

「Cross-Border Transactions and Extraterritorial Application of the FIEA」
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1 Basic matters concerning the scope of application of the FIEA (1)

(1) The “national jurisdiction”

- It is the authority to establish and enforce the national law.

(2) Categories of “national jurisdiction”

- The “prescriptive jurisdiction” (or the “jurisdiction of discipline”)

⇒ It concerns the establishment of laws.

- The “court’s jurisdiction”

⇒ It concerns judicial decisions of specific issues.

- The “enforcing jurisdiction”

⇒ It concerns the enforcement of laws.



1 Basic matters concerning the scope of application of the FIEA (2)

(3) Basic matters concerning the prescriptive jurisdiction of the FIEA

① The “territoriality principle”

● The “subjective territoriality principle”

⇒ The state where the actor exists may exercise jurisdiction.

● The “objective territoriality principle”

⇒ The state where the result occurs may exercise jurisdiction.

● The difference between the “act” and the “result” is not always clear.

② The “effect principle”

● We may exercise jurisdiction in the case where interests protected by laws are likely to be violated.

● It can be considered as a form of the “objective territoriality principle.”

③ The “amendment effect principle”

● While we are based on the “territoriality principle,” we adjust the scope of the application coupled with the “effect principle” in the case where we can achieve the purpose of the FIEA sufficiently.

● It is the approach of the financial administration.



1 Basic matters concerning the scope of application of the FIEA (3)

(4) Books for reference

- Interim Note Concerning Application of Finance-related Laws and Regulations to Cross-border Activity, Particularly Issues under the Securities and Exchange Act,” issued by the Financial Law Board (September 13, 2002).
- “Systems, etc. of the Securities Brokers and the Major Shareholders under the Securities and Exchange Act, Revision of the Securities and Exchange Act, etc. in 2003,” issued by Yasufumi Takahashi (Okura Zaimu Kyokai, 2004).
- “Outline of the comments and Financial Services Agency’s views on the comments,” issued by JFSA (July 31, 2007).
- “International scope of the application of the FIEA,” the University of Tokyo Law Review Vol.6, issued by Naohiko Matsuo (September, 2011).



2 Principle concerning the scope of application of the FIEA (1)

(1) Principle concerning the scope of application of the FIEA

- FIEA is essentially applied in cross-border transactions.
- FIEA is applied in the case where investors are residents.
- FIEA may be applied in the case where investors are non-residents.
 - ⇒ The “professional investors, etc.” that are subject to the private placement with professional investors (Article 2, paragraph (3), item (ii), sub-item (b)(2) of the FIEA) include non-residents.
 - ⇒ The “professional investors” (Article 2, paragraph (31) of the FIEA) include foreign juridical persons.
- FIEA may be applied in the case where operators are non-residents.
 - ⇒ The “foreign securities broker” (Article 58-2 of the FIEA).



2 Principles concerning the scope of the application of the FIEA (2)

(2) Four types of transactions

- Classified into four types of transaction depending on the State where the actor exists.
- “Inward–inward”, “Inward–outward”, “Outward–inward” and “Outward–outward”
- However, the lines between each type of transaction is not necessarily clear.

(3) The “inward–inward” type of transaction

- The inward actor acts in Japan.
- It is subject to the FIEA under the “subjective territoriality principle”.



2 Principles concerning the scope of the application of the FIEA (3)

(4) The “inward–outward” type of transaction

- The inward actor starts acting in Japan and the results arise outside the border of Japan.
- It is subject to the FIEA under the “subjective territoriality principle”.

(5) The “outward–inward” type of transaction

- The outward actor starts acting outside Japan and the results arise inside Japan.
- It is subject to the FIEA under the “objective territoriality principle”.



2 Principles concerning the scope of the application of the FIEA (4)

(6) The “outward-outward” type of transaction (1)

- An outward actor acts with the outward actor outside Japan and the results also arise outside Japan.
- It is basically not subject to the FIEA under the “territoriality principle”.
- The FIEA should apply only in exceptional cases where it is justified from the perspective of the “effect principle” such as cases where it is accepted that the purpose of the transaction is the circumvention of the application of the FIEA.



2 Principles concerning the scope of the application of the FIEA (5)

(6) The “outward-outward” type of transaction (2)

- Acts outside Japan by a branch office outside Japan of financial instruments business operators, etc. should also be treated as “outward-outward” transactions the same as the acts outside Japan by local juridical persons.
 - ⇒ In the case of the underwriting of securities conducted outside Japan issued by foreign juridical persons by a branch outside Japan of a financial instruments business operator, etc.
 - ⇒ However, it is subject to the regulations on the scope of businesses of financial instruments business operators, etc.
- The FSA’s responses to public comments (dated December 21, 2010)
 - ⇒ “If inward financial instruments business operators conduct the management of a foreign investment trust through a foreign branch which is the same juridical personality, the inward financial instruments business operators themselves are subject to the FIEA as persons who engage in investment management business.”
 - ⇒ However, this should be only applied to a limited extent.



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (1)

(1) Overview

- Similar views as those concerning the scope of the application of the FIEA

(2) Volcker Rule (Section 619) (1)

① Prohibitions

- to engage in proprietary trading
- to acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (2)

(2) Volcker Rule (Section 619) (2)

② Permitted Activities for proprietary trading

- proprietary trading conducted by a banking entity, provided that the trading occurs solely outside of the United States and that the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States
- Joint proposed rules (October 2011)
 - ⇒ No party to the purchase or sale is a resident of the United States.
 - ⇒ No personnel of the covered banking entity who is directly involved in the purchase or sales is physically located in the United States.
 - ⇒ The purchase or sale is executed wholly outside of the United States.



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (3)

(2) Volcker Rule (Section 619) (3)

③ Permitted activities with regard to funds

- acquisition or retention of any equity, partnership, or other ownership interest in, or the sponsorship of, a hedge fund or a private equity fund by a banking entity, provided that no ownership interest in such hedge fund or private equity fund is offered for sale or sold to a resident of the United, and that the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States
- Joint proposed rules (October 2011)
 - ⇒ No subsidiary, affiliate, or employee of the covered banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States or in one or more States.



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (4)

(3) Regulations of OTC swaps markets (1)

① Section 722(d)

- The provisions shall not apply to activities outside of the United States unless those activities—
 - ⇒ have a direct and significant connection with activities in, or effect, commerce of the United States; or
 - ⇒ contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (5)

(3) Regulations of OTC swaps markets (2)

② CFTC: Cross–Border Application of Certain Swaps Provisions of the Commodities Exchange Act; Proposed Rule (July 2012)

- A foreign branch or agency of a U.S. person would be considered a U.S. person.
- A foreign affiliate or subsidiary of a U.S. person would be considered a non–U.S. person.
- A direct and significant connection with activities in, or effects on, U.S. commerce would exist when non–U.S. persons conduct more than a de minimis level of swap dealing activities with U.S. persons.



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (6)

(4) Exemption for foreign private advisers (1)

① Definition of a foreign private adviser

- any investment adviser that has no place of business in the United States;
- has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser;
- has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser;
- does not hold itself out generally to the public in the United States as an investment adviser



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (7)

(4) Exemption for foreign private advisers (2)

② Implication

- It assumes applying the U.S. Act to investment advisers outside the U.S., concerning private funds outside U.S. invested by clients and investors in the U.S.



3 Matters concerning the extraterritorial application of the U.S. Dodd–Frank Act (8)

(5) Extraterritorial application of 10(b) (1)

① U.S. Supreme Court: Morrison v. National Australia Bank (June 2010)

- Extraterritorial application of Section 10(b) of the Securities and Exchange Act of 1934 with regard to private rights of action

- Tests by the Second Circuit

 - ⇒ Effect test: whether the wrongful conduct had a substantial effect in the United States or upon United States citizens

 - ⇒ Conduct test: whether the wrongful conduct occurred in the United States

- Transactional test by the Supreme Court

 - ⇒ extending only to transactions in securities listed on domestic exchanges and domestic transaction in other securities



3 Matters concerning extraterritorial application of the U.S. Dodd–Frank Act (9)

(5) Extraterritorial application of 10(b) (2)

② Lower courts' decisions denying 10(b) applications after Morrison

- Case where sales and purchase outside the United States of foreign securities listed on an exchange within the United States.
- Case where a purchase order of foreign securities listed on a foreign exchange is made within the United States.
- Case where a transaction confirmation document of a securities derivative transaction that refers to foreign shares transacted in a foreign exchange is signed within the United States.



3 Matters concerning extraterritorial application of the U.S. Dodd–Frank Act (10)

(5) Extraterritorial application of 10(b) (3)

③ Section 929P(b) of the Dodd–Frank Act

- Extraterritorial jurisdiction of an action or proceeding brought or instituted by the SEC or the United States alleging a violation of the antifraud provisions involving:
 - ⇒ conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside and involves only foreign investors.
 - ⇒ conduct occurring outside the United States that has a foreseeable substantial effect within the United States.



4 Disclosure regulation cases (1)

(1) Basic concepts under disclosure regulation

- Concept of “public offering of securities” or “private placement of securities” (Article 2, paragraph (3) of the FIEA).
 - ⇒ “Solicitation for acquisition”
- Concept of “secondary distribution of securities” (Article 2, paragraph (4) of the FIEA).
 - ⇒ “Solicitation for selling, etc.”
 - ⇒ “Applications to sell” or “solicitations of an application to purchase.”
- The distinction between them: “newly issued securities” or “already-issued securities.”



4 Disclosure regulation cases (2)

(2) Concept of “solicitation” under disclosure regulation

- There is no definition of the concept of “solicitation.”
- Interpretation that it is “an act that increases interest of investors pertaining to certain securities and promotes acquisition or purchase thereof.” [Professor Katsuro Kanzaki]
- Broad concept that may include the provision of information.
 - ⇒ Includes document distribution, oral explanations and advertising (B4-1 of the Corporate Disclosure Guideline).
 - ⇒ Broader concept than the concept of “solicitation” under business regulations. (Basically, it does not include the mere provision of information.)
 - ⇒ Care must be taken in judging that there is no “solicitation.”



4 Disclosure regulation cases (3)

(3) Application of the FIEA to “solicitation”

- Cases where solicitation occurs within Japan in principle.
- Even a non-resident is subject to application when an act of solicitation occurs within Japan.
- When an act of solicitation occurs outside Japan, it is subject to regulation at the place of solicitation.
 - ⇒ Judged by whether the securities acquired by a non-resident will circulate in Japan.
 - ⇒ Cases where a telephone solicitation of foreign-issued securities occurs towards a non-resident living in a foreign country.
- Whether the person who receives the securities is a resident or a non-resident is not a standard for this point.
- Restrictions on resale based on Japanese law are valid for solicitations that occur within Japan.
[Answer to public comments by JFSA (December 28, 2009) No.28, No.37 and others.]



4 Disclosure regulation cases (4)

(4) “Inward-inward” type of transaction

- Cases where a person subject to an act of another person within Japan is a non-resident, but exists within Japan.
⇒ Falls under the category of “inward-inward” type of transaction.
- Judgment of whether a transaction falls under the category of “public offering of securities.”
⇒ Non-residents who received solicitations for acquisition within Japan are included in the number of persons subject to the solicitation for acquisition.



4 Disclosure regulation cases (5)

(5) “Inward-outward” type of transaction (1)

- Where a public offering or a secondary offering of securities (the total value of which is 100 million yen or more) by issuers who are companies obliged to submit an annual securities report begins outside Japan
 - ⇒ A ground for submitting an extraordinary report.
- one-day seasoning
 - ⇒ A solicitation begins within Japan one day after an issuance outside Japan (handled as already-issued securities).
 - ⇒ Issues regarding the time of an act of solicitation
 - ⇒ In cases of issuance after solicitation begins in Japan, handled as newly-issued securities
 - ⇒ However, there are in fact cases where solicitation to institutional investors within Japan would begin before the issuance of securities?
 - ⇒ In the Euro-market, an act of solicitation to investors begins on the gray market when securities are not yet issued (transactions conditioned on an issuance of securities) [Mr. Satoshi Nakamura and others]
 - ⇒ Recognition as a “solicitation for selling, etc.” of already-issued securities with conditions of issuance of securities?



4 Disclosure regulation cases (6)

(6) “Outward-inward” type of transaction (1)

- Transfer of securities with a restriction on resale to non-residents.
 - ⇒ The restriction on resale will be extinguished.
 - ⇒ No notification of solicitation (Article 23-13 of the FIEA) is required.
- Transfer to residents after transferring to non-residents.
 - ⇒ The restriction on resale persists.
 - ⇒ The obligation for notification of solicitation is revived.



5 Regulations on Foreign Securities Brokers (1)

(1) Exclusion from application of an obligation for registration of a foreign securities broker

- Proviso to Article 58-2 of the FIEA

(2) Concept of a “solicitation”

- Distinction between a “solicitation” and a “provision of information”

- ⇒ Abolition of the concept of “acts similar to solicitation” in the former Foreign Securities Broker Act

- ⇒ Advertisements, holding of a brief session, provisions of information or acts similar thereto

- Distinction between “solicitation” and “introduction”

- ⇒ VII-3-1(2)(ii) and VIII-2-5(1) of the Supervisory Guideline



5 Regulations on Foreign Securities Brokers (2)

(3) Exclusion from the application of regulations on a securities-related business

- Exclusion from the application of regulations in cases of conducting certain activity from outside Japan “without any solicitation being made” regarding acts falling under the category of securities-related business (Article 17-3, item (ii) of the Cabinet Order for the Implementation of the FIEA)
- Cross-border transactions through the internet, etc., by a foreign securities broker (X-1-2 of the Supervisory Guideline)
 - ⇒ Acts of advertising, etc., generally fall under the category of an act of “solicitation.”
 - ⇒ Conservative interpretation



5 Regulations on Foreign Securities Brokers (3)

- (4) Exclusion from the application of regulations pertaining to wholesale underwriting businesses
- Details of a wholesale underwriting business
 - ⇒ Consultations about determining the details of a wholesale underwriting business
 - ⇒ Conclusion of the wholesale underwriting contract (participation in the wholesale underwriting contract)
 - ⇒ Implementation of the wholesale underwriting contract
 - Exclusion from application only pertaining to discussions about determining the details of the wholesale underwriting business “conducted within Japan” (Article 17-3, item (iii) of the Cabinet Order for the Implementation of the FIEA)
 - Permission system for part of the underwriting business conducted by foreign securities brokers
 - ⇒ Exclusion from application only pertaining to participation in the wholesale underwriting contract (Article 59, paragraph (1) of the FIEA, Article 17-4 of the Cabinet Order for the Implementation of the FIEA)



6 Conclusion

Determined on a case by case basis

I would like to thank you
all for listening so attentively.



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He graduated from the Faculty of Law of the University of Tokyo (LL.B.) in 1986, and the U.S. Harvard Law School (LL.M.) in 1989. He has published many books and articles, in particular on the FIEA. His latest Japanese books include “Q&A American Financial Reform Act – All about the Dodd-Frank Act” in 2010 and “Financial Instruments and Exchange Act” in 2011.

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