THE STRUCTURED PRODUCTS LAW REVIEW

SECOND EDITION

Editors
Christopher S Schell, Yan Zhang and Derek Walters

THE LAWREVIEWS

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PUBLISHER
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PREFACE

It is our pleasure to continue to act as the editors for this second edition of *The Structured Products Law Review*. Despite the significant growth of the global structured products market in recent years and the continuing evolution of the global regulatory framework, very few books on legal and regulatory issues related to structured products are available. Our first edition last year was meant to cover that gap and we hope that this second edition will continue to further the knowledge base of legal practitioners and other structured products market participants.

For this year, we are pleased to report that this second edition adds one new jurisdiction and updates each existing geographical overview to cover its developments over the past year. One of the major developments, of course, has been the global covid-19 pandemic and the societal and governmental responses to that health risk. One of the more interesting effects of the pandemic for the structured products market was the intense volatility of the global stock markets in March and April 2020 as the world grappled with the new virus and its economic consequences. The volatility index of Chicago Board Options Exchange, known as the VIX index, reached a peak of 82.7 on 16 March 2020, which was higher than during the 2008 financial crisis and significantly higher than its long-run volatility average of approximately 20. This volatility resulted in substantial pricing movements in the structured products market. Combined with high levels of investor demand and longer marketing periods for typical structured products, and thus longer periods between the indicative pricing at launch and the final pricing at the close of the marketing, this unprecedented volatility required significant issuer and distributor efforts to appropriately price and sell structured products to those who understood the risks. Many transactions needed restructuring or repricing. At the same time, the investors saw the value of capital protection, including features such as buffers and triggers. The ultimate effects of this market dislocation, including any regulatory response, will take a long time to unravel. The near term results, however, are unambiguous: investors clearly noticed that structured products provided them with a set of investment options to capitalise on, or mitigate against, those unparalleled market conditions.

For our purposes, the term structured product refers to a pre-packaged investment that combines derivatives with other financial instruments to provide a return based on the performance of one or more underlying assets, including equity securities, indices, commodities, interest rates, currencies and, in some jurisdictions, credit risks. Typical structured products are issued as debt securities, certificates of deposit or investment certificates or units, and include embedded derivatives to provide a customised risk-return trade-off. Common issuers of structured products are financial institutions, other corporate issuers, special purpose vehicles and trusts. Structured products should not be confused with other structured finance products, which include asset-backed securities such as collateralised debt obligations and mortgage-backed securities, synthetic loans and credit derivatives such as credit default swaps.

Structured products have been in the spotlight since the global financial crisis in 2008. In the years following the financial crisis, there was an increase in regulatory investigations into the issuance and distribution of structured products and the promulgation of new rules and regulations to govern the conduct of structured product issuers and distributors. Regulators are particularly concerned about certain risk characteristics of structured products, including credit risk, investor suitability, pricing transparency, secondary market liquidity and conflicts of interest. Global regulators have taken a range of approaches to address these issues. To enhance investor protection, the International Organization of Securities Commissions published a report on the regulation of structured products in December 2013, which provides a toolkit outlining possible regulatory options that regulators in different jurisdictions may find useful to address their concerns about structured products. The process that led to the publication of this report has helped increase regulatory consistency across different jurisdictions and is an excellent example of international collaboration. The growing popularity of complex structured products among retail investors has also caught regulators' attention. Pursuant to the EU Markets in Financial Instruments Directive legislation that came into effect in January 2018, an issuer is required to supplement offering materials with a key information document when offering structured products to retail investors in EU Member States in order to strengthen investor protection and improve their investment decision and selection process. Other jurisdictions have also implemented rules aimed at protecting retail investors.

Given its unique ability to tailor investments to investor preferences, the structured product industry continues to grow at an impressive pace, and it is estimated that the size of outstanding structured products around the world has increased to over US$3 trillion in 2020. Technology plays an increasingly important role as the structured product market continues to grow in terms of issuance volume, innovation and broadening distribution channels. Recent examples include the growing popularity of online distribution platforms that provide an open marketplace for structured product issuers and distributors with a focus on streamlining the offering process to increase efficiency and transparency, the development of blockchain technology to facilitate securities clearing and settlement, and the use of large volumes of data from non-traditional sources, such as social media, to assess investors' financial needs and to design investment strategies. In recent years, not only have market participants embraced the rise of fintech by integrating new technology into offerings and issuances of structured products, securities regulators are also exploring the possibility of adopting new technology in structured product regulation. In Japan, online-based procedures have been permitted since November 2018 as a new know-your-customer (KYC) process to complement traditional face-to-face or mail-based KYC procedures. The US Securities and Exchange Commission (SEC) also has explored the use of big data in enforcement actions. In one recent example, the SEC used for the first time a coding technique against a broker-dealer that allows regulators to analyse data across an entire trading platform to identify potential unsuitable sales to a particular class of investors. The financial industry has historically been an early adopter of new technologies. With the onset of the remote working environment in many jurisdictions due to covid-19, the industry saw a continued investor demand for structured products and the technology was available to deliver structured products to those investors notwithstanding the dramatic decrease in in-person interactions. There is no doubt that technological development will continue to have a profound impact on structured products markets across all jurisdictions.

The Structured Products Law Review is designed to provide an overview of recent changes and developments in legal and regulatory issues regarding structured products markets. It would not have come together without the participation of a group of top lawyers and law firms from seven jurisdictions around the world. We hope that you find this book a useful tool in navigating the ever-changing legal and regulatory landscape in a fast-growing industry.

Finally, we would like to thank our counsel, Vidal Vanhoof, and other colleagues for their contributions in editing this book and the team at Law Business Research for their patience and efforts in compiling this second edition.

Christopher S Schell, Yan Zhang and Derek Walters
Davis Polk & Wardwell LLP
New York
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Chapter 5

JAPAN

Naoya Ariyoshi, Toshiyuki Yamamoto and Yuki Taguchi[1]

I OVERVIEW

The Japanese structured products market has a long history and is still active, although no official statistics are available. For retail investors, running a search on EDINET,[2] the Japanese equivalent to the US EDGAR, will find many derivatives-embedded securities linked to exposure to Nikkei Stock Average (Nikkei 225) and FX transactions. According to one publicly available source, the outstanding amount of Nikkei 225 linked public-offered bonds appeared to be over ¥1.7 trillion in November 2019. Banks also offer structured deposits to retail customers. Further, on the institutional investor front, similar or more complex types of structured products linked to stock indices and FX transactions, such as power reverse dual bonds, reverse floater bonds and constant maturity swap bonds, are offered.

The structured products described above are typically issued by foreign financial institutions (including foreign subsidiaries of Japanese financial institutions) pursuant to foreign laws and offered to investors in Japan. The structure of trust bonds established pursuant to Japanese law is also seen (as discussed further in Section II). Additionally, we understand that offshore vehicles are utilised to issue structured bonds.

For public offerings (typically sold to retail investors), securities registration statements are filed (see Section III). Domestic and foreign bonds fall under the definition of securities under Article 2, Paragraph 1 of the Financial Instruments and Exchange Act of Japan (FIEA) (Paragraph 1 securities). If this is the case, a financial instruments business operator that conducts a Type I business registered pursuant to the FIEA (Type I business operator) generally distributes bonds to investors.

II LEGAL AND REGULATORY FRAMEWORK

i Types of structure

Japanese structured products (issuing bonds[3]) are differentiated into two types.

Under one typical structure, a going-concern issuer such as a foreign financial institution issues bonds whose terms and conditions already have derivatives features embedded (issuer

1 Naoya Ariyoshi is a partner and Toshiyuki Yamamoto and Yuki Taguchi are associates at Nishimura & Asahi.

2 http://disclosure.edinet-fsa.go.jp/.

3 We understand that structured loans, whose economics are similar to structured bonds, are also popular products in Japan.

bonds). The issuer will enter into back-to-back derivatives transactions with a dealer for hedging purposes. The issuer bonds are typically governed by the foreign law where the issuer is located; for example, if the issuer is located in the UK, English law governs.

Under another typical structure, an arranger sets up a bankruptcy-remote special purpose vehicle (SPV), and that SPV issues bonds to investors and enters into derivatives transactions with a swap counterparty (SPV bonds). In Japan, trusts under the Trust Act of Japan (Trust Act) are utilised as vehicles for issuing bonds, in addition to SPVs established offshore, such as in the Cayman Islands, issuing bonds pursuant to foreign laws such as English law. For SPV bonds, the issue amount from investors will be invested in a safe underlying asset such as Japanese government bonds. For the purpose of matching cashflows between the SPV bonds and the underlying assets, derivatives transactions are used and the swap counterparty provides cashflow tailored to payments of the principal and interest of the SPV bonds.

From a credit risk perspective, investors in issuer bonds are subject to the credit risk of the issuer. However, investors in SPV bonds are subject to the credit risks of both the swap counterparty and the issuer of the underlying bonds.

ii Trust bonds

As the trust structure is Japan-specific, we would like to elaborate on trust bonds as follows. Under the Companies Act of Japan (the Companies Act), a trust bond is defined as 'a bond that the trustee of a trust issues, which is issued for trust property (meaning the trust property established in Article 2, Paragraph 3 of the Trust Act)' (Article 2, Paragraph 3, Item 17 of the Regulation for Enforcement of the Companies Act).

An issuer of trust bonds is typically a trust bank. An arranger (as trustor) and a trust bank (as trustee) enter into a trust agreement. The initial trust property paid by the arranger is nominal cash. The trust bank issues trust bonds for the trust property, and the issue amount of the trust bonds comprises the trust properties under the trust agreement. The issue amount will be invested in a safe underlying asset such as Japanese government bonds, and the trust bank also enters into a swap agreement with the arranger to generate cashflow of the interest and principal of the trust bond linked to, for instance, a stock index. Issuance of the trust bonds is based on limited recourse clauses so that the obligations of the trust bank (issuer) are limited to the trust property of the trust bonds only. To protect the structure, there is also a prohibition against filing for the commencement of bankruptcy proceedings for the trust property stipulated in the trust agreement.

Pursuant to Article 25, Paragraphs 1, 4 and 7 of the Trust Act, even where a trust bank is subject to bankruptcy, rehabilitation or reorganisation proceedings, the trust property will not be subject to such proceedings. In other words, the trust property is independent from the credit risk of the trust bank so long as the trust bank complies with its legal obligations as a trustee. Thus, investors in trust bonds are limited to the credit risks of both the swap counterparty and the issuer of the underlying bonds.

Issuance of trust bonds is subject to the Companies Act. The trust bond is treated as a corporate bond under Article 2, Paragraph 1, Item 5 of the FIEA. Thus, disclosure of the publicly offered trust bond is subject to the statutory process pursuant to the FIEA, the relevant enforcement order and cabinet office ordinances. It is possible that the Act on

Book-Entry Transfer of Corporate Bonds and Shares of Japan will apply to trust bonds, whereby the trust bonds are handled by the book-entry transfer system operated by the Japan Securities Depository Center, Incorporated.[4]

iii Japanese law applications and the regulator

Laws and regulations applicable to distributions of structured products

When Type I business operators distribute structured products that are Paragraph 1 securities to investors, the applicability of the FIEA has to be considered from several perspectives. The supervisory body for Type I business operators is the Financial Services Agency of Japan (JFSA). The FIEA stipulates numerous regulations applicable to distributions of structured products, including, without limitation:

a a duty of sincerity to customers (Article 36);
b regulation of advertising (Article 37);
c delivery of documents both prior to the conclusion of a contract and upon the conclusion of a contract (Articles 37-3 and 37-4);
d an obligation to conclude a contract with a designated dispute resolution organisation (Article 37-7);
e prohibited acts (Article 38);
f a prohibition on compensation of loss (Article 39); and
g the principle of suitability (Article 40).

However, some of these regulations are exempt if customers are classified as professional investors. Professional investors include qualified institutional investors (such as banks and insurance companies), the state and the Bank of Japan (BoJ). Listed companies and stock companies whose stated capital is expected to be ¥500 million or more are also included, but they can be treated as non-professional investors if they would like to be so by applying the statutory procedures. Conversely, corporations that are originally classified as non-professional investors as well as certain high net worth individuals can be treated as professional investors if they would like to be so by applying the statutory procedures.

The Act on Sales, etc., of Financial Instruments of Japan (Sales Act) also provides investor protection mechanisms by forcing financial instruments providers, including Type I business operators, to explain statutorily important matters to customers. Important matters under the Sales Act include a risk of principal losses, indicators that lead to principal losses due to fluctuations and important portions of the structure of transactions. Financial instruments providers are also prohibited from providing customers with conclusive evaluations on uncertain matters or with information that misleads them into believing that uncertain matters are certain. If financial instruments providers fail to comply with the above obligations, the Sales Act stipulates clauses concerning liability for damages and presumptions concerning the amount of loss that provide customers with easier damage claims as compared with those under tort pursuant to the Civil Code of Japan. An explanation of the important matters pursuant to the Sales Act will not be necessary if customers are specified customers that overlap with professional investors as stipulated under the FIEA, or if the customers have manifestly expressed that they do not require such an explanation.

4 http://www.jasdec.com/en/.

Laws and regulations applicable to structured deposits

Structured deposits offered by banks are regulated by the Banking Act of Japan (Banking Act). The Banking Act stipulates that structured deposits are specified deposits. Specified deposits are defined as 'deposits or instalment savings, etc., that carry the risk of a loss of the principal due to fluctuations in the money rate, value of currencies, quotations on a financial instruments market as prescribed in Article 2, Paragraph 14 of the FIEA, or any other index', and more precise specifications are provided by the delegated Regulation for Enforcement of the Banking Act. The following fall under specified deposits:

a deposits that require that a penalty be paid or other conditions equivalent to this when a depositor terminates the deposit before maturity, and that the amount, as a result of deducting the amount of said penalty from the balance of said deposit at the time of said termination, is likely to fall below the deposited amount due to changes in money rates, values of currencies, quotations on a financial instruments market and other indexes;

b deposits that are indicated in a foreign currency; and

c deposits for which a currency option transaction is incidental.

The investor protection mechanism under the FIEA described above in addition to the termination of contracts during a statutory cooling-off period generally apply *mutatis mutandis* to a bank's conclusion of contracts for specified deposits. The Sales Act described above is also applicable.

iv Margin requirements for non-centrally cleared derivatives

The Basel Committee on Banking Supervision and International Organization of Securities Commissions' margin requirements for non-centrally cleared derivatives have been implemented in Japan since September 2016 via the two separate channels of the FIEA and the supervisory guidelines of the JFSA (collectively, the Japanese MR). Under the Japanese MR, a trust formed by a trust bank (as a trustee) that is a registered financial institution under the FIEA is subject to the Japanese MR if certain conditions are met, such as that a swap counterparty is also a financial instruments business operator or a registered financial institution,[5] and that the swap agreement is a non-cleared over-the-counter (OTC) derivatives transaction for FIEA purposes. The JFSA's response to consultations concerning the relevant draft regulations (public comments) mentions that even if a trust account is used as a repackaged vehicle, no special exemption is scheduled to be implemented.[6] Generally, even in a trust bond structure, depending on the swap exposure, the trust bank posts underlying assets to the swap counterparty (and receives collateral from the swap counterparty) as a variation margin.

5 As to a foreign swap counterparty, 'a person engaged in OTC derivatives transactions in the course of trade in a foreign state' is subject to the Japanese MR. Thus, in general, foreign financial institutions serving as swap counterparties are subject to the Japanese MR. However, note that foreign states here are limited to those where close-out netting or any similar clauses are appropriately confirmed to be effective in light of laws and regulations of such foreign states.

6 See No. 41 on page 7 available at https://www.fsa.go.jp/news/27/syouken/20151211-1/01.pdf (Japanese only).

When responding to the question about derivatives transactions embedded in deposits or loans, however, the JFSA has responded that the Japanese MR will not be applicable if OTC derivatives transactions are integrated with deposits or loans, which are the major factors in transactions.[7]

III OFFERING PROCESS AND POST-SALE REQUIREMENTS

i What is a public offering?

In general, an offering by an offshore issuer of newly issued debt securities in Japan is treated as a public offering under the FIEA if the number of offerees (excluding certain qualified institutional investors) in Japan is 50 or more.[8] Thus, an offering of structured products that targets retail investors in Japan would constitute a public offering, and private deals targeted at professional investors only or a small number of investors could rely on private placement exemptions.

There have been no significant amendments of the relevant securities laws in recent years. As such, a general overview of public offerings and private placements of debt securities is provided in Sections III.ii and III.iii.

ii Public offering process

In the case of a public offering of newly issued debt securities, if the aggregate offer price in the proposed offering in Japan is ¥100 million or more,[9] the issuer must file a securities registration statement (SRS) with the Director General of the Kanto Local Finance Bureau with respect to the proposed offering in Japan.[10] The SRS must include comprehensive information regarding the offered securities and the issuer (e.g., an SRS for trust bonds must contain the structure of the trust, the status of underlying assets, risk factors, financial information of both trustor and trustee, and similar information). The SRS will be publicly disclosed on EDINET. As a general rule, the SRS will become effective 16 days after it is filed, and the issuer cannot start offering until then. When the issuer is subject to continuous disclosure requirements under the FIEA (i.e., the issuer made public offerings in Japan in the past), the waiting period for the SRS can be shortened to approximately seven days. In addition, such issuer can file a shelf registration statement instead of an SRS to achieve a more flexible offering through the shelf registration system.

The issuer in a public offering must deliver a prospectus to each offeree with respect to the proposed offering in Japan. The prospectus must contain certain items regarding

7 See No. 7 on page 2 available at https://www.fsa.go.jp/news/27/syouken/20160331-4/01.pdf (Japanese only).

8 However, in cases where structured products are created in the form of trust beneficiary interests without beneficiary certificates, the offering of such newly issued structured products (i.e., an offering of securities other than Paragraph 1 securities) is treated as a public offering if the number of parties acquiring such interests (excluding certain qualified institutional investors) in Japan is 500 or more.

9 If the same kind of debt securities (i.e., securities with the same maturity, coupon and currency) was offered in Japan during the past year, the aggregate offer price in the past offering is also counted for the purpose of the ¥100 million threshold, although it is unlikely to occur in the context of debt securities.

10 If the amount ranges from ¥10 million to ¥100 million, the issuer must file a securities notice with the Director General of the Kanto Local Finance Bureau, which is simpler than an SRS and is not publicly disclosed.

offered securities and the issuer in accordance with the FIEA. In practice, because most debt securities are sold through OTC transactions, securities companies as distributors for offered securities deliver a prospectus to potential investors.

iii Private placement process

In cases where issuers rely on the private placement exemptions discussed in Subsection i, there are no filing requirements under the FIEA. However, issuers must notify offerees that no SRS has been filed in relation to the private placements. Delivery of a prospectus is not a requirement under the FIEA for a private placement but, in practice, issuers prepare a prospectus in concert with arrangers and deliver it to investors even when the products being offered in the private placement are tailored for a single investor. This is because the FIEA requires that Type I business operators as distributors deliver certain documents to their clients prior to and upon the conclusion of a sale and purchase agreement for securities (see Section II.iii).

iv Investor identification

Under the Act on Prevention of Transfer of Criminal Proceeds of Japan (APTCP), a financial institution, including a bank or a securities company, is required to identify and verify its customers when conducting individual transactions with them. In principle, customer identification documents, the purpose for conducting the transaction and other information is necessary to identify and verify a customer.

The identification and verification methods, and the necessary documents to be obtained from customers, are specified in the relevant ordinance of the APTCP. Previously, face-to-face know your customer (KYC) procedures through the presentation of identification documents and non-face-to-face KYC procedures through postal mail with no-forwarding service were used in practice. However, since 30 November 2018, online-based procedures involving the provision of a photo or video of customer identification documents are permitted as a new KYC method. As mail-based procedures result in delays before financial institutions and their customers can enter into transactions, this new method will help financial institutions to conduct their KYC procedures more rapidly.

Financial institutions must also check, inter alia, their customers' knowledge, investment experience, risk appetite, investment purpose and asset portfolio, and ensure that the offered products are suitable for those customers. In fact, a lot of litigation and alternative dispute resolutions in relation to complex structured products (especially sales of derivative embedded debt securities to retail investors without suitability checks or adequate explanations) have occurred in Japan during the past decade. Such suitability checks are necessary to mitigate post-sale liability of distributors.

IV EXCHANGE LISTING AND TRADING

In Japan, most structured products are not listed on exchanges and are traded via securities companies as OTC transactions. The trade volume of such OTC structured products in the secondary market is relatively low.

The only category of listed structured products on Japanese exchanges is exchange-traded notes (ETNs) that intend to track the performance of various underlying indices. In 2011, the listing rules of the Tokyo Stock Exchange (TSE) for ETNs were established, and trades of listed ETNs on the TSE began. As of July 2020, 24 ETNs were listed on the TSE, all of them issued by non-Japanese issuers. In accordance with the practice in the Japanese market, these ETNs are in the form of Japanese depositary receipts issued pursuant to the Trust Act, and their underlying assets are derivative embedded notes governed by non-Japanese laws.

V TAX CONSIDERATIONS

i Taxation for Japanese investors

Typical structured products in the form of debt securities are generally treated as bonds for Japanese tax purposes. Any interest on bonds and gains derived from the sale or redemption of bonds that are receivable by individual residents of Japan and Japanese corporations are generally subject to Japanese taxation, as is the case with straight bonds.

For individual residents of Japan, taxable income in relation to bonds is taxed separately from other types of income, such as business income and salary income. The applicable tax rate is, in general, 20.315 per cent (including a 5 per cent local tax and 0.315 per cent special surtaxes). When an issuer or a paying agent located in Japan makes a payment of interest on bonds, 20.315 per cent of the interest amount is withheld. Proceeds from a sale of bonds and payment of principal (except the principal of certain discounted bonds and strip bonds) are not subject to withholding tax, so in general individual residents of Japan must file a tax return with the relevant regional taxation office with respect to gains derived from a sale or redemption of bonds.

For Japanese corporations, all income and losses are aggregated for the purpose of corporate taxation. Applicable tax rates are slightly different depending on the amount of capital and location, but the effective tax rate for Japanese corporations is approximately 29.74 per cent. However, a 15.315 per cent withholding tax is withheld on the payment of interest made by an issuer or a paying agent located in Japan.

Interest on structured deposits is also taxed and withheld at the same rate for interest on bonds.

ii Tax ruling

There is no official tax clearance or ruling system from the National Tax Agency, the tax authority in Japan. However, when taxation issues arise during a structuring process and no clear interpretation has been revealed by the authority, issuers or arrangers of structured products may submit an enquiry before a transaction to request a written response from the National Tax Agency about whether they will be subject to taxes. This advance enquiry functions in practice as a tax clearance in other countries. In addition, issuers and arrangers can also obtain informal guidance on the tax treatment of a particular transaction through informal consultation with tax officers at regional taxation bureaus or tax offices. This informal guidance may provide some comfort to proceed with a transaction.

iii Recent amendments to tax legislation

On 1 January 2016, amendments to financial instruments taxation laws became effective in order to reduce the imbalance of income tax treatments on individual residents among various financial instruments. The goal of the amendments is to achieve simpler taxation and encourage investments in securities by individual investors. The amendments enable losses on the sale of listed equity securities or publicly offered bonds to be deducted against interest on publicly offered bonds and gains derived from the sale or redemption of publicly offered bonds, and at the same time enable losses on the sale of non-listed equity securities or privately offered bonds to be deducted against interest on privately offered bonds and gains derived from the sale or redemption of privately offered bonds.

VI OTHER ISSUES

i Regulations of the self-regulatory body

In relation to complex products similar to OTC derivatives transactions, the Japan Securities Dealers Association (JSDA), a self-regulatory body of brokers and dealers in Japan, introduced self-regulatory regulations in April 2011 that apply to members of the JSDA.

The regulations require that:

a before distributing products to customers, members verify reasonable grounds concerning the suitability of products, such as risk profiles and performance, and establish solicitation criteria for selecting customers by considering their age, whether they have previous experience with the type of transaction and the assets that the customers hold; and

b members enhance their obligations to explain when soliciting and selling products by:
- delivering explanatory documents, including warnings of risks inherent in products, and the contact information for the institution for financial alternative dispute resolutions;
- providing explanations about material matters such as losses in worst-case scenarios, selling restrictions and preliminary calculations of the selling amounts during the term of a transaction; and
- receiving confirmation letters from customers.

The JSDA explains that in general, the regulations cover exchangeable bonds, equity indices-linked notes and dual currency bonds with conditions.

ii Impacts of the LIBOR transition

The response in Japan to a potential discontinuation of the London Interbank Offered Rate (LIBOR) involved the establishment of the Cross-Industry Committee on Japanese Yen Interest Rate Benchmarks[11] (secretariat: the BoJ) in August 2018. Through practical and robust discussions in and among its three sub-groups (based on loans, bonds and development of term reference rates), relevant proposals were put forth, and the Public Consultation on the Appropriate Choice and Usage of Japanese Yen Interest Rate Benchmarks (Consultation Paper) was published on 2 July 2019.

In Reforming Major Interest Rate Benchmarks,[12] the Financial Stability Board advocated a multiple-rate approach under which different appropriate interest rate benchmarks are used depending on the financial instruments or the nature of transactions. This is to be accomplished by enhancing the reliability and robustness of existing interbank offered rates (IBORs), such as the LIBOR and Tokyo Interbank Offered Rate (TIBOR), and identifying a nearly risk-free rate (RFR) that should not reflect the credit risks of banks; the assumption is that IBORs would be used for, inter alia, loans, and RFRs would be used in

11 https://www.boj.or.jp/en/paym/market/jpy_cmte/index.htm/.

12 https://www.fsb.org/wp-content/uploads/r_140722.pdf (published in July 2014).

many derivatives transactions. In Japan, the TIBOR reform was implemented by the JBA TIBOR Administration, and a Tokyo Overnight Average Rate (TONA) was selected to serve as an RFR. Further, market participants are now working on constructing a term RFR, known as Tokyo Term Risk Free Rate (TORF).[13]

At the time of writing, it is difficult to assess the impact of the transition movement in Japan, but market participants for structured products should monitor the progress of discussions in the market closely.[14]

VII OUTLOOK AND CONCLUSIONS

As can be seen from the above, the Japanese structured products market is stable and well developed from many perspectives such as the market's size, varieties of products, including Japan-specific trust structures, and healthy and enhanced laws and regulations to protect (retail) investors. Market participants from the buy-side as well as the sell-side appear to be very familiar with this asset class. The outlook for the market should be stable, and we believe that market participants can continue to handle new issues such as the LIBOR transition in an appropriate manner going forward.

Appendix 1

ABOUT THE AUTHORS

NAOYA ARIYOSHI

Nishimura & Asahi

Naoya Ariyoshi is a partner at Nishimura & Asahi. He specialises in finance transactions, especially in the areas of securitisation and structured finance, and trust transactions, and in finance regulations. With respect to the field of finance transactions, his extensive experience includes securitisation transactions regarding a wide variety of receivables and other asset classes as legal counsel for originators, arrangers and trustees, and he has worked on structured finance transactions involving various schemes, including those uniquely achieved for the first time in Japan. Furthermore, as he has worked at the Financial Services Agency of Japan in the Corporate Accounting and Disclosure Division of the Planning and Coordination Bureau, and gained experience in the planning of financial regulations there, in addition to his skills developed through his experience as a lawyer in the area of finance he has acquired a detailed knowledge of various financial regulations. Accordingly, he has provided advice to many financial institutions, including banks, trust banks, securities firms, insurance companies, non-banks and fintech companies.

TOSHIYUKI YAMAMOTO

Nishimura & Asahi

Toshiyuki Yamamoto is an associate at Nishimura & Asahi. His main practice areas are asset management and derivatives. He is also involved in finance transactions and regulatory matters as well as foreign regulatory defence and litigation. Prior to joining a Japanese law firm and starting his career as a lawyer in 2009, he worked in the field of securitisation at a domestic credit rating agency and at the Tokyo office of a global investment bank as an analyst. He is a certified member analyst of the Securities Analysts Association of Japan and a certified international investment analyst. He regularly serves as a speaker at conferences for the ISDA Master Agreement held by the International Swaps and Derivatives Association. Recently, he has published articles and given a presentation regarding artificial intelligence in finance industries.

YUKI TAGUCHI

Nishimura & Asahi

Yuki Taguchi is an attorney at Nishimura & Asahi specialising in finance. He engages in various financial transactions such as securitisation, acquisition finance and asset management, and handles financial regulations. He spent one year as a secondee at the London office of a Japanese bank, where he was involved in reviewing various banking products as an EMEA Legal Office member. He was admitted to the Bar in Japan in 2010 and New York in 2018.

NISHIMURA & ASAHI

Otemon Tower
1-1-2 Otemachi
Chiyoda-ku
Tokyo 100-8124
Japan
Tel: +81 3 6250 6406/6612/6616
Fax: + 81 3 6250 7200
n_ariyoshi@jurists.co.jp
to_yamamoto@jurists.co.jp
y_taguchi@jurists.co.jp
www.jurists.co.jp/en

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