds?

There are no additional restrictions.

### 3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors (whether as sponsors or investors)?

There are no restrictions on participation in Alternative Investment Funds.

### 3.10 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

There are no restrictions on the use of intermediaries. However, in principle, intermediaries may not engage in solicitation of investments in interests in Alternative Investment Funds without registering themselves as a Type I or Type II FIBO depending on the type of interests. Specifically, intermediaries that engage in solicitation of investments in interests of investment trusts or investment corporations are, in principle, required to be registered as a Type I FIBO. On the other hand, intermediaries that engage in solicitation of investments in interests of CISs are, in principle, required to be registered as a Type II FIBO.

## 4 Investments

### 4.1 Are there any restrictions on the types of investment activities that can be performed by Alternative Investment Funds?

An Investment Manager and an Article 63 business operator (i.e., a general partner of a CIS) are subject to certain codes of conduct for protection of interests of investors when carrying on its discretionary investment management business for Alternative Investment Funds. In this regard, they are generally prohibited from managing assets of an Alternative Investment Fund for the purpose of conducting a transaction involving such assets and themselves, or their officers, or other assets managed by them for avoidance of conflict of interest.

In addition, the ITA provides for the rules that are applicable to Japanese Investment Trusts and Japanese Investment Corporations whose interests are publicly offered. These rules restrict certain activities such as short selling of bonds whose aggregate market value exceeds the amount of net asset value of the Japanese Investment Trust or the Japanese Investment Corporation.

The ITA's rules above do not apply to investment trusts and investment corporations established in foreign jurisdictions. However, JSDA provides for rules that would apply to investment trusts and investment corporations established in foreign jurisdictions whose interests are publicly offered in Japan. These rules would restrict certain activities such as short selling of securities whose aggregate market value exceeds the amount of net asset value of the investment trust or the investment corporation.

### 4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio, whether for diversification reasons or otherwise?

Japanese Investment Trusts and Japanese Investment Corporations are obliged to invest more than 50% of their assets in "specified assets". Such "specified assets" include, but are not limited to, securities, rights pertaining to derivatives transactions, real properties, rights of lease of real properties, superficies rights, promissory notes, monetary claims, and commodities.

Japanese Investment Trusts and Japanese Investment Corporations are prohibited by the ITICA from acquiring a certain percentage of shares of an entity. Investment trusts and investment corporations established in foreign jurisdictions whose interests are publicly offered in Japan are also subject to a similar limitation imposed by JSDA.

In addition, ITA's rules provide certain limitations on investment objectives that Japanese Investment Trusts and Japanese Investment Corporations may acquire. These rules do not apply to investment trusts and investment corporations established in foreign jurisdictions.

CISs are not subject to any limitations on the types of investments; provided that where an Alternative Investment Fund is structured as a Japanese Limited Partnership, 50% or more of its contributed money may not be invested in foreign shares, etc.

### 4.3 Are there any local regulatory requirements which apply to investing in particular investments (e.g. derivatives or loans)?

If Alternative Investment Funds directly invest in real estate or commodities (not through any fund), the following regulatory requirements apply depending on the legal structure of the Alternative Investment Fund (i.e., whether it is an investment trust, an investment corporation or CIS).

A locally licensed Investment Manager who intends to invest assets of a Japanese Investment Trust or a Japanese Investment Corporation in real estate must obtain an approval from the FSA pursuant to the FIEA. The Investment Manager also needs to be licensed as a real estate brokerage business as well as obtain an approval from the Ministry of Land, Infrastructure, Transport and Tourism pursuant to the Real Estate Brokerage Act (Act No. 176 of 1952) to conduct transactions in real estate on behalf of the Japanese Investment Trust or the Japanese Investment Corporation.

A general partner who intends to invest assets of a CIS in real estate is, in principle, required to be licensed as a specified joint real estate venture (*budousan tokutei kyoyudou jigyou*) pursuant to the SJREVA. A general partner locally licensed as an Investment

Manager also needs to file a certain notification with the relevant Local Finance Bureau pursuant to the FIEA.

A locally licensed Investment Manager who intends to invest assets of a Japanese Investment Trust or a Japanese Investment Corporation in commodities or commodities derivatives must obtain an approval from the FSA pursuant to the FIEA.

A general partner who intends to invest assets of a CIS in commodities or commodities derivatives must delegate its authority to make investment decisions to a locally licensed commodities investment manager pursuant to the Act on Regulation of Business Pertaining to Commodity Investment (Act No. 66 of 1991). A general partner locally licensed as an Investment Manager also needs to file a certain notification with the relevant Local Finance Bureau pursuant to the FIEA.

#### 4.4 Are there any restrictions on borrowing by the Alternative Investment Fund?

Pursuant to ITA's rules, Japanese Investment Trusts and Japanese Investment Corporations may, in principle, borrow money only for the purposes of (i) payment of cancellation money, (ii) distributions for certain investment trusts, or (iii) financing for handling of any accident (excluding borrowings where the investment trust or the investment corporation bear interest on such borrowings).

In addition, JSDA provides for rules applicable to investment trusts established in foreign jurisdictions which are publicly offered in Japan (excluding investment trusts investing in real estate trust beneficiary rights), under which the amount of its borrowing cannot exceed 10% of the net assets value of the investment trust; provided, however, that this restriction does not apply if such amount temporarily exceeds 10% for a reason such as a merger.

CISs are not subject to any restrictions on borrowing unless the constitutional documents of the CIS restrict borrowing.

#### 4.5 Are there any restrictions on who holds the Alternative Investment Fund's assets?

There are no restrictions on who holds the Alternative Investment Fund's assets.

## 5 Disclosure of Information

#### 5.1 What disclosure must the Alternative Investment Fund or its manager make to prospective investors, investors, regulators or other parties, including on environmental, social and/or governance factors?

If interests in an Alternative Investment Fund are publicly offered, a securities registration statement which contains, (including but not limited to), the investment objectives, the investment policy, the investment restrictions, the investment risks, all of the costs borne by investors and an outline of the investment management company, needs to be filed with the FSA before commencement of such public offering, which is also publicly disclosed through the "Electronic Disclosure for Investors' NETwork" (so-called, "EDINET"). The Alternative Investment Funds which have filed the securities registration statement must file an annual securities report and semi-annual securities report periodically, which are also publicly disclosed on the EDINET.

In addition, an Investment Manager and an Article 63 business operator (i.e., a sponsor (e.g. general partner) of a CIS) needs to annually prepare an explanatory document describing

certain information about its businesses and publicly disclose it at their business offices or through their website.

#### 5.2 Are there any requirements to provide details of participants (whether owners, controllers or investors) in Alternative Investment Funds or managers established in your jurisdiction (including details of investors) to any local regulator or record-keeping agency, for example for the purposes of a public (or non-public) register of beneficial owners?

An Article 63 business operator (i.e., a sponsor (e.g. general partner) of a CIS) needs to specify the names of prospective QIIs (to whom the Article 63 business operator will market interests in the CIS) in a notification of Article 63 business (Form 20) which is required to be filed with the relevant Local Finance Bureau prior to commencement of the Article 63 business. An Article 63 business operator also needs to provide the names of QIIs (who have actually invested in the CIS) and the amount of contributions by such QIIs in an annual business report to be filed with the regulator.

An Investment Manager and an Article 63 business operator are required to describe the names of their shareholders in an annual business report to be filed with the regulator.

#### 5.3 What are the reporting requirements to investors or regulators in relation to Alternative Investment Funds or their managers, including on environmental, social and/or governance factors?

An Investment Manager and an Article 63 business operator (i.e., a sponsor (e.g. general partner) of a CIS) are, in principle, required to provide investors with a management report describing certain matters such as status of assets of the Alternative Investment Fund periodically pursuant to the FIEA or the ITICA depending on the types of Alternative Investment Funds.

Also they need to file an annual business report in relation to their business with the regulator after the end of each fiscal year.

#### 5.4 Is the use of side letters restricted?

The use of side letters is not restricted. However, as a financial instruments business operator registered as an Investment Manager and an Article 63 business operator (i.e., a sponsor (e.g. general partner) of a CIS) are in principle prohibited from compensating customers for their losses or making a promise to do so, they would not be permitted to execute a side letter for the purposes of providing such compensation. In addition, an Investment Manager and an Article 63 business operator are subject to a duty of loyalty to its investors, and all the investors of the same Alternative Investment Fund are required to be treated fairly and equally.

## 6 Taxation

#### 6.1 What is the tax treatment of the principal forms of Alternative Investment Funds and local asset holding companies identified in question 2.1?

An investment corporation is subject to corporate tax. While calculating corporate tax on an investment corporation, dividends to investors can be treated as deductible expenses, if the conduit requirements are satisfied (so-called "pay-through taxation"). Conduit requirements are, among other things, that



the amount of payment such as the amount of dividends for the fiscal year exceeds the amount equivalent to 90/100 of the amount of distributable profits.

With regard to investment trusts, there are two types of taxations. First, with respect to collective investment trusts, i.e., securities investment trusts, domestic public offering investment trusts and foreign investment trusts, the trust will not be required to pay Japanese corporate tax but the beneficiaries are taxed when they actually receive the income from such trusts. On the other hand, for investment trusts other than collective investment trusts, the income arising from the property of the trust is subject to corporate tax and the trustee of the trust is the taxpayer.

Vehicles to be used for collective investment schemes (other than investment corporations and investment trusts) include partnerships formed under the Civil Code of Japan (Act No. 89 of 1896) (“NKs”), limited liability partnerships formed under the Limited Liability Partnership Act (Act No. 40 of 2005) (“LLPs”), Japanese Investment Limited Partnerships (“LPSs”), those similar to these in foreign countries (together with NKs, LLPs and LPSs, referred to as “NKs etc.”) and silent partnerships (“TKs”). With regard to NKs etc., these entities are fiscally transparent and therefore their assets/debts and profits/losses are treated as being attributed to the members. The subject of direct tax liability is not NKs etc. themselves, but the members of them (so-called pass-through taxation). On the other hand, in the case of TKs, the contribution belongs to their business operator, and not the silent partners. Hence, the TKs themselves are not subject to tax, but the business operators are. When calculating the taxable income of the business operator, the amount of losses or profits distributed to its silent partners are treated as gross revenue or deductible expenses, respectively.

Asset holding companies are commonly structured as joint stock companies (*Kabushiki Kaisha*). Joint stock companies are subject to corporate tax. While calculating corporate tax on a joint stock company, dividends to investors cannot be treated as deductible expenses.

## 6.2 What is the tax treatment of the principal forms of investment manager/adviser identified in question 2.4?

Investment managers/advisers are usually formed as a joint stock company (*Kabushiki Kaisha*) or a branch of foreign company. Their fees derived from managing/advising are subject to corporate tax. In the case of an investment trust which is subject to corporate tax, the trustee is obliged to pay corporate tax levied on the trust property. As for TK, the business operator is also subject to corporate tax on income derived from the TK's business.

## 6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

In general, there is no establishment tax or transfer tax levied in connection with an investor's participation.

On the other hand, in the case of transfer of interest in investment corporations and investment trusts, capital gains derived from such transfers are generally subject to corporate or income tax.

## 6.4 What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds?

### (1) Investment corporations

#### (a) Resident investors

##### ■ Closed-ended investment corporations

Dividends of closed-ended investment corporations, i.e. not assuming a refund, are subject to withholding tax at the rate of 20.42% and to comprehensive taxation for resident individuals in general.

If the equity of an investment corporation is listed, dividends are subject to 15.315% withholding tax (plus 5% of local tax levied in the case of resident individual investors) and it is not necessary to file a tax return.

##### ■ Open-ended investment corporations

Dividends of open-ended investment corporations, i.e. assuming a refund, are taxed generally the same as dividends of unlisted equity of closed-ended investment corporations.

As for dividends from specified investment corporations, i.e. a domestic public offering investment corporation that assumes a refund in terms of conditions that meets certain requirements, are generally subject to withholding tax at the rate of 15.315% (plus 5% of local tax levied in the case of resident individual investors) when such dividends are paid to resident investors. If the tax is withheld at source, resident investors may select not to file a tax return or file a tax return under comprehensive taxation or separate self-assessment taxation.

#### (b) Non-resident investors

Concerning non-resident individuals or foreign corporations, who do not have a PE in Japan, dividends are subject to 20.42% withholding tax and it is not necessary to file a tax return.

Dividends of specified investment corporations are subject to 15.315% (plus 5% of local tax levied in the case of non-resident individual investors) withholding tax and it is not necessary to file a tax return.

#### (c) Pension fund investors and other common types of investors

Dividends received by a pension fund investor are not subject to tax, as long as the pension fund investor constitutes a public corporation or a public interest corporation as defined in the Corporation Tax Act (Act No. 34 of 1965; “Corporation Tax Act”). The majority of financial institutions and joint stock companies (*Kabushiki Kaisha*) do not fall within the category of these corporations and are taxed according to (a) or (b) above depending on their residence.

### (2) Investment trusts

#### (a) Resident investors

Income withholding tax at the rate of 15.315% and local withholding tax at the rate of 5% will be imposed on profit distributions (to be treated as interest income) from investment funds that only invest in public and corporate bonds (bond-related investment funds).

Income withholding tax at the rate of 15.315% and local withholding tax at the rate of 5% will be imposed on profit distributions (to be treated as dividend income) from investment funds that are securities-related investment funds other than bond-related investment funds (equity-related investment funds), where such investment funds publicly offer their shares or units in Japan.

Profit distributions from other investment funds, with some exceptions, will be subject to income withholding tax at the rate of 20.42% (but no local withholding tax).

- (b) Non-resident investors  
Income tax will only be imposed on non-resident investors with regard to income classified as domestic source income.
- (c) Pension fund investors and other common types of investors  
Profit distributions are not subject to tax, as long as the pension fund investor constitutes a public corporation or a public interest corporation as defined in the Corporation Tax Act. The majority of financial institutions and joint stock companies do not fall within the category of these corporations and are taxed according to (a) or (b) above depending on their residence.
- (3) NKs etc.**
- (a) Resident investors  
For resident members of NKs etc., as stated in question 6.1, these entities are fiscally transparent and therefore its members are subject to the direct tax liability (so-called pass-through taxation).  
Distribution of profit from TKs is subject to 20.42% withholding tax. In addition, as to individual investors, the distribution will be subject to income tax under comprehensive taxation. As to corporate investors, the distribution will be subject to corporate tax. The withholding tax amount paid can be deducted in calculating the tax amount of both.
- (b) Non-resident investors  
Distributions of profits from the businesses through PE based on contracts of NKs, etc. are generally subject to withholding tax at the rate of 20.42%.  
In the case of TKs, those who do not have a PE are subject to withholding tax at the rate of 20.42%, and it is not necessary to file a tax return.
- (c) Pension fund investors and other common types of investors  
Profit distributions are not subject to tax, as long as the pension fund investor constitutes a public corporation or a public interest corporation as defined in the Corporation Tax Act. The majority of financial institutions and joint stock companies do not fall within the category of these corporations and are taxed according to (a) or (b) above depending on their residence.

**6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund or local asset holding company?**

It is possible to apply for a tax ruling in Japan, but the Japanese tax authorities are not obliged to issue a tax ruling.

In the case of partnerships, it may be worthwhile to consult in advance if it is identified as a TK or an NK to make sure whether pass-through taxation is available.

**6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the OECD's Common Reporting Standard?**

With respect to FATCA, a statement was issued in 2013 that the government of Japan and the United States will cooperate with each other to implement FATCA in Japan. Based on this, the

Japanese authorities have asked domestic financial institutions to register with the IRS and provide information on the targeted accounts to the IRS.

With respect to CRS, based on the Act on Special Provisions of Income Tax Act, Corporation Tax Act, and Local Tax Act Incidental to Enforcement of Tax Treaties (Act No. 46 of 1969), the system for financial institutions based in Japan to report the information of non-resident's accounts to the head of the corresponding tax office has been introduced.

**6.7 What steps have been or are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 2 (hybrids/reverse hybrids/shell entities) (for example ATAD I, II and III), 6 (prevention of treaty abuse) (for example, the MLI), and 7 (permanent establishments), insofar as they affect Alternative Investment Funds' and local asset holding companies' operations?**

In cases where a Japanese corporation holding 25% or more of the issued shares in a foreign company receives dividends from the company, 95% of the dividends are excluded from treatment as the corporation's gross revenue. However, the relevant rules concerning this treatment were revised, based on recommendations from Action 2, in the 2015 tax reform. Commencing from the fiscal year beginning 1 April 2016, dividends from a foreign company which are included as deductible expenses in that country (in whole or in part) are now, in principle, treated as the corporation's gross revenue under the Corporation Tax Act.

In relation to Action 6, Japan has introduced the Principal Purpose Test (PPT), Limitation on Benefits clauses and anti-conduit rules in tax treaties. By these, unfairly obtained treaty benefits are avoided. Also, on the protocol attached to the tax treaty executed with the United States, it has been stated that income arising from TKs can be taxed in accordance with domestic law in both countries in order to prevent tax avoidance.

In accordance with Action 7, the scope of PE under Japanese tax law has been revised in order to prevent artificial avoidance of PE status.

**6.8 Are there any tax-advantaged asset classes or structures available? How widely are they deployed?**

There are no special tax-advantaged asset classes or structures available in Japan.

**6.9 Are there any other material tax issues for investors, managers, advisers or AIFs?**

There are no other material tax issues.

**6.10 Are there any meaningful tax changes anticipated in the coming 12 months other than as set out at question 6.6 above?**

No, we do not anticipate any meaningful tax changes in the coming 12 months.

## 7 Trends and Reforms

**7.1 What have been the main trends in the Alternative Investment Funds space in the last 12 months?**

Index funds have attracted more interest in the Japanese market.

They have expanded their horizons to balanced funds, theme funds and ESG-related funds. Index funds, which can invest in a variety of investments at a relatively low cost, are expected to continue to grow. Competition is intensifying among index funds to offer products carrying lower management costs. The total expense ratio of one such fund recorded an all-time low fee level of 0.10% in 2021.

#### 7.2 What reforms (if any) in the Alternative Investment Funds space are proposed?

There are currently no proposed reforms in Japan.

### Acknowledgments

The authors would like to acknowledge the assistance of their colleagues Akira Tanaka and Yoshiko Nakamura in the preparation of this chapter.



**Koichi Miyamoto** is a partner and an expert specialising in providing advice on the Financial Instruments and Exchange Act, Banking Act and Investment Trust Act. His professional experience also includes providing legal services and advice in relation to structuring, formation and marketing of domestic and foreign investment funds, including private equity funds, venture capital funds, mezzanine funds, real estate funds, infrastructure funds, as well as asset management, FinTech and various types of complex financial and regulatory transactions. In addition to his professional experience at Anderson Mōri & Tomotsune, he has also worked for the Securities and Exchange Surveillance Commission of Japan (from May 2008 to May 2010), where he was in charge of inspection of financial instruments business operators.

**Anderson Mōri & Tomotsune**  
Otemachi Park Building  
1-1-1 Otemachi, Chiyoda-ku  
Tokyo 100-8136  
Japan

Tel: +81 3 6775 1222  
Email: [koichi.miyamoto@amt-law.com](mailto:koichi.miyamoto@amt-law.com)  
URL: [www.amt-law.com/en](http://www.amt-law.com/en)



**Takahiko Yamada** is special counsel at Anderson Mōri & Tomotsune, specialising in financial regulation, asset management, investment funds, and insurance and financial transactions. He has substantial experience advising broker dealers, banks, insurance companies, asset managers and other financial institutions on matters of financial regulation. He has also been seconded as a Deputy Director in the Planning and Coordination Bureau (Financial Markets Division) of the Financial Services Agency of Japan (July 2009–February 2012), where he was responsible for overseeing all aspects of regulations governing investment management businesses in Japan, including the Financial Instruments and Exchange Act, the Investment Trust and Investment Corporation Act and the Act on Securitization of Assets, among others. Takahiko also participated in the development of new legislation during his secondment with the Financial Services Agency of Japan.

**Anderson Mōri & Tomotsune**  
Otemachi Park Building  
1-1-1 Otemachi, Chiyoda-ku  
Tokyo 100-8136  
Japan

Tel: +81 3 6775 1153  
Email: [takahiko.yamada@amt-law.com](mailto:takahiko.yamada@amt-law.com)  
URL: [www.amt-law.com/en](http://www.amt-law.com/en)

Anderson Mōri & Tomotsune is a full-service law firm formed by the merger and consolidation of the practices of three leading Japanese law firms: Anderson Mōri, which established its reputation as one of the largest and most established international law firms in Japan since its inception in the early 1950s; Tomotsune & Kimura, particularly known for its expertise in international finance transactions; and Bingham Sakai Mimura Aizawa, a premier international insolvency/restructuring and crisis-management firm. With a long tradition of serving the international business and legal communities, our superior expertise, coupled with our standing as one of the largest law firms in Japan, translates to not only high-quality services but also time and cost efficiencies, which we share with our clients.

[www.amt-law.com/en](http://www.amt-law.com/en)

**ANDERSON  
MŌRI &  
TOMOTSUNE**

# ICLG.com



## Current titles in the ICLG series

Alternative Investment Funds  
Anti-Money Laundering  
Aviation Finance & Leasing  
Aviation Law  
Business Crime  
Cartels & Leniency  
Class & Group Actions  
Competition Litigation  
Construction & Engineering Law  
Consumer Protection  
Copyright  
Corporate Governance  
Corporate Immigration  
Corporate Investigations  
Corporate Tax  
Cybersecurity  
Data Protection  
Derivatives  
Designs  
Digital Business  
Digital Health  
Drug & Medical Device Litigation  
Employment & Labour Law  
Enforcement of Foreign Judgments  
Environment & Climate Change Law  
Environmental, Social & Governance Law  
Family Law  
Fintech  
Foreign Direct Investment Regimes  
Franchise  
Gambling  
Insurance & Reinsurance  
International Arbitration  
Investor-State Arbitration  
Lending & Secured Finance  
Litigation & Dispute Resolution  
Merger Control  
Mergers & Acquisitions  
Mining Law  
Oil & Gas Regulation  
Patents  
Pharmaceutical Advertising  
Private Client  
Private Equity  
Product Liability  
Project Finance  
Public Investment Funds  
Public Procurement  
Real Estate  
Renewable Energy  
Restructuring & Insolvency  
Sanctions  
Securitisation  
Shipping Law  
Technology Sourcing  
Telecoms, Media & Internet  
Trade Marks  
Vertical Agreements and Dominant Firms