

# TOKYO PRO-BOND Market

A new professional securities market, the TOKYO PRO-BOND Market, was established by TOKYO AIM (now Tokyo Stock Exchange (the "TSE")) in May 2011. The market is very distinctive; the instruments traded in this market are sold within the framework of a private placement, and only professional investors and certain non-residents of Japan are allowed to participate in the market, although they are listed instruments and a certain amount of disclosure is required. We discuss below the framework as a whole, including certain updates and practical developments.

## Listing on the TOKYO PRO-BOND Market and Private Placement to Professional Investors Only

The TOKYO PRO-BOND Market, as the name suggests, is a debt securities exchange market for Professional Investors (as defined below) only, established by the TSE.

A listing on the TOKYO PRO-BOND Market allows for an offering of debt securities in Japan within the "Private Placement to Professional Investors Only" exemption from full securities registration.

"**Private Placement to Professional Investors Only**" is one of the exemptions from the securities registration requirements under the Financial Instruments and Exchange Act of Japan (Act no. 25 of 1948, as amended, the "**FIEA**"). The requirements to rely on the Private Placement to Professional Investors Only exemption, insofar as the TOKYO PRO-BOND Market is concerned, are as follows:

- *Listing.* The issuer must have or will have the bonds being offered listed on the TOKYO PRO-BOND Market.
- *Offerees.* The offerees of the initial distribution of the bonds must be limited to Professional Investors. (Note also that solicitations to Professional Investors (except for solicitations to QIIs (defined below), the Japanese government and the Bank of Japan) must be conducted by Japanese licensed securities companies).
- *Transfer restrictions.* Transfers of the bonds by an investor to other investors are restricted unless the transferees are Professional Investors or certain non-residents of Japan. To ensure compliance with this restriction, the FIEA requires (i) the issuer and the initial subscriber, and (ii) the distributor and the initial subscriber, to enter into a transfer restriction agreement prohibiting transfers to persons other than Professional Investors or certain non-residents of Japan.

We take each of the above requirements in turn below.

### Key issues

- Listing on the TOKYO PRO-BOND Market and private placement to professional investors only: listing criteria, offering to professional investors only, transfer restrictions (including practical developments)
- Listing logistics – programme/standalone, documentation, language, uploading on websites, GAAP, clearing, listing fees
- Liabilities for disclosure and "gun jumping"
- Continuous disclosure
- Delisting
- Recent listing – The Metropolis of Tokyo

## Listing criteria for the TOKYO PRO-BOND Market

There are only two listing criteria for a listing on the TOKYO PRO-BOND Market:

- **Rating.** The bonds (or, in the case of a programme listing, the programme) must be assigned a credit rating. Any level of rating is acceptable, but ratings must be assigned by certain qualified rating agencies, such as Moody's, Standard & Poor's and Fitch, or Japanese domestic rating agencies such as Rating and Investment Information, Inc. and Japan Credit Rating Agency, Ltd. A rating downgrade has no impact on the listing eligibility. There are limited exemptions from the credit rating requirement, including for government bonds and government-guaranteed bonds.
- **Underwriters.** The bonds must be underwritten by at least one dealer listed on the "Lead Managing Underwriter List", which has been prepared and published by the TSE. Application to be registered on the list is a relatively simple process: a dealer wishing to register on the list must file an application in a set form with the TSE, which will examine the application taking into account factors such as the applicant's appropriate domestic and overseas experience as a lead managing underwriter. No particular liabilities or licensing requirements in Japan attach merely by virtue of being registered on such Lead Managing Underwriter List, and both Japanese and overseas securities firms/investment banks can be found on the current list. The current list can be found on the following site: <http://www.jpx.co.jp/english/equities/products/tpbm/listing/04.html>.

The TOKYO PRO-BOND Market Listing Regulations (the "**Listing Regulations**") and Q&A are available on the TSE's website (<http://www.jpx.co.jp/english/equities/products/tpbm/outline/02.html>).

## Offering to Professional Investors only

The offerees of the initial distribution of the bonds to be listed on the TOKYO PRO-BOND Market must be Professional Investors only to be exempted from securities registration under the FIEA ("Private Placement to Professional Investors Only").

"Professional Investors", among others, include:

- Qualified Institutional Investors ("QIIs") (as further explained below);
- The Japanese government;
- Bank of Japan;
- Corporations that have been incorporated by a special act of incorporation under a special law in Japan;
- Investors' protection funds;
- The Deposit Insurance Corporation of Japan;
- The Agricultural and Fishery Co-operative Saving Insurance Corporation;
- Insurance policyholders' protection associations;
- Special purpose companies incorporated under the Japanese securitisation law;
- Companies listed on a Japanese exchange;
- Stock corporations which reasonably appear to have at least ¥500 million in their capital;
- Registered financial instruments dealers or entities which have applied for the QII special business licence under Article 63 of the FIEA; and
- Foreign companies.

QIIs include, among others, Japanese licensed securities companies, banks, investment managers, insurance companies, regulated investment corporations, Shinkin banks and federations of Shinkin banks, labour banks (*roudou kinko*) and federations of labour banks (*roudou kinko rengouka*), Norinchukin Bank and Shokochukin Bank, Government Pension Investment Fund (*nenkin shikin unyou kikin*), limited liability investment partnerships (*toushi jigyou yugen sekinin kumiai*), certain employees' pension funds (*kousei nenkin kikin*), certain new employees' pension funds (*kigyuu nenkin kikin*) and certain federations of employees' pension funds (*kigyuu nenkin rengouka*) which have filed notifications with the Financial Services Agency of Japan (the "**Japanese FSA**").

The status of an investor may be changed by a contractual arrangement between the investor and a securities broker. An entity which is categorised as a Professional Investor (except for a QII, the Japanese government and Bank of Japan) can be treated as a non-Professional Investor if the entity so agrees with the securities broker. In a similar way, an entity (including a local government) which is categorised as a non-Professional Investor can be treated as a Professional Investor if the entity so agrees with the securities broker. Although an individual is, in principle, treated as a non-Professional

Investor, a high net worth individual can be treated as a Professional Investor if the person so agrees with the relevant securities broker.

Solicitation to a Professional Investor (except for solicitation to a QII, the Japanese government and Bank of Japan) must be conducted by Japanese licensed securities companies. Therefore, the attendees of a roadshow presentation by the issuer must be limited to a QII, the Japanese government and Bank of Japan.

## Transfer restrictions

A holder of bonds listed or to be listed on the TOKYO PRO-BOND Market may only transfer such bonds to Professional Investors or certain non-residents of Japan. Additionally, such bonds may also be transferred without restriction to:

- The issuer;
- A majority shareholder of the issuer (being a company holding (either in its own name or in another person's name), voting rights in the issuer exceeding 50% of all voting rights in the issuer (excluding voting rights pertaining to treasury stock);
- A Connected Officer of the issuer. A "**Connected Officer**" comprises an officer (meaning directors, corporate auditors, executive officers or persons equivalent thereto) of the issuer holding (either in his/her own name or in another person's name), voting rights in the issuer exceeding 50% of all voting rights in the issuer (excluding voting rights pertaining to treasury stock); and
- A person controlled by a Connected Officer (a "**Controlled Person**", being a juridical person over 50% of whose total voting rights (excluding voting rights pertaining to treasury stock) are held by a Connected Officer (or jointly by a Connected Officer and another Controlled Person)).

To ensure compliance with this transfer restriction, a transfer restriction agreement must be entered into between (i) the issuer and the initial investor, and (ii) the initial investor and the relevant distributing securities company (such as underwriting securities companies and other selling group members) by the date of issue of the bonds. Practically, it would be very difficult for the issuer to enter into such agreement with each of the initial investors, so certain alternative methods have been considered and developed. For example, with regard to the agreement between the issuer and the initial investor mentioned in (i) above, the underwriter may be able to enter into an agreement with the issuer on behalf of the investors, or with the investors on behalf of the issuer. Alternatively, the underwriter may be able to act as an intermediary to make sure an agreement is entered into by and between the issuer and the investor. While the most prudent method of evidencing such an agreement would be to prepare an agreement in writing (which can be in English), as such a process may not be practicable within the current debt issuance execution process, the Japanese regulator has indicated in practice that it will allow such agreement to be in verbal form, provided that the underwriter explains the existence, purpose and consequences of the transfer restriction agreement and that the investor understands these terms. If the parties fail to enter into a transfer restriction agreement, the offering of the Bonds will not constitute an offering under the Private Placement to Professional Investors Only exemption, which will therefore trigger the requirement to file a full securities registration statement in Japan. In this regard, the issuer will basically need to rely on the underwriter to ensure that the proper processes regarding the transfer restriction agreement are adhered to.

## Listing logistics

### Programme or standalone?

An issuer can have its debt issuance programme listed on the TOKYO PRO-BOND Market so long as it obtains a credit rating in respect of the programme and appoints a prospective lead manager (for the purposes of the TOKYO PRO-BOND Market programme listing) from the Lead Managing Underwriter List. However, even where the issuer issues the bonds by means of a drawdown from a TOKYO PRO-BOND Market listed programme, it needs to have such drawdown bonds listed as well (i.e. it is not sufficient merely for the programme to be listed) in order to offer and sell them within the framework of the Private Placement to Professional Investors Only exemption. Where the programme which is proposed to be listed on the TOKYO PRO-BOND Market is already established and has no (or unlimited) programme amount (being the maximum principal amount of outstanding bonds issued thereunder), the TSE is likely to allow the programme amount to be unlimited (subject to prior discussion). The TSE has indicated that it expects, in principle, that the scheduled issuance period under the programme will be one year (and therefore that the programme will be "renewed" (updated) every year if the issuer wishes to maintain the listing); however, if there are special circumstances where such scheduled issuance period is difficult or inappropriate to set, it may be possible to request an exception to the TSE.

The issuer can also choose to do a standalone bond issue for the purposes of the offer and listing. See also "— Listing fees" below for a further discussion on the choice between a programme listing and a standalone bond listing from a listing fee point of view.

## Filing and disclosure documents

### Programme listing

Where an issuer chooses a programme listing, the following documents must be filed with the TSE and published at the TSE's website:

- The "**Programme Information**", at the time of the programme listing.

The Programme Information is filed and published in order to have the issuer's debt issuance programme listed on the TOKYO PRO-BOND Market. Drawdowns under the programme become possible from the day following the date of the filing and the publishing of the Programme Information, and the drawdown period lasts, in principle, for one year from such date following the filing date. The Programme Information basically comprises of two principal sections, namely the terms and conditions, and the issuer's corporate information. The TSE has published a prescribed form for the disclosure of the corporate information (which principally consists of (i) financial highlights for the most recent three years, (ii) business description, (iii) description of affiliated companies and (iv) the financial statements for the latest completed fiscal year and the audit report in respect thereof), but such form does not necessarily need to be strictly adhered to, and the issuer can generally discuss the form of disclosure in advance with the TSE. Two principal "streams" of practice have arisen in respect of the drafting of the Programme Information, based on the type of product being listed:

- "*Samurai Bond-Alternative Listing*"

This was the first type of listing obtained on the TOKYO PRO-BOND Market (by ING Bank N.V., in 2012), and essentially allows a non-Japanese issuer, through the TOKYO PRO-BOND Market listing, to access the Japanese debt capital market as an "alternative" to a traditional "Samurai Bond" offering (being Japanese Yen denominated, Japanese law-governed straight bonds offered publicly in Japan, clearing in JASDEC, the Japanese clearing system). In such cases, the issuer has generally prepared tailored, Japanese law-governed terms and conditions which follow the Samurai Bond practice (rather than the euro/global MTN practice) for the Programme Information, and in respect of its corporate information, has prepared the relevant section in the Programme Information by copying and pasting the relevant text from its MTN programme base prospectus or any other existing offering documents prepared in English (if allowed to do so in prior discussions with the TSE). In other words, a Programme Information which is specific to, and tailored for, the TOKYO PRO-BOND Market programme listing has been prepared (based on the issuer's existing disclosures). As at the date of this briefing (not counting programmes which have already expired), ING Bank N.V., Banco Santander-Chile, Deutsche Pfandbriefbank AG and ICICI Bank Limited have listed their programmes under this method (and the first two have subsequently listed their "Samurai Bond-Alternative" type drawdowns, both clearing in JASDEC). As the terms and conditions are specifically tailored for the TOKYO PRO-BOND Market listing, they tend to contain a description of the transfer restrictions (as part of the evidence of the terms of the transfer restriction agreement (although such inclusion may not necessarily be self-sufficient by itself as discussed in the "— Listing on the TOKYO PRO-BOND Market and Private Placement to Professional Investors Only — Transfer restrictions" above, nor is such inclusion mandatory if the transfer restriction agreement is entered into through alternative means)).

- "*Existing MTN Programme Listing*"

The other "type" of programme listing currently used for the purposes of a TOKYO PRO-BOND Market listing is to take an existing euro/global MTN programme base prospectus, and to simply put a TOKYO PRO-BOND Market-specific "wrapper" around it and use that as the Programme Information. In this type of listing, the programme will usually be pre-existing, and the bonds will typically be English or New York law governed, clearing through Euroclear, Clearstream, Luxembourg or DTC. This type of listing has generally been used by non-Japanese issuers wishing to access the Japanese market through on a secondary basis (i.e., the bonds are subscribed on a primary basis by one of the MTN dealers outside Japan, and sold into Japan on a secondary basis) using its existing MTN programme documentation. As at the date of this briefing (not counting programmes which have already expired), seven non-Japanese issuers have listed their MTN/debt issuance programmes under this method (and three issuers (First Gulf Bank P.J.S.C., Macquarie Bank Limited and Malayan Banking Berhad) have listed drawdowns under such programmes, all clearing in Euroclear/Clearstream, Luxembourg). As the terms and

conditions are not specifically tailored for the TOKYO PRO-BOND Market listing, they tend not to contain the TOKYO PRO-BOND Market-related transfer restrictions.

– *Emergence of the "Hybrid" Type*

In May 2015, The Metropolis of Tokyo listed its US dollar-denominated eurobond on the TOKYO PRO-BOND Market through a programme listing. This does not fit into either of the two "types" discussed above, and will be described in more detail below, although it is expected that (given the specific circumstances of this transaction) that most of the programme listings on the TOKYO PRO-BOND Market will fall within the above two "types", and not this "type".

Where the issuer wishes to use the text extracted from its MTN programme base prospectus or any other existing offering documents for the purposes of the Programme Information, or to use its existing MTN programme base prospectus with a wrapper, the TSE will usually request the issuer to confirm that such MTN programme/other existing offering documents have been prepared in accordance with the laws and regulations of the (non-Japanese) jurisdiction whose market the issuer has been accessing for the purposes of such MTN programme/offering. The content of the Programme Information is generally unlikely to exceed the information that has already been published in the issuer's home jurisdiction. There are also some exemptions from certain "corporate information" disclosures available, for example for issuers which are exempt from the disclosure requirements under the FIEA (e.g. local government bonds), and for issuers which are already registered for public securities issuances in Japan and have filed Annual Securities Reports with the Japanese FSA continuously for more than one year.

The Programme Information must also include, in order to show satisfaction of the listing criteria, (a) the name of prospective underwriting dealer which is listed on the "Lead Managing Underwriter List" and (b) a credit rating assigned to the Programme (with certain exceptions, including for government bonds and government-guaranteed bonds).

It is worth noting that if a special purpose vehicle issuer or a financing subsidiary issuer wishes to list its debt issuance programme, usually guaranteed by its parent company, on the TOKYO PRO-BOND Market, the TSE expects the financial statements of not only the guarantor parent company, but also of the issuer, to be included in the Programme Information.

■ The "**Written Assurance regarding Programme Listing**", at the time of the programme listing.

The Written Assurance regarding Programme Listing is a standard form document addressed to the TSE and signed or sealed (in English or in Japanese) by the issuer. This will be published on the TSE's website together with the issuer's Programme Information.

■ The "**Specified Securities Information**", at the time of the drawdown.

The Specified Securities Information (which acts here as a supplement to the Programme Information) is filed and published in order to have the drawdown bonds listed. Although the TSE has published a prescribed form of the Specified Securities Information (which expects detailed offering terms to be included therein), the issuer does not necessarily need to adhere to the form and certain non-material offering terms may be omitted. The disclosure of the issuer's corporate information which should be included in the Specified Securities Information may be made by means of referencing the relevant section in the Programme Information. A non-Japanese issuer wanting to access this market using its existing MTN programme can use the relevant Pricing Supplement or Final Terms together with a TOKYO PRO-BOND Market-specific wrapper as the Specified Securities Information. The Specified Securities Information, in principle, should also include a description of the credit rating assigned to the drawdown, but in practice, the individual rating is not required for the purposes of the TOKYO PRO-BOND Market listing if the Programme is rated.

In practice, in the case of a "Samurai Bond-Alternative Listing" type drawdown, the issuer has first filed the Programme Information (with indicative terms and conditions of the Bonds (with the pricing terms being in "blobs") and the issuer's corporate information) in order to start the marketing process and to list the Programme, and after bookbuilding and pricing, the Specified Securities Information containing the fully completed terms and conditions (with pricing terms included) has been filed. In the case of a drawdown under an "Existing MTN Programme Listing" type programme, the issuer has usually first filed the Programme Information, comprising of the euro/global MTN programme base prospectus plus a TOKYO PRO-BOND Market wrapper, to commence the marketing and to list the Programme, and after pricing, the Specified Securities Information comprising of the completed MTN Pricing Supplement/Final Terms plus a TOKYO PRO-BOND Market wrapper has been filed; such MTN Pricing Supplement/Final Terms have sometimes contained the TOKYO PRO-BOND Market-related transfer restrictions, while in others the transfer restrictions have been dealt with separately.

### Standalone bond listing

Where an issuer chooses to do a standalone issue, it only needs to file the Specified Securities Information with the TSE. Such Specified Securities Information should contain both the issuer's corporate information and the terms and conditions of the bonds. The corporate information can be prepared in the same way as those contained in the Programme Information mentioned above. The Specified Securities Information must also include (a) the name of the lead manager which must be an entity which is listed on the "Lead Managing Underwriter List" mentioned above<sup>1</sup>, and (b) the credit rating assigned to the bonds.

Although there is no established practice yet, as, so far, all listings have been on a programme basis, we believe that if a standalone bond listing were to take place, the timing will be as follows: (i) the Specified Securities Information (with indicative terms and conditions of the Bonds and the issuer's corporate information) will be filed at launch or deal announcement and marketing will start at that time; and (ii) thereafter, after bookbuilding and pricing, an Amendment to the Specified Securities Information (containing the full terms and conditions with pricing terms) will be filed.

### Language

All of the filing and disclosure documents mentioned above can be in English or Japanese. Considering that most Samurai Bonds use Japanese as the binding language for filing and disclosure documents (as well as transactional documents), this fact alone may be of particular interest to non-Japanese issuers offering bonds to Japanese investors for the first time, as it allows considerable cost savings in terms of fees of lawyers and auditors (which translate the disclosures and financial statements, respectively) as compared to a debut Samurai Bond issue.

### Publication

The filed documents are published on the TSE's website at least for one year (although the TSE currently keeps them published for more than one year) from the date of initial publication. The issuer must amend the contents of such documents when it deems necessary. The issuer is also recommended, but not required, to publish the documents so filed on its website. The issuer will be asked by the TSE to provide a website address at which its investor relations information can be viewed, and this will be published together with the filed documents.

### GAAP

In terms of generally accepted accounting principles ("**GAAP**") under which financial statements are to be prepared, the TSE generally accepts US GAAP, IFRS<sup>2</sup> and Japanese GAAP. The TSE may also consider other GAAP which it deems to be equivalent to US GAAP, IFRS or Japanese GAAP on a case-by-case basis, and in doing so will consider whether there have been cases of filings already made where the Japanese FSA had deemed disclosure under such GAAP not to be lacking in the public interest or investor protection (see TOKYO PRO-BOND Market FAQ, A22 (<http://www.jpx.co.jp/english/equities/products/tpbm/outline/tvdivq00000006xw-att/201503Q&AinEnglish.pdf>)).

In practice, the question of whether a particular country's GAAP will be accepted by the TSE tends to turn on its similarity or otherwise with IFRS. To the extent a certain country's GAAP is identical to IFRS, it may well be accepted by the TSE (although, as mentioned above, subject to case-by-case application); but to the extent there are any divergences of any nature (even if considered "more conservative than IFRS") from IFRS, it is likely to be very difficult to obtain approval unless the Japanese FSA has already approved the use of such GAAP in the context of a public offering in Japan. It should however be noted that the fact that the Japanese FSA has previously approved the use of a country's GAAP in the context of a public offering in Japan does not necessarily mean that such GAAP will be automatically accepted by the TSE – it is just one of the factors which will be taken into consideration.

If any GAAP other than US GAAP, IFRS and Japanese GAAP is used for the issuer's disclosure, then a description of the differences in the accounting principles and procedures between the accounting standards adopted and one of US GAAP, IFRS and Japanese GAAP must be disclosed; but disclosure of such "GAAP differences" does not by itself get the issuer over the "GAAP hurdle", as it may do in some other exchanges around the world – the GAAP must, as mentioned above, be specifically approved for use by the TSE.

The "GAAP hurdle" may be overcome in certain instances, if the issuer for example prepares local GAAP financial statements *in addition to* a permitted GAAP such as US GAAP and IFRS. For instance, some US SEC registrants prepare

<sup>1</sup> In the case of a jointly lead managed transaction (whether for a standalone bond issue or a programme listing with a drawdown), it may be possible to pass the TOKYO PRO-BOND Market listing criteria so long as one of the joint lead managers is an entity that is on the TSE's Lead Managing Underwriter List (and a joint lead manager that is not on the Lead Managing Underwriter List can nevertheless be disclosed as being a "joint lead manager"), but subject to discussion of the underwriting structure with the TSE.

<sup>2</sup> Note that IFRS, for these purposes, is "pure IFRS" (IASB IFRS), not IFRS as adapted for a particular jurisdiction.

their annual financial statements in accordance with US GAAP or IFRS, but prepare their interim or quarterly financial statements only in accordance with their local GAAP. In such a case, the issuer will not need to obtain clearance in relation to the local GAAP from the TSE, as the US GAAP/IFRS annual financial statements will comprise the "regulatory disclosure" for the purposes of the TOKYO PRO-BOND Market listing, while the local GAAP financial statements can simply comprise "voluntary disclosure" for such regulatory purposes. Similarly, if for example the issuer has already prepared its audited annual financial statements in accordance with local GAAP but has yet to finish the preparation of its audited financial statements under US GAAP/IFRS, it can list its programme including the latest local GAAP annual financial statements (*voluntarily* from a regulatory perspective) and the previous year's US GAAP/IFRS annual financial statements (which comprises the *formal* financial statements from a regulatory perspective). This allows the issuer to give relevant and timely disclosure in local GAAP, while still satisfying the formal requirements regarding the audited annual financial statements needing to be prepared under a permitted GAAP.

## Transaction documents and other documents

### Principal transaction documents

The following comprise the principal transaction documents prepared by and/or entered into by an issuer:

- In the case of a programme listing followed by a drawdown, the Programme Information and the Specified Securities Information which acts as a supplement thereto (see "— Filing and disclosure documents — Programme listing" above). The Programme Information will be filed by the date on which the marketing of the bonds is to start, and the Specified Securities Information will be filed as a supplement to the Programme Information on the pricing date.
- In the case of a standalone bond listing, the Specified Securities Information (see "— Filing and disclosure documents — Standalone bond listing" above). This will be filed by the date on which the marketing of the bonds is to start, and amendment thereto will be filed on the pricing date.
- In the case of a "Samurai Bond-Alternative Listing" (assuming that the bonds being offered are Japanese law-governed bonds issued by a non-Japanese issuer, clearing in JASDEC):
  - Conditions of the Bonds (Terms and Conditions);
  - Subscription Agreement; and
  - Fiscal Agency Agreement (note, a trust deed structure is not common in Japan for straight debt issues).
 These will be entered into or completed, as the case may be, on the pricing date. These documents are likely to be based on the Samurai Bond market standard if the issuer wants to access this market as an alternative to the traditional Samurai Bond; the major "time/cost-saver" for a non-Japanese issuer would be that unlike the documentation for traditional Samurai Bonds, where the binding agreements are in Japanese, these documents can be binding in English (even though Japanese law-governed).
- In the case of an "Existing MTN Programme Listing"-type drawdown: Pricing Supplement/Final Terms (this will be included in the Specified Securities Information). This will normally be in English.
- Transfer Restriction Agreement (in whatever form appropriate: see "— Listing on the TOKYO PRO-BOND Market and Private Placement to Professional Investors Only — Transfer restrictions" above).

Further, depending on the transaction and the underwriter's requirements, legal opinions and auditors' comfort letters may be required.

### Other documents

Other documents prepared by and/or entered into by an issuer include the following:

- Listing application documents to the TSE (in a form prescribed by the TSE, either in English or Japanese).
- In the case of a "Samurai Bond-Alternative Listing", standard form letters relating to the application to JASDEC (in English and Japanese, but supporting documents such as the certificate of incorporation and the incumbency certificate must be translated into Japanese).
- For Japanese Yen issues of above ¥1 billion principal amount, a post-issue foreign exchange report to the Bank of Japan (in a prescribed form, in Japanese). (This requirement is not specific to TOKYO PRO-BOND Market listed bonds, and applies to any Japanese Yen denominated issues of above ¥1 billion principal amount.)
- Various other peripheral documents and letters (e.g. process agent appointment letter, powers of attorney and other corporate authorisation documents).

## Listing fees

The TSE currently charges the following fees for listing on the TOKYO PRO-BOND Market:

- Programme listing:
  - Initial listing of the programme: ¥1 million.
  - Annual renewal of the programme: no fees updates (so long as the type of securities issuable under the programme does not change).
  - Increase in the programme amount (the maximum principal amount of bonds issuable under the programme): ¥1 million.
  - Listing of bonds issued as drawdowns under a TOKYO PRO-BOND Market listed programme: no fees.
- Standalone bond listing: ¥1 million per issuance.

The above fees are payable together with applicable Japanese consumption tax. Fees are payable by the end of the month following the date of listing, and will be invoiced by the TSE to the issuer. Please check the TOKYO PRO-BOND Market website for the most current level of fees payable (<http://www.jpx.co.jp/english/equities/products/tpbm/listing/03.html>). Based on the current fee structure, it would generally be more economical from a listing fee point of view, if there is any intention to list more than one issue of bonds, to obtain a programme listing; hence, to date, there have been no standalone bond listings on the TOKYO PRO-BOND Market.

## Liabilities for disclosure and "gun jumping"

### Disclosure liability

#### Liability for disclosure documents

The FIEA and other applicable Japanese laws impose certain civil, administrative and/or criminal liabilities on the Responsible Persons (as defined below) in respect of the Disclosure Documents (as defined below). In this briefing, we focus on the liabilities imposed by the FIEA.

The following comprise the "**Responsible Persons**":

- the issuer;
- the persons (the "**Providers or Publishers**", as described below) who are deemed to have submitted the Programme Information or the Specified Securities Information to the TSE or published them at the issuer's website; and
- the directors of the issuer, including non-executive directors and independent directors of the issuer (the "**Directors**").

The person who is named as a representative of the issuer on the cover page of the Disclosure Documents will be considered to be the "Provider or Publisher". In addition, the Chief Executive Officer and the Chairman of the issuer may also generally be deemed to be the "Providers or Publishers".

The Responsible Persons are liable for the Programme Information and the Specified Securities Information, including any amendments and supplements thereto (collectively, the "**Disclosure Documents**"). The FIEA does not stipulate any disclosure liabilities of the issuer or its directors on any misstatement in the marketing materials (such as roadshow materials) other than the Disclosure Documents; however, the issuer is not entirely free from such liability in connection with its marketing materials – general rules under the Civil Code or the Penal Code of Japan may apply.

To the extent an offering has been made pursuant to the Disclosure Documents, the underwriters are also liable for any untrue material statements or omissions of material statements in the Disclosure Documents, subject to certain defences (such as due diligence).

#### Civil liability

Civil liability applies to the issuer and the Directors in relation to both initial and secondary investors of the bonds, in connection with untrue material statements or omissions of material statements in the Disclosure Documents, unless they can prove that (i) the relevant investor was aware of the untrue material statements or omissions of material statements when the investor purchased the bonds, or (ii) (in the case of the issuer) such untrue material statements or omissions of material statements were not intentionally or negligently made by the issuer, or (iii) (in the case of the Directors) (a) they were not aware of such untrue material statements or omission of material statements, and (b) it was not possible to know of such untrue material statements or omission of material statements even if they had taken due care. The amount of



damages payable by the issuer will be calculated pursuant to the FIEA, so the investors do not need to prove the actual amount of damages.

### **Criminal liability**

Criminal liability applies to the issuer and the Providers or Publishers of the Disclosure Documents in connection with untrue material statements which have been fraudulently included in these documents. The issuer may be liable for a fine of up to ¥0.7 billion. The Providers or Publishers may be liable for a fine of up to ¥10 million and/or imprisonment of up to 10 years.

### **Administrative monetary penalties**

Administrative monetary penalties can be imposed by the Japanese regulatory authorities on the issuer for untrue material statements or omission of material statements in the Disclosure Documents. The amount of the penalty will be 2.25% of the issue amount of the Bonds.

### **Liability for "gun jumping"**

Either the Programme Information (for a programme listing) or the Specified Securities Information (for a standalone listing) must be published at the TSE's website prior to the commencement of any solicitation, marketing or offering of the bonds in Japan. Issuers and underwriters who fail to comply with the above rule and "gun jump" an offer may have criminal liabilities and administrative monetary penalties imposed on them.

## **Continuous obligations**

Following the issuance of the bonds, the issuer is obliged to file the following for continuous disclosure purposes:

- Any amendments to the Specified Securities Information for one year starting on the date of its publication.
- Any amendments to the Programme Information for one year starting on the date of its publication (note that the TSE does not currently have mechanisms for a withdrawal of a programme).
- The Issuer Filing Information (as explained below) and any amendments thereto.
- Timely disclosure documents (as explained below).

All of these documents can be in English or Japanese.

The issuer's continuous disclosure obligations in Japan relating to the Issuer Filing Information and timely disclosure documents will cease when none of the relevant bonds are outstanding or listed on the TOKYO PRO-BOND Market.

### **Amendments to the filings**

Although the FIEA and Listing Regulations specify the method for the issuer to amend the contents of the Specified Securities Information, the Programme Information and the Issuer Filing Information, the thresholds for filing and publishing the amendments are not provided (unlike, for example, the numerical thresholds provided for an "extraordinary report" filing for a Japanese FSA registrant issuer). Basically, the issuer needs to file and publish an amendment when it thinks it is necessary. In general, we believe that in addition to any transaction-related amendment to the Specified Securities Information, an amendment filing should be considered when the issuer issues a supplement to its MTN programme base prospectus. In addition, if the issuer uses the relevant text of its MTN programme base prospectus as corporate information in the Programme Information or Specified Securities Information, or uses its MTN programme base prospectus with a wrapper for the purposes of the TOKYO PRO-BOND Market listing, it is likely that an amendment thereto should be filed when there is an annual update of the MTN programme, in order to update all information therein.

### **Issuer Filing Information**

The "**Issuer Filing Information**" is an equivalent to the annual report which the issuer publishes in its home jurisdiction. The obligation to file this will be imposed on the issuer only after it has listed an actual issue on the TOKYO PRO-BOND Market; in other words, if only a programme listing has been obtained (but no drawdown has been listed on the TOKYO PRO-BOND Market), the issuer does not need to file or publish its Issuer Filing Information.

While the TSE has published a prescribed form of the Issuer Filing Information<sup>3</sup>, the issuer does not necessarily need to adhere to such form, and can instead prepare it by using sections of its annual report prepared in English if so permitted by

<sup>3</sup> The prescribed form of the Issuer Filing Information consists of (i) financial highlights for the most recent three years, (ii) business description, (iii) description of affiliated companies and (iv) the consolidated financial statements for the latest completed fiscal year and the audit report in respect thereof.

the TSE. If the issuer wishes to use its annual report prepared in its home jurisdiction, the TSE will request the issuer to confirm that such annual report has been prepared in accordance with the relevant laws and regulations applicable in such jurisdiction (e.g. for issuers with shares listed on an EU regulated market, it will normally be preparing annual reports pursuant to the EU Transparency Directive).

Although the Listing Regulations require the Issuer Filing Information to be filed within three months after the end of the relevant fiscal year, the TSE is likely to give an extension to an issuer if it applies for such extension with rational reasoning. For example, if the issuer is able to explain to the TSE that the deadline for the filing of its annual report in its own jurisdiction under the applicable rules is later than three months after the end of the fiscal year (e.g. under the EU Transparency Directive, an issuer must publish a directive-compliant annual report within four months of the end of the fiscal year), then this will be considered as a sufficiently rational reason for an extension to be granted.

## Timely disclosure

In addition to the amendments to the filings mentioned above, the issuer must also make timely disclosure in cases such as dissolutions, bankruptcies and default on the bonds. This, however, will be exempted if the issuer has its shares listed on a Japanese stock exchange, or if the issuer is a wholly-owned subsidiary of such listed company.

## Disclosure liability for continuous disclosure

Civil, criminal and/or administrative (including those imposed by the TSE) liabilities will apply in connection with the continuous disclosure documents as well as administrative penalties for failing to file such documents.

## Delisting

A credit rating downgrade does not trigger a delisting.

The Bonds will be delisted when, among other things:

- the bonds mature, or are otherwise redeemed in full;
- any material misstatement is found in the Specified Securities Information, the Issuer Filing Information or (if applicable) the Annual Securities Report (the annual report filed in accordance with Japanese regulations in respect of certain Japanese FSA registrant issuers);
- the bonds become due and payable by reason of default; or
- The TSE has decided to delist the Bonds for any other reason.

There is currently no method for the issuer to apply to have its programme or bonds delisted.

## Recent listing – The Metropolis of Tokyo

In May 2015, The Metropolis of Tokyo issued US\$1 billion in principal amount of foreign currency bonds, and for the first time listed such eurobonds not only on the Regulated Market of the London Stock Exchange, where it had traditionally sought its listing, but also on the TOKYO PRO-BOND Market. This forms part of the Tokyo Metropolitan Government's "Initiatives for the Tokyo Global Financial Center", which aim to reinstate Tokyo as a global financial centre in order to revitalise Tokyo and the Japanese economy<sup>4</sup>.

The transaction was in many a "first": it was the first Japanese issuer to list an issue on the TOKYO PRO-BOND Market; it was the first non-Japanese Yen bond to be listed on the TOKYO PRO-BOND Market; and, as mentioned above, it was the first time that the issuer obtained a dual listing. There were some distinctive features, some of which are mentioned below:

- The Metropolis of Tokyo is a municipal issuer, and is, as such, exempt from the disclosure requirements under the FIEA when making offerings of bonds in Japan. The issuer's filings made for the purposes of the TOKYO PRO-BOND Market listing track the filing made in the UK with regard to the London listing and therefore contains a certain amount of issuer-related disclosure; but as the issuer is a disclosure-exempt issuer in Japan, such disclosure comprises voluntary disclosure for the purposes of the TOKYO PRO-BOND Market listing.

<sup>4</sup> See announcements made by the Tokyo Metropolitan Government and Japan Exchange Group, Inc. for further background: <http://www.jpix.co.jp/english/corporate/news-releases/0060/b5b4pj000000ko7m-att/b5b4pj000000ko9e.pdf>, <http://www.jpix.co.jp/english/corporate/news-releases/0060/b5b4pj000000ko7m-att/b5b4pj000000ko9o.pdf>, <http://www.jpix.co.jp/english/corporate/news-releases/0060/b5b4pj000000ko7m-att/b5b4pj000000ko9i.pdf>.

- The phrase "specified securities information" is a defined term under the FIEA, and disclosure liabilities generally attach to it. The use of the term was therefore specifically avoided for the purposes of the transaction (and thus the document usually called "Specified Securities Information" referred to in "— Listing logistics — Filing and disclosure documents" above has been called by another name).
- Until this transaction, all English/New York law-governed programme listings on the TOKYO PRO-BOND Market had taken the form of existing MTN programmes being listed with a wrapper for the TOKYO PRO-BOND Market listing. The Programme Information for this transaction more resembles the "Samurai Bond-Alternative Listing" type documentation (with indicative terms and conditions of the Bonds (with the pricing terms being in "blobs") and issuer-related disclosures), while the bonds are governed not by Japanese law but by English law.

The transaction gained some media attention upon its closing, with the Governor of Tokyo and the Japan Exchange Group making statements regarding the listing at a press conference held at the Exchange. It is hoped that the transaction, together with other factors such as Development Bank of Japan Inc.'s plans regarding investment in bonds listed on this market<sup>5</sup>, will help further raise the profile of the TOKYO PRO-BOND Market and lead to greater activity with regard to listings on this market.

***Clifford Chance Tokyo acted as legal advisers to ING Bank N.V., Banco Santander-Chile and First Gulf Bank P.J.S.C. in respect of their respective programme and drawdown listings on the TOKYO PRO-BOND Market, and to Deutsche Pfandbriefbank AG in respect of its programme listing on the TOKYO PRO-BOND Market. Clifford Chance Tokyo also acted on the dual listing of The Metropolis of Tokyo's eurodollar bonds on the Regulated Market of the London Stock Exchange and the TOKYO PRO-BOND Market.***

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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<sup>5</sup> See DBJ's Annual Report & CSR Report 2014 ([http://www.dbj.jp/en/pdf/CSR\\_disclo/2014/2014\\_all.pdf](http://www.dbj.jp/en/pdf/CSR_disclo/2014/2014_all.pdf)), page 71.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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