

# Legal 500

## Country Comparative Guides 2024

### Japan

## Alternative Investment Funds

### Contributor



Anderson Mori &  
Tomotsune

#### Koichi Miyamoto

Partner | [koichi.miyamoto@amt-law.com](mailto:koichi.miyamoto@amt-law.com)

#### Akira Tanaka

Partner | [akira.tanaka@amt-law.com](mailto:akira.tanaka@amt-law.com)

#### Anri Suzuki

Special Counsel | [anri.suzuki@amt-law.com](mailto:anri.suzuki@amt-law.com)

#### Hiroko Aono

Special Counsel | [hiroko.aono@amt-law.com](mailto:hiroko.aono@amt-law.com)

This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Japan.

For a full list of jurisdictional Q&As visit [legal500.com/guides](https://legal500.com/guides)

## Japan: Alternative Investment Funds

### 1. What are the principal legal structures used for Alternative Investment Funds?

The principal legal structure used for Alternative Investment Funds is an investment trust formed pursuant to the Act on Investment Trusts and Investment Corporations (Act No. 198 of 1951, the "AITIC") ("Japanese Investment Trust"). Japanese Investment Trusts are formed when a settlor (i.e., manager) enters into a trust agreement with a trustee under which investors acquire divided beneficiary interests in the trust.

Investment corporations formed under the AITIC ("Japanese Investment Corporations") are vehicles commonly used for investment in real property, which is known as a Japanese real estate investment trust ("J-REIT").

Collective investment schemes ("CIS"), including limited partnerships ("Japanese Limited Partnerships") formed pursuant to the Limited Partnership Act for Investment (Act No. 90 of 1998), silent partnerships (*tokumei kumiai*, or "TKs") formed pursuant to the Commercial Code (Act No. 48 of 1899), and partnerships ("NKs") formed pursuant to the Civil Code (Act No. 89 of 1896) are also commonly used.

Foreign Alternative Investment Funds of similar structures (e.g., foreign investment trusts, foreign investment corporations, foreign limited partnerships) may also be offered in Japan.

Certain types of CIS, including TKs and NKs (and similar foreign partnerships), that directly invest in real properties are subject to the Act on Specified Joint Real Estate Ventures (Act No. 77 of 1994). Given the parameters of this document, a description of the regulations of this Act applicable to Alternative Investment Funds has been omitted.

The marketing, management, and disclosure of Alternative Investment Funds are primarily regulated by the Financial Instruments and Exchange Act (Act No. 25 of 1948, the "FIEA"). Investment trusts and investment corporations are also subject to the AITIC.

### 2. Does a structure provide limited liability to the investors? If so, how is this achieved?

Liability of the investors in Japanese Investment Trusts and Japanese Investment Corporations is limited to the amount of the investor's contribution. Investors in Japanese Limited Partnerships are also subject to limited liability by law and TKs are generally structured to provide limited liability to investors which can be created by drafting the partnership agreement to that effect.

Whereas liability of investors in NKs is generally unlimited, in practice, some NKs are structured to substantially limit investor's liabilities, typically by restricting the fund borrowing and/or internally limiting the allocation of losses by the partnership agreement.

### 3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

The most commonly-marketed type of investment fund in Japan is a Japanese Investment Trust. According to the statistics published by The Investment Trusts Association ("ITA"), which is a self-regulatory organisation in Japan, almost all Japanese Investment Trusts under management as of the end of June 2024[HOA:こちらの「A 2投資信託の全体像(純資産総額・ファンド本数)」] are securities investment trusts, i.e. investment trusts (except certain types) with an objective to invest more than 50% of the assets in securities and securities-related derivative transactions. There are no official statistics specific to Alternative Investment Funds.

For investment in real property, listed J-REITs are commonly used for public offerings, and TKs are commonly used for private placements.

Private equity funds and venture capital funds are typically structured as Japanese Limited Partnerships or other CIS schemes.

### 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. However, if an Alternative Investment Fund is structured as a foreign investment trust or a foreign investment corporation, and is publicly offered in Japan, different rules established by the Japan Securities Dealers Association ("JSDA"), a self-regulatory organisation in Japan, will apply depending on whether the investment trust/investment corporation is open-ended or closed-ended (e.g., certain selection criteria apply to only open-ended funds). Further, Japanese Investment Trusts and Japanese Investment Corporations that constitute "Real Estate Investment Trusts, etc.," as defined under the rules of the ITA, are subject to different rules depending on whether the investment trust/investment corporation is open-ended or closed-ended (e.g., NAV calculation, and redemption). Listed J-REITs must be closed-ended pursuant to the listing rules.

The regulatory regime is different depending on whether the Alternative Investment Fund is categorised as an investment trust, an investment corporation, or a CIS, but the regime does not differentiate between the strategies of Alternative Investment Funds except for the direct investment in real property by a CIS as noted in 1.1.

## 5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

There are no limitations on a manager's ability to restrict redemptions unless the constitutional documents impose a limitation. However, the limited partners of a Japanese Limited Partnership may withdraw from the partnership based on unavoidable grounds, and that statutory right may not be contractually restricted.

## 6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

Most types of J-REITs are structured as closed-ended in order to manage the illiquidity risks regarding the portfolio assets (e.g., real property), while also permitting the investors to dispose of their interests on the market by listing.

Japanese Limited Partnerships may provide for in-kind distribution in a partnership agreement.

## 7. Are there any restrictions on transfers of investors' interests?

A transfer restriction may apply if the interests in Alternative Investment Funds are privately placed. Further, if a CIS relies on a certain exemption from the registration requirement in question 12 below, additional transfer restrictions will apply to satisfy the requirements of the exemption.

## 8. Are there any other limitations on a manager's ability to manage its funds (e.g., diversification requirements)?

A manager of an Alternative Investment Fund that is registered as an Investment Manager (defined in question 12), or that has filed a Form 20 pursuant to Article 63 of the FIEA ("Article 63 Business Operator") (see question 12 for more details) is subject to codes of conduct for investor protection under the FIEA when it conducts investment management activities for the Alternative Investment Funds. For instance, an Investment Manager and Article 63 Business Operator is prohibited from causing a transaction as a part of its management activities between (i) the fund's assets on one side, and (ii) the manager, its officers or other assets managed by the manager on the other.

Further, Japanese Investment Trusts and Japanese Investment Corporations are subject to requirements under the AITIC that they: (i) must invest more than 50% of assets in "specified assets" pursuant to the AITIC; and (ii) must not acquire more than 50% of the voting rights of an entity (in the case of Japanese Investment Corporations, with certain exceptions) (in the case of Japanese Investment Trusts, the voting rights held by all Japanese Investment Trusts managed by the manager are aggregated). "Specified assets" include securities, rights pertaining to derivative transactions, real property, and rights of lease of real property. Further, the ITA imposes rules on investment management (e.g., eligible securities and borrowings).

Foreign investment trusts and foreign investment corporations that are publicly offered in Japan are subject to rules established by JSDA. For open-ended funds, the rules include a prohibition against acquiring more than 50% of the voting rights of an entity, and a requirement to create, and comply with, methods to appropriately manage credit risks (e.g., diversification).

Investment assets of Japanese Limited Partnerships are limited to those listed in the Limited Partnership Act for Investment. Among others, Japanese Limited Partnerships may not invest 50% or more of the assets in equity or interests of a foreign entity. Please note that due to amendments to the Limited Partnership Act for Investment promulgated in June 2024 (as of this writing, the effective date has not been determined), equities or interests of certain foreign entities (the specific details of such foreign entities will be prescribed by a cabinet order) will be exempted from such 50% investment ratio restrictions.

## 9. 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? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

### (1) Investment trusts

Investment trusts are generally categorised for tax purposes as follows: (i) collective investment trusts, i.e., securities investment trusts, domestic publicly offered investment trusts, and foreign investment trusts; and (ii) investment trusts other than collective investment trusts. Collective investment trusts are tax transparent, i.e., the trust itself is not subject to Japanese corporate tax, and the investors are taxed when they receive income and gains from the trust. However, investment trusts other than collective investment trusts are subject to corporate tax and the trustee will be a taxpayer.

#### (a) Resident investors

Profit distributions to resident investors from publicly-offered securities investment trusts that only invest in public and corporate bonds ("bond investment trusts") are treated as interest income, and will be subject to income withholding tax at the rate of 15.315% and local withholding tax at the rate of 5%.

Profit distributions from publicly-offered securities investment trusts other than bond investment trusts ("equity investment trusts") are treated as dividend income and will be subject to income withholding tax at the rate of 15.315% and local withholding tax at the rate of 5%.

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

#### (b) Non-resident investors

Income tax will only be imposed on non-resident investors with respect to income categorised as domestic source income.

#### (c) Pension fund investors

Profit distributions are not subject to tax, as long as the pension fund constitutes each as a public interest corporation etc. as defined in the Corporation Tax Act (Act No. 34 of 1965) and a public corporation as defined in the Income Tax Act (Act No. 33 of 1965). Profit distributions to the Government Pension Investment Fund (GPIF) are also non-taxable under the Corporations Tax Act and the Income Tax Act.

#### (d) Sovereign wealth fund investors

There is no specific treatment for sovereign wealth fund investors.

### (2) Investment corporations

Investment corporations are generally subject to Japanese corporate tax. However, dividends to investors may be treated as deductible expenses if so-called conduit requirements are satisfied, thereby avoiding double taxation. Conduit requirements include that the amount of payment to the investors, including dividends, for the fiscal year exceeds the amount equivalent to 90% of the distributable profits.

#### (a) Resident investors

##### (i) Closed-ended investment corporations

Dividends of closed-ended investment corporations are subject to income withholding tax at the rate of 20.42%, and are subject to comprehensive income taxation (*sogo kazei*) in general.

If the equity of closed-ended investment corporations is listed, dividends to resident investors (excluding certain large-lot investors) are subject to a 15.315% income withholding tax and a 5% local withholding tax. Investors need not file a tax return in general (with certain exceptions), but may elect to file a tax return based on comprehensive taxation or separate self-assessment taxation.

##### (ii) Open-ended investment corporations

Dividends of open-ended investment corporations are taxed generally the same as dividends of unlisted closed-ended investment corporations.

If the investment corporation constitutes a "specified investment corporation" (i.e., a domestic open-ended publicly offered investment corporation that meets certain requirements), dividends are subject to a 15.315% income withholding tax and a 5% local withholding tax. Investors need not file a tax return, but may elect to do so based on comprehensive taxation or separate self-assessment taxation.

(b) Non-resident investors

Dividends to non-resident investors who have permanent establishments (PEs) are taxed similarly as resident investors.

For non-resident investors who do not have PEs in Japan, dividends are generally subject to a 20.42% income withholding tax, and filing a tax return is not required.

(c) Pension fund investors

Same as (1) (c) above.

(d) Sovereign wealth fund investors

Same as (1) (d) above.

(3) CIS

Japanese Limited Partnerships, NKs, and limited liability partnerships formed pursuant to the Limited Liability Partnership Act (Act No. 40 of 2005) (collectively, "NKs etc."), are tax transparent, and their assets/debts and profits/losses are treated as attributable to the members. Therefore, the members of NKs etc., are subject to direct tax liability. However, contributions in TKs belong to the business operator (i.e., manager), so the business operator, rather than the TK, is subject to tax. When calculating the taxable income of the business operator, however, the amount of losses or profits distributed to its silent partners is treated as gross revenue or deductible expenses, respectively, thereby avoiding double taxation.

(a) Resident investors

Distribution of profits accrued from investment of NKs etc. are subject to income tax under comprehensive income taxation at progressive rates.

Distribution of profits accrued from investment of TKs are subject to a 20.42% income withholding tax. In addition, investors are subject to comprehensive income taxation, calculation of which allows deduction of the withheld tax amount.

(b) Non-resident investors

Distribution of profits derived from businesses pursuant to the partnership agreement of NKs etc. are generally subject to a 20.42% income withholding tax, with certain exemptions from withholding obligations for non-resident investors that have PEs.

Distribution of profits derived from businesses pursuant to the silent partnership agreement of TKs are subject to a 20.42% income withholding tax, plus comprehensive income tax for those that have PEs in Japan. Non-resident investors that do not have PEs need not file a tax return.

(c) Pension fund investors

Same as (1) (c) above.

(d) Sovereign wealth fund investors

Same as (1) (d) above.

Tax status or preference of investors or the tax treatment, in particular the tax transparency of the vehicle, is one of the critical considerations when determining the structure of Alternative Investment Funds, together with other considerations such as relevant regulations and costs.

## 10. What rights do investors typically have and what restrictions are investors typically subject to with respect to the management or operations of the Alternative Investment Fund?

The investor's participation in the management or operation of Japanese Investment Trusts is limited to voting on written resolutions for material changes in the trust agreement or consolidation of investment trusts.

Investors in Japanese Investment Corporations have wider voting rights, including with respect to the appointment and removal of officers and financial auditors.

In Japanese Limited Partnerships, the general partner has the authority to manage and operate the partnership, and investors (i.e., limited partners) have limited supervisory rights (e.g., the right to inspect the status of the partnership's business and assets). Investors in TKs are also restricted from managing and operating the partnership by law.

## 11. Where customization of Alternative

## Investment Funds is required by investors, what types of legal structures are most commonly used?

For regulatory flexibility, Japanese limited partnerships, other CIS or similarly structured foreign Alternative Investment Funds are commonly used where investors require to customize the terms. However, other structures such as privately placed investment trusts may also be used.

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

In principle, a person engaged in the business of discretionary investment management of Alternative Investment Funds (e.g., a settlor that manages an investment trust, a manager of investment corporations, a general partner of a limited partnership) is required to be registered as an investment manager ("Investment Manager"); and a person engaging in the business of providing non-discretionary investment advice to Alternative Investment Funds is required to be registered as an investment advisor ("Investment Advisor") pursuant to the FIEA.

A foreign manager or advisor need not acquire registration if both the foreign manager or advisor as well as the relevant Alternative Investment Funds are domiciled outside Japan; provided, however, that a manager of a CIS is required to be registered as an Investment Manager if the CIS invests more than 50% of its assets in securities and/or derivative transactions and if the CIS has a Japanese investor. However, registration is not required if the manager delegates all of its investment management authority to a locally registered Investment Manager and meets certain requirements under the FIEA. Further, exemptions from the general registration requirements are summarised below:

- (a) the manager is exempt from the registration requirement as an Investment Manager (the "Article 63 Exemption") if:
  - (i) Japanese investors in the CIS consist of: (a) one or more qualified institutional investors as defined in the FIEA ("QIIs"); and (b) not more than, if any, 49 eligible investors, other than QIIs, as set out in the FIEA;
  - (ii) none of the QIIs or eligible investors (other than QIIs) are "unqualified investors" as set out in the FIEA; and
  - (iii) the manager submitted a Form 20 under Article 63 of

the FIEA prior to commencement of management of the assets of the CIS.

(b) the manager is exempt from the registration requirement as an Investment Manager if:

- (i) all of the direct investors (i.e., Japanese investors that directly hold interests in the CIS) are either: (x) QIIs; or (y) investors that have filed a Form 20 and engage in the investment management business pursuant to Article 63 of the FIEA;
- (ii) indirect investors (i.e., Japanese investors that indirectly invest in the CIS through a Japanese CIS that directly invests in the CIS), if any, are all QIIs;
- (iii) there are not more than nine (9) Japanese investors in the CIS (including indirect investors); and
- (iv) the aggregate amount of investments in the CIS by direct investors is not more than one-third (1/3) of the aggregate amount of the investments in the CIS by all investors.

"QII" is defined under the FIEA to include: banks, insurance companies, financial instruments business operators registered as Type I FIBOs (see question 27) or Investment Managers, the Government Pension Investment Fund (GPIF), and Japanese Limited Partnerships. The manager may consult the list of QIIs available on the website of the Financial Services Agency to ascertain whether a prospective investor is a QII.

Further, [HOA: 施行から約3年経っていますので newを削除して若干表現を変えました ]under an exemption which became effective in November 2021, a foreign manager may conduct solicitation and management activities without the registration where the conditions are satisfied. The conditions include: the manager has an office in Japan; the Japanese investors in the relevant fund are limited to certain eligible categories, including QIIs and other Professional Investors (see question 27); and 50% or more of the fund assets are contributed by foreign investors.

For registration requirements that may be applicable to a manager that markets the interests in Alternative Investment Funds in Japan, see question 27.

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

No license or authorisation is required for Alternative Investment Funds themselves. However, if the interests in

Alternative Investment Funds are publicly offered in Japan, a securities registration statement must be filed.

Further, investment trusts and investment corporations are subject to certain filing requirements under the AITIC regardless of whether the interests are publicly offered or privately placed. A trust agreement of a Japanese Investment Trust must be filed before entering into the agreement, and the formation of a Japanese Investment Corporation must be filed in advance. If the Alternative Investment Fund is a foreign investment trust or a foreign investment corporation, a notification of foreign investment trust or foreign investment corporation must be filed prior to the commencement of solicitation of the interests.

#### **14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?**

The manager of securities investment trusts (i.e., the most commonly-structured type of Japanese investment trust) and Japanese investment corporations must be registered as an Investment Manager, and it must have a local business office in Japan. Please also see question 12 and 16. However, no such requirement applies to investment advisors.

As a part of the initiatives to encourage foreign managers to enter into Japanese markets, Japan's regulator has established the "Financial Market Entry Office" in January 2021, which provides a one-stop centre for consultation and registration services.

#### **15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?**

To be qualified as an Investment Manager, the manager must have a local business office in Japan, and if the manager is a foreign entity, it must appoint a local representative in Japan. No local presence or local representative is required for an Investment Advisor.

An Article 63 Business Operator domiciled outside Japan is also required to appoint a local representative in Japan.

#### **16. What service providers are required by applicable law and regulation?**

A Japanese Investment Corporation must delegate all of its investment management authority to a registered Investment Manager, and must appoint a custodian and an administrator for its businesses.

An Article 63 Business Operator domiciled outside Japan may engage an outside service provider to act as a local representative in Japan, instead of appointing a local representative internally.

#### **17. Are local resident directors / trustees required?**

For directors, see 2.4. There is no requirement for local resident trustee with respect to Alternative Investment Funds organised under foreign law.

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

If a foreign manager or advisor is registered as an Investment Manager or Investment Advisor, or if it has filed a Form 20 (i.e., an Article 63 Business Operator), it must comply with the codes of conduct as set out in the FIEA. For codes of conduct applicable to an Investment Manager and an Article 63 Business Operator, please see question 8.

Further, if a locally-registered Investment Manager delegates the discretionary investment management authority (or a part of the authority) for an Alternative Investment Fund to a foreign manager, certain codes of conduct and other requirements (e.g., fiduciary duty) that are applicable to the Investment Manager will similarly apply to the foreign manager, regardless of whether the foreign manager is registered in Japan.

#### **19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?**

Managers may commonly face an enforcement risk if they conduct regulated businesses without the requisite registration (e.g., if a manager solicits the interests in an Alternative Investment Fund without a Type I or Type II FIBO registration (see question 27), or if it manages a foreign CIS that has a Japanese investor without having an Investment Manager registration (and without relying on any of the exemptions from the registration requirement)). Care should be taken when analysing whether an activity constitutes "solicitation," which

triggers the registration requirements, as detailed in question 28.

Other common enforcement cases include where the assets of Alternative Investment Funds were not segregated from a manager's own assets and other assets managed by the manager pursuant to the FIEA, and where a manager delivers false information to the investor when it solicits the Alternative Investment Funds.

## 20. What is the typical level of management fee paid? Does it vary by asset type?

The typical management fee paid in Japanese Limited Partnerships is two (2) to three (3) percent of the total commitments/invested assets of the partnership.

For Japanese Investment Trusts, the average management fee for all of the publicly-offered equity investment trusts of which interests can be purchased from time to time (open-type) is 0.96%, the average for active funds is 1.11% and the average for ETFs is 0.29% (as of the end of June 2024, ITA)[HOA: [こちらのファクトブック](#) (2024年6月末)の13項(13ページ)]. Generally speaking, management fee rates for investment trusts that principally invest in overseas assets (especially those investing in stocks, real property, or other assets) are higher than those investing principally in domestic assets.

## 21. Is a performance fee typical? If so, does it commonly include a "high water mark", "hurdle", "water-fall" or other condition? If so, please explain.

A performance fee or carried interest is a typical charge levied in Japanese Limited Partnerships. In particular, 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.

A hedge fund structured as a Japanese Investment Trust commonly sets out a high water mark, pursuant to which a certain percentage (e.g., 20%) of the amount exceeding the high water mark will be paid to the manager as a

performance fee.

J-REITs commonly provide incentive fees, such as fees linked to net operating income (NOI) from leasing, capital gain, or unit price of the share of the J-REIT, in addition to, or as an alternative to, the fixed-rate management fee.

## 22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?

While not typical, some private equity funds structured as a Japanese Limited Partnership have a category of investors called "special limited partners" who have a certain relationship with the general partner, and treat such investors differently in regard to management fees and costs (usually in a way which is beneficial for special limited partners).

## 23. Are management fee "break-points" offered based on investment size?

Offering management fee "break-points" based on investment size is not very common in Alternative Investment Funds structured under Japanese law, while some managers do provide them.

## 24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?

First loss programs are not typical in Alternative Investment Funds structured under Japanese law.

## 25. What is the typical terms of a seeding / acceleration program?

Typical terms of distribution of proceeds in venture capital funds structured as Japanese Limited Partnerships are as follows:

- i. First, distribute 100% of the distributable proceeds to each of the partners until the cumulative distribution is equal to the total capital contribution [or total commitment] by the partner;
- ii. Then, distribute [x]% (e.g., 20%) of the outstanding distributable proceeds to the general partner; and



- iii. Finally, distribute the residual to the partners.

Hurdle-rates and catch-ups may also be provided in some cases.

## 26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?

In Japanese Limited Partnerships, the general partner's fee was previously set out as a performance fee in typical cases for certain tax reasons. However, following the FSA's announcement in April 2021 that clarified the tax treatment of carried interest to certain extent, and reflecting overseas practices, more and more Japanese Limited Partnerships have been opting for carried interest structures recently. A performance fee and carried interest are taxed differently, especially when the general partner is an individual (or a limited liability partnerships formed pursuant to the Limited Liability Partnership Act that consist of individual partners).

The average subscription fees and management fees for Japanese Investment Trusts are showing a decreasing trend due to such factors as increased shares of index funds, and more popularised investment through defined-contribution pension system and separately managed accounts.

In relation to management fees, incentives or carried interest payments, there are no clear cut industry standards or norms to distinguish between primary funds and secondary funds.

## 27. What restrictions are there on marketing Alternative Investment Funds?

If the issuer itself (e.g., a manager or trustee of a foreign investment trust in accordance with the governing law of the trust) solicits interests in Japanese Investment Trusts or foreign investment trusts in Japan, that solicitation activity requires registration as a Type II Financial Instruments Business Operator ("Type II FIBO"). If marketing is delegated to a third party placement agent (including to a manager who is not an issuer pursuant to the governing law), the placement agent must be a registered Type I Financial Instruments Business Operator ("Type I FIBO") or a registered financial institution. The marketing of shares in foreign investment corporations in Japan by the corporation itself ("self-marketing") is not regulated. In this regard, what is

regarded as self-marketing is limited to the marketing activities conducted by directors/officers/employees of the corporation itself, and would not extend to the marketing activities by service providers to the corporation (including the investment manager of the corporation). If marketing is delegated to a third party placement agent, the placement agent must be a registered Type I FIBO or a registered financial institution.

If a manager of a CIS (e.g., general partner) itself solicits the interests in Japan, the manager is required to register as a Type II FIBO, but may instead delegate all solicitation activities to a registered Type II FIBO. Further, the manager may rely on an exemption from the registration requirement by filing a Form 20 and meeting certain requirements, most of which are similar to the requirements for the Article 63 Exemption regarding investment management activities as explained in question 12. If the manager of a CIS engages a third party placement agent for marketing in Japan, the placement agent must be a registered Type II FIBO or a registered financial institution.

Marketing of interests in Alternative Investment Funds in Japan by a third party placement agent who qualifies as a "Foreign Securities Dealer" as defined under the FIEA would be exempted from the registration requirement, if (i) such marketing is made from outside Japan (via telephone calls, video conferences, exchange of emails, etc), and (ii) such marketing is made only to financial institutions (i.e., banks, broker-dealers, trust companies, insurance companies and discretionary investment managers) licensed in Japan.

A person registered as a Type I FIBO or Type II FIBO, or a manager who is an Article 63 Business Operator, is subject to certain codes of conduct under the FIEA when it conducts its solicitation activities for the Alternative Investment Funds, including prohibitions against the delivery of false information to investors, and against compensating losses for the investors or promising to do so. If the investors are not categorised as "Professional Investors" (*tokutei toshika*) as defined under the FIEA, additional investor protection rules will apply, which include the requirement to deliver statutory documents (note that due to amendments to the FIEA, etc. promulgated in November 2023 (as of this writing, the effective date has not been determined), with regard to certain statutory documents, this will be changed to an obligation to provide information, including digital method) and advertisement regulations. If the investor is a Professional Investor, a notification that the investor may request to be treated as a non-Professional Investor is required, except for certain types of professional investors (e.g., QIIs). Professional Investors include QIIs,

listed companies, stock companies with stated capital expected to be 500 million yen or more, financial instruments business operators, and foreign entities. On 1 July 2022, a subordinated regulation to the FIEA came in to effect whereby more flexible categories of individuals can request for being treated as Professional Investors.

Further, if the interests in Alternative Investment Funds are privately placed, certain written notification to investors (e.g., transfer restriction) is generally required.

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

Japanese law has no concept of "pre-marketing" or equivalent conduct in the context of marketing of interests in Alternative Investment Funds.

The FIEA has no clear definition of "solicitation," which generally triggers the registration requirement. The determination of whether an activity constitutes "solicitation" is a matter of factual observation, and is made on a case-by-case basis by considering all relevant facts and circumstances. However, providing information about a specific fund is generally understood to be likely to constitute "solicitation."

### **29. Can Alternative Investment Funds be marketed to retail investors?**

Alternative Investment Funds may be marketed to retail investors. However, if the marketing is made by way of private placement for a small number of investors, the number of investors (excluding QIIs) solicited to invest in investment trusts or investment corporations is limited to 49 or less during 3-month period (note that the aggregation period was shortened by the amendment that became effective on 29 January 2022), or if the Alternative Investment Funds are CIS, the number of investors (including QIIs) investing in the CIS is limited to 499 or less.

Further, if the manager of the CIS relies on certain exemptions from the registration requirements, the types and number of investors are further restricted to satisfy the relevant requirements as referred to in question 12 and 27.

### **30. Does your jurisdiction have a particular form**

### **of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?**

There is no particular form of an Alternative Investment Fund that can be marketed to retail investors. However, most retail funds are structured as Japanese Investment Trusts or Japanese Investment Corporations because of the investor qualification requirements for CIS (please see question 12 and 29).

### **31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?**

Investor qualification requirements vary by the type of the vehicle involved. If the interests in investment trusts or investment corporations are marketed by way of private placement to QIIs, solicitation may be made only to QIIs. For a CIS, investor qualifications will be limited if the manager relies on an exemption from the registration requirements as noted in question 12 and 27.

### **32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?**

There are no additional restrictions.

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

There are no restrictions on the use of intermediaries, but if an intermediary's actions amount to "solicitation" of interests in Alternative Investment Funds, the intermediary must be registered as a Type I FIBO or a Type II FIBO, depending on the type of Alternative Investment Fund, as noted in question 27.

### **34. Is the use of "side letters" restricted?**

The use of side letters is not restricted. However, an Investment Manager and an Article 63 Business Operator are subject to a duty of loyalty and duty to treat its investors fairly and in good faith, and are restricted from compensating customers for their losses or promising to do so. A side letter may not violate these regulations.

**35. Are there any disclosure requirements with respect to side letters?**

There are no explicit disclosure requirements under Japanese law.

**36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?**

Common side letter terms include an excuse right based on the investor's internal policy, and a right to not receive distributions in-kind. If an investor is a bank or an insurance company, the side letter typically includes a term to prevent a violation of voting rights restrictions under the Banking Act (Act No. 59 of 1981), the Insurance Business Act (Act No. 105 of 1995) and the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 22 of 2007) (e.g., excuse).

**Contributors**

**Koichi Miyamoto**  
Partner

[koichi.miyamoto@amt-law.com](mailto:koichi.miyamoto@amt-law.com)



**Akira Tanaka**  
Partner

[akira.tanaka@amt-law.com](mailto:akira.tanaka@amt-law.com)



**Anri Suzuki**  
Special Counsel

[anri.suzuki@amt-law.com](mailto:anri.suzuki@amt-law.com)



**Hiroko Aono**  
Special Counsel

[hiroko.aono@amt-law.com](mailto:hiroko.aono@amt-law.com)

