THE INTERNATIONAL CAPITAL MARKETS REVIEW

Fourth Edition

Editor

JEFFREY GOLDEN

LAW BUSINESS RESEARCH LTD
THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2014, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-30-1

Printed in Great Britain by Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112
ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET GRETTE DA
AFRIDI & ANGELL LEGAL CONSULTANTS
ALLEN & OVERY LLP
ATTORNEYS AT LAW BORENIUS LTD
BBH, ADVOKÁTNÍ KANCELÁŘ, S.R.O.
DE PARDIEU BROCAS MAFFEI
ENSAFRICA
FENXUN PARTNERS
INTERNATIONAL COUNSEL BUREAU
KIM & CHANG
KING & WOOD MALLESONS
KOLCUOĞLU DEMİRKAN KOÇAKLI ATTORNEYS AT LAW
LOYENS & LOEFF NV
MAKES & PARTNERS LAW FIRM
MAPLES AND CALDER
MEYERLUSTENBERGER LACHENAL ATTORNEYS AT LAW
MIRANDA & AMADO ABOGADOS
MKONO & CO ADVOCATES
Acknowledgements

MNA MARTINEZ ABOGADOS
MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS
MORRISON & FOERSTER LLP / ITO & MITOMI
OPPENHOFF & PARTNER
PINHEIRO NETO ADVOGADOS
PLESNER
P.R.I.M.E. FINANCE FOUNDATION
REED SMITH
RUSSELL McVEAGH
SIDLEY AUSTIN LLP
SYCIP SALAZAR HERNANDEZ & GATMAITAN
UGHI E NUNZIANTE STUDIO LEGALE
URÍA MENÉNDEZ ABOGADOS SLP
VIEIRA DE ALMEIDA & ASSOCIADOS,
SOCIEDADE DE ADVOGADOS RL
CONTENTS

Editor’s Prefaces ........................................................................................................vii
Jeffrey Golden

Chapter 1  AUSTRALIA.........................................................................................1
Ian Paterson

Chapter 2  BELGIUM..........................................................................................21
Sylvia Kierszenbaum and Willem Van de Wiele

Chapter 3  BRAZIL..............................................................................................36
Ricardo Simões Russo, Gustavo Ferrari Chauffaille
and Luiz Felipe Fleury Vaz Guimaraes

Chapter 4  CHINA...............................................................................................45
Xusheng Yang

Chapter 5  COLOMBIA.......................................................................................60
Camilo Martínez Beltrán, Luis Miguel Falla Zuñiga
and Luis Hofmann Delvalle

Chapter 6  CZECH REPUBLIC.................................................................69
Tomáš Sedláček and Zdeněk Husták

Chapter 7  DENMARK.........................................................................................80
Jørgen Permin, Emil Deleuran, Jef Nymand Houngaard
and Simon Skjold Jensen

Chapter 8  EU OVERVIEW.............................................................................92
Oliver Kessler and Stefanie Zugelder

Chapter 9  FINLAND.........................................................................................107
Ari-Pekka Saanio
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 10</td>
<td>FRANCE</td>
<td>117</td>
<td>Antoine Maffei and Olivier Hubert</td>
</tr>
<tr>
<td>Chapter 11</td>
<td>GERMANY</td>
<td>141</td>
<td>Kai A Schaffelhuber</td>
</tr>
<tr>
<td>Chapter 12</td>
<td>INDONESIA</td>
<td>152</td>
<td>Yozua Makes</td>
</tr>
<tr>
<td>Chapter 13</td>
<td>IRELAND</td>
<td>164</td>
<td>Nollaig Murphy</td>
</tr>
<tr>
<td>Chapter 14</td>
<td>ITALY</td>
<td>180</td>
<td>Marcello Gioscia and Gianluigi Pugliese</td>
</tr>
<tr>
<td>Chapter 15</td>
<td>JAPAN</td>
<td>195</td>
<td>Akihiro Wani and Reiko Omachi</td>
</tr>
<tr>
<td>Chapter 16</td>
<td>KOREA</td>
<td>209</td>
<td>Myoung Jae Chung, Hyunsoo Doh and Nina Sun Young Ju</td>
</tr>
<tr>
<td>Chapter 17</td>
<td>KUWAIT</td>
<td>221</td>
<td>Abdullah Al Kharafi and Abdullah Alharoun</td>
</tr>
<tr>
<td>Chapter 18</td>
<td>LUXEMBOURG</td>
<td>233</td>
<td>Frank Mausen and Henri Wagner</td>
</tr>
<tr>
<td>Chapter 19</td>
<td>NETHERLANDS</td>
<td>254</td>
<td>Mariëtte van 't Westeinde and Martijn Schoonewille</td>
</tr>
<tr>
<td>Chapter 20</td>
<td>NEW ZEALAND</td>
<td>269</td>
<td>Deemple Budhia and John-Paul Rice</td>
</tr>
<tr>
<td>Chapter 21</td>
<td>NORWAY</td>
<td>283</td>
<td>Andreas O Myrstad and Johan C Kongsl</td>
</tr>
<tr>
<td>Chapter 22</td>
<td>PERU</td>
<td>299</td>
<td>Juan Luis Avendaño C and Nydia Guevara V</td>
</tr>
<tr>
<td>Chapter</td>
<td>Country</td>
<td>Authors</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>23</td>
<td>PHILIPPINES</td>
<td>Maria Teresa D Mercado-Ferrer, Joan Mae S To and Earla Kahlila Mikhaila C Langit</td>
<td>309</td>
</tr>
<tr>
<td>24</td>
<td>PORTUGAL</td>
<td>Orlando Vogler Guiné, Ana Moniz Macedo and Sandra Cardoso</td>
<td>324</td>
</tr>
<tr>
<td>25</td>
<td>RUSSIA</td>
<td>Vladimir Khrenov</td>
<td>335</td>
</tr>
<tr>
<td>26</td>
<td>SOUTH AFRICA</td>
<td>Clinton van Loggerenberg and Stephen von Schirnding</td>
<td>351</td>
</tr>
<tr>
<td>27</td>
<td>SPAIN</td>
<td>David García-Ochoa Mayor and Daniel Pedro Valcarce Fernández</td>
<td>364</td>
</tr>
<tr>
<td>28</td>
<td>SWITZERLAND</td>
<td>Christoph Heiz, Wolfgang Müller and Marc Schamaun</td>
<td>376</td>
</tr>
<tr>
<td>29</td>
<td>TANZANIA</td>
<td>Kamanga Wilbert Kapinga and Kenneth Mwasi Nzagi</td>
<td>387</td>
</tr>
<tr>
<td>30</td>
<td>TURKEY</td>
<td>Umut Kolcuoglu, Kemal Aksel and Begüm İnceçam</td>
<td>395</td>
</tr>
<tr>
<td>31</td>
<td>UNITED ARAB EMIRATES</td>
<td>Gregory J Mayew</td>
<td>404</td>
</tr>
<tr>
<td>32</td>
<td>UNITED KINGDOM</td>
<td>Tamara Box, Ranajoy Basu, Nick Stainthorpe, Caspar Fox, Roy Montague-Jones, Jacqui Hatfield and Winston Penhall</td>
<td>416</td>
</tr>
<tr>
<td>33</td>
<td>UNITED STATES</td>
<td>Bart Capeci</td>
<td>439</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS</td>
<td></td>
<td>449</td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTING LAW FIRMS' CONTACT DETAILS</td>
<td></td>
<td>471</td>
</tr>
</tbody>
</table>
EDITOR’S PREFACE TO
THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor’s Preface to each of the previous editions of The International Capital Markets Review. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the ‘resilience’ of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a ‘big freeze’ on capital market transactional work was ‘thawing’ were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or ‘confirmation’ that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor’s Preface to the fourth edition of the work, we have just witnessed the successful launch of the world’s largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US$25 billion. Meanwhile, The Times reports a buoyant London braced for a ‘listing stampede’. Hong Kong is rivalling New York for the greatest number of cross-border deals. The Financial Times also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA
contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting ‘fatter’. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of The International Capital Markets Review!

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2014
EDITOR’S PREFACE TO
THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter’s filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: “This Tweet does not constitute an offer of any securities for sale”!

Yes, confirmation of an uptick in deal flow – especially ‘big deals’ flow – would be nice. In the preface to the last edition of this work, I speculated that there were ‘signs that any ‘big freeze’ on post-crisis capital markets transactional work may be thawing’. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner’s resulting challenge in ‘keeping up’ have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.
The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients’ regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a ‘virtual’ legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to ‘first in class’ capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

*The International Capital Markets Review* is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher’s intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

**Jeffrey Golden**
P.R.I.M.E. Finance Foundation
The Hague
October 2013
EDITOR’S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of The International Capital Markets Review my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher’s decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved.Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any ‘big freeze’ on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.
Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and ‘cherry-pick’ best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012
EDITOR’S PREFACE TO
THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater ‘show-stopper’ to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – ‘holding court’, so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding US$700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than US$180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the ‘IPO machine is set to roar back into life’, with 11 flotations due in the United States in the space of a single week. As Gandhi said: ‘Capital in some form or another will always be needed.’

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely ‘preventive medicine’. To continue the analogy, the courts are our ‘hospitals’. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to
facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book’s scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

_The International Capital Markets Review_ is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction’s legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

**Jeffrey Golden**
London School of Economics and Political Science
London
November 2011
Chapter 15

JAPAN

Akihiro Wani and Reiko Omachi¹

I INTRODUCTION

i Structure of financial laws and regulations in Japan

The Financial Instruments and Exchange Act (FIEA)² and the Cabinet Order and Cabinet Office Ordinances thereunder are the most basic and important direct regulations on capital markets in Japan. The FIEA regulates the financial instruments business and financial transactions, including securities offerings and distributions for the purpose of maintaining the fairness of capital markets, protecting investors and developing the economy. In Japan, there are no overarching laws that regulate all financial institutions, which means that each type of institution is regulated separately; for example, banks are regulated by the Banking Act,³ securities firms are regulated by the FIEA and insurance companies are regulated by the Insurance Business Act.⁴ The FIEA is still important, however, from the standpoint of these financial institutions because it applies, mutatis mutandis, to relevant acts and regulations and, as a result, other financial institutions are actually regulated by the principles of the FIEA in many respects, such as when conducting securities and derivatives transactions.

Additionally, there are several other laws and regulations that specifically govern certain types of financial transactions including derivatives transactions, securitisations, structured products, investment funds, trusts and partnerships, including the Commodity

¹ Akihiro Wani is a senior counsellor and Reiko Omachi is an of counsel at Morrison & Foerster LLP / Ito & Mitomi.
² Act No. 25 of 1948, as amended.
³ Act No. 59 of 1981, as amended.
⁴ Act No. 105 of 1995, as amended.
Derivatives Act, the Act on Investment Trusts and Investment Corporations, the Limited Partnership Act for Investment, the Act on Securitisation of Assets, the Trust Act and the Companies Act.

ii Roles of regulatory and supervisory agencies and of the central bank in the Japanese capital markets

The Financial Services Agency (FSA) is responsible for, inter alia, ensuring the stability of the Japanese financial system, protecting investors and carrying out surveillance over securities transactions. The FSA delegates powers relating to securities registration to local finance bureaux (LFBs), and powers relating to daily market surveillance, inspections on financial instruments firms, inspections of disclosure documents and related activities to the Securities and Exchange Surveillance Commission (SESC).

The commodity derivatives business is regulated by either the Ministry of Economy, Trade and Industry (METI) or the Ministry of Agriculture, Forestry and Fisheries (or both), depending on the type of underlying commodity.

The Bank of Japan (BOJ), which is Japan’s central bank, is independent of the Japanese government, including the FSA, similar to many other central banks in other jurisdictions. Its mission mainly focuses on the implementation of monetary policy, treasury and government securities-related operations.

Additionally, there are several self-regulatory organisations (SROs) whose membership consists of financial institutions. Among them, the Japan Securities Dealers Association (JSDA) is the most representative and important organisation in the Japanese capital markets. The JSDA promotes sound business development and protects investors by ensuring that securities transactions by its members are conducted fairly and smoothly.

There is also an electronic system called ‘Compliance WAN’, which can be accessed by the SESC, LFBs, securities companies, SROs (including the JSDA) and stock exchanges. This system enables the SESC and LFBs to utilise transaction data sent, for example, from securities companies for the purpose of market surveillance.

iii Financial dispute resolution in Japan

Several options exist for resolving financial disputes in Japan: judiciary proceedings in court, arbitration procedures at an arbitral tribunal and alternative dispute resolution (financial ADR) procedures.

Usually, a party to a financial transaction is able to sue the counterparty in court, and once a court procedure is chosen, the parties will be entitled to a decision by a district court and two instances of appeal to the High Court and the Supreme Court.
Alternatively, a party may elect arbitral institutions including the Japan Commercial Arbitration Association or the International Chamber of Commerce (ICC) for arbitral awards that are deemed to be final and binding by the courts. Japan is a member of both the ICSID Convention and the New York Convention, and Japan's Arbitration Act\textsuperscript{11} is based on the UNCITRAL Model Law.

In addition to court and arbitral procedures, an investor may seek settlement of a financial dispute by choosing the Financial ADR procedures, a simplified and expeditious resolution system.

iv Scope of jurisdiction
In general, it is believed that Japanese laws and regulations do not apply to activities by foreign companies outside Japan as the scope of jurisdiction should be limited to Japanese territory. With respect to cross-border cases, however, there is no provision that specifies the extent of the application of financial laws and regulations, and the scope of the powers of regulatory authorities is still open to interpretation. Even so, it is almost certain that Japanese laws and regulations apply when a foreign company solicits an investor who resides in Japan, even from outside Japan (see Section II.v, infra).

In practice, the FSA maintains close contact with the regulators of foreign countries on a daily basis. Financial institutions should pay careful attention to the relevant overseas regulations and to Japanese regulations as well.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Framework for legislation or regulation on debt and equity offerings
In order to make a debt or equity offering (whether primary or secondary), a securities registration statement (SRS), mainly consisting of information about the securities being offered and about the issuer, must be filed with the director-general of the LFB, unless such offering constitutes a 'private placement' that is exempt from disclosure obligations (private placement exemption). Two major private placement exemptions are the small-number exemption (which may be available when solicitations are made to no more than 49 investors in Japan) and the professional investors exemption (which may be available when solicitations are made only to qualified institutional investors (QIIs) or specified investors defined in the FIEA). Detailed conditions for each exemption differ depending on the type of security being offered.

Once a company has filed the SRS with the LFB as described above, it becomes subject to ongoing disclosure obligations and must file annual securities reports, semi-annual or quarterly reports, and extraordinary reports with the LFB, as all listed companies in Japan must do.

\textsuperscript{11} Act No. 138 of 2003, as amended.
Recent developments in regulations
Rights offering
On 1 October 2014, the Tokyo Stock Exchange Inc (TSE) amended its listing rules that apply to raising additional capital through rights offerings. In principle, a rights offering is regarded as more favourable to existing shareholders because it does not dilute value per share. However, some financially troubled companies currently implement rights offerings without having their plans examined by a securities company (so-called non-commitment rights offering) and shareholders face a choice to either exercise their rights and buy the new shares, or to refrain from exercising their rights and sell their allotted shares at a loss. The TSE’s amendment to its listing rules requires that a company seeking to conduct a rights offering obtain prior shareholders’ approval at a shareholders’ meeting or explain the reasonableness of raising additional capital.

Equity crowdfunding
In order to provide risk money to new growth companies, the FIEA will be revised by June 2015 to relax regulations on financial instruments business operators (FIOs) that handle public offerings, secondary distributions or private placements of securities through investment crowdfunding. The requirements that a business related to investment crowdfunding must satisfy in order to be eligible for the relaxed regulations (electronic small amount subscription business) include that the total issue amount of securities must be less than ¥100 million and the subscription amount must be less than ¥500 thousand per person.

Under the relaxed regulations, minimum capital requirements will be reduced to ¥10 million for FIOs dealing with Type I securities, and to ¥5 million for FIOs dealing with Type II securities. Moreover, FIOs conducting an electronic small amount subscription business will be allowed to engage in other businesses (e.g., incubation business), in addition to financial instruments business. Further, while solicitation of investments in unlisted shares is generally prohibited under the current rules, such solicitation will be permitted as long as it is performed by an electronic small amount subscription business.

Concurrent with relaxing the regulations, the FIEA will also introduce some new rules applicable to electronic small amount subscription business in order to protect investors. For instance, FIOs will be required to perform ‘due diligence’ on issuers and provide information about such due diligence as appropriate through the internet.

Promoting new listings on the market
One factor that has been regarded as deterring companies from listing on the TSE is the requirement that the SRS, which must be submitted at the time of a new stock listing, contain financial statements for the past five fiscal years. In order to reduce the obstacles to a new stock listing, the Cabinet Office Ordinance on the FIEA was amended on 20 August 2014 to require financial statements for only the past two fiscal years.

Another obligation that is considered burdensome for newly listed companies is the requirement to file internal control reports audited by a certified public accountant. To address this issue, the FIEA will be revised by June 2015 to allow companies to choose not to file their internal control report for a period of three years after listing, considering
that newly listed companies have already been subjected to strict examination by the stock exchange in connection with the listing. This choice will, however, not be available to listed companies that exert strong influence over the market (for example, companies with capital amounts of ¥10 million or more.)

In addition to the foregoing, the FIEA generally requires a seven-day waiting period from the filing of the SRS before a listed company is permitted to issue new securities to investors (although solicitation of investors is permitted during this period) in order to give investors time to decide whether to purchase new securities. In order, however, to facilitate fundraising by companies immediately after listing, the Guidelines on the FIEA have since 20 August 2014 allowed exemptions to the waiting period. Such exemptions are available when the target securities of the public offering or secondary distribution have a simple and standardised structure as is, for example, the case with common stock, and the ratio of dilution by capital increase is no more than 20 per cent.

Furthermore, the prohibition against offering securities to investors before the filing of the SRS has allegedly caused companies to be reluctant to provide even general corporate information since the scope of the term ‘pre-filing offer’ is not clear. With the introduction of the exemptions abolishing the waiting period described above, it will be important to provide investors with as many opportunities as possible to receive corporate information before the SRS is filed. For this reason, the Guidelines on the FIEA have since 20 August 2014 clarified the scope of the term ‘pre-filing offer’ by providing examples of permitted activities.

**Insider trading**

On 1 April 2014, in order to tighten insider-trading regulations, the improper leakage of inside information or the inducement to improper trading through the use of such information by officers or employees of listed companies or similarly situated persons, or by lead underwriters, became prohibited. The amended law applies to persons who have leaked inside information or induced improper trading even if no trading has actually occurred. When a recipient of such information actually engages in improper trading, the person who provided such information or induced the trading through improper use of such information is subject to criminal charges and an administrative penalty.

In addition, there has been an increase in the administrative monetary penalty imposed on asset managers who engage in insider trading on their client’s account. The increased penalty is equal to three times the asset management fee paid to the asset manager by the client for the month during which the insider trading occurred.

Another new development is the application of insider-trading restrictions to investment securities issued by investment corporations (formerly, such restrictions did not apply to investment securities). Under the newly applicable restrictions, officers, employees and similarly situated persons of asset management companies and their parent companies are deemed ‘insiders’, are required to submit a report when they engage in trading as an insider, and must engage in such trading only to the extent permissible under certain exemptions.

Additional amendments to insider-trading regulations have been implemented to facilitate smooth business practice; for example, transactions that are conducted between parties that possess the same inside information are exempt from the insider-trading
restrictions. Moreover, the recipients of information in a tender offer are permitted to purchase shares of the offeree company if the information has been made public by way of a tender offer notification and six months have passed since the recipients have received such information.

Around December 2014, procedures for confiscating intangible property (such as electronic share certificates) will be introduced through amendments to the FIEA and other procedural laws. The amended law is expected to be used in relation to economic crimes, especially insider trading and other unfair transactions.

Large shareholding report
In principle, a large shareholder of a listed company is required to file a large shareholding report within five business days from the date on which its holding ratio exceeds five percent, which reflects the great importance of information about large shareholdings for investors. However, information on holding treasury stock has been regarded as less important to investors since treasury stock does not carry voting rights. Therefore, treasury stock will be excluded from the calculation of the holding ratio by June 2015.

New trading system for unlisted start-up shares
By June 2015, the FSA and the JSDA will create a new trading system for unlisted start-up shares to encourage investors to invest in venture businesses. Currently, the JSDA provides the ‘Green Sheet Market’ for unlisted shares, but the number of registered companies remains small because of the JSDA’s strict disclosure requirements and insider-trading restrictions which are similar to those applicable to listed companies. The JSDA has decided to abolish the Green Sheet Market and to create a new trading system for unlisted shares. The new market will facilitate the trade of unlisted shares among a limited number of investors called an ‘investment group’ consisting of directors or employees, shareholders, business partners or consumers of the issuing company. Shares will be permitted to be traded only among the ‘investment group’ regulated by the rules of the JSDA. Disclosure requirement and insider-trading regulations will largely be relaxed.

Financial benchmarks
By June 2015, the FIEA will be amended to introduce a new regulatory framework for organisations that set financial benchmarks such as the Tokyo Interbank Offered Rate (TIBOR) (financial benchmark administrators). Under the amended FIEA, the FSA may designate financial benchmark administrators that will be required to establish and comply with operational rules regarding their system of governance, the quality of the benchmarks, the quality of the methodology and accountability, which will all be expected to be in line with the IOSCO’s principles for financial benchmarks. Financial benchmark administrators will be subject to supervision by the SESC, including on-site inspection. Each reference bank or financial institution that submits rate data will be subject to and monitored for compliance with the code of conduct agreed upon with the financial benchmark administrator. The first entity that the FSA is expected to designate as a financial benchmark administrator is the JBA TIBOR Administration (JBATA), which engages in the calculation, publication and administration of JBA TIBOR.
Developments affecting derivatives, securitisations and other structured products

The FIEA is the most basic and fundamental instrument of regulation applicable across the spectrum of derivatives, securitisations and other structured products. In addition, there are other laws governing derivatives, securitisations and other structured products such as the Act on Investment Trusts and Investment Corporations, the Limited Partnership Act for Investment, the Act on Securitisation of Assets, the Trust Act and the Companies Act. Other related laws and regulations may apply depending on the type of the product.

In 2006, the FIEA underwent radical amendment (it was formerly the Securities and Exchange Act), as did the CDA in 2011 (formerly the Commodity Exchange Act). The main purpose of these amendments was to provide more complete protection for investors and to improve and enhance the convenience of participating in the Japanese market. While these amendments introduced strict and rigid regulations for investor protection, there are exceptions for rules and regulations that are applicable to financial instruments business targeting only professional investors, QIIs or commodity derivatives professionals. In other words, the rules and regulations applicable to the financial instruments business can differ depending on the type of investor. The FSA has also promoted a considerable number of further amendments to the FIEA in recent years in order to implement agreements reached at the G20 summits, which aim to strengthen the global financial system by fortifying prudential oversight, improving risk management, promoting transparency and continuously reinforcing international cooperation.

Derivatives

In light of the statements made by leaders at the G20 summits calling for improvements in the over-the-counter (OTC) derivatives markets, there have been several legislative and regulatory developments intended to implement policies that reflect such improvements.

First, a Japanese version of an electronic trading platform (also called ‘swap execution facility’ or SEF) is scheduled to be introduced on 1 September 2015. FIOs and registered financial institutions (RFIs) will be required to use an electronic trading platform when engaging in OTC interest rate swap transactions denominated in Japanese yen in order to enhance the immediate disclosure of information about the derivatives trade. According to the draft amendment of the Cabinet Order under the FIEA, a licensing system, minimum capital requirements, record-keeping rules and other regulations will be introduced for the operators of electronic trading platforms. FIOs and RFIs may be exempt from the mandatory use of an electronic trading platform if (1) the transaction is booked in the trust account, (2) the transaction is between the affiliates, (3) one or both of the parties are not FIOs, RFIs or certain designated financial institutions, or (4) the average outstanding notional amount of one or both of the parties is less than ¥6 trillion.

Second, on 3 July 2014, the FSA proposed draft amendments to the Cabinet Office Ordinance of the FIEA to implement BCBS-IOSCO’s margin requirements for non-centrally cleared derivatives. Under this amendment, there are variation margin (VM) obligations and initial margin (IM) obligations. Margin obligations will basically apply to all non-centrally cleared derivatives, but will not apply in the event that:

a. one of the parties is not an FIO or RFI (except when such party is engaging in OTC derivative transactions in a foreign country with an aggregate notional amount of ¥300 billion or more);
b one or both of the parties are FIOs or RFIs, or certain designated financial institutions, but the average aggregate notional amount of the transaction is less than ¥300 billion;
c the transaction is booked in the trust account with an average aggregate notional amount of less than ¥300 billion; or
d the transaction is between the affiliates.

In addition, the IM obligations will not apply to the exchange of principal amounts under currency swaps. Under these margin obligations, FIOs and RFIs must calculate (1) the mark-to-market value of non-cleared OTC derivative transactions on a daily basis and (2) the amount of IM upon the execution, termination or amendment of the transactions, and must collect the VM and IM amounts from the counterparty without delay on a bilateral basis; provided, however, that if the amount to be received is under ¥70 million, the party may choose not to receive it. The IM amount basically must be segregated in a trust account or by other means, and hypothecation and reuse of the IM are not allowed. The amendment is expected to become effective on 1 December 2015 but IM obligations will be implemented in phases starting from the effective date to December 2019.

Apart from the foregoing, the FSA amended the Cabinet Order under the FIEA and the METI amended the Cabinet Office Ordinance under the CDA in 2014 with respect to customer solicitation rules regarding commodity derivatives. The solicitation rules under the CDA before these amendments were much more restrictive compared with those for financial derivatives, but the amendments have partly eliminated this difference. On the one hand, the FSA has added new restrictions on customer solicitation for commodity derivatives contracts, and on the other hand, it has become permissible under the CDA to solicit new customers if they have experience with high-risk transactions (such as FX, derivative or margin transactions); however, when a new customer does not have any experience in commodity derivative transactions, the customer must be less than 70 years old and the contract must include a ‘cooling-off’ period of seven days.

**Investment funds**

**Investment trusts and investment corporations**

In order to facilitate transactions using investment trusts or investment corporations including J-REITs, the regulations on investment trusts and investment corporations will be amended on 1 December 2014.

With respect to investment corporations, first an investment corporation will be permitted to repurchase its equity or undertake financing by way of a rights offering or some other transactions. This revision is expected to provide investment corporations with more options for financing or raising capital. Second, investment corporations will be allowed to use a special purpose company to hold overseas real estate when local regulations prohibit an investment corporation from directly holding such real estate. Third, in order to improve J-REIT governance, an investment corporation will be required to obtain prior approval from the board of the investment corporation when making substantial acquisitions of property from any interested person (e.g., a sponsor company).
With respect to investment trusts, the asset manager will be required to deliver a ‘summary of an investment performance report’ to all investors, as current investment reports are often expansive and complicated. At the same time, the merger process for small-scale investment trusts will be simplified in order to improve their operational efficiency.

With respect to the introduction of the Japanese Stewardship Code, please see Section II, v, infra.

Sales of partnership rights

In response to problematic incidents involving FIOs engaged in Type II financial instruments business (i.e., ‘Type II FIOs’ including vendors of partnership rights), the FIEA will strengthen regulations applicable to Type II FIOs. Under the new regulations, Type II FIOs will be prohibited from soliciting investments in partnership rights while knowing that the money to be invested will in fact be used for a different purpose (it is already prohibited for Type II FIOs to solicit investment partnership rights if the partnership agreements do not stipulate segregation of funds). Furthermore, Type II FIOs will be required to establish a domestic office with a domestic representative and will be encouraged to join a self-regulatory organisation. These amendments will be implemented before June 2015.

In addition, the FSA is increasingly concerned about general partners who rely on the ‘QII business exemptions’ under Article 63 of the FIEA. Under the current regulation, if a general partner relies on the QII business exemption, up to 49 non-QII investors may invest in the partnership under the relaxed rules so long as at least one QII joins the partnership as a limited partner. Given that general partners sometimes use this exemption to solicit non-QIIs without providing adequate information, the FSA is considering limiting the category of non-QII limited partners who are eligible for this QII business exemption to wealthy investors. A draft amendment was proposed by the FSA in May 2014 but was met with strong objections from the Japan Venture Capital Association. It is likely that the FSA will propose another draft amendment after making modifications.

iii Relevant tax and insolvency law

Tax law

In general, all corporations in Japan are subject to treatment as taxable entities. Foreign corporations are liable to pay certain types of corporate tax and income tax on domestic-sourced income, which varies depending on whether the foreign corporation has a permanent establishment in Japan. Non-corporate forms that are sometimes used as a vehicle for financial transactions, such as general partnerships, limited liability partnerships or trusts, are, in principle, fiscally transparent for Japanese tax purposes.

Some reforms on domestic taxation that may affect investors have been implemented.

In order to advance the government’s policy aimed at the convergence of financial income with respect to the Japanese tax system, income from the transfer of public bonds and corporate bonds has become subject to taxation as of January 2014. Further, the government aims to allow for the aggregation of profit and loss from a broader
range of financial products so that investors can choose financial products without being concerned about the differences in tax rates among financial products. This reform is expected to be introduced in January 2016.

In January 2014, a Japanese version of an individual saving account (ISA) system called ‘NISA’ was also introduced, whereby investments of up to ¥1 million per year are tax free if the investment has been made through an ISA. An investor can hold an ISA as a tax-exempt account for a maximum of five years falling within the period from 2014 to 2023. This system is intended to promote greater participation in the stock market by individual investors and has attracted the interest of retail investors. The government may explore extending NISA eligibility in terms of the scope of products available for investment, the length of the tax-free period or the maximum amount of the tax-free investment in the near future.

Further, on 26 January 2014, the Industrial Competitiveness Enhancement Act was enacted, introducing a new tax incentive to promote investment in venture capital funds. Under this tax incentive, institutional investors in certain venture capital are allowed to claim 80 per cent of the invested amount as deductible expenses under certain conditions.

Finally, the government plans to reduce the corporate tax rate to 20 per cent in the near future, with the first phase of the reduction starting in fiscal year 2015. The reduction in the corporate tax rate is intended to strengthen Japan’s attractiveness as a location and enhance the competitiveness of Japanese companies.

**Insolvency law**

There have been no material amendments to the insolvency laws (last revised between 1999 and 2004) or the Companies Act.

Even so, it should be noted that the Deposit Insurance Act (DIA) was amended on 6 March 2014. The amendment of the DIA included creation of a new orderly resolution regime covering banks, securities companies, insurance companies, financial holding companies, and similar entities that are experiencing financial difficulties. This regime is in line with the international agreement reached at the Financial Stability Board and G20 Cannes summit. The DIA provides that the Prime Minister will determine the specific implementation of the resolution regime following the deliberations by the Financial Crisis Response Council. Thereafter, appropriate measures such as oversight by the Deposits Insurance Corporation and provision of liquidity and financial assistance to financial institutions (by way of providing loans, guarantees, the subscription of shares, business transfers or sales of assets, etc.) will be enforced. The new regime is intended to reduce market transactions, enable the orderly resolution of financial institutions and

---

12 Act No.98 of 2005, as amended.
13 Which include the Bankruptcy Act (Act No. 75 of 2004, as amended), the Civil Rehabilitation Act (Act No. 225 of 1999, as amended), the Corporate Reorganisation Act (Act No. 154 of 2002, as amended), the Act Concerning the Special Provisions for the Reorganisation of Financial Institutions (Act No. 95 of 1996, as amended).
14 Act No. 34 of 1971, as amended.
prevent severe market disruption, while ensuring the performance and continuation of obligations that are critical for the stabilisation of the financial system. In this connection, it is notable that the Prime Minister has the authority to suspend the application of any termination provisions of certain financial agreements and close-out netting provisions for a period the Prime Minister so designates (designated period). The designated period provides a temporary stay to enable a troubled financial institution to transfer its assets to an acquiring financial institution or to a bridge financial institution. The appropriate length of the designated period is thought to be one or two business days, although there is no explicit provision in this regard.

iv Role of the exchanges, central counterparties and rating agencies

In principle, the FIEA regulates financial instruments exchanges, financial instruments clearing organisations (central counterparties, or CCPs) and rating agencies. The CDA regulates the commodity exchanges.

Exchanges

The Tokyo Stock Exchange Group and the Osaka Securities Exchange merged on 1 January 2013 to form the Japan Exchange Group (JPX) in order to enhance competitiveness in the global market. Through the merger, the TSE and the Osaka Exchange Inc (OSE) became subsidiaries of JPX. Currently, the TSE functions as the cash equity market and the OSE functions as the derivatives market. Mothers of the TSE, JASDAQ of the OSE, the TOKYO PRO Market and the TOKYO PRO-BOND Market continue to offer companies an alternative listing framework to meet the needs of professional and other investors.

JPX is expected to become a ‘unified exchange’. With a view to creating such unified exchange, the FIEA was recently amended to (1) allow the financial instruments exchanges to trade commodity products and to (2) establish the necessary procedures for merging financial instruments exchanges with commodity exchanges. The amendment also allows further types of integration between financial instruments exchanges and commodity exchanges. For example, a financial instruments exchange can become a subsidiary or parent company of a commodity exchange and vice versa. JPX has not yet, however, commenced commodity trading operations because the Tokyo Commodity Exchange Inc (TOCOM) has not decided to become a subsidiary of JPX, and is still considering alternative survival strategies amid Japan’s shrinking commodities market.

In addition to the foregoing, the TSE started to allocate legal entity identifiers (LEIs) as LOUs (local operation units) on 1 August 2014 in response to the decisions made by G20 summits, so that regulators may analyse financial transaction data efficiently and effectively under the FIEA. It is also worth noting that the TSE is considering extending its equity market trading hours. Currently, the TSE’s equity market opens for five hours per trading day, making it the shortest trading day in the developed world. The TSE’s decision on whether to extend its trading hours is expected shortly.

15 That is, an integrated exchange for equities, derivatives, commodities and other products supervised by the FSA.
Also, the Japan OTC Exchange Inc\textsuperscript{16} commenced OTC commodity non-deliverable forward trading on 12 September 2014 in order to provide broader services relating to commodity transactions.

**Central counterparties**

Since November 2012, FIOs and RFIs have been required to clear certain types of OTC derivatives transactions via the mandatory use of central clearing under the FIEA.

Under the current FIEA, the types of OTC derivatives transactions that are subject to mandatory clearing are credit derivatives swaps (CDS) on Markit iTraxx Japan referencing the credit of no more than 50 Japanese corporations, and ‘plain vanilla’ yen-denominated interest rate swaps (IRS) referencing three-month or six-month JPY LIBOR or Euro JPY TIBOR, which are eligible for clearing services provided by a Japanese CCP (i.e., the Japan Securities Clearing Corporation (JSCC)). Certain transactions, however, such as (1) transactions with a party that is not an FIO or RFI, (2) transactions that are booked in the trust account or (3) transactions between affiliates may be exempt from the mandatory use of the CCP.

With respect to client clearing, CDS or IRS transactions with a party that is not a clearing participant of the CCP may be exempt from mandatory clearing; however, starting on 1 December 2014, IRS transactions will become subject to mandatory clearing (through client-clearing services) when one or both parties are FIOs or RFIs that are registered with the FSA. Such registration is required when the average outstanding notional amount of OTC derivatives is ¥1 trillion (from 1 December 2015, ¥300 billion) or more. Furthermore, starting on 1 December 2016, IRS transactions that are booked in a trust account will become subject to mandatory clearing when the trust account’s average outstanding notional amount is ¥300 billion or more, notwithstanding the exemption described above, in which transactions are booked in the trust account.

In practice, the JSCC has provided clearing services for CDS transactions since 19 July 2011, working with 11 major financial institutions as clearing participants, and for IRS transactions since October 2012, working with 22 financial institutions. Some of the clearing participants started providing client-clearing services for several non-clearing participants on 24 February 2014.

The JSCC and its parent company, JPX, expect that many other market participants will become members of the clearing framework at the JSCC in the near future, and JSCC has expressed its intention to expand its range of services. For example, it is providing clearing services for listed derivatives and FX transactions traded on the OSE in addition to the clearing services offered for equities transactions traded on the TSE. Furthermore, with a view towards enhancing the convenience of the market, the JSCC plans to provide clearing services for IRS transactions denominated in US dollars and euros in September 2015.

With respect to commodity derivative transactions, Japan Commodity Clearing House Co Ltd (JCCH), which provides clearing services for the transactions traded at

\textsuperscript{16} The joint venture between TOCOM and Ginga Energy Japan Pte Ltd.
the TOCOM or the Osaka Dojima Commodity Exchange, extended its clearing services to OTC commodity derivative transactions from 16 May 2014.

**Transaction information and trade repositories**

Since November 2012, certain financial institutions, CCPs and trade repositories have been required to report OTC derivatives transaction information to the FSA under the FIEA. More specifically:

- **a** FIOs and RFIs are required to store transaction information and report said information to the FSA on or before the third business day of the following week, unless the transaction was cleared by a Japanese or foreign CCP (registered in Japan) or the information has been provided to the ‘trade repositories’ within three business days.
- **b** Japanese and foreign CCPs (registered in Japan) must record transaction information and report said information to the FSA within three business days.
- **c** Trade repositories must record transaction information provided by FIOs or RFIs and report said information to the FSA within one business day.

The FSA uses such data to publish information on the number of transactions and total amounts. The DTCC Data Repository Japan (DDRJ) has provided trade depository services in Japan as a ‘Foreign Trade Repository’ under the FIEA since March 2013.

**v Other strategic considerations**

The FIEA, which imposes restrictions on the solicitation of certain securities transactions (including offerings, purchases, and sales of securities, but excluding securities lending and repo transactions) directed at residents in Japan, applies regardless of whether the solicitation is domestic or from overseas. This means that direct solicitation for securities transactions is permitted without satisfying licensing requirements only when it is directed at QIIs such as banks, FIOs and insurance companies. All other direct solicitations for securities transactions directed at residents in Japan are strictly prohibited by the FIEA and require agency or intermediary services by a licensed FIO. Similar but different standards apply to the solicitation for derivatives transactions from overseas (which are also controlled by the FIEA). In any event, careful legal due diligence is highly recommended before entering into securities transactions with residents in Japan.

Money-lending activities from overseas to residents in Japan are restricted mainly under the Money Lending Business Act\(^{17}\) and the Usury Act\(^{18}\). Briefly stated, direct lending from overseas to residents in Japan is prohibited except if a foreign bank uses a branch in Japan that is licensed as the foreign bank’s branch under the Banking Act. It is noteworthy that this restriction does not apply when the borrowing is made in the form of a bond issuance.

It is particularly noteworthy that the government is seeking to promote the internationalisation of capital markets. As an example, the amendment to the Companies

---

17 Act No. 32 of 1983, as amended.
18 Act No. 195 of 1954, as amended.
Act that will be implemented around April 2015 to improve corporate governance will in principle require a listed company to have one or more outside directors and will regulate the relationship between a parent company and its subsidiary more strictly. Also, the government introduced the Japanese Stewardship Code (which closely follows the voluntary ‘comply-or-explain’ regime of the UK Stewardship Code) in February 2014 in order to guide institutional investors in their stewardship responsibilities to promote medium or long-term sustainable returns to their clients. Nearly 150 institutional investors (such as trust banks, insurance companies, investment management companies, pension funds, etc.) have adopted the Japanese Stewardship Code and Japanese institutional investors which are often described as ‘silent investors’ are expected to take an active stance in constructive dialogue with companies and in the exercise of voting rights. The government believes that these amendments will encourage investments in the capital and stock market of Japan.

Furthermore, several basic laws (especially the Civil Code) are being reviewed for future amendment, and such amendments are likely to affect the capital markets in Japan. Incidentally, the consumption tax increased to 8 per cent in April 2014, and is scheduled to further increase to 10 per cent in October 2015. While the consumption tax is not directly applicable to financial transactions, the increase in the consumption tax may have broader implications for the Japanese economy, including the financial markets.

**III OUTLOOK AND CONCLUSIONS**

In spite of the negative perceptions of the effects of Abenomics in the Japanese market due to the relatively slow economic growth, the government and the BOJ do not show any intention of changing their current policy. It appears that the government will execute the scheduled increase of the consumption tax (see Section II.v, supra) without changing its economic policy. In essence, easy-money policies will continue.

On the other hand, the government is keen to promote the internationalisation of capital markets. For example, in addition to reformation of financial benchmarks including TIBOR (see Section II.i, supra), the financial sector has been asked to consider the introduction of a new financial index called ‘TIBOR+’ that is an interest rate index not considering the credit of the borrower. The FSA aims to have the banking industry introduce this new index in 2016 following the policy of the Financial Stability Board, although the introduction of such an index will be accompanied by difficulties in collecting actual transaction data. In addition, the government is proceeding with reforms related to derivatives, establishing frameworks of central clearing, a trade repository (see Section II.iv, supra), electronic trading platforms and margin regulations (see Section II.ii, supra), but the industry also faces many problems from an operational and practical standpoint. 2015 will doubtless also prove to be a challenging year for the Japanese financial markets.
Appendix 1

ABOUT THE AUTHORS

AKIHIRO WANI

*Morrison & Foerster LLP / Ito & Mitomi*

Akihiro Wani has almost 30 years’ experience in the capital markets arena and is widely renowned as an expert in the banking sector. He has acted for major financial institutions on financial regulations and cutting-edge derivatives transactions, advised on the establishment of head and branch offices of financial institutions, and acted on various matters involving cross-border financial trading, securities, insurance and general corporate transactions. Mr Wani is a professor at Sophia University Law School, a counsel for the International Swaps and Derivatives Association in Japan, and a financial expert at the P.R.I.M.E. Finance Foundation.

REIKO OMACHI

*Morrison & Foerster LLP / Ito & Mitomi*

Reiko Omachi specialises in financial transactions involving banks, securities and insurance as well as structured finance, derivatives and general corporate transactions, and she has also advised on laws and regulations imposed upon banks and securities firms. From 2003 to 2006, she was seconded to the Civil Affairs Bureau of the Ministry of Justice of Japan and handled the amendment of Japan’s private international law. Ms Omachi graduated from the University of Tokyo in 1996 and qualified in 2000.
MORRISON & FOERSTER LLP / ITO & MITOMI
Shin-Marunouchi Building, 29th Floor
5-1 Marunouchi 1-chome
Chiyoda-ku
Tokyo 100-6529
Japan
Tel: +81 3 3214 6522
Fax: +81 3 3214 6512
awani@mofo.com
romachi@mofo.com
www.mofo.com