

# Client Alert.

March 21, 2012

## Amendment to the QII Special Business Activities Exemption for Partnership-Type Funds under Article 63 of the FIEL of Japan

General partners<sup>1</sup> (“GPs”) of partnership-type funds availing themselves of the exemption from registration under Article 63 of the Financial Instruments and Exchange Law of Japan (the “FIEL”) will need to take action — a recent amendment to the FIEL requires a new form of notification for filings made on or after April 1, 2012 and existing filings must be re-filed in the new format by June 30, 2012.

**By Mitsutoshi Uchida and Robyn Nadler**

In February 2012, the Financial Services Agency of Japan (the “FSA”) published final rules and guidelines (the “New Rules”) implementing certain scheduled amendments to the FIEL. The amendments are to become effective on April 1, 2012.

The amendments are a response to recent incidents in which the FSA became aware that certain funds did not satisfy the requirements for eligibility for exemption from the registration under the FIEL available for “special business activities for qualified institutional investors (*tekikaku-kan-tōshikatō-tokurei-gyōmu*)” (the “QII Special Business Activities”) under Article 63 of the FIEL.

A key feature of the amendments is the expansion of the information to be provided in the form of notification required to obtain the exemption so as to give the FSA increased visibility to the GP and the nature of the investors in the fund.

As discussed below, any entity that has previously filed a notification for the QII Special Business Activities exemption should note that it is required to file an amended notification in the new format by June 30, 2012.

### 1. OUTLINE OF REGULATIONS APPLICABLE TO GENERAL PARTNER OF PARTNERSHIP-TYPE FUNDS

In general, the FIEL requires a GP of a partnership-type fund<sup>2</sup> investing primarily in securities or derivatives to be registered as an investment management business (*tōshi-unyō-gyō*) if it accepts investments from any Japanese residents or conducts its business in Japan. Additionally, irrespective of the types of assets the fund invests in, the GP must also obtain a registration as a Type 2 financial instruments trading business (*dai-ni-shu-kinyū-shōhin-torihiki-gyō*) if it solicits investors to purchase, or sells, partnership interests in such funds within or into Japan (“self-offering”).<sup>3</sup>

Certain exemptions from these registration requirements are available to the GP of a partnership-type fund under the FIEL. The exemption for QII Special Business Activities is one of the most commonly relied upon by GPs.

<sup>1</sup> The provisions of the FIEL discussed in this paper are also applicable to certain other entities who operate partnership-type funds.

<sup>2</sup> A partnership-type fund for purposes of the QII Special Business Activities exemption includes domestic and foreign partnerships such as silent partnerships (*tokumei-kumiai*), investment limited partnerships (*tōshi-jigyō-yūgen-sekinin-kumiai*) formed under the Limited Partnership Law for Investment of Japan and Cayman Islands limited partnerships.

<sup>3</sup> The FIEL prescribes registration and other regulatory requirement on both investment management and solicitation activities. The requirements differ depending on the nature of the investment vehicle. For example, different requirements apply to corporate-type or trust-type funds.

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In order to rely on the QII Special Business Activities exemption, (a) there must be *always* at least one qualified institutional investor (*tekikaku-kan-tōshika*) (a “QII”)<sup>4</sup> among the investors in each fund managed by the GP and (b) the number of non-QII investors in each fund must be 49 or less.<sup>5</sup> To limit the scope for circumvention of these controls on retail investment in a fund eligible for the QII Special Business Activities exemption, special purpose companies and other partnerships are, subject to certain exceptions, disqualified from investing in the fund. Further, certain transfer restrictions must be imposed on the partnership interests in order to secure the composition of the investors.

A GP who intends to rely on the QII Special Business Activities exemption must file the required notification in the form<sup>6</sup> prescribed under the relevant rules of the FIEL with the competent local finance bureau prior to commencing any regulated activities.<sup>7</sup> Further, when any change occurs in the information included in the notification, an amending notification must be filed with the competent local finance bureau without delay. These notifications can be prepared in the English language.

## 2. AMENDMENTS TO NOTIFICATION REQUIREMENTS

### (1) Information in Notification

Currently, the notification of QII Special Business Activities requires only information regarding the GP, and not about the partnership-type fund itself. The New Rules will require the following additional information to be included in a notification for QII Special Business Activities:

- the name of each partnership-type fund that the GP solicits or manages under the QII Special Business Activities exemption; and
- the name of a QII investor in each partnership-type fund (if there is more than one QII in a fund, the name of at least one QII must be stated in the notification).<sup>8</sup>

If any required information has not yet been determined at the time of filing, the notification must state such fact, and an amendment to the notification must be filed without delay when such information becomes available.

### (2) Attachments

Under the amended FIEL, an applicant will be required to attach a certified copy of its commercial register (or, in the case of a foreign corporation, a certificate of incorporation or similar document) to a notification of QII Special Business Activities. In unavoidable circumstances, the copy can be submitted after filing provided it is done so without delay. A Japanese translation of the attachments is not required.

These documents are also required to be attached to amended filings with respect to any changes in trade name, capital amount, board members or the name or address of the principal business office of the applicant.

<sup>4</sup> QIIs are certain types of professional investors as prescribed in Article 10 of the Cabinet Office Ordinance on Definitions under Article 2 of the Financial Instruments and Exchange Law of Japan.

<sup>5</sup> If the GP is a foreign entity conducting its business outside of Japan, in general, the number of non-resident investors who are solicited outside of Japan is not counted toward the 49 limit of non-QII investors.

<sup>6</sup> For the current form of the notification in the English language and outline of the regulations applicable to QII Special Business Activities, please refer to the website of the FSA at: <http://www.fsa.go.jp/en/news/2007/20071119.html>

<sup>7</sup> In practice, such notification should be made prior to commencing solicitation of interests.

<sup>8</sup> The FSA has responded in the public comments procedure that the names of QIIs are kept confidential and will not be disclosed unless required under applicable laws.

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## (3) Obligations to File New Notification Forms For Persons Conducting Existing QII Business Activities

The new form of the notification will apply to any new filing to be made on or after April 1, 2012; *however*, persons who have filed a notification for QII Special Business Activities prior to that date are also required to file an amendment to the prior notification in the format under the New Rules, together with the above-mentioned attachments, within a three-month grace period after the effective date of the amendments (i.e., no later than June 30, 2012).

### 3. CLARITY OF MONITORING ACTIVITIES BY REGULATORS

#### (1) Existence of QII

The rationale for requiring a partnership-type fund to have at least one QII as a condition for obtaining the exemption for QII Special Business Activities is that the FIEL contemplates the QII exercising its professional experience and capabilities to monitor the operation of the fund by a GP.

The New Rules clarify that at the time of accepting any notification for QII Special Business Activities, the regulator will confirm, based on the information provided by an applicant, that any QII which invests in the partnership-type fund operated by the applicant is not a sham entity. Examples of cases that would be unacceptable are: (a) where the fund has only one QII which is an investment limited partnership (*tōshi-jigyō-yūgen-sekinin-kumiai*) formed under the Limited Partnership Law for Investment of Japan that has no substantive operation or for which no regulated entities are involved in its formation; or (b) the QII has received compensation from the operator of the fund without providing any substantive services and virtually no investment by such QII has been made.<sup>9</sup>

The New Rules also state that the regulator may require an applicant to submit a copy of the respective commercial register or similar documents in order to confirm the existence of the QII named in the notification.

#### (2) Offices and Representatives

The New Rules further provide that the regulators will secure a method to contact the representative of the applicant by requesting a document to verify the representative's personal address. In addition, if the applicant's office is only virtual and the applicant separately maintains an actual business office, the regulator will require the applicant to verify its principal business office. In the course of the public comment process, the FSA has stated that if an applicant's principal business office is different from its registered office, the former should be stated in the notification for QII Special Business Activities.

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<sup>9</sup> The FSA has responded in the public comment process that the amended guidelines primarily concern situations such as those described in (a) and (b), and does not seem to negate the current interpretation of the law that the size of investments by individual QIIs is generally irrelevant for the purpose of the exemption for QII Special Business Activities.

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