

Private Equity 2021

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Private Equity

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Contributing editor**Atif Azher****Simpson Thacher & Bartlett LLP**

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Equity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Russia. The report is divided into two sections: the first deals with fund formation in 13 jurisdictions and the second deals with transactions in 18 jurisdictions.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Atif Azher of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume, and also extend thanks to Bill Curbow of Simpson Thacher & Bartlett LLP, the former contributing editor, who helped to shape the publication to date.



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Contents

Global overview 5

Atif Azher, Peter H Gilman, Fred de Albuquerque and Audra Cohen
Simpson Thacher & Bartlett LLP

FUND FORMATION

Australia 8

Ben Landau, Con Tzerefos, Benson Chin and Fergus Calwell
Ashurst LLP

Austria 16

Martin Abram and Clemens Philipp Schindler
Schindler Attorneys

British Virgin Islands 23

Andrew Jowett and Rebecca Jack
Appleby

Cayman Islands 32

Chris Humphries, Jonathan McLean and Simon Orriss
Stuarts Walker Hersant Humphries

Egypt 42

Nora Harb
Thebes Consultancy

Germany 49

Tarek Mardini and Sebastian K apflinger
POELLATH

Japan 57

Makoto Igarashi and Yoshiharu Kawamata
Nishimura & Asahi

Luxembourg 63

Marc Meyers
Loyens & Loeff

South Korea 76

Sungjo Yun, Mok Hong Kim, Ho Kyung Chang, Eugene Hwang and
Seung-Wan Chae
Bae, Kim & Lee LLC

Spain 82

Carlos de C ardenas, Alejandra Font, V ctor Dom enech and
Manuel Garc a-Riestra
Alter Legal

United Arab Emirates 92

Hasan Anwar Rizvi
RIAA Barker Gillette (Middle East) LLP

United Kingdom 98

Robert Lee, Yash Rupal, Amy Fox and Paul Dodd
Simpson Thacher & Bartlett LLP

United States 107

Thomas H Bell, Barrie B Covit, Peter Gilman, Olga Gutman, Jason A
Herman, Jonathan A Karen, Parker B Kelsey, Steven R Klar, Rony L
Rothken, Glenn R Sarno, Peter P Vassilev and Michael W Wolitzer
Simpson Thacher & Bartlett LLP

TRANSACTIONS

| | | | |
|--|------------|--|------------|
| Australia | 122 | Nigeria | 187 |
| Anton Harris, Ben Landau, Mark Stanbridge and Stuart Dullard Ashurst LLP | | Tamuno Atekebo, Eberechi Okoh, Oyeniyi Immanuel and Oluwafeyikemi Fatunmbi Streamsowers & Köhn | |
| Austria | 132 | Russia | 193 |
| Florian Philipp Cvak and Clemens Philipp Schindler Schindler Attorneys | | Laura M Brank, Evgenia Korotkova, Kirill Skopchevskiy, Pavel Dunaev, Tatiana Shlenchakova and Akop Tovmasyan Dechert LLP | |
| British Virgin Islands | 139 | South Korea | 199 |
| Andrew Jowett and Rebecca Jack Appleby | | Sungjo Yun, Mok Hong Kim, Ho Kyung Chang, Eugene Hwang and Seung-Wan Chae Bae, Kim & Lee LLC | |
| Cayman Islands | 145 | Spain | 204 |
| Chris Humphries, Jonathan McLean and Simon Orriss Stuarts Walker Hersant Humphries | | Lucas Palomar and Bojan Radovanovic Cases & Lacambra Abogados SLP | |
| Egypt | 150 | Switzerland | 211 |
| Aya Sabry and Nora Harb Thebes Consultancy | | Patrik R Peyer, Daniela Schmucki, Till Spillmann and Philippe A Weber Niederer Kraft Frey | |
| France | 154 | Thailand | 219 |
| Saam Golshani, Alexis Hojabr, Estelle Philippi , Franck De Vita, Samir Berlat and Alexandre Balat White & Case LLP | | Jirapong Sriwat and Apinya Sarntikasem Nishimura & Asahi | |
| Germany | 161 | United Arab Emirates | 225 |
| Tim Kaufhold and Tobias Jäger POELLATH | | Hasan Anwar Rizvi RIAA Barker Gillette (Middle East) LLP | |
| India | 168 | United Kingdom | 230 |
| Aakash Choubey and Sharad Moudgal Khaitan & Co | | Clare Gaskell, Amy Mahon, Yash Rupal and Kate Sinclair Simpson Thacher & Bartlett LLP | |
| Japan | 180 | United States | 237 |
| Asa Shinkawa and Keitaro Hamada Nishimura & Asahi | | Atif Azher, Peter Gilman and Fred de Albuquerque Simpson Thacher & Bartlett LLP | |

Japan

Makoto Igarashi and Yoshiharu Kawamata

Nishimura & Asahi

FORMATION

Forms of vehicle

- 1 | What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

In Japan, a limited partnership formed under the Act concerning Investment Business Limited Partnership Agreements (the AIBLPA) (Act No. 90 of 1998) is the most typical vehicle for private equity funds. A limited partnership does not have a separate legal personality from its partners; therefore, the partners are deemed to hold the assets and liabilities of the partnership directly. Usually, an investor becomes a limited partner, whose liability is limited to the amount of its capital contribution, unless otherwise agreed, and the manager becomes, or has its affiliate become, the general partner of the partnership.

Forming a private equity fund vehicle

- 2 | What is the process for forming a private equity fund vehicle in your jurisdiction?

To form a limited partnership, a general partner must execute a limited partnership agreement, in writing, with at least one limited partner. In rare instances in Japan, a short-form agreement with a nominee limited partner for formation is used, which is later replaced with an amended and restated agreement upon negotiation and documentation with the initial investors. Therefore, the length of time required for formation depends on the offering activities for fundraising and documentation with the initial investors. Once the general partner executes the limited partnership agreement, it has to register the limited partnership with the relevant local legal affairs bureau within two weeks of the execution. A registration tax of ¥30,000 is imposed for the initial registration. The general partner may file the registration documents themselves, or through an attorney. The registration will be completed within one week or so, upon filing. Under the AIBLPA all the partners are required to make capital contributions to the limited partnership, but there are no minimum capital requirements.

Requirements

- 3 | Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

Under the AIBLPA, the limited partnership needs to have a registered office in Japan. The general partner must prepare financial statements, request that a certified auditor audit the statements within three months

of the end of each business year and maintain a copy of the audited financial statements, together with a copy of the partnership agreement and the auditor's opinion, at the principal office for a period of five years. Limited partners and creditors to the limited partnership may ask the general partner to allow them to review those documents. The general partner may have to retain a custodian under the Financial Instruments and Exchange Act (FIEA) in order to meet the asset-segregation requirements in connection with its licence or offering activities. There are no requirements for an administrator or a corporate secretary.

Access to information

- 4 | What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

A general partner must register the following information with a local legal affairs bureau within two weeks of the limited partnership agreement becoming effective:

- the business purpose of the limited partnership;
- the name of the limited partnership;
- the date when the limited partnership agreement became effective;
- the duration period of the limited partnership;
- the name and location address of the general partner;
- the location of the office of the limited partnership; and
- any additional dissolution events of the limited partnership that are not set forth under the AIBLPA.

When any information changes, the general partner must register the changed information within two weeks of the change occurring. If the general partner fails to file within this deadline, it may be subject to a monetary penalty of ¥1 million or less. Anyone may request that the registry issue a certified copy of the registered information, and may also access the information through the website, but information regarding the identities of the investors or the amount of their capital commitment is not publicly available.

Limited liability for third-party investors

- 5 | In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Generally, the limited liability for third-party investors is respected under the AIBLPA. However, if a limited partner has misled a third party to believe that it has the power or authority to execute the business on behalf of the limited partnership, it shall owe the same responsibilities as the general partner with regard to such third party who entered into a transaction with the limited partnership on the basis of such misunderstanding.

Fund manager's fiduciary duties

- 6 | What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

Under the AIBLPA, a general partner owes a 'duty of due care of a prudent manager' to the limited partners of the partnership. This duty, according to the prevailing interpretation thereof, requires the degree of care that a prudent and competent person engaged in the same line of business or endeavour would exercise under similar circumstances. If the general partner fails to exercise such due care, it may be liable to compensate the limited partners for the damages resulting therefrom. Upon agreement with the limited partners, it may modify the scope or extent of such duty, but may not remove such duty entirely. Note, however, that if the general partner assumes its role as a financial instruments business operator (FIBO) who engages in the discretionary investment management business or if the general partner relies on the qualified institutional investor (QII) business exemption, the FIEA expressly imposes on the general partner the duty of due care of a prudent manager and a duty of loyalty to the limited partner, as well as various other regulatory obligations and restrictions. In such an instance, it may not modify the duties to be inconsistent with such regulations.

Gross negligence

- 7 | Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Japan recognises the gross negligence standard of liability in general, and upon agreement with the limited partners, a general partner may adopt such standard applicable to the management of a private equity fund.

Other special issues or requirements

- 8 | Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The AIBLPA stipulates certain investment restrictions. A general partner may not invest the assets of the partnership into assets other than those listed under the AIBLPA. The AIBLPA covers almost all asset classes that private equity funds typically invest in, but a limited partnership is subject to a certain portfolio test if it wishes to invest in non-Japanese corporations. It may hold equity interests, warrants, and debts issued by non-Japanese corporations only if the total amount of the investments in non-Japanese corporations does not exceed 50 per cent of the total partnership assets.

Also, the offering activities of the interests in a limited partnership and the investment management activities are generally subject to the regulations under the FIEA. Therefore, unless respectively exempted thereunder, a general partner would have to obtain a business licence to conduct both activities in Japan, file the securities registration statement, prepare and deliver the prospectus to the investors for the public offering of the interests and continue the timely disclosure after the offering thereunder. In the usual cases, however, a general partner will comply with the requirements of the relevant exemptions, to avoid both licence requirements and public disclosure requirements.

Neither conversion nor redomiciling to limited partnerships in Japan from those of other jurisdictions is allowed.

Fund sponsor bankruptcy or change of control

- 9 | With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Unless otherwise specifically provided for in the limited partnership agreement, events affecting the fund sponsor's status such as bankruptcy, insolvency, change of control or restructuring will not trigger dissolution of the fund or removal of the general partner. Provided that, only if the sponsor is the sole general partner and becomes bankrupt, the limited partnership shall be dissolved, unless the other partners find a new general partner within two weeks, under the AIBLPA.

REGULATION, LICENSING AND REGISTRATION

Principal regulatory bodies

- 10 | What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

Unless exempted under the Financial Instruments and Exchange Act (FIEA), the general partner is required to register him or herself as a financial instruments business operator (FIBO) that engages in offering fund interest (Type II business) or discretionary investment management business. The Financial Services Agency (FSA) or the local financial bureaus (LFBs) are the principal regulatory bodies over a general partner of the fund. If a general partner registers itself as a FIBO, the FSA or the LFBs have broad power and authority to audit and inspect this general partner. It is also required to regularly provide investment management reports to investors and submit annual business reports to the relevant LFB, although they also are required to follow other continuous reporting requirements.

As a matter of practice, however, most of the general partners rely on the exemption from the above business licence requirements by satisfying certain conditions under article 63 of the FIEA (the qualified institutional investor (QII) business exemption). Even in such a case, the FSA or the LFBs maintain the right to monitor and inspect such general partners, but it is not on a regular basis. Such general partners are required to file and update certain matters with the LFBs. Such general partners must comply with certain conduct requirements equivalent to a FIBO, and they may be required to regularly provide investment management reports to investors in connection with the status of investors. Such general partners must prepare and maintain records on their business, and must prepare and submit an annual business report to the LFBs, and must make some parts of their business reports available to the public at their relevant offices or on their website.

Governmental requirements

11 What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

As opposed to a corporate-type fund or unit trust, partnership-type funds do not need to be registered under the mutual fund law of Japan. However, if the interests are publicly offered in Japan, the general partner has to file the securities registration statement, prepare and deliver the prospectus to the investors, and conduct the ongoing disclosure under the FIEA. In connection with the FIEA, the location of significant investment activities does not make any difference in the application thereof.

Unless exempted under the FIEA, the general partner is required to register him or herself as a FIBO that engages in offering fund interest (Type II business) or discretionary investment management business. As a matter of practice, however, most of the general partners rely on the exemption from the above business licence requirements by relying on the QII business exemption.

Registration of investment adviser

12 Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Once a general partner is registered as a FIBO on an entity basis, the officers or directors do not need to obtain a separate licence (their information is included in the FIBO application documents of the general partner). They may conduct their business as personnel of the licensed FIBO. A control person will, as the case may be, be required to file another report of its shareholding of the licensed FIBO under the FIEA.

There is no such registration requirement if the general partner relies on the QII business exemption (the information regarding the officers or directors is included in the notification (Form 20) to be filed by the general partner), although the requirement to report a control person is not applicable.

Fund manager requirements

13 Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

If the general partner registers as a FIBO that engages in discretionary investment management, it must satisfy the following requirements for the registration:

- its permission, approval or registration necessary for financial instrument business or other business under the FIEA or other equivalent non-Japanese laws has not been rescinded within the preceding five years;
- it has not violated the FIEA or other laws, and has not been subject to a fine within the preceding five years;
- it has not engaged in business contrary to the public interest;
- it has sufficient staff to properly conduct financial instrument business;
- it has ¥50 million in stated capital or in total equity;
- it is either a Japanese corporation with a board of directors, or a foreign corporation equivalent thereto;
- it has net assets of at least ¥50 million;
- it does not engage in such business (other than permitted business under the FIEA) that it cannot properly control the risk;
- none of its directors, officers, others who have power to manage it, fund managers or compliance officers fall into any of the excluded categories under the FIEA; and

- if it is a Japanese corporation, none of its major shareholders fall into any of the excluded categories under the FIEA; if it is a non-Japanese entity, the authorities in its home jurisdiction confirm that the solid and appropriate operation of its financial instrument business will not be prevented by any major shareholders.

If the general partner relies on the QII business exemption, it must satisfy the following requirements:

- its permission, approval or registration necessary for financial instrument business or other business under the FIEA or other equivalent non-Japanese laws has not been rescinded within the preceding five years;
- it has not violated the FIEA or other laws, and has not been subject to a fine within the preceding five years;
- none of its directors, officers, others who have power to manage it, fund managers or compliance officers fall into any of the excluded categories under the FIEA;
- if it is a non-Japanese person, any foreign regulatory authority in the jurisdiction where the general partner domiciles or is operating has signed the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or an equivalent bilateral agreement with the Japanese government; and
- if it is a non-Japanese person, it must appoint a representative in Japan.

Political contributions

14 Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

In Japan, no one may accept contributions for political activities from a non-Japanese person or a Japanese entity whose equities are mainly held by a non-Japanese person. Other than this restriction, a general partner may make political contributions, which are in principle disclosed to the public.

Use of intermediaries and lobbyist registration

15 Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There is no such restriction or requirement under Japanese law. We have not found any such internal rule or policy of public pension plans or governmental entities, based on publicly available information.

Bank participation

16 Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

This is not a recent legal development, but owing to the voting equity holding restriction applicable to banking entities, a Japanese bank would hesitate to hold more than a 5 per cent interest in a partnership-type

private equity fund unless specifically exempted thereunder. In the case of a limited partnership under the Act concerning Investment Business Limited Partnership Agreements, a bank may rely on the exemption if certain conditions are met, but usually requests that the general partner make further covenants to ensure its compliance with such regulations.

TAXATION

Tax obligations

17 | Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Under Japanese tax law, a limited partnership is itself a non-taxable entity, and income or gain arising from investment through the partnership will be allocated to each partner without imposition of a tax at the limited partnership level. All distributions made by the limited partnership to foreign investors (if they maintain a permanent establishment in Japan) are generally subject to a withholding tax at the rate of 20 per cent. Other than this, neither the limited partnership nor the general partner is required to withhold taxes regarding distributions to partners.

Local taxation of non-resident investors

18 | Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

According to a tax authority ruling, investment activities conducted by a general partner on behalf of a limited partnership are generally deemed to be activities jointly carried out by all partners of the partnership. Based on this idea, when a non-Japanese investor becomes a limited partner of a limited partnership, the investor is deemed to have a permanent establishment in Japan so that all investment income derived from the partnership is subject to Japanese taxation if at least one general partner of the limited partnership is a Japanese resident. Therefore, all distributions made by the limited partnership to foreign investors are generally subject to taxation in Japan. However, there is a statutory exemption, under which a foreign investor as a limited partner of a limited partnership is deemed to have no permanent establishment in Japan. In such cases, distributions made to the limited partner (that would otherwise be subject to taxation because of a permanent establishment) will not be subject to withholding tax in Japan and no obligation to file a Japanese tax return is imposed. To rely on the exemption, a foreign investor who satisfies all of the following requirements must file an application with the Japanese tax authorities via the general partner stating:

- it is a limited partner;
- it does not engage in business operations or management of the limited partnership;
- it does not hold 25 per cent or more of the whole of the partnership interests;
- it does not have any close capital relationship with the general partner; and
- it has no permanent establishment in Japan other than by virtue of having invested in the partnership.

Under Japanese tax law, even if a non-Japanese resident investor does not have a permanent establishment in Japan, when a non-Japanese resident investor possesses 25 per cent or more of the total issued shares of a Japanese corporation at any time within three years prior to the last day of the business year containing the date of transfer, and

the investor transfers 5 per cent or more of the total issued shares, the transfer of shares is taxable in Japan (the 25 per cent/5 per cent rule). In calculating these ratios, the number of shares held or transferred by specific persons related to the investor is aggregated, and when the non-Japanese resident investor invests in a limited partnership which invests its partnership assets into shares of Japanese corporations, other limited partners of the limited partnership fall into the category of specially related persons. If, however, a non-Japanese resident investor that is a limited partner in a limited partnership satisfies certain conditions, it may exclude other partners' shares to calculate the 25 per cent/5 per cent rule. This exemption applies when the non-Japanese resident investor satisfies the following requirements:

- either the limited partnership is one to which the previously discussed exemption applies, or during the relevant three-year period, the non-Japanese resident investor was not involved in the conduct of the operations or management of the limited partnership;
- at any time during the three-year period, no specially related person (other than other limited partners) of the non-Japanese resident investor held 25 per cent or more of the interest of the domestic company;
- the limited partnership held the relevant shares for at least one year;
- the investment target is not a proscribed type of insolvent financial institution; and
- the non-Japanese resident investor files certain documents with the Japanese tax authorities by 15 March of the following year (for an individual investor) or two months after the fiscal year-end (for a corporate investor).

Besides the above, capital gains resulting from any of the following share transfers are subject to Japanese tax unless otherwise exempted:

- the transfer of shares in a Japanese corporation by conducting certain market manipulations or greenmail activities against the Japanese corporation; and
- the transfer of more than 2 per cent (in the case of the listed shares, 5 per cent) of the shares in a corporation that derives 50 per cent or more of the value of its gross assets directly or indirectly from real estate (including related rights over real estate) in Japan by the non-Japanese resident investor and other specially related shareholders.

Local tax authority ruling

19 | Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

There is no special necessity to obtain a ruling from the Japanese tax authorities.

Organisational taxes

20 | Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

To register the formation of a limited partnership, ¥30,000 must be paid as a registration tax.

Special tax considerations

21 | Describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

On the assumption that the general partner is a corporate entity (as opposed to an individual), there are no special considerations

regarding carried interest and management fees from the viewpoint of Japanese taxation.

Tax treaties

- 22 | List any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Japan has entered into a number of tax treaties, and how those treaties apply to a specific fund vehicle or its partners depends on the specific facts, including the structure of that fund vehicle and the residence of the relevant parties.

Other significant tax issues

- 23 | Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

As with many other jurisdictions, the tax rules in Japan are complex and intricate. Nevertheless, tax matters occupy an important position in fund structuring, and we highly recommend that tax advisers are consulted with regarding the specific fund structure and investment.

SELLING RESTRICTIONS AND INVESTORS GENERALLY

Legal and regulatory restrictions

- 24 | Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

In connection with the private placement exemption for marketing interests in partnership-type funds, fewer than 500 investors in Japan shall acquire the interests, and the investors shall be notified that the offer of the interests has not been or will not be registered on the ground that they are securities set forth in article 2, paragraph 2, item 5 of the Financial Instruments and Exchange Act (FIEA) and that the offer of the interests falls under the category of a small number private placement exemption. Further, if the general partner relies on the qualified institutional investor (QII) business exemption, it shall comply with, among other things, the following conditions:

- it has at least one QII limited partner;
- it has no investors other than QIIs or eligible non-QIIs;
- it has no more than 49 eligible non-QII limited partners;
- it has no disqualified investors listed in the FIEA; and
- it complies with the transfer restrictions, in which the QII may not transfer its interests to a person other than a QII and an eligible non-QII may not transfer its interests to more than one person who is a QII or an eligible non-QII.

A QII is defined in article 2, paragraph 3, item 1 of the FIEA. An eligible non-QII is listed in article 17-12, paragraphs 1 and 2 of the Order for Enforcement of the FIEA, which includes, among others, financial instruments business operators (FIBOs), parent companies, subsidiaries and sister companies of a general partner and officers or employees thereof, listed companies, Japanese juridical persons with ¥50 million or more in stated capital or of net assets, foreign juridical persons, individuals who hold investment-type financial products equivalent to ¥100 million or more and opened securities accounts at least one year previously, and other certain persons.

In relying on the exemption, the general partner must file a notification (Form 20) with the relevant office of the local financial bureau (LFB) prior to any solicitation.

Types of investor

- 25 | Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

If a general partner relies on the QII business exemption, at least one limited partner shall be a QII, it may not accept a Japanese investor other than a QII or eligible non-QII and the number of eligible non-QII limited partners shall be 49 or less. Further, it may not accept a disqualified investor (such as certain special-purpose companies and certain funds of funds in which a non-QII invests).

Identity of investors

- 26 | Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

If a general partner relies on the QII business exemption, it must specify each QII's name, and the name of the fund in the notification (Form 20) to, and be filed with the LFBs; however, QIIs' names are not publicly available. Also, the general partner is required to update the notification without delay (within one month) if any matter described therein is changed. Also, in connection with the registration with the legal affairs bureau, it must update any registered matter to be changed, within two weeks of the change being effective.

Licences and registrations

- 27 | Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Unless otherwise exempted, a general partner or outside placement agents who offer fund interests are required to register themselves as a FIBO that engages in Type II business. However, if a general partner relies on the QII business exemption, such general partner does not have to register as a FIBO for offering their fund interests.

Money laundering

- 28 | Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The Act on Prevention of Transfer of Criminal Proceeds (APTCP) requires that a general partner who is registered as an FIBO or relies on the QII business exemption, before accepting a new investor, completes the investor identification process in accordance with the APTCP. At a minimum, the general partner must verify the identity of its investor prior to the execution of the subscription agreement with that investor and maintain records of the information used to verify the investor's identity. The general partner must promptly report to the regulatory authority if the general partner suspects that property received from an investor relating to its investment management business may be from criminal proceedings, or that an investor may have engaged in criminal conduct in connection with any transaction relating to its investment management business. The administrative guideline requires that the general partner avoid contact with 'antisocial forces'. An organised crime group, a member of an organised crime group, a quasi-member

of an organised crime group, a related company or association of an organised crime group, a corporate racketeer and other equivalent groups are included in antisocial forces. The general partner shall not enter into any agreement with antisocial forces or entities controlled by antisocial forces.

EXCHANGE LISTING

Listing

- 29 | Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Under the Financial Instruments and Exchange Act it is technically possible to list on a securities exchange, but no securities exchanges in Japan have rules that assume partnership interests are to be listed on the exchanges. Therefore, based on the current situation, private equity funds formed as partnerships are unable to be listed on securities exchanges in Japan.

Restriction on transfers of interest

- 30 | To what extent can a listed fund restrict transfers of its interests?

This is not applicable under the current exchange rules.

PARTICIPATION IN PRIVATE EQUITY TRANSACTIONS

Legal and regulatory restrictions

- 31 | Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Other than those described herein, there are no explicit legal or regulatory restrictions that a general partner should be concerned with when it establishes a limited partnership as an investment vehicle for private equity investments.

If the general partner retains a placement agent in Japan who is a financial instruments business operator engaging in Type II business or the general partner relies on the qualified institutional investor business exemption, it must make sure to segregate partnership assets from its own assets, in accordance with the Financial Instruments and Exchange Act. Also, in connection with the foreign exchange regulations of Japan, if the majority of the limited partnership interests are held by non-Japanese limited partners or a majority of the general partners are non-Japanese persons, the limited partnership needs to file a prior notification or a report of the acquisition of an equity share when the limited partnership acquires an equity share in a certain category of Japanese corporations.

Compensation and profit-sharing

- 32 | Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

There are no specific issues regarding this topic.

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UPDATE AND TRENDS

Key developments of the past year

- 33 | What are the most significant recent trends and developments relating to private equity funds in your jurisdiction? What impact do you expect such trends and developments will have on global private equity fundraising and on private equity funds generally?

Since May 2020, the Japanese foreign exchange regulations have changed the filing obligations of non-Japanese limited partners. Prior to the amendment, each non-Japanese limited partner had to file a prior notification or a report of the acquisition of an equity share when the limited partnership acquired an equity share in a certain category of Japanese corporations, since such acquisition would be deemed to be a direct investment by non-Japanese limited partners in a part of the equity share, owing to the legal transparency of the limited partnership. After the amendment, there are no such filing obligations for non-Japanese limited partners; instead, however, if 50 per cent or more of the limited partnership interests are held by non-Japanese limited partners, or a majority of the general partners are non-Japanese persons, the limited partnership itself (not each of the non-Japanese limited partners) needs to file a prior notification or a report of the acquisition of an equity share when the limited partnership acquires an equity share in a certain category of Japanese corporation.

Coronavirus

- 34 | What are some of the significant developments and initiatives relating to the covid-19 pandemic that have impacted private equity fund formation?

With respect to the qualified institutional investor business exemption, the local financial bureaus (LFBs) have changed the filing processes taking into account the circumstances regarding covid-19 and now accept a notification (Form 20) and attachments via email without signatures for some documents. However, certain attachments to the notification, such as affidavits, still need to have their originals physically provided to the LFBs after the filing of the notification (within one month).

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