

Amendments to the Financial Investment Services and Capital Markets Act - Collective Investments

Various amendments to the Financial Investment Services and Capital Markets Act (the “Capital Markets Act”) were recently promulgated on May 28, 2013. This legal update is the first of a series of updates that will summarize the amendments made to the Capital Markets Act and discuss the major issues relating to such amendments.

Unless otherwise specified in the amendments, the amended Capital Markets Act (the “Amended Act”) will come into force on August 29, 2013, which is the date falling three months from promulgation. For provisions of the Amended Act that will come into force on a separately specified date, we have made note of such dates in our discussion below.

The following is a summary of the amendments made to the collective investment provisions of the Capital Markets Act.

1. Amended Definition of “Collective Investments”

(Articles 6(5), 192(2) and 202(1) of the Amended Act and Articles 1 and 9 of the Addenda thereof)

Prior to the amendments to the Capital Markets Act, the term “collective investment” was defined as monies collected through solicitations for investment made to two or more persons; as such, regardless of actual investment, any solicitation for investment made to two or more persons was deemed a collective investment. Under the Amended Act, the term “collective investment” is now defined as monies collected from two or more investors, which means that there has to have been an actual investment by two or more investors to qualify as a collective investment.

As a result of the above change in definition, dissolution of a collective investment scheme will now be required where the number of investors is reduced to 1: which includes, with respect to a limited

investment company, a case where the number of partners, other than the general partner, is reduced to 1; with respect to a limited liability investment company, a case where the number of partners, other than the managing partner, is reduced to 1; and with respect to a limited investment partnership, a case where the total number of its limited partners is reduced to 1.

However, certain exceptional cases in which having a single investor will not lead to dissolution of the collective investment scheme will be specified in the Enforcement Decree.

The relevant amendments will come into force as of January 1, 2015, the amendment to the definition of “collective investment” will not affect a collective investment scheme in which the number of registered investors is already 1 as of January 1, 2015 (i.e., the dissolution requirement will not apply) as long as collective investment certificates are not newly issued by such collective investment scheme after January 1, 2015 (i.e., the effective date of the Amended Act).

2. Specified Fiduciary Duty in Collective Investment Manager’s Exercise of Voting Rights (Articles 87, 210 and 215 of the Amended Act)

The Amended Act now expressly provides for a specific fiduciary duty on the collective investment manager to exercise its voting rights in the best interests of the investors.

As for the disclosure requirements in respect of exercises of voting rights, the Amended Act appears to contain no substantial changes, except for the insertion of the obligation to “disclose the specific reasons for exercise of voting rights.”

3. Relaxation of Requirements for Beneficiaries’ and Partners’ Resolutions and Introduction of the Deemed Exercise of Voting Rights System (Articles 190, 201, 210, 215, 217-5, 218, 220 and 226 of the Amended Act, and Article 7 of the Addenda thereof)

The Amended Act abolishes the quorum requirement for the presence of at least one-half (1/2) of the total number of issued collective investment certificates at general meetings of beneficiaries of investment trusts, shareholders of investment companies, and partners of limited investment companies, limited investment partnerships and limited liability investment companies (collectively, “Beneficiaries’ Meetings”), for the adoption of resolutions at such Beneficiaries’ Meetings. The requirement for the adoption of resolutions at a Beneficiaries’ Meeting is now the affirmative vote of at least one-half (1/2) of the number of collective investment certificates with voting rights present at such Beneficiaries’ Meeting, representing at least one-fourth (1/4) of the total number of issued collective investment certificates.

Further, as regards matters to be resolved at Beneficiaries' Meetings which are set forth in the collective investment agreement (or trust deed), as opposed to those set forth in the Capital Markets Act, the requirement for the adoption of a resolution is the affirmative vote of at least one-half (1/2) of the number of collective investment certificates with voting rights present at the Beneficiaries' Meeting, representing at least one-fifth (1/5) of the total number of issued collective investment certificates. With respect to investment companies, the Existing Act already contains the same resolution requirements, and the Amended Act merely abolishes the quorum requirement for presence of investors holding, in aggregate, at least one-half (1/2) of the total number of issued shares. With respect to investment companies, limited investment companies, limited partnership investment companies and limited investment partnerships, the Amended Act abolishes the provisions requiring mutatis mutandis application of the provisions of the Commercial Code regarding special resolutions and adopts the provisions regarding matters to be resolved at Beneficiaries' Meetings which are set forth in the collective investment agreement (or trust deed).

In conjunction with the relaxation of existing quorum and resolution requirements, the Amended Act also contains provisions regarding the adjournment of Beneficiaries' Meetings and adoption of resolutions at such adjourned Beneficiaries' Meetings. If no resolution is adopted at a given Beneficiaries' Meeting, an adjourned Beneficiaries' Meeting must be convened within 2 weeks. The requirement for adoption of a resolution at such adjourned Beneficiaries' Meeting is the affirmative vote of at least one-half (1/2) of the number of collective investment certificates with voting rights present at the adjourned Beneficiaries' Meeting, representing at least one-eighth (1/8) (or one-tenth (1/10) for matters set forth in the collective investment agreement or trust deed) of the total number of issued collective investment certificates.

These amendments have been put in place to address the problem of Beneficiaries' Meetings being adjourned repeatedly without substantial decisions being made; it is hoped that the amendments will result in more efficiently run Beneficiaries' Meetings and facilitate the adoption of resolutions at Beneficiaries' Meetings.

In this regard, the Amended Act also introduces the deemed exercise of voting rights system, under which an investor who failed to attend a Beneficiaries' Meeting shall be deemed to have exercised his/her voting rights in a manner not affecting the resolutions adopted at such Beneficiaries' Meeting, subject to satisfaction of certain requirements, including that the method of deemed exercise of voting rights be set forth in the collective investment agreement (or trust deed).

The above amendments regarding Beneficiaries' Meetings are applicable to all general meetings of beneficiaries, adjourned general meetings of beneficiaries, general meetings of shareholders and general meetings of partners, at which resolutions will be adopted after August 29, 2013.

4. Change in Method of Adoption of Resolutions for Mergers of Small-sized Collective Investment Schemes (Proviso to Articles 193(2) and 191(1) and Proviso to Article 204(2) of the Amended Act)

Under the Amended Act, certain types of mergers prescribed by the Presidential Decree, including mergers of small-sized collective investment schemes which are considered unlikely to undermine sound trading practices, shall no longer be matters requiring approval by resolution adopted at a Beneficiaries' Meeting. An investor objecting to a proposed merger may request the collective investment manager to purchase the collective investment certificates held by such investor, in a manner set forth in the Presidential Decree to the Capital Markets Act.

It is anticipated that mergers subject to the above simplified decision-making process can be used as a means of dissolution of small-sized collective investment schemes.

5. Introduction of the Limited Liability Investment Company and the Limited Investment Partnership (Articles 217-2 through 217-7 and 218 through 223 of the Amended Act)

The Amended Act introduces new collective investment vehicles such as limited liability investment companies and limited investment partnerships, which are collective investment schemes structured as limited liability companies and limited partnerships, respectively. The Amended Act introduces the limited investment partnership to replace the investment partnership provided under the Existing Act, and replaces the provisions regarding investment partnerships under the Existing Act with provisions regarding limited investment partnerships. The limited liability investment company is a collective investment scheme which has been newly introduced in the Amended Act.

The relevant amended provisions took effect from May 28, 2013.

6. Summarized Prospectus (Articles 57, 123(1), 123(3), 124(1), 124(3) and 124(4) of the Amended Act, and Article 10 of the Addenda thereof)

The Amended Act requires the preparation and submission of both a full prospectus and a summarized prospectus with respect to collective investment certificates; provided, however, that a summarized prospectus may be delivered unless the investors request a full prospectus.

The summarized prospectus, which summarizes key information, is believed to help improve investors' understanding of the fund in question by enabling them to rely on the summarized prospectus for

substantive information required for their investment decisions.

Under the addenda of the Amended Act, provisions of the Existing Act will apply to registration statements, shelf registration statements, additional shelf registration statements, corrective registration statements, prospectuses and summarized prospectuses, which have been submitted prior to the effective date of the Amended Act in accordance with the Existing Act. Accordingly, collective investment schemes established under the Existing Act are not required to additionally provide a summarized prospectus, including for any registrations of amendments.

Should you have any questions regarding any of the foregoing, please feel free to contact us at any time.

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