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Alternative Funds 2022

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JAPAN

Law and Practice

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1. General

1.1 General Overview of Jurisdiction

Japan is the world's third-largest economy by GDP and has sophisticated and well-developed debt and equity capital markets, with many leading global corporations. However, outside of the real estate sector, Japanese private funds have generally lagged behind other regions, including North America and Europe in particular, from both a transactional and fundraising perspective. According to M&A advisory services firm RECOF, M&A penetration relative to GDP has hovered near 2% in Japan in recent years, compared to 9–10% in the United States and the United Kingdom; outside of real estate and infrastructure, average fund sizes tend to be quite small (approximately USD270 million in 2019, according to Asia Private Equity Review). Japan-domiciled hedge funds are very uncommon, with industry tracker eVestment reporting that less than 1% of all hedge funds globally have their primary physical location in Japan. Real estate is the main exception, where Japan ranks second only to the United States in Morgan Stanley Capital International's estimated share of the global professionally managed real estate investment market.

Although generally smaller than in North America and Europe, alternative private funds are active and growing, and are becoming an increasingly important part of finance in Japan. According to Deloitte, at least 170 private equity firms are now active in Japan, with many global firms focusing on larger corporate carve-out transactions, and a burgeoning domestic industry focusing on small and mid-cap deals, playing a vital role in founder successions.

2. Funds

2.1 Types of Alternative Funds

A wide range of alternative funds are established in Japan. The main fund structures are summarised in **2.2 Fund Structures** (note that retail funds and investment trusts are not discussed, as they are beyond the scope of this chapter). By class, real estate and private equity are most common, with an increasing number of infrastructure funds and increasing amounts of capital raised by them. Conversely, domestic hedge funds are not particularly prevalent.

2.2 Fund Structures

For legal, regulatory and tax reasons, different fund structures are used for different types of alternative funds. This section outlines six of the most common domestic structures and discusses their applicability with respect to different strategies.

Investment Business Limited Partnerships (Toshi Jigyo Yugen Sekinin Kumiai)

The Investment Business Limited Partnership Act permits funds to be formed as investment business limited partnerships (IBLPs), with a general partner that manages the fund and limited partners having limited liability. The IBLP has become a common domestic entity used by alternative funds, particularly in the private equity and venture capital spaces, and in some cases for infrastructure funds.

The use of the IBLP structure is limited, however, due to restrictions on the types of assets in which an IBLP fund is permitted to invest. In particular, subject to certain limited exceptions, an IBLP may not invest 50% or more of its assets in non-Japanese securities (other than foreign partnership interests), making the IBLP relatively unsuitable for funds that invest

substantial portions of their capital outside of Japan. IBLPs may also present complexities for non-Japanese investors, including potential Japanese tax issues, as will be discussed below.

As offshore fund structures can generally be used for investments in Japanese assets, it is not uncommon for Cayman Islands exempted limited partnerships (ELPs) and similar offshore vehicles to be used for alternative funds that invest in Japan.

General Partnerships (Nin'i Kumiai)

A general partnership (*nin'i kumiai* or NK) may be used when an IBLP is unsuitable – eg, due to the asset class restrictions mentioned above. An NK can be managed in a manner similar to an IBLP, by appointing an executive partner who will manage the NK, but all the partners, including those that may have only passive roles, will have unlimited liability.

GK-TK Structures

A GK-TK is a structure unique to Japan that is often used for making domestic real estate and infrastructure investments. In essence, a *godo kaisha* (GK), which is a form of limited liability company that acts as a property-holding company, enters into a bilateral contract, called a *tokumei kumiai* agreement (TK agreement), with the investor (TK investor). Pursuant to the TK agreement, the TK investor makes a commitment to contribute capital to the GK, to be used for the GK's investment activities (as set forth in the TK agreement) in exchange for profit rights with respect to such activities. In a GK-TK structure, the TK investor is not permitted to take an active role in the management of the GK.

The GK-TK structure may also be used as an aggregating arrangement for multiple TK investors, effectively creating a fund-like collective investment scheme. In such a case, while the TK agreements remain bilateral contracts between the TK investor and the GK acting as a TK operator, certain rights may be conditioned upon the collective actions of other TK investors, thereby providing for governance and co-ordination among the TK investors in a manner somewhat similar to more common alternative fund arrangements (by providing for removal of the GK, a key-person event, conflict of interest protections, synchronisation of drawdowns and distributions, etc). Despite the creation of a partnership-like relationship for the TK investors with respect to the GK, the GK-TK itself is a contractual arrangement and there is no actual legal GK-TK entity.

Tokutei Mokuteki Kaisha (TMK)

A TMK is literally a special-purpose company that takes the form of a limited liability company established under the Act on the Securitisation of Assets. It is used exclusively for the securitisation of assets, and is often used as a vehicle for investment in real estate. Property rights can be securitised via a TMK through the issuance of asset-backed securities to investors, usually in the form of equities or bonds.

J-REITs

Japanese REITs (J-REITs) are established as investment corporations under the Act on Investment Trusts and Investment Corporations. Many J-REITs are listed and publicly traded in Japan, although an increasing number of J-REITs are private. The rules and regulations applicable to the formation and management of J-REITs are significantly more complex and onerous than those applicable to the other fund structures discussed above.

Investment Trusts (Toshi Shintaku)
Investment trusts are established under the Act on Investment Trusts and Investment Corporations. They are a popular form of investment fund for both retail and institutional investors but, as noted previously, are not discussed in detail in this chapter.

2.3 Funds: Regulatory Regime
In Japan, the regulatory regime applicable to an alternative fund depends in the first instance on the organisational structure of the fund – primarily, whether the fund is organised as a partnership, corporate or other entity form.

Partnership-Type Alternative Funds
For partnership-like vehicles, including IBLPs, foreign partnerships, NKs and GK-TKs (referred to collectively here as "funds"), the relevant regulatory regime will generally be the Financial Instruments and Exchange Act of Japan (FIEA), which sets forth the rules applicable to both the offering of securities and regulation of the managers of the relevant fund. The FIEA is generally applicable where an investor in a fund or the fund's manager is located in Japan. This section considers the FIEA regulations applicable to marketing and investment management separately.

Marketing regulations
As a general rule, if a general partner of a partnership, including an IBLP or a foreign partnership (or a person acting in a similar capacity in a partnership-type fund such as a GK in a GK-TK structure, which is referred to collectively here and in **4.2 Marketing of Alternative Funds** and **4.5 Investors: Regulatory Regime** as a "general partner"), solicits investors in Japan, the general partner must generally either be registered as a financial instruments business operator engaged in Type II financial instruments business under the FIEA (ie, hold a Type II licence) or perfect an exemption from registration for this.

Alternatively, it may be possible for the general partner to solicit investors in Japan without a Type II licence if the general partner delegates all solicitation activities relating to the fund to a third party holding a Type II licence. In such cases, the general partner must not itself engage in any solicitation relating to the fund unless requirements for another exemption from holding a Type II licence are satisfied.

QII Exemption (for marketing)
One of the most common exemptions from the registration requirement in connection with marketing interests in a partnership-like fund under the FIEA is the special business exemption for qualified institutional investors (QII Exemption). The QII Exemption is available to qualified general partners where the fund's partners include at least one qualified institutional investor (QII) solicited in Japan and 49 or fewer non-QIIs that meet certain statutory qualifications (ie, non-QII qualified purchasers). If a general partner qualifies for the QII Exemption, it must make a notice filing pursuant to Article 63 of the FIEA on Form 20 (Article 63 Notice) with the applicable local finance bureau prior to having a closing with the investors who are solicited in Japan. Certain transfer restrictions and asset segregation requirements will apply, and the general partner will be subject to certain other ongoing compliance requirements, including the requirement for a non-Japanese general partner to appoint a local representative in Japan, compliance with certain code of conduct rules and disclosure requirements, and certain record-keeping obligations.

Two additional exemptions were introduced in 2021:

- the Specially Permitted Business for Foreign Investors Exemption; and
- the Specially Permitted Business During a Transition Period Exemption.

The first exemption is available for general partners of partnerships in which the majority of contributions are from offshore investors, but the scope of Japan-resident investors who may be solicited under this exemption is limited. The second exemption is available for investment managers that are licensed as an investment manager in certain designated jurisdictions. Each of these exemptions has additional requirements. The QII Exemption continues to be the most popular exemption used in the market, and is expected to remain so.

Investment management regulations

In addition to marketing regulations, a partnership-type fund will also need to comply with certain investment management regulations under the FIEA if it will invest mainly in securities and/or derivatives. In this case, the general partner will need to register as a financial instruments business operator engaged in investment management business under the FIEA (ie, an "investment manager" registration).

QII Exemption (for investment management)

The QII Exemption discussed above with respect to marketing is also generally available with respect to investment management requirements. There are some slight differences in the requirements for the QII Exemption for the purposes of investment management regulations compared to the exemption for marketing, such as the additional ongoing compliance obligations (including additional asset segregation requirements) and absence of transfer restrictions, but otherwise the exemptions are fairly similar. By filing an Article 63 Notice, the general partner will be exempt from registration as an investment manager under the FIEA.

De minimis exemption

An alternative exemption from the investment manager regulations under the FIEA, which is available solely for funds established outside Japan, is the so-called "de minimis exemption" (also sometimes referred to as the "foreign funds exemption"). This exemption is available when:

- the fund's direct investors in Japan (Japanese direct investors) are limited to QIIs and persons who have submitted an Article 63 Notice with respect to the investment management of the fund;
- the fund's indirect investors, who invest through partnerships formed under Japanese law (indirect investors), are limited to QIIs;
- the fund has fewer than ten investors who are either Japanese direct investors or indirect investors resident in Japan; and
- aggregate contributions from the fund's Japanese direct investors make up one third or less of the aggregate contributions to the fund from all investors.

For the purposes of the de minimis exemption, an investor will be deemed to be a "direct Japanese investor" if it is a resident of Japan and directly holds its interest in the foreign fund, and will be considered an "indirect Japanese investor" if it is a resident of Japan and holds its interest in the foreign fund indirectly through a partnership-type entity formed under Japanese law (eg, an IBLP, NK or GK-TK).

Additional regulations may also apply depending on the type of investments made by the fund, including regulations under the Act on Specified Joint Real Estate Ventures and/or the Act on Regulation of Commodity Investment.

The two additional exemptions introduced in 2021 (the Specially Permitted Business for Foreign Investors Exemption and the Specially Permitted Business during a Transition Period Exemption) discussed in relation to marketing regulations are similarly available for investment management. However, as discussed above, each of these new exemptions has additional requirements. The QII Exemption continues to be the most popular exemption used in the market, and is expected to remain so.

Regulations Applicable to TMKs, J-REITs and Investment Trusts

Marketing regulations

Marketing of interests in a TMK, a J-REIT or an investment trust may only be made by persons who either hold a Type I financial instruments business operator licence or satisfy an available exemption.

Separate and apart from the registration requirements for a person who engages in the marketing of the relevant interests, the offering will be considered a public offering unless it qualifies under an applicable private placement exemption, and will therefore require the filing of a securities registration statement and the meeting of additional requirements under the FIEA. Two private placement exemptions are available:

- a private placement for a small number of investors; and
- a private placement for QIIs.

The requirements for such exemptions differ depending on the type of interest.

Investment management regulations

Under the applicable law, investment management of a J-REIT must be delegated to an investment manager registered under the FIEA, and investment trusts may only be established by an investment manager registered under the FIEA to engage in investment trust management business. There are additional rules and regulations that apply to investment management of J-REIT and investment trusts.

Investment decisions for TMKs may be made by the TMK itself, often based on investment advice from a registered investment adviser. Alternatively, the TMK may delegate investment management to an investment manager, which needs to be registered under the FIEA if the TMK invests in securities.

2.4 Loan Origination

It is technically possible to originate loans in Japan if the funds comply with the applicable laws, rules and regulations. Direct lending to any person in Japan is generally regulated under the Money Lending Business Act and requires that moneylenders be registered thereunder. These regulations are also applicable to alternative funds; depending on the legal structure of the alternative fund, the fund or its general partner will need to be licensed as a moneylender in order to originate loans to a person in Japan, if the lending activities are considered to take place in Japan and lending is considered to be conducted as a business.

In determining whether lending activities take place in Japan, the applicable facts and circumstances would be taken into consideration, including factors such as the location of the lender and the borrower, where the loan agreement is negotiated and executed, and the location of the bank accounts from which the money is sent and received.

There are limited exemptions from the requirement to register as a moneylender – for example,

if an alternative investment fund holds 50% or more of the voting rights in a Japanese portfolio company, direct lending to such portfolio company is exempt from this registration requirement.

2.5 Non-traditional Assets

IBLPs are subject to asset class restrictions under which they are not permitted to invest in cryptocurrency assets. Such restrictions are not, however, applicable to NKs or GK-TK structures, subject to compliance with other applicable requirements under the FIEA.

J-REITs and investment trusts are also subject to asset class restrictions and may not invest in cryptocurrency assets.

2.6 Regulatory Approval Process

As discussed in **2.3 Funds: Regulatory Regime**, where funds are structured as partnerships, the fund operator would generally make an Article 63 Notice filing with respect to marketing and/or investment management, subject to the application of other exemptions from registration requirements. No regulatory approval is required to make an Article 63 Notice filing, although the Japanese regulators will review the Article 63 Notice and request that revisions be made to the filing if they consider such revisions necessary.

A TMK can be established without regulatory approval, but it must be established under the Act on the Securitisation of Assets and a business commencement notification must be filed pursuant to this. Pre-review procedures are not required.

J-REITs can usually be established as investment corporations under the Act Concerning Investment Trusts and Investment Corporations. If the investment manager is newly established with the J-REIT, it will be required to register as an investment manager under the FIEA prior to the establishment of the investment corporation. The time required to complete the process varies and may take anywhere from several months to more than a year.

2.7 Requirement for Local Investment Managers

For IBLPs, as discussed in **2.3 Funds: Regulatory Regime**, the general partner may manage the assets of the partnership by filing an Article 63 Notice and qualifying under the QII Exemption. If the general partner delegates investment management in securities or derivatives to an investment manager, such investment manager must be a registered investment manager under the FIEA. A non-Japanese entity can be registered as an investment manager under the FIEA, but must have an office in Japan.

For NKs, there is no requirement for the executive partner to be a Japanese entity or person. For a GK-TK structure, as discussed in **2.2 Fund Structures**, the GK is typically a Japanese limited liability company, although it is possible, although rare, for a non-Japanese entity to enter into a TK agreement with an investor. However, as with IBLPs, if investment management in securities or derivatives is delegated to an investment manager, said investment manager must be registered under the FIEA.

An investment manager or investment adviser to a TMK must be registered as an investment manager or investment adviser under the FIEA. For J-REITs and investment trusts, as discussed in **2.6 Regulatory Approval Process**, the investment manager must be registered in this capacity under the FIEA.

2.8 Other Local Requirements

While there is no particular local substance rule other than as discussed in **2.7 Requirement for Local Investment Managers**, Japanese alternative fund vehicles are generally established and managed by local entities.

2.9 Rules Concerning Other Service Providers

There are no specific rules applicable to service providers of IBLPs, NKs or GK-TK structures, nor the operators of such fund vehicles, other than the requirement regarding the delegation of investment management as discussed in **2.7 Requirement for Local Investment Managers**.

As J-REITs and investment trusts are strictly regulated, service providers need to meet certain requirements under the Act on Investment Trusts and Investment Corporations.

2.10 Requirements for Non-local Service Providers

Generally, if services that are regulated under Japanese law are provided to Japanese funds or fund operators, Japanese laws and regulations would apply. However, other than as discussed in **2.7 Requirement for Local Investment Managers** and **2.9 Rules Concerning Other Service Providers**, customary services provided by administrators, custodians and director services providers are generally not regulated in Japan.

2.11 Funds: Tax Regime

Taxation of Alternative Funds Established in Japan

Japan is a relatively high-tax jurisdiction and it is important that non-Japanese investors investing in alternative funds in Japan ensure that the structure is tax-optimal, so as to minimise the exposure of non-Japanese investors through their Japanese investments in such alternative funds.

Under the applicable Japanese tax laws, non-Japanese resident investors without a permanent establishment in Japan (offshore investors) are generally not subject to tax on capital gains from the sale of shares of a Japanese company, unless certain enumerated exceptions apply. There are three main exceptions that are relevant to offshore investors:

- being deemed to have a permanent establishment in Japan (eg, by virtue of being a partner in a fund vehicle that itself has a permanent establishment in Japan);
- becoming subject to the so-called “25/5 Rule” by owning, or being deemed to own, 25% or more of the shares of the Japanese company during an applicable holding period in which the offshore investor sells, or is deemed to have sold, 5% or more of such company’s shares; or
- becoming subject to the so-called “Real Estate Holding Company Rule” by owning, or being deemed to own, more than 2% of the shares of the Japanese company (or more than 5% of shares, if the company is listed on an exchange), the value of which is predominantly derived, directly or indirectly, from real estate in Japan, on the day preceding the first day of the fiscal year in which the offshore investor sells, or is deemed to have sold, all or part of such company’s shares.

In addition to capital gains, certain types of income (eg, dividends, interest and distribution under a TK agreement) derived by offshore investors will be subject to withholding tax at varying rates. Both capital gains and other income may be subject to a reduction or exemp-

tion under applicable tax treaties, as discussed in **2.12 Double-Tax Treaties**.

These tax consequences for offshore investors vary depending on the type of vehicle used by the alternative fund, as summarised below. See **4.7 Investors: Tax Regime** for the taxation of investors in Japan.

Tax treatment of NKs

An NK is transparent for Japanese tax purposes and, as such, each partner in an NK is viewed as earning its allocated share of income derived by the NK. However, since the NK is typically managed in Japan and has one or more partners that are resident in Japan, there is generally a high risk that offshore investors in an NK will be deemed to have a permanent establishment in Japan. This is because the Japanese tax authority takes the position that if even a single partner in an NK has a permanent establishment in Japan, then all of the offshore investors in the NK are deemed to have a permanent establishment, based on the view that an NK's business is operated jointly by all partners. Unlike in the case of an investment made through an IBLP (discussed below), no statutory exemption is available to permit offshore investors in an NK to be exempted from being deemed to have a permanent establishment in Japan.

If an offshore investor investing through the NK is deemed to have a permanent establishment in relation to the business of the NK, the NK will be subject to withholding on distributions of the partnership profits to such partners at a rate of 20.42%. A non-resident partner who is deemed to have a permanent establishment in Japan will be required to file a tax return to report its share of income from the NK. This makes an NK relatively unsuited for use by offshore investors for Japan-focused investments.

Tax treatment of IBLPs

An IBLP is treated as being transparent for Japanese tax purposes and, as such, each partner in an IBLP is viewed as earning its allocated share of income derived from the IBLP. As mentioned above, while offshore investors are generally not subject to tax on capital gains from the sale of shares of a Japanese company, there are three exceptions under which their capital gains become subject to tax. Since it is uncommon to use an IBLP for investment in real estate (see **2.2 Fund Structures** regarding restrictions on the types of assets in which an IBLP is permitted to invest), the other two exceptions are discussed below.

Permanent establishment (PE)

The Japanese tax authority's position discussed above with respect to NKs applies equally to IBLPs. As such, in the absence of an available exemption (discussed below), an offshore investor will be deemed to have a permanent establishment in Japan if it invests in an IBLP that has a partner with a permanent establishment in Japan (eg, if its managing entity conducts business in Japan).

In contrast to an IBLP, if a fund is established as a legal entity outside Japan and is not managed in Japan, it may be possible to structure the fund so that it does not cause offshore investors to be deemed to have a permanent establishment in Japan. As the analysis is complex, sponsors and offshore investors should discuss the tax implications of an investment in a fund organised as a non-Japanese legal entity carefully with their tax advisers in Japan.

PE exemption filings

Pursuant to a proposal by the Japanese Ministry of Economy, Trade and Industry (METI) intended to facilitate investment in Japanese alternative

funds by offshore investors, the 2009 annual tax reforms introduced a safe harbour that permits offshore investors to invest through such funds, notwithstanding the fact that they may be deemed to have a permanent establishment in Japan. To take advantage of the safe harbour, offshore investors are required to make a filing to perfect the exemption. In order to qualify for the exemption, the offshore investor must:

- be a limited partner in the fund;
- not be deemed to take part in certain aspects of the management or operation of the fund;
- itself own less than a 25% share of the assets of the fund;
- have no special relationship to the general partner of the fund; and
- not otherwise have a permanent establishment in Japan.

Three factors limit the use of the PE exemption filing (and the 25/5 Rule exemption filing discussed below) for Japanese buyout funds:

- in order to be eligible for the exemption, offshore investors must not take part in the management of the fund, effectively requiring such investors seeking the benefit of the safe harbour to waive certain governance, oversight and consent rights (eg, participation in an LP advisory commitment), which tend to be important to private fund investors;
- offshore investors relying on the filing would still be subject to the 25% limit (in the case of a 25/5 Rule exemption filing, without application of the aggregation principle discussed below), which could pose difficulties for smaller funds and/or funds with a concentrated investor base, such as co-investment funds, bespoke funds and fund-of-one arrangements; and
- sponsors and some investors may find the filing requirements to be burdensome, particularly funds of funds, which may be required to make such filings on behalf of their underlying investors, and other investors who find such filings to be intrusive.

The 25/5 Rule

Under the 25/5 Rule, an offshore investor will become subject to tax on capital gains from the sale of shares of a Japanese company if the offshore investor owns, or is deemed to own, 25% or more of the shares of the underlying Japanese company during an applicable holding period in which the offshore investor sells, or is deemed to have sold, 5% or more of such company's shares. While an IBLP is treated as transparent for Japanese tax purposes, where the offshore investor invests through a fund structure as a pass-through partnership (eg, as an IBLP), an aggregation rule applies for the purposes of calculating the 25% and 5% thresholds under the 25/5 Rule. Under this aggregation rule, an offshore investor's holdings are aggregated with all of the offshore investor's "specially related shareholders", which are deemed to include all of the other partners in the fund in which the offshore investor invests. As with a permanent establishment, the analysis is complex, and sponsors and offshore investors should discuss the tax implications of an investment in a fund organised as a pass-through partnership carefully with their tax advisers in Japan.

Two safe harbours from capital gains taxation under the 25/5 Rule may potentially be available for offshore investors investing through a fund structured as an IBLP:

- a safe harbour perfected through a statutory exemption filing; and

- reliance on treaty benefits under an applicable tax treaty.

25/5 Rule exemption filings

The 2009 annual tax reform that introduced the PE exemption safe harbour also introduced a separate safe harbour to permit offshore investors to invest through such funds, notwithstanding the fact that the fund in the aggregate owns, or is deemed to own, 25% or more of the shares of any underlying Japanese portfolio company. To take advantage of the safe harbour, an offshore investor is required to make a filing to perfect the exemption. In order to qualify for the exemption, the offshore investor must:

- be a limited partner in the fund;
- not be deemed to take part in certain aspects of the management or operation of the fund; and
- itself own less than 25% of the shares of the underlying Japanese portfolio company in which the fund invests (without application of the aggregation principle under the 25/5 Rule).

This exemption does not apply if the relevant fund has held the shares for a period of less than one year at the time of sale. Note also that the limitations applicable with respect to PE exemption filings (discussed above) also apply to 25/5 Rule exemption filings.

Tax treaty benefits

Even if capital gains derived by offshore investors become taxable under the 25/5 Rule, an offshore investor may still be able to rely on an available tax treaty between Japan and the jurisdiction in which the offshore investor is considered to be resident under such tax treaty. This is discussed in more detail in **2.12 Double-Tax Treaties**.

Tax treatment of GK-TK structures

A GK itself is opaque for Japanese tax purposes and is therefore required to file a tax return to report its income each fiscal year. However, under a GK-TK structure, profits allocated to the TK investors are deductible in calculating the taxable corporate income of the GK, and would therefore be subject to tax only once at the level of TK investors, not at the level of the GK. A GK conducting its business in Japan will have withholding tax obligations for the distribution of its profits to TK investors at a rate of 20.42%.

Tax treatment of TMKs

A TMK is opaque for Japanese tax purposes and is therefore required to file a tax return to report its income each fiscal year. However, dividends paid out to its investors are deductible in calculating the taxable corporate income of the TMK, subject to the TMK satisfying certain conditions, including a requirement to distribute as dividends more than 90% of the distributable profits of the TMK in the same fiscal year. As long as all such conditions are met, profits earned and paid out as dividends by a TMK would be subject to tax only once at the level of its investors, and not at the level of the TMK itself. A TMK will have a withholding tax obligation for dividends at a rate of 20.42%. Depending on the particular circumstances, non-resident investors in a TMK may be required to file tax returns to report capital gains from alienation of their interest in the TMK.

Tax treatment of the investment corporation of a J-REIT

The investment corporation of a J-REIT is itself opaque for Japanese tax purposes and is therefore required to file a tax return to report its income each fiscal year. However, as with a TMK, dividends paid out to its investors are deductible in calculating the taxable corporate income of the investment corporation if the investment cor-

poration meets certain conditions, including a requirement to distribute as dividends more than 90% of the distributable profits of the investment corporation in the same fiscal year. As long as all such conditions are met, profits earned and paid out as dividends by the investment corporation will be subject to tax only once at the level of its investors, and not at the level of the investment corporation itself. An investment corporation will have a withholding tax obligation for such dividends (applicable withholding tax rates differ depending on whether the investment corporation is listed on an exchange and whether the recipient is a corporate entity or individual). Depending on the particular circumstances, non-resident investors in the investment corporation may be required to file tax returns to report capital gains from alienation of their interest in the investment corporation.

2.12 Double-Tax Treaties

Japan has an extensive double-tax treaty network, and the Japanese government is actively seeking to expand it further. Not every jurisdiction has a tax treaty with Japan, however, and the benefits may vary significantly between jurisdictions, so any investor seeking to invest in Japan while relying on tax treaty benefits should consult its own tax adviser to understand whether and to what extent such benefits may be available.

Whether alternative funds established in Japan qualify for benefits under an applicable double-tax treaty generally depends on whether the relevant vehicle used for such funds is transparent or opaque for Japanese tax purposes, as explained below. It should be noted, however, that where an alternative fund established in Japan derives income from a foreign jurisdiction (source jurisdiction), whether such fund would be entitled to benefits under the applicable double-tax treaty for such income is ultimately a question of tax law in the source jurisdiction (including interpretation of the treaty in that jurisdiction).

Where the Vehicle Used for the Alternative Fund is Opaque for Japanese Tax Purposes

Depending on the terms of the double-tax treaty between Japan and the source jurisdiction, the fund may qualify for benefits under such treaty (eg, reduction in or exemption of withholding tax in the source jurisdiction).

Where the Vehicle Used for the Alternative Fund is Transparent for Japanese Tax Purposes

The fund itself would not generally qualify for benefits under the double-tax treaty between Japan and the source jurisdiction. However, investors in the fund may, qualify for benefits under the double-tax treaty between the jurisdiction of their residence and the source jurisdiction, depending on the terms of such treaty.

2.13 Use of Subsidiaries for Investment Purposes

It is common for alternative funds (particularly private equity funds, real estate funds and infrastructure funds) to use subsidiaries for investment purposes. The primary reasons for the use of subsidiaries include to take advantage of debt-to-equity leverage at the subsidiary level and to segregate liabilities within each investment.

2.14 Origin of Promoters/Sponsors of Alternative Funds

Generally speaking, blind-pool alternative funds established in Japan tend to be established predominantly by domestic sponsors. Some of the larger buyout funds that invest in Japan, whether as a Japan-focused, pan-regional or global investment strategy, are established in offshore

jurisdictions due to legal, tax and regulatory considerations. Such larger funds are most commonly established by North American or European sponsors.

For real estate and infrastructure funds, an offshore feeder fund is commonly established, with investors investing into the offshore feeder, which then invests in a GK-TK or TMK arrangement when investing in particular transactions. Sponsors of these funds are typically a mix of domestic and overseas players, where these firms are established and operate in multiple jurisdictions, including Japan.

2.15 Origin of Investors in Alternative Funds

Subject to applicable international sanctions and other eligibility requirements, there are generally no restrictions on the domicile of investors investing in Japanese alternative funds. Japanese investors naturally make up a significant proportion of investors in Japanese alternative funds, but investors from many foreign jurisdictions commonly invest in these funds as well. Investors from Asia, Europe, North America, Oceania and occasionally the Middle East and other jurisdictions are not uncommon.

2.16 Key Trends

Please refer to the Japan Trends and Developments chapter in this guide for information on key trends.

2.17 Disclosure/Reporting Requirements

As discussed in **2.3 Funds: Regulatory Regime**, if an offering is regarded as a public offering under the FIEA, securities registration requirements and other disclosure requirements apply.

In addition to the requirement to provide sufficient information for the investor to make an investment decision, the following are also required:

- a document covering certain matters required under the FIEA – including an explanation of the fund structure, an outline of the terms of the fund, and disclosure of certain risks and fees that may be payable in connection with an investment in such alternative fund – should be provided prior to the investor signing a subscription agreement or similar agreement; and
- a document summarising the subscription by the investor may apply if the investor is not a professional investor (*tokutei toshika*) under the FIEA. Moreover, if an Article 63 Notice is filed by the general partner, the general partner will be required to:
  - (a) provide an investment management report if the investor is not a professional investor;
  - (b) make certain matters indicated in such Article 63 Notice publicly available;
  - (c) file an annual business report; and
  - (d) make certain matters included in the annual business report publicly available.

Additional reporting requirements are applicable to J-REITs and investment trusts.

2.18 Anticipated Changes

No substantial changes to the regulations relating to alternative funds are expected in the short term.

3. Managers

3.1 Legal Structures Used by Fund Managers

In the case of IBLPs, the general partner is often established as a joint stock company (*kabushiki*

kaisha or KK under the Companies Act), a GK or an LLP. In the case of a GK-TK arrangement, the GK is a limited liability company (*godo kaisha*) established under the Companies Act, but it is possible for an entity other than a GK to enter into a TK agreement with the investor.

To the extent that investment managers of J-REITs, investment trusts and TMKs are Japanese corporations, they would be KKs, as required under the FIEA. If a TMK is simply a client receiving investment advice, the investment adviser need not be a KK, as long as it is registered as an investment adviser under the FIEA.

3.2 Managers: Regulatory Regime

See **2.2 Fund Structure** s and **2.3 Funds: Regulatory Regime** for an outline of the regulatory regime applicable to alternative fund managers. If investment management in securities and/or derivatives is delegated to an investment manager, the investment manager must be registered as such under the FIEA.

3.3 Managers: Tax Regime

Taxation of Alternative Fund Managers in Japan

In Japan, there is no special tax regime applicable to fund managers, whether alternative funds or otherwise, and the tax treatment of management fees and carried interest received from the fund are determined in accordance with the general rules of Japanese tax law. In practice, managers of alternative fund are typically either:

- vehicles that are opaque for Japanese tax purposes (eg, a KK or a GK, if such vehicle is established in Japan); or
- vehicles that are transparent for Japanese tax purposes (eg, an NK, an IBLP or an LLP, if such vehicle is established in Japan).

In each case, individual managers receive their management fees and carried interest from such vehicle. Below is a tax summary of the treatment in each case.

Where the vehicle used for the alternative fund manager is opaque for Japanese tax purposes

Such vehicle is subject to corporation tax on the management fees and carried interest at the effective tax rate of approximately 30%. When such management fees and carried interest are further paid from such vehicle to individual managers who are officers or employees of such vehicle, such management fees and carried interest would be treated as “salary income” of such individual managers, since such remuneration is paid in consideration for services provided in their capacity as officers or employees of such vehicle. As a result, such remuneration would be subject to tax under progressive tax rates (up to a maximum rate of 55.945%). There is a deduction limitation rule for remuneration paid to officers, under which all or part of the remuneration paid to individual managers may not be deductible in the calculation of taxable corporate income of such vehicle, if individual managers are officers of such vehicle.

Where the vehicle used for the alternative fund manager is transparent for Japanese tax purposes

Management fees received by individual managers are viewed as remuneration paid in consideration for the provision of their services. As a result, such remuneration would be treated as “business income” or “miscellaneous income” of such individual managers, both of which are subject to tax under progressive tax rates (up to a maximum rate of 55.945%). For the tax treatment of carried interest allocated to individual managers, see **3.5 Taxation of Carried Interest**.

3.4 Rules Concerning Permanent Establishments

In order to encourage foreign funds to invest in Japanese securities, the Financial Services Agency published guidelines for an "independent agent exemption" with respect to fund managers, in consultation with the Tax Bureau of the Ministry of Finance and the National Tax Agency. While these guidelines are not prepared specifically for alternative funds, it would not be unreasonable to refer to them in analysing any "agent permanent establishment" issues in the context of alternative funds.

Under the guidelines, when a foreign fund enters into a discretionary investment agreement with a domestic investment manager and the domestic investment manager conducts certain investment activities in Japan under the discretionary investment agreement on behalf of such fund, that domestic investment manager would be considered to be an "independent agent", thereby not constituting an "agent permanent establishment" of such fund, if all of the following conditions are met:

- discretion delegated to the domestic investment manager is not so limited that such fund would be considered, in substance, to be directly conducting investment activities in Japan;
- the number of officers of the domestic investment manager who concurrently serve as officers or employees of the foreign general partner or foreign investment manager of the fund is less than half the total number of officers of the domestic investment manager;
- the amount of remuneration of the domestic investment manager is linked to the amount of the total assets to be invested under the discretionary investment agreement or the investment income, with the contributions of the relevant parties appropriately taken into account;
- in cases where the domestic investment manager exclusively or almost exclusively deals with such fund, the domestic investment manager has the capacity to diversify its business or acquire other clients without fundamentally altering the way it conducts its business or losing economic rationality for its current business; and
- in cases where the domestic investment manager is considered to be a "specially related person" of certain investors in the fund, the domestic investment manager is not exclusively, or almost exclusively, acting on behalf of such certain investors.

It is also possible for the offshore investors to rely on the PE exemption filing discussed in **2.11 Funds: Tax Regime**.

3.5 Taxation of Carried Interest

In Japan, there is no special legislative rule for the taxation of carried interest and therefore its tax treatment is determined by applying the general rules of Japanese tax law.

Where the Vehicle Used for the Alternative Fund Manager is Opaque for Japanese Tax Purposes and Individual Managers Receive Carried Interest from Such Vehicle

Since it can be assumed that individual managers receive carried interest from such vehicle in consideration for their services provided in their capacity as officers or employees of such vehicle, carried interest can be expected to be treated as "salary income" of such individual managers, and would therefore be subject to tax under progressive tax rates, up to a maximum rate of 55.945% (see also **3.3 Managers: Tax Regime**).

Where the Vehicle Used for the Alternative Fund Manager is Transparent for Japanese Tax Purposes and Individual Managers Receive Carried Interest from Such Vehicle

There are two different views on the tax treatment of carried interest in this case,. One view is that, as with management fees discussed in **3.3 Managers: Tax Regime**, carried interest received by individual managers would be viewed as remuneration paid to them in consideration for their services and thus treated as "business income" or "miscellaneous income" of such individual managers, both of which are subject to tax under progressive tax rates (up to a maximum rate of 55.945%). The other view is that, since the vehicle is tax transparent, individual managers would be viewed as having directly earned their allocated shares of the income derived by the fund, and the character of such income at the fund level would be respected in determining the tax treatment of carried interest at the level of individual managers. Under this view, where the source of carried interest is capital gains from the alienation of securities by the fund, carried interest received by individual managers would also be treated as capital gains from the alienation of securities, subject to tax at a flat rate of 20.315%.

While both of these views are possible under the law, the Financial Services Agency published a notice summarising the tax treatment of carried interest received by individual managers under certain circumstances in 2021, with the aim of promoting Japan as an international finance hub, to which the National Tax Agency confirmed that it had no objections. According to this notice, carried interest to be paid as a distribution of partnership profits to its partners would be treated as capital gains from the alienation of securities, subject to tax at a flat rate of 20.315%, if certain conditions specified therein are met.

3.6 Outsourcing of Investment Functions/Business Operations

Managers of alternative investment funds are permitted to appoint sub-advisers and to delegate their investment management functions or outsource other operations of the funds to third parties. To the extent that the fund documents permit such delegation or outsourcing, there are no particular laws or regulations that restrict or regulate such delegation or outsourcing, subject to the service provider holding the appropriate licences and registrations, if the provision of such services requires any such licence or registration. For example, if the function of investment management in securities or derivatives is outsourced, as discussed in **2.7 Requirement for Local Investment Managers**, such investment functions may only be delegated to an investment manager registered under the FIEA.

3.7 Local Substance Requirements

An investment manager registered under the FIEA is required to have an office in Japan and personnel capable of appropriately conducting the investment management business in compliance with the applicable laws and regulations.

See **2.7 Requirement for Local Investment Managers** and **2.9 Rules Concerning Other Service Providers** for requirements regarding the general partner of an IBLP or NK, or the TK operator of a TK.

3.8 Local Regulatory Requirements for Non-local Managers

When a non-local manager wishes to act as sub-manager in Japanese alternative fund schemes, such non-local manager will need to have the appropriate licence or registration under Japanese law, which differs depending on the assets in which the fund invests. Even if the ultimate investment target of the fund is not securities, if

the fund nonetheless invests in securities, a sub-manager will need to be registered as an investment manager under the FIEA. See **3.7 Local Substance Requirements** for the requirements applicable to registered investment managers.

See also **2.7 Requirement for Local Investment Managers**, **2.8 Other Local Requirements** and **2.9 Rules Concerning Other Service Providers** with respect to the appointment of non-local managers.

4. Investors

4.1 Types of Investors in Alternative Funds

See **2.15 Origin of Investors in Alternative Funds.**

4.2 Marketing of Alternative Funds

For IBLPs, NKs, GK-TKs and foreign partnerships, if the general partner chooses to rely on the QII Exemption for marketing, as discussed in **2.3 Funds: Regulatory Regime**, which tends to be common in practice, an Article 63 Notice filing must be made. To qualify for the QII Exemption for marketing, a fund can be marketed to an unlimited number of QIIs and non-QIIs that satisfy certain criteria (in that they are qualified purchasers), but the fund must have at least one QII and may not have more than 49 non-QII qualified purchasers who will commit to invest in it.

A different set of rules applies to the marketing of J-REITs, investment trusts and TMKs. As discussed in **2.3 Funds: Regulatory Regime**, there are two types of private placement exemptions available:

- exemption for the private placement for QIIs; and
- exemption for the private placement to a small number of investors.

Funds can only be marketed to QIIs if the J-REIT, investment trust or TMK relies on the exemption for the private placement for QIIs; for the private placement to a small number of investors exemption and public offerings, there is no restriction under the private placement exemption on the types of offerees to which the funds can be marketed, but the marketing cannot be made to more than 49 investors. Note that for the purposes of determining the number of investors in the case of J-REITs and TMKs, one counts the number of investors solicited, whereas for partnership-type funds, one counts the number of investors who subscribe for interests in the fund.

4.3 Rules Concerning Marketing of Alternative Funds

See **2.3 Funds: Regulatory Regime**.

4.4 Local Investors

Subject to the applicable marketing rules, local investors may invest in alternative funds established in Japan. However, if a partnership-type alternative fund relies on the QII Exemption for marketing and/or investment management, or a J-REIT, an investment trust or a TMK relies on one of the private placement exemptions, the types of investors that may invest in such alternative funds would be restricted.

4.5 Investors: Regulatory Regime

For partnership-type funds, general partners that rely on the QII Exemption for marketing must make an Article 63 Notice filing prior to the first closing with any investor solicited in Japan. Certain conduct rules apply once an Article 63 Notice filing for marketing is made, including a duty of good faith, advertising regulations, pro-

hibitions on providing false information, a principle of suitability and a requirement to segregate assets, some of which are not applicable if the investors are "professional investors". The provision of any kind of discount or benefit, as well as compensation for any loss, may also be prohibited, and require careful legal analysis.

"Professional investors" are defined under the FIEA, but an investor may choose to be treated as a "professional investor" even if it does not fall within the categorisation. In 2022, an amendment to the FIEA expanding the scope of natural persons who may choose to be treated as a "professional investor" came into effect.

A different set of rules applies for the marketing of J-REITs and TMKs, and marketing is typically conducted through a placement agent registered as a Type I financial instruments business operator. Unless the marketing of interests is made by way of a public offering, there would not be a requirement to file a securities registration statement for the marketing of such interests. See also **2.3 Funds: Regulatory Regime** for the filing requirements for the formation of J-REITs and TMKs.

4.6 Disclosure Requirements

Any person (eg, a general partner that has filed an Article 63 Notice or a placement agent) soliciting investors that are not "professional investors" (*tokutei toshika*) under the FIEA with respect to a prospective investment in an alternative fund must deliver the following to such non-professional investors:

- a document that includes certain matters required under the FIEA, including an explanation of the fund structure, an outline of the terms of the fund, and disclosure of certain risks and fees that may be payable in connection with an investment in such alternative fund, prior to the investor signing a subscription or similar agreement; and
- a document summarising the subscription by the investor (upon the closing).

Also, any person soliciting investors who are not "professional investors" (*tokutei toshika*) under the FIEA (or certain other investors), with respect to an investment in an alternative fund, must provide an explanation of certain important matters relating to such prospective investment under the Act on Provision of Financial Services.

See also **2.17 Disclosure/Reporting Requirements.**

4.7 Investors: Tax Regime

There are no special or preferential tax regimes in Japan that might be available to investors in alternative funds, so the tax treatment of such investors is determined under general Japanese tax laws and principles. See also **2.11 Funds: Tax Regime** for the tax treatment of offshore investors.

Taxation of Corporate Investors in Japan

Corporate investors resident in Japan are generally subject to Japanese taxation on their worldwide income. One exception is that a certain portion of dividends received from the fund may be excluded from the amount of such investor's taxable corporate income, depending on the circumstances and whether such dividends are deductible at the level of the distributing entity. The income of a corporate investor is taxed at the effective tax rate of approximately 30%, without regard to type of income.

Taxation of Individual Investors in Japan

While the income of individual investors resident in Japan is generally taxed under progressive tax

rates (up to a maximum rate of 55.945%), capital gains from the alienation of securities are taxed at a flat rate of 20.315%. Depending on the circumstances, individual investors who receive dividends from a fund vehicle, the equity interest of which is listed on an exchange, may be able to opt to be taxed at a flat rate of 20.315%.

Timing of Taxation

Where the alternative fund is opaque for Japanese tax purposes (eg, a TMK or an investment corporation established in Japan), Japanese investors are subject to tax upon the receipt of profit distributions from the fund or the alienation of their interest in the fund.

Conversely, where the alternative fund is transparent for Japanese tax purposes (eg, an NK or a partnership-type entity established in Japan), Japanese investors are subject to tax on their allocated share of the income derived from the fund each fiscal year, regardless of whether such income has been distributed. Since the fund is transparent, the character of such income at the fund level would generally be respected in determining tax treatment at the investor level. However, see **3.5 Taxation of Carried Interest**.

In the case of a GK-TK structure, while the GK itself is opaque for Japanese tax purposes, TK investors would be subject to tax for profits allocated to them each year, whether distributed or not; however, unlike an NK or a partnership-type fund, income from such allocated profits would generally be treated as "miscellaneous income", regardless of the character of the income at the GK level.

4.8 Foreign Account Tax Compliance Act (FATCA)/Common Reporting Standard (CRS) Compliance Regime

FATCA

Japanese alternative funds are "financial institutions" under FATCA. Japan and the United States have entered into a Model 2 intergovernmental agreement with respect to FATCA, under which Japanese alternative funds are required to comply with certain due diligence, reporting and withholding obligations. Information with respect to US investors and non-compliant investors must be reported to the US Internal Revenue Service on an annual basis. If a Japanese alternative fund does not comply with its reporting obligations, payments of interest and dividends from certain US sources may be subject to withholding tax at a rate of 30%.

CRS

The Japanese government has also amended domestic law to implement the CRS published by the OECD. Under the amended law, each of the following is subject to certain compliance obligations, including identification and reporting of the tax residence and beneficial owners of their clients (ie, their investors) to the Japanese tax authorities, which will then exchange this information with tax authorities in other relevant jurisdictions under the automatic exchange of information (AEOI) framework:

- general partners of NKs and IBLPs (in the case of alternative funds);
- GKs of GK-TK structures;
- TMKs; and
- investment corporations of J-REITs.

Contributed by: Keiko Shimizu, David Azcue, Koichiro Yoshimura and Lily Rasel,
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Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. In representing its leading domestic and international clients, it has successfully structured and negotiated many of the largest and most significant corporate, finance and real estate transactions related to Japan. The firm has extensive corporate and litigation capabilities spanning key commercial areas, such as antitrust, intellectual property, labour and taxation, and is known for ground-breaking domestic and cross-border risk management/corporate governance cases and large-scale corporate reorganisations. More than 500 lawyers at the firm work together in customised teams to provide clients with the expertise and experience specifically required for each matter. The lawyers advise both domestic and international clients on the structuring, formation and offering of alternative funds from a legal, regulatory and tax perspective, and also provide regulatory and ongoing compliance advice to investment managers.

Simpson Thacher & Bartlett LLP is a global law firm with more than 1,000 lawyers working across 32 major practice areas and almost every industry sector. Its multidisciplinary private funds practice has advised clients for over 40 years, playing a prominent role in the development of the private funds industry. Working closely with the firm's other practice areas, the private funds team advises many of the world's best-known institutional alternative asset managers, as well as smaller funds and independent boutiques. In addition to comprehensive fund formation advice, the firm provides sponsor and adviser clients with practical solutions to complex regulatory, compliance and enforcement issues, and advises sponsors of private funds worldwide. Simpson Thacher also has substantial experience in M&A transactions involving private investment firms, IPOs by alternative asset managers, credit facilities for funds and managers, and secondary transfers of private fund investments. Having been in Tokyo for over three decades, the firm advises both Japanese and international clients on capital markets, M&A and cross-border private fund formation transactions.

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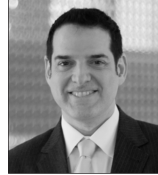

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Trends and Developments

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Overview

Fundraising has remained strong overall in 2022, bolstered by record-setting closes in the real estate and logistics sectors, the continued development of the Japanese venture capital ecosystem, increasing diversification of the industry across asset classes, and favourable conditions for private fund investments. Fundraising for buyout funds has been an exception, however, entering a cyclical decline in 2022 in the wake of the record-setting 2020 and a strong follow-up in 2021. But with growth in M&A investments and several flagship funds expected back in the market in 2023–2024, together with entries from new domestic and overseas players, the long-term outlook remains bright across all sectors of the industry.

The global recession and other challenges that contributed to a slowdown in global fundraising have also had an impact in Japan, particularly for first-time funds. While video conferencing and VDRs helped keep fundraising activity going during the pandemic, providing a work-around to travel restrictions and social distancing measures, Japan's rigid multi-year restrictions on inbound travel by non-Japanese residents, which at the time of writing are being relaxed for the first time since early 2020, have posed challenges for sponsors seeking to forge relationships with new overseas investors, and this has disproportionately impacted domestic sponsors seeking to raise funds with commitments from non-Japanese investors for the first time.

Despite these challenges, overall fundraising has remained resilient due to a host of factors, including:

- the maturation and diversification of the industry across asset classes;
- the nearly 30% depreciation of the Japanese yen against major currencies over the past year;
- Japan's convenience as a substitute market for international investors reallocating their Asia-earmarked commitments away from China;
- the unique opportunity Japan presents for digital transformation; and
- government policies intended to foster the development of domestic industry and accelerate digital and financial transformation.

Continued Growth and Diversification of the Industry

The continued growth and diversification of the Japanese alternative investments industry became apparent in 2022, as overall fundraising remained strong despite a cyclical slowdown in the buyout sector. Whereas buyout and real estate once defined Japanese alternatives, logistics, infrastructure, venture capital and other sectors have now begun to share the spotlight. In January, GLP closed its flagship Japan logistics development fund, GLP Japan Development Partners IV, with more than JPY400 billion in commitments. Meanwhile, venture capital fundraising continued to surge in the first half of 2022, with APER reporting USD1.6 billion in capital raised for Japan-focused early-stage/seed equity funds, a figure all the more remark-

able considering the significant depreciation of the Japanese yen against the US dollar. Notably, according to APER, venture capital accounted for almost 44% of total capital raised by alternative investment funds in Japan across all asset classes in the first half of 2022.

Domestic private equity buyout firms have distinct cultures and, in some cases, have grown and diversified their investment strategies. Ironically, however, this growth and diversification may have blurred the distinctions between sponsors and segments and crowded the market. For the past two decades, the industry has generally been segmented between large-cap funds from the global mega-firms and the small to mid-cap funds from domestic sponsors. In recent years, however, global mega-firms like Bain and Carlyle have raised mid-cap focused funds, and domestic sponsors such as Polaris, Integral and Japan Industrial Partners have raised larger funds, allowing them to occasionally compete for larger deals. Meanwhile, principal investors may be crowding the market, led by the megabanks and corporate investors making strategic acquisitions.

Digital Transformation

Digital transformation is a current focus for alternative investors in Japan. The Japanese economy is uniquely positioned to benefit from the digital transformation of business operations, sales and marketing. Businesses here have long been bound by culture and tradition to inefficient analog systems, and have tended to resist change. In many ways, Japan's modern history is a story of preservation of tradition and resistance to change. But from Admiral Perry's Black Ships to the Nixon Shock and the Oil Shocks, a common thread has been that Japan resists change until there is a paradigm-shifting shock or until change is compelled by outside forces. The COVID-19 pandemic and private equity may have been the shock or outside force Japan needed to finally embrace digital transformation.

When Japan nearly shut down due to pandemic restrictions and social distancing, digital solutions helped fill the void created by the absence of traditional modes of commerce and interaction. New video conferencing technologies and e-commerce techniques like Zoom and ZoZo replaced classroom education and in-store shopping for millions across Japan. Retail businesses with strong brands but no digital platform turned to e-commerce and rebuilt their brands online.

Private equity and venture capital investors were uniquely situated to help these businesses make more effective use of data-driven marketing, implement direct-to-consumer (D2C) solutions, and otherwise help to modernise and transform businesses in ways that might otherwise have taken decades. New private equity and venture capital firms in particular have focused on helping traditional brick and mortar businesses move online and develop D2C platforms and targeted marketing with social media. The logistics and infrastructure sectors have also been key areas for private equity players in Japan, as new capital has focused on modernising and improving efficiencies in Japan's unique industrial and business geography.

The Japanese government, meanwhile, fully embraced and encouraged these changes, which were viewed as vital for making Japan more globally competitive in the digital age. In October 2020, Prime Minister Yoshihide Suga announced the end of the use of hanko seals on administrative documents. The national government also created a new Digital Agency in September 2021, with the English language slogan

"Government as a Startup". The Digital Agency has taken aim at everything from fax machines to floppy disks in an effort to improve efficiency through digitalisation and conversion to newer technologies. And the potential benefits from digitising the world's third largest economy have not been lost on alternative asset investors.

Continued Emergence of Venture Capital

In an economy that has been defined by large corporate-driven innovation and a relative dearth of unicorns, a more robust infrastructure is blossoming. Nearly JPY1 trillion has reportedly been raised for Japanese start-up investments – a more than 50% increase from 2020. The emerging Japanese venture capital market is increasingly robust and diverse, with entities including:

- established private venture capital firms like Jafco and Global Brain;
- large banks such as SMBC, MUFG and Mizuho;
- foreign-directed firms like Coral Capital and Shizen Capital;
- emerging ESG/SDG-focused firms like Kathy Matsui's MPower;
- large corporate players making their own strategic acquisitions; and
- government-sponsored funds like the new JPY1 billion Japanese government-led Japan Venture Growth Investments venture fund.

The Japanese Ministry of Economy, Trade and Industry (METI) has also taken concrete steps to help develop the emerging domestic venture capital ecosystem through the innovative J-Startup Programme, a public-private programme that aims to identify and provide intensive support to the most promising new companies from a pool of over 10,000 Japanese start-ups.

Deepening of ESG Principles

The Japanese alternative investments industry has continued to deepen its focus on ESG principles. Although Japan has consistently ranked towards the bottom of most global ESG surveys, currently ranking 120th out of 156 countries in the current World Economic Forum Global Gender Gap Report, it seems to have identified gender inequality and its ESG performance as both an obstacle to achieving critical policy objectives and an opportunity to address broader challenges, including:

- sustainable economic growth;
- improving economic competitiveness;
- blunting the impacts of population decline on the economy; and
- achieving greater energy independence and blunting the impacts of climate change.

Japanese alternative investment managers have also recognised ESG principles not only as an opportunity for making positive social impacts, but also as a means for improving investment returns. Private equity firm NSSK, for example, has made an open commitment to diversity and inclusion, and made focused on impact investing a centrepiece of its corporate mission. In its 2021 ESG report, NSSK proudly touts its multiple PEI Operational Excellence Awards and states that 40% of its portfolio company CEOs or COOs are women or minorities, 78% of its total portfolio company employee base (of more than 5,000) are women, and 49% of managerial positions in its portfolio companies are held by women.

While NSSK is at the forefront of ESG in Japan, alternative investment managers generally seem to be making sincere efforts to focus on ESG principles. Many if not most major alternative investment managers are signatories to

the United Nations Principles for Responsible Investment and highlight their commitment to ESG and SDG principles at both the firm and portfolio company levels, and many have hired ESG specialists to lead their efforts.

In November 2021, 21 major Japanese financial institutions signed a new initiative reflecting Japan's embracing of ESG principles: the "Japan Impact-driven Financing Initiative". The initiative acknowledges solving environmental and social issues as the fundamental purpose of private financial institutions and seeks to promote local impact-driven finance and investment.

Even prior to the initiative, however, Japan had established social impact funds, including the Japan Social Innovation and Investment Foundation, the Cool Japan Fund, and NSSK's regional impact funds, focusing on increasing employment, gender diversity and local community commitment across several prefectures in central Japan. And the alternatives industry is not just talking about social impact investing: it is backing it up with financial commitments, with the Japan Social Innovation and Investment Foundation reporting 250% annual growth in assets under management in 2021.

Simpson Thacher & Bartlett LLP is a global law firm with more than 1,000 lawyers working across 32 major practice areas and almost every industry sector. Its multidisciplinary private funds practice has advised clients for over 40 years, playing a prominent role in the development of the private funds industry. Working closely with the firm's other practice areas, the private funds team advises many of the world's best-known institutional alternative asset managers, as well as smaller funds and independent boutiques. In addition to comprehensive fund formation advice, the firm provides sponsor and adviser clients with practical solutions to complex regulatory, compliance and enforcement issues, and advises sponsors of private funds worldwide. Simpson Thacher also has substantial experience in M&A transactions involving private investment firms, IPOs by alternative asset managers, credit facilities for funds and managers, and secondary transfers of private fund investments. Having been in Tokyo for over three decades, the firm advises both Japanese and international clients on capital markets, M&A and cross-border private fund formation transactions.

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