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FINANCIAL REGULATIONS/FINANCIAL COMPLIANCE

The Financial Market Entry Office and Foreign Financial Business Operators Registration of a Financial Instruments Business

I. Introduction

In January 2021, the Financial Services Agency and Local Finance Bureaus (“Japanese Regulators”) established the Financial Market Entry Office to assist foreign financial business operators seeking to register as a financial instruments business in Japan. Before the establishment of the Financial Market Entry Office, foreign financial business operators were required to prepare and file application documents in Japanese to obtain the registration to carry on a financial instruments business. However, a partial amendment to the Cabinet Office Ordinance on Financial Instruments Business, etc. was promulgated and entered into force on January 12, 2021, which allows foreign financial business operators that meet certain requirements to prepare and file application documents in English for registration as a financial instruments business in Japan.

II. Covered Businesses and Eligible Applicants

An application for registration in English will only be accepted if the application is filed for one of the following covered businesses and the applicant falls within one of the following eligible applicants:

Covered Businesses:

- (a) Investment Advisory and Agency Business as defined in Article 28, Paragraph 3 of the Financial Instruments and Exchange Act (the “FIEA”);
- (b) Investment Management Business as defined in Article 28, Paragraph 4 of the FIEA; or
- (c) Type II Financial Instruments Business as defined in Article 28, Paragraph 2 of the FIEA related to investment management business where:
 - i. a manager conducts self-solicitation of units of a unit trust or interests in a fund it established; or
 - ii. an investment manager for qualified investors or an asset management company for an investment corporation conducts a deemed Type II Financial Instruments Business.

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Eligible Applicants:

- (a) a person or a corporation who conducts business in a foreign country that is the same type of business as an Investment Advisory and Agency Business or an Investment Management Business, and complies with all relevant laws and regulations in that jurisdiction (the “Relevant Foreign Financial Business Operator”);
- (b) certain affiliated entity of a Relevant Foreign Financial Business Operator;
- (c) a corporation whose officer or important employee was an officer or employee of a Relevant Foreign Financial Business Operator; or
- (d) a person who was or whose important employee was an officer or employee of a Relevant Foreign Financial Business Operator.

III. Registration Procedures**(i) Overview**

The Financial Market Entry Office serves as a centralized consultation service provided by the Japanese Regulators for foreign financial business operators that are considering establishing a subsidiary or a branch to carry on a financial instruments business in Japan. A foreign financial business operator is able to schedule a prior consultation with the Financial Market Entry Office to determine whether it is eligible to apply in English for the registration to carry on a financial instruments business pursuant to the FIEA.

(ii) Prior Consultation and Registration Application

At a prior consultation with the Financial Market Entry Office for an application for the registration of a financial instruments business, an applicant is typically asked to explain its business model in Japan. The Financial Market Entry Office will review the business model and determine whether all the legal requirements have been met. To assist with the review, the applicant is required to complete an information sheet (*gaiyou sho*) in advance that includes a detailed outline of its business in Japan. If the Financial Market Entry Office informs the applicant that it is eligible to submit the application for registration in English, the applicant will also be permitted to prepare and submit all other necessary accompanying documents in English, including information sheet, consultation materials, the business rules for the financial instruments business in Japan and other internal rules that are referred to therein.

In order to apply to be registered as a financial instruments business in Japan, it is necessary to demonstrate compliance with various regulations required under the FIEA by establishing an internal system that takes into account the applicable matters under Japanese laws, regulations and the Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc. To establish such a system, a foreign financial business operator will be expected to appoint a compliance officer who has sufficient knowledge and experience in compliance with the FIEA and the supervisory guidelines. Furthermore, even if an applicant is permitted to submit its internal rules in English as part of the registration process as described above, it is often the case that the internal rules of a foreign financial business operator that have been used outside Japan require significant revisions to be aligned with Japanese laws and regulations.

(iii) Supervision and Notification after Registration

For foreign financial business operators who successfully complete the registration procedures in English, post-registration supervisory activities and inspections by the Japanese Regulators will be conducted in English.

Recent Publications

- ***New Thai Trade Competition Commission's Regulation on Credit Terms applicable to SMEs***
(NO&T Thailand Legal Update No.13, September 2021)
by Yothin Intaraprasong, Luxsiri Supakijjanusorn, Yuyu Komine and Chatpong Sunthorn-opas
- ***Lexology Getting the Deal Through - Rail Transport 2022 Japan***
(Law Business Research Ltd, September 2021)
by Naoki Iguchi
- ***Current State of Intellectual Property Dispute Resolution Systems in Japan***
(Japan Commercial Arbitration Journal VOL. 2 [2021], September 2021)
by Kenji Tosaki
- ***RIGHTS OF DEVELOPERS AND PURCHASERS UNDER PART 8C OF THE COVID-19 (TEMPORARY MEASURES) ACT 2020 (NO. 14 OF 2020) AND THE COVID-19 (TEMPORARY MEASURES) (PART 8C RELIEF) REGULATIONS 2021 (Singapore)***
(NO&T Asia Legal Review No.38, August 2021)
by Weijian Teo
- ***CALCULATION OF ADMINISTRATIVE FINES FOR VIOLATION OF COMPETITION LAWS (Indonesia)***
(NO&T Asia Legal Review No.38, August 2021)
by Ichsan Montang
- ***MEMORANDUM OF COOPERATION BETWEEN COMPETITION COMMISSION OF INDIA AND JAPAN FAIR TRADE COMMISSION (India)***
(NO&T Asia Legal Review No.38, August 2021)
by Rashmi Grover
- ***Real Estate-Backed ICOs: General Information, New Requirements, and Comparison to REITs***
NO&T Thailand Legal Update No.12, August 2021)
by Yothin Intaraprasong, Kwanchanok Jantakram and Teeruth Suttabongcho

In addition, foreign financial business operators who have completed the registration procedures in English are permitted to make certain required notifications to the Japanese Regulators in English. On the other hand, financial instruments business operators who complete the registration procedures in Japanese are not permitted to submit notifications in English and must submit all notifications in Japanese.

IV. Comment

With the recent revision of the relevant laws and regulations and the establishment of the Financial Market Entry Office, subject to certain requirements, it is now possible to prepare and submit the application for registration as a financial instruments business in English, which can have lasting benefits in relation to post-registration interactions with the Japanese regulators. However, foreign financial business operators seeking to register as a financial instruments business in Japan will still need to give careful thought to how it establishes an internal system that demonstrates compliance with Japanese laws and regulations. It is expected that this new system and the Financial Market Entry Office will be a useful pathway going forward for foreign financial business operators when establishing a subsidiary or branch in Japan.

CORPORATE/M&A

Recent Amendments to Foreign Direct Investment Regulations – Expansion of Designated and Core Business Sectors**I. Introduction**

Over a year has passed since the amendment to the Foreign Exchange and Foreign Trade Act (the “FEFTA”) and its related cabinet orders, ministerial ordinances and public notifications (collectively, the “2019 Amendment”) entered into force on May 8, 2020¹.

On June 15, 2020, the Japanese government added the manufacturing of pharmaceuticals for specific infectious diseases as well as the manufacturing of specially-controlled medical devices to the list of business sectors that require advance filing under Japanese foreign direct investment (“FDI”) regulations under the FEFTA (“designated business sectors”). In addition, those business sectors were also designated as “core business sectors” because of their strategic value from a national security perspective. Entities purporting to acquire up to 10 percent of a listed company in a core business sector are subject to more stringent criteria when applying for an exemption from making advance filings, and are not eligible for any exemption from making advance filings for share acquisitions of an unlisted company.

On August 18, 2021, the Japanese government announced its plan to add business sectors relating to rare-earth metals to the list of designated and core business sectors.

This article outlines the Japanese government’s recent movements to expand the scope of more stringent FDI regulations to new business sectors.

II. Regulations for Foreign Investment in Designated Business Sectors and Core Business Sectors

As a general rule under Japanese FDI regulations, an advance filing must be made with the Bank of Japan by foreign investors who acquire: (a) one percent or more of the shares of a listed Japanese company which is engaged in any of the designated business sectors; or (b) one share or more of an unlisted Japanese company which is engaged in any of the designated business sectors. A 30-day waiting period applies from the date of the filing; however, such waiting period may be shortened to four business days if the relevant ministries decide that such shortened review period is warranted from national security perspective.

Having said that, certain exemptions are available in respect of the advance filing obligation triggered by a foreign investor’s investment in a designated business sector. That is, an advance filing may not be required even if the foreign investor purports to invest in a designated business sector if certain conditions are satisfied. In short, broader exemptions are available for investments in a designated business sector which is not also core business sector compared with investments in a sector which is both a designated and core business sector.

Please see the table below which summarizes the requirements for an application for an exemption from making the advance filing:

¹ The 2019 Amendment was fully implemented from June 7, 2020. Please see NO&T Japan Legal Update No.23 (June, 2020) for an overview of the 2019 Amendment with a particular focus on topics relating to businesses in the technology field (https://www.noandt.com/en/publications/newsletter/documents/japan_no23.pdf).

	Designated Business Sectors (Non-Core Business Sectors)	Core Business Sectors (share acquisition of up to 10 percent)	Core Business Sectors (share acquisition of 10 percent or more)
Acquisition of a Listed Company's Shares (one percent or more)	Exemption is available if the Basic Conditions criteria is satisfied	Exemption is available if the Basic Conditions and Additional Conditions criteria are satisfied	No exemption available
Acquisition of an Unlisted Company's Share(s) (one or more)	Exemption is available if the Basic Conditions criteria is satisfied	No exemption available	No exemption available

Basic Conditions:

- The foreign investor or its related persons shall not be appointed as board members or statutory auditors of the target company.
- The foreign investor shall not make shareholder proposals for the divestiture of functions or assets in the designated business sectors in whole or in part.
- The foreign investor shall not access non-public information concerning the target company's technology in the designated business sector, propose any disclosure of such information or request any changes to the target company's internal rules concerning the control of such information.

Additional Conditions for Investments in Core Business Sectors:

- The foreign investor shall not attend any meetings of the target company's executive board/committees where important decision-making concerning core business sector activities is discussed.
- The foreign investor shall not submit any written recommendations regarding core business sector activities to any of the target company's executive board/committees requiring action or response within a specific timeframe.

III. Recent Expansion of the Scope of Designated and Core Business Sectors

The scope of the designated business sectors and the core business sectors is determined at the discretion of the relevant ministers and communicated through public notifications. The Order on Inward Direct Investment gives the relevant ministries the authority to determine which sectors are categorized as designated business sectors and/or core business sectors.

In response to the outbreak of the COVID-19 pandemic, on June 15, 2020, the Japanese government decided to add the manufacturing of pharmaceuticals for specific infectious diseases and the manufacturing of specially-controlled medical devices to the list of designated business sectors and core business sectors. Before this addition, the only pharmaceutical manufacturing sector listed as a designated business sector was the manufacturing of biological products. This is also the first time that a pharmaceutical manufacturing sector has been listed as a core business sector.

In addition, the Japanese government recently announced a proposed amendment to add business sectors related to rare-earth metals to the list of designated business sectors and core business sectors.

(i) Manufacturing of Pharmaceuticals for Specific Infectious Disease

As mentioned above, manufacturing of pharmaceuticals for specific infectious disease – specifically, “agents against pathogenic organisms and parasites” under classification number 87-6 of Japan Standard Commodity Classification (the “JSCC”), and intermediates thereof manufactured and sold after obtaining approval in accordance with Section 1, Article 14 of the Act on Securing Quality, Efficacy and Safety of

Products Including Pharmaceuticals and Medical Devices (the “PMD Act”) – was added to the list of designated business sectors and core business sectors. “*Agents against pathogenic organisms and parasites*” under classification number 87-6 of the JSCC includes “*anti-virus agents*” and “*vaccines*”.

(ii) Manufacturing of Specially-controlled Medical Devices

Similarly, manufacturing of specially-controlled medical devices, their accessories and parts, as defined in Section 5, Article 2 of the PMD Act, was added to the list of designated business sectors and core business sectors. Specifically, manufacturing of specially-controlled medical devices is limited to those manufactured and sold after obtaining approval in accordance with Section 1, Article 23-2-5 of the PMD Act or a certificate in accordance with Section 1, Article 23-2-23 of the PMD Act. Specially-controlled medical devices are designated by the Minister of Health, Labour and Welfare and include artificial heart-lung machines, ventilators and pacemakers.

(iii) Business Sectors related to Rare-Earth Metals

On August 18, 2021, the Ministry of Finance and other relevant ministries announced a proposed amendment to add business sectors related to rare-earth metals to the list of designated business sectors and core business sectors. According to the announcement, the purpose of the proposed amendment is to secure a stable supply of rare-earth metals, which are expected to increase in demand globally.

More accurately, the business sectors to be added by the proposed amendment include:

- (a) The following business sectors relating to 34 specified important mineral resources (e.g., lithium, cobalt and rare-earth elements):
- Mineral mining industries;
 - Manufacturing, repair and software businesses for machines used in mineral mining industries; and
 - Component analysis businesses for the mineral mining industries.
- (b) Construction businesses that perform maintenance of port facilities of designated islands related to important mineral resources, such as Oki-no-Torishima Island and Minami-Torishima Island.

The list of designated business sectors and core business sectors also states that it follows the classifications contained in the Japan Standard Industrial Classification (the “JSIC”), which means that the JSIC and its explanatory notes are useful reference materials for the interpretation of the scope of the listed business sectors.

The public consultation period for this amendment expired on September 16, 2021 but the result of the public consultation has not yet been disclosed. According to the Ministry of Finance, the amendment is expected to be officially announced and come into force in early October 2021 at the earliest.

IV. Comment

The scope of the designated business sectors and the core business sectors under the FDI regulations is set to expand to accommodate changes in the Japanese government’s national security policy. Given that no statute or order is required to be amended to expand the scope of the designated business sectors and the core business sectors, it is important for foreign investors to pay close attention to the Japanese government’s movements in order not to miss any changes to their advance filing obligations under the FDI.

As outlined above, each designated business sector and core business sector is defined by reference to various laws and regulations including the rules and standard classifications set by the JSIC and the JSCC. It is recommended that foreign investors consult with Japanese lawyers from an early stage to seek advice on the applicability of the designated/core business sector restrictions and to work together to prepare the necessary filings well in advance when considering investing in Japanese companies.

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