
Rules and Regulations Regarding Capital Raising in Japan

22 July 2020 | Confidentiality

Speakers



Koji Yamamoto

Partner | Tokyo

+81 3 3500 3754

Koji.Yamamoto@withersworldwide.com



Yoshiyuki Omori

Partner | Tokyo

+81 3 3500 3755

Yoshiyuki.Omori@withersworldwide.com

Market Trends and Overview

Like most of the world, there is a sense of anxiety in the capital markets in Japan – particularly with capital raising

- ❑ Capital Raising activities have slowed down in Japan due to Covid-19
- ❑ Inability on travel has greatly impacted the means and the ability to raise capital
- ❑ Those fund managers that have established offices in Japan seem to be less impacted by Covid-19
- ❑ However, even then, in person meetings are rare and it would be inaccurate to say that it is smooth
- ❑ Fixed income, credit products, etc., appear to be doing well in Japan



Japan Regulatory Presentation - Overview

Japan jurisdiction for foreign managers to raise capital

- This presentation will cover the following specific topics in relation to capital raising in Japan:
 1. The Japan Regulatory Regime for Securities Distribution
 2. Setting up in Japan
 3. Scope unrelated business activities
 4. Registering as a Financial Instruments Business Operator in Japan (“**FIBO**”)

The Four Financial Instruments Business Registrations

Four key financial instruments business registrations under the FIEA

Essential to understand the **two classes** of fund interests

Four Financial Instruments Business Operator Registrations

1. Type 1 Financial Instruments Business
2. Type 2 Financial Instruments Business
3. Discretionary Investment Management Business
4. Investment Advisory and Agency Business

Two Classes of Fund Interests

Paragraph 1 Securities: Shares of capital stock companies, bonds, warrants, commercial paper, units of Cayman trusts and FCPs, shares of Cayman corporations, shares of SICAV, etc.

- ❑ Generally only may be sold to Japanese investors by a party registered to engage in a Type 1 Financial Instruments Business

Paragraph 2 Securities: Trust certificates, interests of Japan limited liability companies and Japan general partnership companies, limited partnership company, interests of limited partnership, limited liability companies, etc.

- ❑ Generally only may be sold to Japanese investors by a party registered to engage in a Type 2 Business

Two Capital Raising Models

Two models of capital raising for Japan investors

The type of model used will be based on the target investor

Two Primary Methods of Capital Raising: Distribution Model vs. Management Model

Distribution Model - *Direct Capital Raising*

- ❑ Distribution Model is the direct placement of the fund interests in Japan and typically requires a Type 1 Dealer or a Type 2 Dealer
- ❑ Banks, Insurance Companies, Corporations, etc.

Management Model - *Indirect Capital Raising*

- ❑ Managing the Japan investor money and directing such money into an affiliated fund - Requires the DIM Registration
- ❑ Primarily used for Japan pension funds
- ❑ Japan pension funds generally cannot make investment decisions



Exemptions – Foreign Securities Firm Exemption

Representatives of managers are **not permitted to physically engage** in marketing activity from Japan

General Marketing Rule

- ❑ Only a Type 1 Dealer or a Type 2 Dealer may engage in the marketing of fund interests to Japanese Investors



Foreign Securities Firm Exemption For Foreign Broker-Dealers

- ❑ Article 58-2 of the FIEA, a Foreign Securities Firm may market securities to Japanese Investors without any registration – subject to certain conditions based on the type of investor (“**Permitted Investors**”)
- ❑ Scope of Permitted Investors includes: banks, insurance companies and DIMs
- ❑ Frequently this will prevent a Foreign Securities Firm from engaging in marketing activities in Japan and only permit marketing from offshore
- ❑ Paragraph 1 Funds marketed under this specific exemption should file an ITICA Notification prior to engaging in marketing activities

Exemptions – The Article 63 Exemption

Article 63 Exemption is still deemed as a practical option for many foreign managers that do not have a Japan Distribution Arrangement although over the past three years it has become more expensive and burdensome

The Article 63 Exemption - Overview

- ❑ Article 63 of the FIEA provides an exemption for the general partner from the registration of two business activities: (i) Self-Offering; and (ii) Self-Management (the “**Article 63 Exemption**”).
- ❑ Exemption can only be used with limited partnership funds.
- ❑ Commonly used by the general partners of LP funds to market the fund interests into Japan due to its relative ease.

2016 Amendments to the Article 63 Exemption

- ❑ However, the Article 63 Exemption was significantly overhauled as of March 1, 2016 with existing filers required to re-submit and comply with new regulations by August 31, 2016.
- ❑ New requirements include the filer under the Article 63 Exemption appointing a Japan representative, maintaining a website, segregation of assets, etc.
- ❑ Some fund managers have de-registered their general partner from this exemption in light of the new regime.

Notification to the Japan FSA – Investment Corporations and Trusts

Managers of Corporate Type Funds and Trust Type Funds must file an ITICA Notification **prior to marketing** In Japan

- ❑ Prior to being marketed to a Japanese Investors, the Investment Trusts and Investment Corporations Act of Japan requires foreign investment trusts and foreign investment corporations to submit a notification to the FSA (the “**ITICA Notification**”).
- ❑ Twenty to thirty-page Japanese language document which summarizes the material terms of the relevant fund.
- ❑ Not necessary to be filed for limited partnerships and only required for foreign investment trusts and foreign investment corporations.
- ❑ Notification filing is effective immediately upon submission and needs not be made periodically, provided, however, an amendment notification filing must be required when any contents of the prior ITICA Notification have been amended.



Japan Office – Stock Company vs. Branch

The familiarity with the laws of the jurisdiction and the potential tax benefits usually affect the decision making

Determination as to what form of entity to set up in Japan

A stand-alone Japan entity such as a Japanese stock company vs Branch

Considerations

Type of Activity (Present and Future):

Certain FIBO's require a certain form of legal entity

Tax Implications:

Treatment of Performance Bonuses

Application of Japanese Law:

Limited application of the Companies Act to Japan branches

Perception:

Consider the market perception and employee perception



Unregistered Business Activities

The key factor is **what specific activity** does the fund manager want to do in Japan

- ❑ Many fund managers seek a “light touch” to the Japan market regarding uncertainty of the business prospects.
- ❑ No immediate plans to seek to be registered as a FIBO.
- ❑ However, it is still possible to engage in many types of unregistered activities which include:
 - Brand promotion
 - Relationship Development
 - Sounding of Strategies with Potential Japan Investors
 - Investor Relations with Existing Investors
- ❑ Common approach to take prior to making a commitment to come to Japan

Be careful not to engage in a registered activity!

Setting up a FIBO in Japan

The key factor is **what specific activity** does the fund manager want to do in Japan

Determination as to what business you want to engage in:

- ❑ Fund Distribution – Type 1 Dealer or Type 2 Dealer
- ❑ Investment Management – Discretionary Investment Manager
- ❑ Investment Advice – Investment Advisory and Agency
- ❑ Intermediary and/or Agency – Investment Advisory and Agency
- ❑ Research – No Registration
- ❑ Client Support / Investor Relations – No Registration



Requirements for each FIBO registration

	Type 1 Financial Instruments Business	Investment Management Business (DIM)	Type 2 Financial Instruments Business	Investment Advisory and Agency Business (IAA)
Personnel Requirements	√ (6 to 8 People)	√ (5 to 7 people)	√	√
Minimum Capital/Net Asset Requirements	√ (Minimum JPY 50 million)	√ (JPY 50 million) (For Pro-DIM: JPY 10 million)	√ (JPY 10 million)	N/A Deposit (5 million)
Must be a K.K or branch of a K.K equivalent foreign company.	√ (Board of Directors, Statutory Auditor)	√ (Board of Directors, Statutory Auditor) (For Pro-DIM: Statutory Auditor only)	N/A	N/A
Limitation on the Side Business	√	√	N/A	N/A
Major Shareholder's Requirement	√	√	N/A	N/A
Minimum Capital Adequacy Ratio	√ (120% or more)	N/A	N/A	N/A

Registration Process for FIBO in Japan

Foreign asset managers considering opening an office in Tokyo may apply for A **Subsidy Program** – a meeting with the TMG **before setting up a Japan office** is required

1. Confirm application of any subsidy programs of the Tokyo Metro Government and the Japan FSA Market Entry Program
2. Announce intention with Japan regulators to commence Formal Application Process
3. Pre-Submission Stage
 - Preparation of the application documents
 - Easily take 4 months or more depending on the registration sought
4. Formal Submission
 - Submission of the executed documents
 - Minor comments possible
5. Within two months, registration is granted
6. Apply to any self regulatory body that is required to be joined

Business and Personnel Considerations in the FIBO Registration

FIBO registrations are often **burdensome** applications and “Tricky” in nature

Careful planning is required on how to proceed

Business Considerations

- ❑ What is the purpose of the registration?
- ❑ Does it make business sense to the seek the specific registration?
- ❑ Are there other means (i.e. exemptions) by which to achieve the same purpose?

Personnel Considerations

(The Compliance Officer)

- ❑ Compliance officer most frequently acts as a gating item as this position is technically required for each of the four business registrations
- ❑ Hiring should be made as a priority for any applicant.

(Statutory Auditor)

- ❑ For the DIM registration (and Type 1), the applicant must appoint a statutory auditor
- ❑ Many are uncertain as to exact role of the statutory auditor.

Thank you



Send in your questions by clicking on the Q&A icon