Private Banking & Wealth Management 2022

Contributing editor
Shelby R du Pasquier

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Private Banking & Wealth Management*, 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 Brazil.

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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, Shelby R du Pasquier of Lenz & Staehelin, for his continued assistance with this volume.

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Getting The Deal Through

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Japan

Masamichi Sakamoto and Kentaro Sawata

City-Yuwa Partners

PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 | What are the main sources of law and regulation relevant for private banking?

Although there is no legal definition for 'private banking' in Japan, it is considered comprehensive asset management and administration to meet the financial needs of high net worth individuals and recognised as a broad concept including the following:

- asset management services using discretionary accounts;
- investment and insurance advice;
- creation and sale of investment trusts;
- trust services (testamentary trusts and executions);
- normal banking services;
- securities trading;
- buying and selling currency and funds; and
- custody services.

These operations are primarily regulated by (1) the Financial Instruments and Exchange Act (FIEA) and related laws and regulations, which aim to ensure the fairness of transactions in financial instruments and the protection of investors, (2) the Banking Act and related laws and regulations, which provide for the licensing of banks and the regulation of bank conduct and (3) the Trust Business Act and related laws and regulations, which regulate trust related businesses. In addition, these regulations are under the jurisdiction of the Financial Services Agency (FSA), which publishes not only laws and regulations but also supervisory guidelines and guidelines as soft law, which businesses are also required to comply with. The Comprehensive Supervisory Guidelines for Major Banks, etc (guidelines for the banking industry) make some reference to private banking and wealth management and provide some points to bear in mind when engaging in such complex financial services.

Regulatory bodies

2 | What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The FSA is the main regulator of financial administration and has jurisdiction over many of the various activities that fall under the private banking and wealth management categories. Furthermore, the Local Finance Bureau, one of the local branches of the Ministry of Finance, carries out local FSA operations under the mandate of the FSA Commissioner. The Japan Securities Dealers Association (JSDA) formed by the securities companies and registered financial institutions in Japan and the Japanese Bankers Association (JBA) formed by banks, bank-holding companies, and bankers' associations in Japan are the main self-regulatory organisations in Japan for the area related to private banking and wealth management.

Private wealth services

3 | How are private wealth services commonly provided in your jurisdiction?

While the individual businesses that make up wealth management are carried out by securities companies (Type 1 financial instruments business operators), megabanks, ordinary regional banks, and trust banks, the provision of one-stop wealth management services for high net worth individuals is dominated by comprehensive financial groups (including domestic offices of foreign financial groups), which include banks, trust companies, and securities companies as group companies.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

There is no definition of 'private banking' or wealth management services for high net worth individuals. However, private banking is considered comprehensive asset management and administration to meet the financial needs of high net worth individuals.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

Although there is no legal definition for 'private bank', this depends on which entity (specifically, a securities company, bank, trust bank, etc.) performs services constituting private banking.

If an entity intends to engage in Type 1 financial instruments business or discretionary investment management business, it needs to be registered by the Prime Minister but, if the following requirements are not met, such a registration will be refused: it must be comprised of, among others, (1) sufficient human resources and business execution systems, (2) it must be a joint stock company or similar type of entity, (3) having in-country business offices, (4) keeping a certain level of assets (ie, the minimum amount of state capital or amount of net asset), (5) its major shareholders are not certain disqualified individuals or companies, and (6) not concurrently engaging in a prohibited business.

In order to engage in banking, a banking license must be obtained, the examination for which will determine whether the following criteria are met: (1) the applicant has a sufficient financial basis to carry out a banking business soundly and efficiently, and the applicant's prospects for balancing related earnings and expenses are good, and (2) the applicant has the knowledge and experience to carry out this business accurately, fairly, and efficiently in light of its personnel composition and other factors, and has sufficient social credibility.

Most trust business is carried out by licensed banks referred to as trust banks. In order for financial institutions to engage in trust business, they must obtain approval from the Prime Minister based on the Act on Engagement in Trust Business by Financial Institutions, the

examination for which is based on whether the financial institution in question meets the following criteria: (1) it must have a sufficient financial basis for carrying out the trust business soundly and be able to carry out the trust business properly, and (2) its performance of this business must be unlikely to disturb the financial order.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

As the registration, licence, or authorisation is subject to revocation if any of the relevant requirements are no longer met, these must continue to be met. The Comprehensive Supervisory Guidelines for Major Banks, etc. (guidelines for the banking industry) focus on and clarify the supervision of the following aspects of private banking and wealth management business: (1) setting sound and appropriate profit and business targets and supervising and controlling business operations, (2) establishing a framework for supervising and controlling appropriate business operations, (3) establishing an information management framework, etc, (4) establishing a system for eliminating violations of laws and regulations and ensuring fair and appropriate transactions, etc, and (5) establishing systems to detect and eliminate money laundering and suspicious transactions, etc.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

In order to carry out the main businesses constituting private banking business (eg, Type 1 financial instruments business, discretionary investment management business, and banking business), it is necessary to take the form of a joint stock company. Securities companies registered as Type 1 financial instruments businesses, trust banks or large-scale ordinary banks under the Banking Act often engage in private banking-like business. Overseas securities companies and banks carry out the main activities comprising said business in the form of Japanese subsidiaries for securities-related business or Japanese branches for banking business.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

The laws specify standard processing times for applications and licences; for example, registering as a Type 1 financial instruments business operator under the FIEA is stipulated as taking two months from the date of formal application, while an application for a banking licence under the Banking Act takes one month from the date of formal application. However, in practice, it usually takes six months to a year and sometimes even longer, taking into account the time required for preliminary consultations with the authorities before making a formal application.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

When financial instruments business operators, etc intend to abolish their financial instruments business, merge or assign all or part of their business, they must, at least 30 days prior to the abolition date make a public notice to that effect in accordance with the provisions of the Cabinet Office Ordinance, post it in an easily publicly visible place in all of their business offices, and immediately notify the Prime Minister that this has been done.

In the case of a bank intending to make a resolution at the general shareholders' meeting regarding an amendment to the articles of incorporation relating to the discontinuation of a banking business or a dissolution of the bank, due to its public nature, this must be approved by the Prime Minister before it can take effect. If the approval is granted and the discontinuation becomes effective, a public notice will be issued and notices will be posted at all business offices.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Wealth management and private banking include a wide range of business activities, each regulated by its respective business laws. Engaging in the business of selling securities, derivatives, investment trusts, etc, requires a Type 1 financial instruments business operator registration, engaging in discretionary investment management business requires an investment management business operator registration, and engaging in investment advisory business requires an investment advisory business operator registration. In addition, carrying out banking business requires a banking licence under the Banking Act and carrying out trust business requires a trust license under the Trust Business Act or a permit under the Act on Engagement in Trust Business Activities by Financial Institutions. Once the relevant registration, licence or permit has been obtained, the relevant business operations will be subject to FSA or Local Finance Bureau supervision.

Discretionary management services and non-discretionary advisory service are regulated as separate businesses and require separate registrations, the registration requirements for the former being somewhat stricter than those for the latter.

Requirements

11 | What are the main licensing requirements for wealth management?

If an entity intends to engage in Type 1 financial instruments business or discretionary investment management business, it needs to be registered by the Prime Minister but, if the following requirements are not met, such a registration will be refused: it must be comprised of, among others, (1) sufficient human resources and business execution systems, (2) it must be a joint stock company or similar type of entity, (3) having in-country business offices, (4) keeping a certain level of assets (ie, the minimum amount of state capital or amount of net asset), (5) its major shareholders are not certain disqualified individuals or companies, and (6) not concurrently engaging in a prohibited business.

In order to engage in wealth management, a licence must be obtained, the examination for which will determine whether the following criteria are met: (1) the applicant has a sufficient financial basis to carry out a banking business soundly and efficiently, and the applicant's prospects for balancing related earnings and expenses are good, and (2) the applicant has the knowledge and experience to carry out this business accurately, fairly, and efficiently in light of its personnel composition and other factors, and has sufficient social credibility.

12 | What are the main ongoing conditions of a wealth management licence?

As the registration, licence, or authorisation is subject to revocation if any of the relevant requirements are no longer met, these must continue to be met. The Comprehensive Supervisory Guidelines for Major Banks, etc. (guidelines for the banking industry) focus on and clarify the supervision of the following aspects of private banking

and wealth management business: (1) setting sound and appropriate profit and business targets and supervising and controlling business operations, (2) establishing a framework for supervising and controlling appropriate business operations, (3) establishing an information management framework, etc, (4) establishing a system for eliminating violations of laws and regulations and ensuring fair and appropriate transactions, etc, and (5) establishing systems to detect and eliminate money laundering and suspicious transactions, etc.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

Regarding money laundering, it is important to comply with the obligation to identify oneself under the Act on Prevention of Transfer of Criminal Proceeds and the Foreign Exchange and Foreign Trade Act, which obliges 'specified business operators' to identify their clients at the time of transactions, keep records of this identification, and report suspicious transactions, and many financial business operators are considered specified business operators. The latter requires banks and financial institutions to verify the identity of their clients. The Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism, published by the FSA on 19 February 2021, are a code of conduct for financial institutions based on FATF recommendations and require them to implement risk mitigation measures based on customer due diligence and individual customer risk assessments in their various businesses.

Politically exposed persons

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

According to the Order for the Enforcement of the Act on Prevention of Transfer of Criminal Proceeds and its Enforcement Rules, foreign PEPs are defined as listed below. Transactions with foreign PEPs fall under the category of high-risk transactions and are subject to more stringent verification at the time of the transaction than would otherwise be the case. The relevant guideline states that enhanced due diligence on matters such as their position or purpose of transaction, etc. is desirable. There is no legal definition for domestic PEPs

First group

Persons specified by the Ordinance of the competent ministry as being heads of a foreign state, occupying important positions in a foreign government, central bank or other similar organization of a foreign state, and persons who were formerly such persons as follows.

Positions equivalent to the Prime Minister and other Ministers and Vice-Ministers of State in Japan.

1 Positions equivalent to the Speaker of the House of Representatives, the Deputy Speaker of the House of Representatives, the Speaker of the House of Councillors or the Deputy Speaker of the House of Councillors in Japan.
2 A position equivalent to that of a judge of the Supreme Court in Japan.
3 Positions equivalent to ambassador extraordinary and plenipotentiary, minister extraordinary and plenipotentiary, representative of the Government or member of the plenipotentiary committee in Japan.
4 Positions equivalent to the Chief of the Joint Staff, the Deputy Chief of the Joint Staff, the Chief of the Ground Staff, the Deputy Chief of the Ground Staff, the Chief of the Maritime Staff, the Deputy Chief of the Maritime Staff, the Chief of the Air Staff or the Deputy Chief of the Air Staff in Japan.
5 Officers of the Central Bank.
6 Officers of a corporation whose budget must be voted on or approved by Parliament.

Second group

A family member of a person listed in the first group (spouse (including persons whose marriage is not registered but who is in a situation similar to marriage; the same shall apply hereinafter in this item), parents, children, siblings, and parents and children of spouses other than these persons)

Third group

A juridical person who is specified by the Ordinance of the competent ministry as having a relationship that enables the person listed in the first group and second group to substantially control the management of its business.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

When opening a bank account, one will usually be asked to provide one document bearing a photograph such as a driving licence or passport or two documents without a photograph, such as a health insurance card, pension book or seal registration certificate.

Also, one will be required to report one's place of residence and other personal information pursuant to FATCA and Act on Special Provisions of the Income Tax Act, Corporation Tax Act, and Local Tax Act Incidental to Enforcement of Tax Treaties.

According to the 'Guidelines on Anti-Money Laundering and Counter-Terrorist Financing', when a financial institution conducts a transaction with a client it must properly investigate and obtain basic information on the client, such as their identity and that of the beneficial owner of the organisation, the purpose of the transaction, and the flow of funds; this is considered standard in client due diligence.

Tax offence

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Although there is no such specific crime as money-laundering in Japan, the Act on Punishment of Organized Crimes and Control of Proceeds of Crime, article 2, paragraph 2 provides for the punishment for disguising, concealing, receiving, etc, the 'proceeds of crime', which are key provisions for the control of money laundering. The question of whether money laundering is a predicate offence depends on whether the 'proceeds of crime' include the proceeds of the offence. Following the 2012-revised FATF recommendation that tax offences should also be covered as predicate offences, the 2017 amendment to the Act includes offences for which a sentence of long-term imprisonment of more than four years or imprisonment is prescribed as 'proceeds of crime', which now also includes tax offences such as tax evasion.

Compliance verification

17 | What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

The Act on Prevention of Transfer of Criminal Proceeds Foreign Exchange and Foreign Trade Act requires confirmation of clients' identity, etc and transactions' purposes, etc, but there is no specific obligation to confirm clients' compliance with tax laws.

Liability

18 | What is the liability for failing to comply with money laundering or financial crime rules?

Clients or representatives must not misrepresent information relating to the confirmation at the time of transaction to the specified business operator and are subject to criminal penalties (imprisonment for not more than one year or a fine of not more than ¥1 million) in the event of a violation. If the administrative agency finds that a financial institution as a specified business operator is in breach of the provisions of the Act on Prevention of Transfer of Criminal Proceeds, it may order the financial institution to rectify the breach and, if the financial institution violates said order, it will be subject to criminal penalties (imprisonment for not more than two years or a fine of not more than ¥3 million).

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 | Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Although there is no specific criterion to distinguish private banking clients from non-private banking clients, the FIEA imposes financial regulations on financial instruments business operators by dividing investors into professional specified investors and other clients (general investors) based on their knowledge, experience, and wealth. There is also a procedure for making transfers between specific investors and general investors in certain cases, depending on the wishes of the investor. Foreign corporations are classified as specific investors, while foreign individuals are classified as general investors. A foreign individual may only make a transfer to a specified investor if (1) they have net assets of ¥300 million or more, (2) they have financial assets of an investment nature of ¥300 million or more, and (3) they have been trading with the relevant entity for at least one year.

Client categorisation

20 | What are the consequences of client categorisation?

There are no specific criteria to distinguish private banking clients from non-private banking clients. If a client is categorised as a specific investor, the regulations on conduct aimed at correcting information gaps, such as the delivery of pre-contractual documents, would not apply. A separate matter of whether a client is categorised as a specific investor or general investor is an important factor for assessing the suitability of the relevant products and transaction that will be conducted by the financial instruments business operator. Therefore, specific investors will have access to a greater variety of financial products and transactions than general investors.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

The Consumer Contract Act exists to protect the interests of individual consumers (unless they are party to a contract as or on behalf of a business). The determination of the governing law originally depended on the description in the contract but, in the case of consumer contracts, the law of the consumer's habitual place of residence is to be applied. In order to protect the interests of the consumer, the Consumer Contract Act provides protective provisions such as the invalidity of provisions unilaterally prejudicing the interests of the consumer and the prohibition of the provision of definitive information. Although it can be said that private banking is also affected by the Consumer Contract Act, as long as the counterparty is an individual, it is not considered to be more affected than other types of business.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

Domestic exchange businesses are regulated by the Banking Act and exclusively allowed for banks licenced in Japan. However, transfers of one million yen or less can be made with a fund transfer services registration. Those who engage in foreign exchange services must (1) confirm legality and identify themselves when conducting specified exchange transactions as defined in the Foreign Exchange and Foreign Trade Act. In cases where certain requirements are met, (2) reports on foreign exchange business must be submitted to the Minister of Finance via the Bank of Japan.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

When a financial institution suspects that one of its deposit accounts is being used for criminal purposes, taking into consideration the provision of information on the wrongful use of the deposit account, by the investigative agency and other circumstances, the financial institution shall take appropriate measures such as suspending transactions pertaining to the deposit account. In addition, financial institutions themselves set their own restrictions on deposit withdrawals.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

When transferring securities from a domestic securities account to a foreign securities account or vice versa, the financial instruments business operator's client must submit a notice to the financial instruments business operator stating their client information and the details of the transaction causing the transfer. There are no legal provisions regulating the withdrawal of non-deposit and non-security items (gold, checks, crypto assets, etc). The opening of deposit accounts and securities accounts is uniformly handled based on each firm's terms and conditions but the contents thereof vary from firm to firm.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

While there are no provisions of confidentiality obligations specific to private banking, it is understood that financial operators generally assume obligations to keep clients' information confidential. In addition, financial operators must keep all clients' personal information confidential under the Act on Protection of Personal Information.

Scope

26 | What information and documents are within the scope of confidentiality?

Generally, any information provided by a client, whether before or after execution of a contract, is deemed necessary to be kept confidential. However, (1) information already known to the receiving party at the time of disclosure, (2) information already publicly available at the time of disclosure, (3) information entered in the public domain through no act of the receiving party after the time of disclosure and (4) information lawfully obtained by the receiving party without any obligation of confidentiality from a third party having a lawful right to disclose without any obligation of confidentiality to the disclosing party are generally excluded.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

Generally speaking, (1) disclosure to employees and officers of the parties to the agreement, (2) disclosure to affiliate companies of operators who provide services to the client pursuant to the agreement, and (3) disclosure required by laws and regulations are often considered exceptions.

Breach

28 | What is the liability for breach of confidentiality?

The detailed liability for breaches of confidentiality varies depending on the duty of confidentiality, if any, set forth in a contract with each client. Generally, the 'compensation for damage actually caused due to breach of confidentiality to the extent that a legally sufficient cause is found' is specified as such.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

All the business laws governing the activities that constitute private banking are considered to be internationally applicable under the principle of territoriality if any part of the regulated activities (including soliciting, buying and selling) is conducted in Japan.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Depending on the type of business, if a foreign firm is determined by FSA as conducting a regulated activity in Japan, it will be considered as an unregistered or unlicensed illegal business unless the relevant licence or registration is obtained. Although, there are exceptional provisions that allow foreign firms to engage in securities trading, discretionary investment management, and investment advisory services without registration, provided that certain requirements are met, as the kind of business that can be conducted without registration is limited, whether the requirements necessary for the exceptions to apply are met should be carefully considered when conducting business without registration.

Regulation

31 | What forms of cross-border services are regulated and how?

Each service constituting private banking, including wealth management, advisory and banking services, is a regulated activity when it is conducted as a business in Japan. Although it is not clear how a foreign firm can be deemed to have 'conducted business in Japan', we believe that a foreign firm may be considered as 'conducting business in Japan' when it dispatches its employees to Japan or even when it conducts business remotely via email or telephone. Public business announcements addressed online to Japanese residents are considered acts of solicitation if there are no appropriate disclaimers or measures to prevent misidentification, and this may be judged as unregistered or unlicensed business.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If a company is deemed to be conducting business in Japan, it will trigger the requirement of the relevant registration and aligning employees directly with clients or potential clients in Japan increases the likelihood that they will be determined to be conducting business in Japan.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Although there is no clear guideline for whether a person is judged to be operating a business in Japan, they may be judged to be operating an unregistered business. Although it depends on the contents of the document to be delivered, if an act falling under the category of solicitation is carried out in Japan, it may trigger the requirement of the relevant registration.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

Taxpayers and financial institutions may be required to disclose the account information to the tax authority via the following reporting system.

Overseas property report

Any individual tax resident of Japan (excluding non-permanent residents) who has more than ¥50 million in overseas properties as of 31 December of that year is, in principle, required to report such assets to the Japanese tax office by filing an 'overseas property report' by 15 March of the following year. This obligation applies as long as the aforementioned conditions are met, regardless of whether the taxpayer has tax liability in Japan for that year. The information required includes the

types of overseas property owned by the taxpayer and its amounts and values. This reporting system does not apply to domestic private banking accounts as it only targets foreign property, and whether bank accounts are classified as domestic property is determined according to the location of offices and places of business of financial institutions in which the bank accounts are placed.

Property and liability report

Any individual tax resident of Japan who has an obligation to file tax returns is, in principle, required to file a 'property and liability report' to the Japanese tax office upon satisfying both following conditions: (1) the taxpayer's taxable income before applying certain income deductions for that year exceeds ¥20 million and (b) the taxpayer owns in total ¥300 million or more of property or ¥100 million or more of a certain property being subject to Japanese Exit Tax as of 31 December of that year. The filing deadline is 15 March of the following year and the information required includes the types of property owned by the taxpayer and its amounts and values as well as the amount of the taxpayer's liabilities. Therefore, if a taxpayer owns private banking accounts, whether domestic or foreign, and satisfies the aforementioned conditions, they will be required to report the assets' details to the Japanese tax office via a Property and Liability Report.

Common reporting standard

Under the common reporting standard (CRS), financial institutions report non-residents' bank account information to the tax authority of their own countries and said information is automatically shared with the residential countries of those non-residents according to the agreements for the exchange of CRS information between the two countries in order to combat international tax evasion and tax avoidance utilising foreign bank accounts. Therefore, information of foreign private banking accounts that tax residents of Japan hold in foreign financial institutions may be shared with the Japanese tax authority if the country where such foreign financial institutions are located has also joined the CRS.

Tax audit in Japan

In general, the Japanese tax authority has a right to ask business entities to cooperate with it for its tax audits by providing the necessary information of taxpayers being investigated. Therefore, financial institutions that hold individual taxpayers' private banking accounts may disclose such account information as the number of bank accounts the taxpayer holds, transaction history and outstanding balance, to the tax authority, if necessary for the tax audit.

Reporting requirements

35 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Under the Act on Prevention of Transfer of Criminal Proceeds, if a specified business operator suspects that property is profit from crime in a transaction related to the specified business or that a customer is committing a crime under the Organised Crime Control and Prevention Act, article 10 in relation to transactions related to the specified business, the specified business operator must submit a notification to the competent administrative agency and financial institutions that make payments to a foreign country at the request of a client are required to notify the competent administrative agency during the financial period in which the payments are to be sent of the identification and other matters pertaining to the customer. The Japanese and US authorities have issued a statement on mutual cooperation and understanding between them for FATCA compliance, outlining the procedures to be implemented by financial institutions in Japan. At the request of the Japanese and US authorities, clients are asked to confirm whether they are a US taxpayer when they open a new account. As a result, if the client is an American the deposit account information will be reported to the US tax authorities with the consent of the customer. Similar regulations are also provided in the Act on Special Provisions of the Income Tax Act, Corporation Tax Act and Local Tax Act Incidental to Enforcement of Tax Treaties.

Client consent on reporting

36 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

No client consent is required if the company has a duty to report or notify the authorities based on laws and regulations.

STRUCTURES

Asset-holding structures

37 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

It is common in Japan that holding private assets is delegated to asset management companies, general incorporated foundations, general incorporated associations or trusts. While asset management companies are generally used to hold private assets, the entity which is delegated to hold private assets depends on the nature of assets to be managed. In the case of an asset management company, favourable tax treatment can be generally enjoyed but there are, as disadvantages, relatively high costs to establish and operate the asset management company and income tax on capital gain likely to be imposed on assets transferred from a client to an asset management company. In the case of a general incorporated foundation or association, the advantages are favourable tax treatment and opportunities to carry out public benefit services by using private assets. In the case of a trust, rights and obligations-related matters can be flexibly set by the contents of a trust agreement. Civil trusts that can flexibly manage assets have recently gained attention.

Know-your-customer

38 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

For a business operator to conduct appropriate distribution and solicitation activities taking each client's suitability into account, the business operator needs to know the attribution of clients. However, no specific obligation to check or attempt to check the attribution of clients are generally specified in the FIEA. In contrast, the JSDA requires in its rules that its members obtain client cards from clients before executing transactions with them. Pursuant to the rules, the 'name, address, location and contact information, date of birth, occupation, investment purpose, asset conditions, any investment experience, transaction type, reason for becoming a client and any other matters as JSDA deems necessary' must be stated in such client cards.

Controlling person

39 What is the definition of controlling person in your jurisdiction?

A 'controlling person' refers to a 'person who has a relationship in which the person may actually control the business operation of a corporation'.

In the case of a corporation which grants voting rights in proportion to the contribution amount, (1) if there is a natural person who holds voting rights exceeding 25 per cent of the total voting rights, this is a natural person, (2) if there is no such natural person, this is a natural person who exerts a dominant influence on the business activities of the corporation, or (3) if there are no such natural persons listed above, this is a natural person who represents the corporation and executes its businesses. In the case of a corporation other than the above type, (1) if there is a natural person who receives dividends exceeding 25 per cent of the total revenue of the corporation, this is the natural person, (2) if there is no such natural person, this is a natural person who exerts a dominant influence on the business activities of the corporation, or (3) if there are no such persons listed above, this is a natural person who represents the corporation and executes its businesses.

Obstacles

40 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

If private assets are intended to be held through a special purpose company (SPC), it is important that certain requirements to avoid double taxation are satisfied.

CONTRACT PROVISIONS

Types of contract

41 Describe the various types of private banking and wealth management contracts and their main features.

Typically, contracts for the relevant services are prepared by each financial instruments business operator in its own format. The parties have the choice of governing law and many contracts specify the laws of Japan as the governing law.

Liability standard

42 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Under the Civil Code, whether negligence or gross negligence, an act based on negligence might cause liability for default under contract. This point may be changed subject to an agreement between parties. Some relevant regulations have provisions easing burden of proof by letting the amount of damages be presumed in a certain manner. In addition, sometimes parties add provisions for liquidated damages to the contractual liabilities clause through negotiation to eliminate any obstacle or inconvenience incidental to the burden of proof. In contract forms used by financial operators, there are often provisions to release liabilities for negligence other than gross negligence.

Mandatory legal provisions

43 Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

As there are neither regulations that apply only to private banking nor mandatory legal provisions on disclosure or document form that apply only to private banking, private banking is governed by business laws regulating individual activities such as discretionary investment management and deposit operations performed as part of private banking. Under the FIEA, as a general rule, documents explaining transaction details must be delivered to a client before and upon execution of the relevant contract, and the items to be stated and the form are set forth in detail by laws and regulations.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

As there is no limitation period specific to claims under a private banking contract, this is governed by the provisions of the Civil Code applicable to other types of contracts. As a general rule, a claim under a contract is extinguished by prescription on the date on which five years have passed since the date on which the claim holder becomes aware of its right to exercise the claim or on the date on which 10 years have passed since the date on which the claim holder may start to exercise the claim. The extinctive prescription period cannot be changed by executing a contract. Essentially, if legal procedures are taken or an agreement to discuss is reached, the limitation period is tolled for a certain period of time.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

In addition to ordinary courts, as an alternative dispute resolution (ADR) system, the Financial Instruments Mediation Assistance Center (FINMAC) renders the financial ADR service as delegated by financial instruments business associations as self-regulatory institutions under the Financial Instruments and Exchange Act and other self-regulatory institutions and services under a certified investor protection body system as the cross-industry system. Further, other dispute resolution institutions designated by the FSA Commissioner render services for dispute resolution, etc, and for complaint handling procedures. As designated dispute resolution institutions, FINMAC has been designated for the Type 1 financial instruments business, the JBA for banking business, and The Life Insurance Association of Japan, etc, for insurance business. If one or several dispute resolution institutions are designated for the relevant type of dispute resolution or service of a financial instruments business operator, the operator is required to execute a basic contract for implementation of dispute resolution procedures with one of the institutions.

Disclosure

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

If a financial instruments business operator becomes aware of a violation of laws by any of its officers or employees, the operator is required to report the violation to the local regulator. Additionally, a client can also lodge a complaint with the local regulator. If the complaint is deemed justifiable, the local regulator normally demands explanations or information from the operator or inspects and investigates the operator.

UPDATE AND TRENDS

Recent developments

47 Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

Introduction of financial service brokerage business across industries

The Act on Sales, Etc. of Financial Instruments was revised to introduce a financial service brokerage business, resulting in the brokerage businesses for banking, securities, and insurance now being permitted to be carried out with a single registration as financial service brokerage business, and cross-selling activities across several industries have been facilitated. Furthermore, intermediary services under this revision are recognised as being provided via electronic data processing systems and other information and communication technologies and online and non-face-to-face electronic financial services intermediary services using terminals such as smartphones and tablets to conduct transactions via the web and applications are expected to become more active.

Measures easing regulations on investment management business by overseas asset management operators

In order to upgrade the status of the Tokyo market among international financial markets, certain laws were revised (including by drawing up measures easing regulations on investment management business by overseas asset management operators), resulting in the establishment of a system allowing the fund management service and offering or private placement service for interests in the collective investment schemes only for overseas investors to be carried out by filing notifications with authorities.

In addition, for business operators who performed investment management services outside Japan, a specially permitted system for investment management businesses, etc, limited to a five-year period from the notification date (specially permitted services for overseas business operators during the transition period) has been put in place. A foreign investment management business operator who filed the notification on specially permitted services for overseas business operators during the transition period is understood to be allowed to carry out the discretionary investment management service, investment trust contracted service, foreign collective investment scheme's fund management service, etc. at its place of business or offices in Japan. By making it easier for foreign investment managers and high-level financial personnel to do business in Japan, the investment options for high net worth individuals are expected to expand.

Tighter regulations on cryptoassets

With the widespread use of cryptoassets, more clients are expected to select cryptoassets as products to be invested in. As of 1 May 2020, related laws and regulations, including the FIEA, were revised, tightening the regulations on business operators who trade cryptoassets, and cryptoassets not previously regulated by this Act are now subject to regulations similar to those on financial instruments.

Masamichi Sakamoto
masamichi.sakamoto@city-yuwa.com

Kentaro Sawata
kentaro.sawata@city-yuwa.com

Marunouchi Mitsui Bldg
2-2-2 Marunouchi
Chiyoda-ku
Tokyo 100-0005
Japan
Tel: +81 3 6212 5500
www.city-yuwa.com

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