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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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# Capital Markets: Debt

Japan

Nagashima Ohno & Tsunematsu

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## Law and Practice

Contributed by Nagashima Ohno & Tsunematsu

### Contents

<b>1. Debt Markets/Exchanges</b>	<b>p.4</b>	6.5 Exemptions to the Requirement to Produce a Prospectus	p.7
1.1 Main Markets & Exchanges: Rules or Governance and Indices	p.4	<b>7. Marketing</b>	<b>p.7</b>
1.2 Regulatory Bodies	p.4	7.1 Marketing of Publicity Restrictions for an Offering of Debt Securities	p.7
1.3 Remit of Regulatory Bodies	p.4	<b>8. Book building and Underwriting</b>	<b>p.7</b>
1.4 Application Process	p.4	8.1 Extent to Which Book building is Used	p.7
<b>2. Regulatory and Legislative Framework</b>	<b>p.5</b>	8.2 Structure of the Underwriting	p.7
2.1 Key Legislative or Regulatory Instruments	p.5	8.3 Key Terms of Subscription/Dealer Agreement	p.7
2.2 Eligibility Requirements for Listing Debt Securities on the Exchange(s)	p.5	8.4 Rules Regarding Stabilisation and Market Manipulation	p.8
2.3 Minimum Rating for Securities Listed on the Exchange(s)	p.5	<b>9. Governing Law</b>	<b>p.8</b>
2.4 Historical Accounting or Reporting Requirements	p.5	9.1 Restrictions on the Use of Foreign Governing Law and/or Jurisdiction for Debt Issuances	p.8
2.5 Currency of Debt Securities	p.5	9.2 Cases Where the Choice of a Foreign Governing Law/Jurisdiction Has Not Been Recognised	p.8
2.6 Eligibility Requirements for Setting up a Debt Issuance Programme for Securities	p.5	9.3 Enforceability of Foreign Judgments and Arbitration Awards	p.8
<b>3. Standalone Listings</b>	<b>p.5</b>	9.4 Special Requirements for a Contract, Judgment or Award to be Enforceable	p.8
3.1 Main Steps for a Standalone Listing of Debt Securities	p.5	9.5 Special Requirements for the Perfection of Security over Assets	p.8
3.2 Companies Incorporated in a Foreign Jurisdiction	p.5	9.6 Effect on Enforceability of a Bondholder Being Domiciled in a Foreign Jurisdiction	p.8
3.3 Main Ways to Structure an Offer	p.5	<b>10. Offering Timetable</b>	<b>p.8</b>
3.4 Additional or Different Procedures for listing Different Types of Debt Securities	p.5	10.1 Timetable of an Offering of Debt Securities	p.8
<b>4. Issuances Under a programme</b>	<b>p.6</b>	<b>11. Clearing and Settlement</b>	<b>p.9</b>
4.1 Main Steps to Set Up a Programme for the Issuance of Debt Securities	p.6	11.1 Clearing & Settling Debt Securities	p.9
<b>5. Parties to an Offering of Debt Securities</b>	<b>p.6</b>	11.2 Differences When Securities Issued in Currency Other Than Local Currency	p.9
5.1 Roles of Key Advisers	p.6	<b>12. Tax</b>	<b>p.9</b>
5.2 Differences in Roles Played by Advisors or Additional Advisers	p.6	12.1 Main Tax Issues When Issuing & Listing Debt Securities	p.9
<b>6. Offering Documents</b>	<b>p.6</b>	12.2 Withholding Tax	p.9
6.1 The Prospectus or Offering Document	p.6	12.3 Taxes on the Issue or Transfers of Listed or Unlisted Debt Securities	p.9
6.2 Responsibility and/or Liability for the Content of a Prospectus	p.6	12.4 Application of Capital Gains Tax on Disposal of Securities by Non-Residents	p.9
6.3 Offering Documents	p.7		
6.4 Main Publication, Filing or Delivery Requirements for the Prospectus	p.7		

<b>13. Continuing Obligations</b>	<b>p.9</b>
13.1 Continuing Obligations Applicable to Listed Debt Securities	p.9
13.2 Continuing Requirements for Retail and Wholesale Offers of Debt Securities	p.10
13.3 Foreign Incorporated Issuers	p.10
13.4 Penalties for Non-Compliance with Continuing Obligations	p.10

**Nagashima Ohno & Tsunematsu** has an established reputation as a leading Japanese law firm with respect to capital markets transactions. The firm has 16 capital markets partners and approximately 40 associates dedicated to debt and equity work. The key areas of practice in relation to the sector are offerings (including ‘global offerings’), sales and private placements of equity securities and bonds of Japanese corporations, J-REITs and other Japanese funds; hybrid securities of Japanese banks in connection with capital

adequacy regulations (the Basel Accord) and hybrid securities of Japanese corporations; and foreign bonds guaranteed by the Japanese government for Japanese government-related entities and municipalities in international markets. The firm also handles IPOs and listings by Japanese and international corporations, J-REITs and other entities in the Japanese, Asian and other foreign markets; and the establishment and distribution of stock-option programmes by Japanese and international corporations.

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## 1. Debt Markets/Exchanges

### 1.1 Main Markets & Exchanges: Rules or Governance and Indices

There are no major exchanges for debt markets in Japan except for some government bond and convertible bond (“CB”) markets and Tokyo PRO-BOND Market. The vast majority of trading is made through the over-the-counter market. Therefore, set out below is, in most cases, the explanation of not “listing” but “offering” and the “over-the-counter market”.

### 1.2 Regulatory Bodies

The main regulatory body governing the registration process is the Financial Services Agency (“FSA”) in Japan. The listing process at the securities exchange will be handled by the securities exchanges and separately described in **2.2 Eligibility Requirements for Listing Debt Securities on the Exchange(s)**.

### 1.3 Remit of Regulatory Bodies

The FSA is primarily responsible for the administration of these rules, and delegates its powers under Japanese law to each local finance bureau (“LFB”) of the Ministry of Finance for the registration of disclosure documents, including the Securities Registration Statement (“SRS”), and to the Securities and Exchange Surveillance Commission for inspections of securities companies, daily market surveillance and investigation of criminal offences.

### 1.4 Application Process

#### *Standalone*

An issuer usually submits a draft SRS to the LFB for review or otherwise consults with the LFB in advance (normally two weeks to one month before the filing date). A public offering may not be made unless an SRS is filed with the LFB, and a purchase contract may not be entered into until the SRS becomes effective (in principle, 16 days after the filing of the SRS). No fee is payable for registration of the SRS. A foreign issuer is required to appoint a Japanese resident as its attorney-in-fact to file an SRS. A certain procedure is required to prepare for filing for the first time through the Electric Disclosure for Investors’ Network (“EDINET”), which is an electronic filing system similar to EDGAR in the US.

#### *Debt issuance programme*

In Japan, there is a system called “shelf registration” available for seasoned issuers who are subject to continuous disclosure of obligations in Japan and satisfy certain requirements, such as market-capitalisation and trading volume. It is easy to set up the shelf registration itself because the details of the offering terms need not necessarily be disclosed in the initial shelf-registration statement, which can be supplemented later by the amendment to the shelf-registration statement or shelf-registration supplement.

#### *Issuance under the programme*

Once the shelf-registration statement becomes effective, the issuer can sell its bonds immediately after filing of the shelf-

registration supplement (which usually contains pricing information) without any waiting period.

## 2. Regulatory and Legislative Framework

### 2.1 Key Legislative or Regulatory Instruments

The directly relevant legislation on securities offerings is the Financial Instruments and Exchange Law (“FIEL”) and the Enforcement Order and related Cabinet Orders thereunder.

The FSA has issued guidelines concerning corporate disclosure and certain other matters for the interpretation of the FIEL and related regulations.

### 2.2 Eligibility Requirements for Listing Debt Securities on the Exchange(s)

As mentioned in **1.1 Main Markets & Exchanges: Rules or Governance and Indices**, there are no major exchanges for debt markets in Japan except for the government bond and the CB market and Tokyo PRO-BOND Market. The vast majority of trading is made through the over-the-counter market. Therefore, set out below is, in most cases, the explanation of not “listing” but “offering.”

### 2.3 Minimum Rating for Securities Listed on the Exchange(s)

In order for the programme or any standalone bonds to be listed on the Tokyo Pro-Bond Market, a rating of the bonds or the programme by a rating agency is required.

### 2.4 Historical Accounting or Reporting Requirements

The issuer is required to incorporate in the SRS its (consolidated) financial statements for two most recent years and audit report which contains an “unqualified opinion” or a “qualified opinion with exceptions” of certified public accountants, etc. Presentation of financial statements made in accordance with certain overseas generally accepted accounting principles (“GAAP”) may be recognised, in which case material differences from Japanese GAAP for such financial statements should be described in the SRS. Before the amendments to the relevant Cabinet order, which took effect on 1 October 2012, an SRS of a foreign corporate issuer must contain financial statements for the most recent five years, among which the most recent two years’ financial statements must be audited. However, after the amendments to the Cabinet order, an SRS of a foreign corporate issuer may contain three years’ financial statements (all of which must be audited by a Certified Public Accountant (“CPA”)) instead of the five years’ financial statements.

### 2.5 Currency of Debt Securities

Japanese Yen is most common but foreign currency such as US Dollar, Euro, Australian Dollar and South African Rando are often seen.

### 2.6 Eligibility Requirements for Setting up a Debt Issuance Programme for Securities

Shelf registration is available for seasoned issuers who satisfy certain requirements, such as making ongoing disclosures for one year or more, and is widely used in practice for offerings of debt securities. When the issuer conducts an offering of debt securities utilising shelf registration, it is required to submit a shelf-registration statement first, and then a shelf-registration supplement including pricing information upon the actual issuance of debt securities.

## 3. Standalone Listings

### 3.1 Main Steps for a Standalone Listing of Debt Securities

An issuer is generally required to file a securities registration statement (“SRS”) to the local finance bureau when it conducts a public offering, the total amount of which is JPY100 million or more. Public offerings in this context generally mean offerings that do not satisfy the requirements for any of the private placement exemptions. SRSs must be prepared in accordance with the forms prescribed under the FIEA for each type of offering. The filing of an SRS is made through an electronic filing system called “EDINET”, which is a system similar to EDGAR in the United States.

### 3.2 Companies Incorporated in a Foreign Jurisdiction

They do not differ for companies incorporated in a foreign jurisdiction in principle.

### 3.3 Main Ways to Structure an Offer

Issuers in Japan usually issue bonds directly without using a trust or SPC and the bonds are underwritten by underwriters and sold to institutional or retail investors. One requirement is to appoint a commissioned company for bond-holders, which has a role substantially similar to a trustee in other jurisdictions, unless the denomination is JPY100 million or more, or the number obtained by dividing the aggregate number of bonds by the amount of each bond is less than 50. Where commissioned companies for bond-holders are not required for the offering of debt securities, usually a fiscal agent is appointed.

### 3.4 Additional or Different Procedures for listing Different Types of Debt Securities

The issuance of convertible bonds by Japanese companies will be subject to certain rules relating to equity securities under the Companies Act, such as a requirement to leave at least two weeks from the date of filing of an SRS (dur-

ing which existing shareholders may file for a provisional injunction due to the especially favourable conditions to purchasers), or the date of public notice containing certain information relating to the offering, until the closing date.

## 4. Issuances Under a programme

### 4.1 Main Steps to Set Up a Programme for the Issuance of Debt Securities

If securities registration is required (ie, public offering), the solicitation of the relevant securities is prohibited unless and until the SRS or the shelf-registration statement is filed. Binding agreements to sell and purchase the relevant securities cannot be made unless and until (where an SRS is filed) the SRS becomes effective or (where a shelf-registration statement is filed) the shelf-registration statement becomes effective and a shelf-registration supplement is filed. In general, the SRS becomes effective on the sixteenth calendar day from the date of filing. In the case where the issuer is using shelf registration, this waiting period will generally be shortened to the eighth day from the date of filing of the shelf-registration statement. In the case where the SRS or shelf-registration statement is amended, the waiting period may be extended.

## 5. Parties to an Offering of Debt Securities

### 5.1 Roles of Key Advisers

#### *Securities companies*

There are a number of tasks that need to be completed by the securities companies before issuing bonds. At the stage of preparation for offering, the securities companies will provide advice to the issuer on capital policy and also carry out the examination of the corporate profile of the issuer to determine whether the securities companies can perform the required procedures for offering and underwrite the public offering (ie, after the underwriting examination). When the securities companies decide to underwrite the public offering, it has to implement a series of tasks according to the offering schedule.

#### *Fiscal Agent or commissioned company for bondholders*

As described above, a commissioned company for bondholders has a role similar to a trustee, where in other jurisdictions one may be required. If the commissioned company for bondholders is not required, a fiscal agent is commonly required, which is an agent for the issuer with respect to the administration of the bonds.

#### *Certified public accountants*

The certified public accountants (auditing firms) express their audit opinion or review reports on the issuer's financial statements to be filed with LFB, in compliance with the FIEL.

They will also advise the issuer on its accounting practices and internal management.

#### *Lawyers*

In general, when an international offering is implemented, outside counsel prepares the offering circular and conducts the due diligence. Outside counsel also provides a legal opinion and (in the case of 144A) a disclosure letter (10b5 opinion).

### 5.2 Differences in Roles Played by Advisors or Additional Advisers

There is no substantial differences but a foreign issuer is required to appoint a Japanese resident as its attorney-in-fact to file an SRS that is usually a lawyer in Japan.

## 6. Offering Documents

### 6.1 The Prospectus or Offering Document

A registered prospectus with content that is substantially the same as the SRS must be delivered to investors at or prior to the sale of the securities, except for certain limited cases.

An issuer submits a draft SRS to the LFB for review or otherwise consults the LFB in advance (normally two weeks before the filing date), therefore SRS must be prepared beforehand.

A prospectus shall contain, in a prescribed form, information concerning the securities offered (terms of securities and offering) and the issuer (including a description of its business, affiliated companies, officers and employees, assets, shareholdings, stated capital and financial statements) or, in the case of certain securities such as those relating to investment trusts and securitisation, the investment structure (including a description of the investment structure, investment policy and underlying assets, if any). Foreign corporate issuers are also required to incorporate in the prospectus an outline of the legal system and certain other information of its home jurisdiction. Presentation of financial statements made in accordance with certain overseas generally accepted accounting principles ("GAAP") may be recognised, in which case material differences from Japanese GAAP for such financial statements should be described in the prospectus.

### 6.2 Responsibility and/or Liability for the Content of a Prospectus

The issuer, directors, executive officers, corporate auditors, certified public accountants, underwriters and selling shareholders (if any) are jointly and severally liable to any person who purchases securities when there is a material mis-statement or omission in the prospectus. The issuer is strictly liable for material mis-statements or omissions, but the others can avoid liability by proving that they did not know, after due care, of such misstatements or omissions.



The FIEL shifts the burden of proof to the defendants for culpability as above and, in the case of the issuer, also for the amount of damages caused by a misstatement or omission with a provision presuming such amount. Similar liability as with the prospectus is imposed on such use of any offering materials other than the prospectus.

### 6.3 Offering Documents

In the Tokyo Pro-Bond Market, all the documentation and disclosure can be prepared in English and, therefore, would not entail any cost of translation into Japanese, as compared to a public offering in Japan (which usually needs translations). In most cases, the issuer can list its existing medium-term note (“MTN”) programme (such as Euro MTN) directly on the TSE without any substantive modifications. A prospectus or offering circular of the MTN and annual report in its home market would be sufficient as programme information disclosed in the Pro-Bond Market. At the time of pricing, “specified securities information”, which is mostly equivalent to the “final terms” in the MTN, will be prepared in the course of the drawdown process of the programme. For this purpose, the pricing supplement of the existing MTN would usually be sufficient.

After the issuance, “issuer filing information” must be filed once a year within three months of the fiscal year end (or longer when so permitted in the home country). For this purpose, an annual report in its home country would suffice. The issuer is expected to renew the programme annually because it expires after a year. An amendment to, or replacement of, the MTN programme can be “voluntarily” filed as an amendment to programme information.

In addition, timely disclosure (ie, press release) in the Tokyo Pro-Bond Market is required only when a prescribed material event occurs, such as the issuer’s bankruptcy, liquidation, default of bonds, change of corporate name or any other equivalent material event.

### 6.4 Main Publication, Filing or Delivery Requirements for the Prospectus

The prospectus must be delivered to investors before any commitment to purchase the bonds. The prospectus is not necessarily filed and made available for public inspection.

### 6.5 Exemptions to the Requirement to Produce a Prospectus

There are several exemptions to the requirement to produce a prospectus. For example, the securities are acquired by or sold to a person set forth in the following, and such person has consented not to be delivered the prospectus (unless the consenting person requests to be delivered the prospectus by the time it acquires or is sold the securities through the public offering or secondary distribution):

- a person that already holds the same issue of securities as the relevant securities; or
- a person living with the consenting person has already received the prospectus or is reliably expected to receive the prospectus.

## 7. Marketing

### 7.1 Marketing of Publicity Restrictions for an Offering of Debt Securities

Publicity under certain circumstances could fall within pre-filing solicitation (“gun-jumping”) or a selling effort that triggers a violation of the FIEL. There was no safe-harbour rule applicable to publication that could be considered as solicitation of certain securities that would otherwise be subject to public offering rules. In general, any acts that attract the interest of investors on certain securities and promote them to purchase or acquire those securities may be considered to be “solicitation”, which is subject to public-offering rules. However, under the amendments to the disclosure guidelines issued by the FSA, which took effect on 27 August 2014, the scope of publicity restrictions is clarified to some extent by giving several examples of acts that do not constitute “solicitation”. Under the amended guidelines, a pre-hearing from professional investors or principal shareholders with some conditions (such as a confidentiality agreement), distribution of corporate information at least one month before the filing of SRS without reference to the offering, periodic publication of corporate information in the ordinary course of business without reference to the offering, and certain other acts are prescribed as those examples that do not constitute solicitation.

Underwriters are also, in principle, subject to the same restrictions on pre-filing solicitation and selling efforts.

## 8. Book building and Underwriting

### 8.1 Extent to Which Book building is Used

A book building process can be used for debt offerings.

### 8.2 Structure of the Underwriting

“Firm commitment” underwriting is commonly used, in which underwriters usually agree to jointly and severally purchase securities from the issuer for resale to the public at a specified public offering price. The lead manager organises and manages an underwriting syndicate, and executes with the issuer an underwriting agreement on behalf of the syndicate.

### 8.3 Key Terms of Subscription/Dealer Agreement

A typical underwriting agreement requires the issuer to represent and warrant certain matters satisfactory to the underwriter, and agree to indemnify the underwriters for

any liability they may incur under the FIEL because of the SRS or a prospectus containing material mis-statements or omissions. In addition, customary conditions precedent, covenants and termination clauses are provided.

## 8.4 Rules Regarding Stabilisation and Market Manipulation

While the FIEL prohibits stabilisation and market manipulation in principle, stabilisation is permitted under certain conditions but is not commonly used because the bonds are usually not listed in Japan.

## 9. Governing Law

### 9.1 Restrictions on the Use of Foreign Governing Law and/or Jurisdiction for Debt Issuances

The provision of foreign governing law and/or jurisdiction for debt issuances may be, assuming such provision is legal, valid and binding on the issuer under the foreign governing law, and valid and binding on the issuer under the laws in Japan, provided, however, that there are certain exceptions, such as no violation of the overriding mandatory provisions and public policy.

### 9.2 Cases Where the Choice of a Foreign Governing Law/Jurisdiction Has Not Been Recognised

As described in **9.1 Restrictions on the Use of Foreign Governing Law and/or for Debt Issuances**, the choice of a foreign governing law and/or jurisdiction must not be against the overriding mandatory provisions and public policy.

### 9.3 Enforceability of Foreign Judgments and Arbitration Awards

Japanese courts would recognise as a valid judgment any final and conclusive civil judgment for monetary claims (which are limited to those of a purely civil nature and do not include monetary claims in the nature of criminal or administrative sanctions, such as punitive damages, even though they take the form of civil claims) obtained in a foreign court against the issuer by any bond-holder or other parties, provided that: (a) the jurisdiction of such foreign court is permitted under Japanese laws or treaties, (b) the issuer has received service of process necessary for the commencement of the relevant proceedings, otherwise than by public notice or any method comparable thereto, or has appeared before such court, (c) such judgment and court proceedings are not repugnant to public policy as applied in Japan, (d) there exists reciprocity as to recognition by such court of final judgments obtained in a Japanese court, and (e) there is no conflicting Japanese judgment on the subject matter.

Foreign arbitration awards are also generally enforceable, except in certain cases where the parties were unable to

defend themselves in the arbitral proceedings, provided, however, that court decisions are required.

### 9.4 Special Requirements for a Contract, Judgment or Award to be Enforceable

It is not necessary in order for any of the underwriting or purchase agreements to be enforceable or admissible into evidence in Japan that these agreements be filed or recorded with any court or other authority in Japan.

### 9.5 Special Requirements for the Perfection of Security over Assets

Secured bonds are subject to a special law named the “Secured Bond Trust Act of Japan”. However, secured bonds are seldom issued and the vast majority of bonds in Japan are unsecured.

### 9.6 Effect on Enforceability of a Bondholder Being Domiciled in a Foreign Jurisdiction

The enforceability will generally not be affected by a bondholder being domiciled in a foreign jurisdiction.

## 10. Offering Timetable

### 10.1 Timetable of an Offering of Debt Securities

#### *Debut standalone issuance*

- Day X-14: prior consultation with LFB;
- Day X: filing of the SRS;
- Marketing;
- Day X+16: SRS becomes effective;
- Underwriting agreement executed;
- Day X+20: Closing.

#### *Repeat standalone issuance*

For a seasoned issuer who satisfies certain requirements, such as making ongoing disclosures for one year or more, the waiting period would become seven calendar days, in which case the issuer may incorporate its continuously disclosed documents in the SRS by reference.

- Day X-14: prior consultation with LFB;
- Day X: filing of the SRS;
- Marketing;
- Day X+8: SRS becomes effective;
- Underwriting agreement executed;
- Day X+12: Closing.

#### *Drawdown under a programme*

If the shelf-registration is filed, any marketing is permitted. Once the shelf-registration becomes effective, the issuer can sell its bonds immediately after filing of the shelf registration supplement (which usually contains pricing information) without any waiting period.

- Before Day X: Marketing;



- Day X: filing of shelf registration supplement;
- Underwriting agreement executed;
- Day X+4: Closing.

## 11. Clearing and Settlement

### 11.1 Clearing & Settling Debt Securities

Usually, the issuer resolves that the bonds will be subject to the Act on Book-Entry Transfer of Company Bonds, Shares, etc. of Japan (“the Book-Entry Transfer Act”) and will submit a consent form to JASDEC. On the closing date of public offering or private placement, the investors will pay the price for the bonds to the underwriters and usually the bonds will be recorded in the account of the investor via the book-entry system. Where the bonds are subject to the Book-Entry Transfer Act, which is typical for public debt offerings, delivery versus payment settlement is available. In this case, at least four business days are required from the pricing date until the closing date. There are no global or individual notes under this system.

### 11.2 Differences When Securities Issued in Currency Other Than Local Currency

Generally, there is no difference in clearing and settling securities issued in a currency other than the local currency.

## 12. Tax

### 12.1 Main Tax Issues When Issuing & Listing Debt Securities

The main tax issues for investors concern the withholding tax and the regular income or corporate tax (on a net basis), which are imposed on the interest payable on the bonds. Taxation on investors substantially differs depending upon the classification of the issuers and the investors for tax purposes (ie, being a Japanese resident or not).

### 12.2 Withholding Tax

If the issuer of the bonds is a Japanese corporation, and the investor is an individual non-resident of Japan or a non-Japanese corporation having no permanent establishment in Japan for Japanese tax purposes (“foreign investor”), as a general rule, a foreign investor will be subject to Japanese withholding tax at the rate of 15.315% on the interest payable on the bonds. However, in the case of bonds issued within Japan using the Japanese book-entry system, interest payable on such bonds to a foreign investor is exempt from withholding tax as special taxation measures (commonly referred to as the “J-BIEM” or the “New Japanese Bond Income Tax Exemption Scheme”), subject to compliance with certain procedural requirements. This exemption, however, does not apply if the foreign investor is a “specially-related person of the issuer” (ie, in general terms, a person who directly or indirectly controls or is directly or indirectly controlled

by, or is under direct or indirect common control with, the issuer) or the bonds are “taxable linked bonds” (ie, bonds of which the amount of interest is to be calculated by reference to certain indexes (eg, the amount of profits, revenues and dividends) relating to the issuer or a specially related person of the issuer).

Even if a foreign investor is subject to withholding tax under domestic tax law, tax treaties entered into between Japan and the country of tax residence of the foreign investor may provide for exemption or a reduced rate with respect to such withholding tax.

### 12.3 Taxes on the Issue or Transfers of Listed or Unlisted Debt Securities

Upon incorporation of a company or an increase in registered capital, a certain amount of the registration tax is required that is based on the capital amount. But these are generally not applicable to the issue or transfers of debt securities.

### 12.4 Application of Capital Gains Tax on Disposal of Securities by Non-Residents

A foreign investor will in general not be subject to Japanese taxation on capital gains arising from the sale of bonds.

## 13. Continuing Obligations

### 13.1 Continuing Obligations Applicable to Listed Debt Securities

#### *Reporting (financial or otherwise) obligations*

The reporting company must file an annual securities report with the LFB within three months (or six months in the case of foreign corporations) of the end of each fiscal year. The information to be included in the securities report is basically identical to the issuer information for the SRS. The reporting company must also file a semi-annual report for the initial six-month period within three months of the end of such period.

#### *Disclosure requirements in respect of information regarding the issuer*

The reporting company must also file an extraordinary report without delay upon the occurrence of a material event, such as an overseas offering of its securities, a change of its parent company or major shareholders, the company’s decision to implement a merger, a share-for-share exchange or a corporate split, or a disaster or litigation having a material effect on the company.

#### *Specific rules applying to transactions post-offering*

There is no such restriction unless there is any financial covenant contained in the terms of the conditions of the bonds.

### 13.2 Continuing Requirements for Retail and Wholesale Offers of Debt Securities

There is no difference resulting from whether they are retail or wholesale offers. If it falls under the private placements, continuous disclosure requirements are not triggered.

### 13.3 Foreign Incorporated Issuers

A foreign corporation, if it has satisfied certain conditions, is able to file a disclosure document in English disclosed in accordance with the regulations in a foreign jurisdiction instead of a securities report in the Japanese language, when filed with a summary thereof and other supplementary documents in Japanese. This English language disclosure was not available for the purpose of the SRS, but, under the amendments to the FIEL that took effect on 1 April 2012, instead of filing an SRS in Japanese, a foreign corporation, if it has satisfied certain conditions, is able to file a disclosure document concerning the issuer in English disclosed in accordance with the regulations in a foreign jurisdiction, when filed with a summary thereof and other supplementary documents in Japanese as well as information concerning the securities (ie, the terms of securities and offering) in Japanese.

### 13.4 Penalties for Non-Compliance with Continuing Obligations

An issuer who does not comply with the continuing obligations may be subject to criminal proceedings, and, on conviction, imprisonment for up to ten years or a fine of up to JPY700 million, or both and an administrative surcharge.

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