

April 11, 2020

Research Division
International Bureau
Ministry of Finance
3-1-1- Kasumigaseki, Chiyoda-ku
Tokyo 100-8940
Japan
Submitted by email to: gaitame-kaisei@mof.go.jp

Re: Draft Rules and Regulations under the Foreign Exchange and Foreign Trade Act

Dear Sir/Madam,

The Investment Company Institute¹ appreciates the opportunity to provide feedback on the Ministry of Finance's (MOF's) draft rules and regulations under the Foreign Exchange and Foreign Trade Act (FEFTA). Our members invest on a global basis, and the Japanese market continues to be an important market for our funds and their investors. We therefore appreciate the MOF's willingness to take into consideration our members' concerns during the formulation of the new framework.²

We are grateful that the MOF has provided an English-language PowerPoint summarizing the draft rules, and our understanding of the proposed rules is largely based on the information provided in that document (MOF PPT). Many of the points we raised are addressed in the draft rules. In particular, we are pleased that (1) asset management companies that are subject to regulation in their home jurisdiction are one of the categories of foreign financial institutions that are able to utilize the blanket exemption, provided they comply with the specified conditions and (2) owners of assets, such as regulated funds, that have delegated investment decision-making authority and voting rights to an investment adviser (asset management company) do not themselves have a reporting obligation.

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$24.1 trillion in the United States, serving more than 100 million US shareholders, and US\$7.7 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org), with offices in London, Hong Kong, and Washington, DC.

² See Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Atsushi Mimura, Deputy Vice Minister of International Affairs, Ministry of Finance, dated December 19, 2019, available at <https://www.ici.org/pdf/32121a.pdf> (December 2019 letter).

We continue to have a few concerns that we believe the MOF can resolve in the final rules in a manner that will effectuate the objectives of the exemptions while also addressing Japan's legitimate national security concerns.

Regulated Funds of All Legal Forms Should be within the Scope of the Financial Institution Exemption

In our December 2019 letter, we requested that regulated funds³ be included within the scope of the exemption for foreign financial institution (FFI). As stated in the MOF PPT, the MOF has included within the FFI definition "trust companies" and "registered corporate-type investment trusts" that are subject to regulation/supervision under financial regulatory laws in Japan or other jurisdictions. The draft FFI definition individually lists certain types of entities and financial institutions with references to Japanese law. This proposal has the effect of including within the scope of the definition only foreign entities that conduct an analogous business and have the same legal structure. Therefore, the proposed FFI definition would include only certain regulated funds while excluding others based on their legal form.⁴ This different treatment could occur even for regulated funds that are domiciled in the same home jurisdiction and subject to the same national law governing regulated funds.

Because many jurisdictions permit regulated funds to be organized in various legal forms, we believe their ability to rely on the FFI definition should not turn on their legal structure but rather on whether or not they are substantively regulated in their home jurisdiction. For example, the US Investment Company Act of 1940 (ICA) does not require a fund registered under the ICA to be organized in any particular corporate form.⁵ Rather, the decision of legal form is based upon the selection of the US state in which the adviser determines to form the fund. Most US registered funds are organized in the states of Maryland (as corporations with a board of directors), Massachusetts (as a business trust with a board of trustees), or Delaware (as a statutory trust with a board of trustees). Regardless of the legal form, regulated funds in the United States are subject to the same substantive provisions under the ICA.

³ The term "regulated funds" includes US funds, which are comprehensively regulated under the Investment Company Act of 1940 (Investment Company Act), and non-US funds, that are organized or formed outside the US and substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

⁴ Many regulated funds will not themselves have a direct reporting obligation because they have delegated investment discretion and voting authority to their investment adviser. Certain regulated funds, however, may retain voting authority and will therefore themselves be subject to the reporting obligation.

⁵ The ICA generally does impose certain governance requirements on funds that assume that funds have a board of directors/trustees. An exception is a particular, relatively rarely used, type of US registered investment company called a "unit investment trust" that is structured as a trust.

Similarly, funds domiciled in the European Union and regulated under the UCITS Directive (EU Directive 2009/65/EC, as amended) may take a number of different legal structures depending on the organizational form selected by their promoters (i.e., a common fund, trust or corporate investment company structure) and the legal structures available in a particular Member State of the European Union. Regardless of their legal form, all UCITS must adhere to the regulatory framework applicable to UCITS in that jurisdiction.

We therefore respectfully request that the MOF reconsider its drafting approach with respect to regulated funds and explicitly include regulated funds within the FFI definition. Instead of including within the definition of FFI entities that have an analogous legal form to Japanese funds, a more appropriate analysis would be to include within the FFI definition all funds that, like the specified Japanese funds, are substantively regulated in their home jurisdiction to make them eligible for public sale to retail investors (e.g., regulated funds). Generally, regulated funds are comprehensively-regulated investment vehicles subject to substantial regulation in the jurisdiction in which they are domiciled, reflecting common principles that the International Organization of Securities Commissions (IOSCO) has developed. Because regulated funds invest according to the fund's stated investment principles and objective and are otherwise constrained in their actions, they are highly unlikely to pose any risk to national security. Like asset managers, they should be treated as FFIs for purposes of the FFI exemption.

New Rules Should be as Clear and Explicit as Possible for Foreign Investors

To assist foreign investors, particularly as they may not be as familiar with the details of the Japanese legal system as domestic investors, we urge MOF to make the new rules as clear and explicit as possible.

Articulate All Applicable Conditions for Using the FFI or General Investor Exemptions

The MOF PPT specifies on page 4 the conditions with which foreign investors – whether FFIs or general investors – must comply to rely on their respective exemption. Based on the MOF PPT and our prior discussion with MOF, we understand that these are the only applicable conditions. Additional conditions, particularly if they are not clear, would greatly lessen the usefulness of the exemptions. We respectfully request that the MOF clearly state any and all applicable conditions in the final rules (including in any English translation).

The MOF Should Provide a Definitive and Exhaustive List of Designated and Core Businesses

Based on the available information it is unclear whether the MOF will publish a list that will specify which part of the listed company's business constitutes a designated and/or core business. It is also not clear whether the list will be a definitive and exhaustive list on which foreign investors can rely, or

whether a foreign investor will have an obligation to investigate and determine whether any part of an investee company's business constitutes a designated and/or core business. We understood from our earlier discussion with the MOF that this list would be definitive and exhaustive, and we strongly urge the MOF to follow this approach. It is extremely important for the industry to be able to rely on exhaustive lists of issuers of each category in order to ensure full compliance.

Existing Holdings Should Not be Subject to the New Rules

It is our understanding that the new rules and regulations will not apply to foreign investor holdings as of the date of the implementation of the new requirements unless and until there is an acquisition of additional shares after the transition period. Applying the requirements to existing holdings would bring significant disruption and uncertainty to the Japanese market and existing foreign investors. We request that the MOF make the application of the new rules explicit in the final rules to avoid any confusion.

* * *

We appreciate your consideration of our views and concerns as you finalize the rules and regulations. Please contact Jennifer Choi, Chief Counsel, at +1 (202) 326-5876 or jennifer.choi@ici.org; or Eva Mykolenko, Associate Chief Counsel, ICI Global, at +1 (202) 326-5837 or emykolenko@ici.org with any questions.

Sincerely,

A handwritten signature in black ink that reads "Paul Schott Stevens". The signature is written in a cursive style with a large initial "P" and a long horizontal stroke at the end.

Paul Schott Stevens
President & CEO
Investment Company Institute