

Samurai Bonds

Non-Japanese issuers entering the Japanese debt capital markets have a variety of funding options, one of which is issuing Japanese Yen denominated "Samurai Bonds". Appetite for Samurai Bonds remains strong and the public Japanese Yen market continues to provide a sound funding alternative.

This briefing provides a general overview of a Samurai Bonds transaction. Features of Samurai Bonds as well as issues to be considered are discussed.

What are Samurai Bonds?

"**Samurai Bonds**" are (a) Japanese law governed debt securities, (b) denominated in Japanese Yen, (c) publicly offered on a primary basis, (e) by a non Japanese issuer, (f) mainly targeting Japanese investors. Typically, Samurai Bonds are non-guaranteed straight bonds and not listed. The denomination of Samurai Bonds is often 100 million Japanese Yen per bond and institutional investors are targeted. However, lower-denominated Samurai Bonds may be offered to retail investors. Samurai Bonds are dematerialised and electronically settled and issued under the "**Book-Entry Transfer System**" of the Japan Securities Depository Center, Inc. ("**JASDEC**", the Japanese equivalent of Euroclear/Clearstream, Luxembourg).

Are any securities filings required to issue Samurai Bonds?

Yes, securities filings for offering of Samurai Bonds must be made with the Japanese regulatory authorities (the Director of the Kanto Local Financial Bureau, an arm of Financial Services Agency) via EDINET (an electronic filing system equivalent to EDGAR in the United States). The forms for securities filings are prescribed by the applicable Japanese laws and regulations and certain information not required to be disclosed in the issuer's home country may need to be disclosed in Japan.

What is the securities filing document required for a first time offering of Samurai Bonds?

Traditionally, first time offerings were only allowed by filing a Japanese language Securities Registration Statement ("**SRS**"). Since 1 April 2012, non-Japanese issuers can file a Foreign Company Securities Registration Statement ("**Foreign Company SRS**"), partly in English, instead of an all Japanese SRS.

SRS in Japanese – for "Classic Samurai Bonds"

A first time issuer must file a Japanese language SRS to start the marketing of the Samurai Bonds. Only after the filing has become effective (typically, on the 16th day after the filing of the SRS), can the issuer issue and sell the Samurai Bonds.

Key issues

- What are Samurai Bonds?
- Are any securities filings required to issue Samurai Bonds?
- Is a prospectus required to issue Samurai Bonds?
- What are the transaction documents required to issue Samurai Bonds?
- To whom can Samurai Bonds be issued?
- What other issues should be considered in connection with a Samurai Bond offering?
- Is there an alternative to Samurai Bonds?

The SRS needs to include corporate information of the issuing entity (and not of its holding company, even if the issuing entity is a subsidiary of a holding company) and consists of (a) the offering terms and the terms and conditions of the Samurai Bonds (collectively, "**Securities Information**"), (b) corporate information of the issuer, and (c) other specifically required information. The corporate information must include, among other things, the issuer's audited financial statements for the most recent five fiscal years together with audit reports thereon and, if applicable, the issuer's interim financial statements.

Because a Japanese translation of the financial statements must be prepared as well, the preparation of the SRS is the most time-consuming aspect of a "debut Samurai Bond offering".

Foreign Company SRS – for "English Disclosure Samurai Bonds"¹

Starting on 1 April 2012, a non-Japanese issuer may choose to prepare and file a Foreign Company SRS, instead of a Japanese language SRS, in order to offer Samurai Bonds.

A Foreign Company SRS consists of (a) the Securities Information in Japanese and (b) the issuer's continuous disclosure documents in English (such as Annual or Interim Reports) or offering documents in English ("**English Documents**").

Additionally, non-Japanese issuers filing a Foreign Company SRS must prepare the following supplemental documents:

- (a) a Japanese language summary of requisite material information contained in the relevant English Documents, or, if any requisite material information is not contained in the relevant English Documents, a separate document in Japanese or in English with an accompanying Japanese summary disclosing such information. "**Requisite material information**" means information on the issuer's (i) business activities, (ii) key financial information over the most recent five years, (iii) risk factors and (iv) other corporate information, which the issuer considers to be necessary and appropriate to be disclosed in Japanese for protecting the public interest or investors. Unlike the prospectus requirements in the EU, there is no limitation on the length of this summary;
- (b) a document (in Japanese or English) setting out other corporate information (which the issuer would have been required to disclose if it were filing an all-Japanese SRS) not covered by the relevant English Documents; and
- (c) a two-column table setting out (i) items required to be disclosed in an all-Japanese SRS, in one column and (ii) where the corresponding information can be found in the relevant English Documents, in the other.

For the different features of Classic Samurai Bonds and English Disclosure Samurai Bonds, please also refer to the Annex hereto.

What is a Japanese Shelf?

After at least one year from a public offering in Japan (of Samurai Bonds or otherwise), the issuer becomes eligible, provided that certain other criteria are met, to establish a Japanese shelf programme and issue Samurai Bonds thereunder in a speedier and more flexible way than by filing an SRS or a Foreign Company SRS.

An eligible issuer may file a Japanese language shelf registration statement ("**Japanese Shelf**") with a term of either one or two years. Marketing can commence at any time after the Japanese Shelf is filed.

For each issuance of Samurai Bonds under the Japanese Shelf, the issuer must file a Japanese language supplement thereto (in which the Securities Information is set out) and Samurai Bonds can be offered and issued immediately thereafter.

1 For further information on English language disclosure in Japan, please refer to our February 2012 Briefing Note entitled "English language disclosure for foreign issuers in Japan – how useful is the expanded scope in practice?" http://www.cliffordchance.com/publicationviews/publications/2012/02/english_language_disclosure_for_foreign_issuer.html. In particular, interested issuers should note the potential differences in pricing between Classic Samurai Bonds and English Disclosure Samurai Bonds.

Is a prospectus required to issue Samurai Bonds?

Yes, in addition to the requisite securities filing, a prospectus must be prepared, printed and delivered to the investors in connection with each offering. The content of the prospectus is virtually the same as that of the securities filing document.

What are the transaction documents required to issue Samurai Bonds?

The following documents are required for a Samurai Bonds offering. Except for the peripheral documents, these documents are drafted in English first (to be reviewed by the issuer) and then translated into Japanese. The Japanese versions are the binding documents. The Conditions of the Bonds, the Subscription Agreements and the Fiscal Agency Agreements will be made public (as attachments to the securities filings or as part of the SRS itself).

Conditions of the Bonds (the terms and conditions of the Samurai Bonds)

The terms and conditions are very much standardised in the Samurai market, but certain terms such as the negative pledge and events of default can be drafted to conform with the issuer's existing debt issuance documentation. For example, the issuer's MTN programme documents can be used as the basis for drafting the Conditions of the Bonds.

Subscription Agreement (per tranche)

A Subscription Agreement will be entered into by the issuer and the managers who underwrite the Samurai Bonds. Again, while there is some standardisation in the market, issuers may wish to negotiate certain of the clauses to which it is sensitive (such as certain of the representations and warranties) to conform with its existing debt issuance documentation.

Fiscal Agency Agreement (per tranche)

A Fiscal Agency Agreement will be entered into by the issuer and the fiscal agent which acts as the issuer's fiscal, issuing, paying and (for floating rate bonds) reference agent. The Fiscal Agency Agreement is normally in the standard form provided by the relevant fiscal agent.

Other

Various other peripheral documents and letters (e.g. process agent appointment letter, corporate authorisation documents, standard form letters relating to the application to EDINET and JASDEC and so on) must also be prepared. Further, legal counsels will be required to provide relevant legal opinions, and the issuer's external auditors will be required to provide comfort letters. Because a trustee structure is not common in the Samurai market, no trust deeds are executed.

To whom can Samurai Bonds be issued?

Samurai Bonds may be issued to institutional or retail investors. Usually, Samurai Bonds are offered to institutional investors and denominated at 100 million Japanese Yen per bond. If retail investors are targeted and the denomination is set at lower than 100 million Japanese Yen per bond, a Commissioned Company for Bondholders is normally appointed. The Commissioned Company for Bondholders acts on behalf of the Bondholders in the case of a default by the issuer (in a manner somewhat similar to trustees in Eurobonds with a trustee structure).

What other issues should be considered in connection with a Samurai Bond offering?

Timetable

The preparation for a first time offering may take much longer than for an offering under a Japanese Shelf, because the following issues need to be dealt with.

Negotiation and Discussion for Approval of GAAP

The first step is to request the regulator to approve the Generally Accepted Accounting Principles ("**GAAP**") pursuant to which the issuer's accounting and financial statements are compiled. The jurisdiction of the issuer's incorporation (and whether or not issuers of the same jurisdiction have already been "cleared" by the regulator previously) is also considered. If there are precedents where such GAAP/jurisdiction was accepted (e.g. U.S. GAAP used by an U.S. issuer, or EU IFRS used by an EU member state issuer) or if the issuer is registered with the U.S. SEC, the process will be fairly easy (provided that the issuer's auditor and/or its Japanese office are able to respond to inquiries from the regulator in a timely manner). On the other hand, this could stretch to several months if the regulator is not familiar with the relevant GAAP/jurisdiction.

Negotiation and Discussion for Approval of a Foreign Company SRS

Where the issuer opts to file a Foreign Company SRS, an approval from the relevant authorities must be obtained beforehand.

Documentation Process

Assuming that there are appropriate existing English language disclosure materials, it would usually take around six to eight weeks to prepare an SRS. However, the actual timing depends on other factors such as how quickly the issuer can respond to queries and provide required information. If there is no appropriate existing disclosure, the documentation process can take much longer.

After the securities filing

The filing of an SRS or Foreign Company SRS will typically become effective on the 16th day after filing. In practice, some amendments thereto (to disclose final pricing terms and other information) will need to be filed during such waiting period. The contractual documents will be executed immediately after and on the same day as when the Samurai Bonds are priced. The Samurai Bonds are issued on the closing date upon receipt of subscription moneys by the issuer.

Differential treatment of bondholders

All bondholders of a tranche of Samurai Bonds need to be treated equally under JASDEC's book-entry transfer system. For example, even if withholding tax is imposed on part of the bondholders, their Samurai Bonds cannot be dealt with differently by JASDEC from the other Samurai Bonds.

Disclosure liabilities in connection with the public offering of Samurai Bonds

The issuer and its directors may be subject to civil, administrative and/or criminal liability in connection with the disclosure documents for the public offering of Samurai Bonds. In this briefing, we focus on the liabilities imposed by the Financial Instruments and Exchange Act of Japan (Act no. 25 of 1948, as amended, the "**FIEA**").

Civil liability applies to the issuer and its directors in relation to both initial and secondary investors of the Samurai Bonds, in connection with untrue material statements or omissions of material statements in the securities filing documents, prospectus and any amendments or supplements to these documents and marketing documents such as road show materials (whether or not prepared in Japanese), unless they can prove that the relevant investor was aware of the untrue material statements or omissions of material statements when the investor purchased the Samurai Bonds (or, in case of the directors, unless they can prove that (i) they were not aware of such untrue material statements or omission of material

statements, and (ii) 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 and the investors do not need to prove the actual amount of damages.

Criminal liability applies to the issuer and the submitter of the securities filing documents, any supplements or amendments and any ancillary documents thereto, in connection with untrue material statements included fraudulently in these documents. The issuer may be liable for a fine of up to 700,000,000 Japanese Yen. The submitters may be liable for a fine of up to 10,000,000 Japanese Yen and/or imprisonment of up to 10 years. There is no official definition of "submitters", but the chief executive officer and chairman of the issuer are generally deemed to be "submitters". Other persons who are named as a "representative" on the cover of the filing documents, such as the group finance director, may also be considered to be a "submitter".

Administrative monetary penalties can be imposed by the Japanese authorities on the issuer for untrue material statements or omission of material statements in the prospectus, securities filing documents and the ancillary documents thereto. The amount of the fine will be 2.25% of the issuance amount of the Samurai Bonds.

Continuous disclosure obligations

Even though Samurai Bonds are typically not listed, continuous disclosure obligations apply to the issuer during the life of the Samurai Bonds and require annual and semi-annual filings in Japanese or partially in English, pursuant to prescribed time limits – for Japanese language filings, six months from the end of the financial year for annual filings and three months from the end of the first half of the financial year for semi-annual filings (for filings in English, four months from the financial year end and three months from the end of the first half of the financial year, respectively). Additionally, extraordinary filings in Japanese or partially in English need to be made, without delay after the occurrence of prescribed events.

Civil, criminal and/or administrative liability will apply in connection with the continuous disclosure documents as well as applicable penalties for not filing such documents.

The issuer's continuous disclosure obligations in Japan will cease when there are no more outstanding Samurai Bonds, assuming that, in Japan, the issuer has conducted no public offerings other than for the Samurai Bonds and has no securities listed.

Is there an alternative to Samurai Bonds?

Yes, an issuer has the option to issue and list Japanese Yen denominated bonds on the TOKYO PRO-BOND Market, established by TOKYO AIM (a joint venture between the Tokyo Stock Exchange and London Stock Exchange).

Such bonds can only be acquired by Japanese professional investors or non-residents of Japan. As a result, the transfer of the bonds is restricted (i.e. only transferable to professional investors or non-residents of Japan), as opposed to the Samurai Bonds which are freely transferable. Further, unlike Samurai Bonds, the offering documents and the transaction documents can all be in English. The forms of the necessary disclosure documents also allow very flexible disclosure. For other features of TOKYO PRO-BOND Market listed bonds, please refer to the Annex hereto.

This alternative may be of particular interest to non-Japanese issuers offering bonds to Japanese investors for the first time, to the extent that the narrower range of target investors and the restriction of transferability are not material issues for such issuers. However, an interested issuer should check the difference, if any, between the pricing it can achieve for a Samurai Bond and the pricing it can achieve for TOKYO PRO-BOND Market listed bonds (as it seems fairly likely that pricing would be better for Samurai Bonds compared to TOKYO PRO-BOND Market listed bonds) in order to perform a cost-benefit analysis between issuing a Samurai Bond and issuing a TOKYO PRO-BOND Market listed bond.

Annex

Debt Securities Financing in Japan (Primary Offering) for First-time Issuers

	Classic Samurai Bonds	English Disclosure Samurai Bonds	TOKYO PRO-BOND MARKET
	Public Offering		Private Offering
Features	<ul style="list-style-type: none"> • Disclosure entirely in Japanese • Non-listed 	<ul style="list-style-type: none"> • Disclosure partly in English • Non-listed • Alternative to Classic Samurai Bonds 	<ul style="list-style-type: none"> • Disclosure entirely in English • Listed on the TOKYO PRO-BOND Market • Alternative to Classic Samurai Bonds²
Type of Offered Securities	<ul style="list-style-type: none"> • Straight bonds • JPY denominated • New issuance • Denomination: minimum JPY100 million (unless using a Commissioned Company for Bondholders) 		<ul style="list-style-type: none"> • Straight bonds • JPY denominated • New issuance • Denomination: minimum JPY100 million • Rating required
Legal Cost	Relatively high	Slightly less high	Medium
Targeted Investors	Any; typically, institutional investors	Any; in practice, limited to institutional investors who can easily understand English disclosure documents	Specified Professional Investors ³ and non residents of Japan only
Transfer Restrictions	N/A	N/A	Applicable
Settlement	JASDEC	JASDEC	JASDEC
Transaction Documents (legal contracts)	<ul style="list-style-type: none"> • Conditions of the Bonds • Subscription Agreement • Fiscal Agency Agreement 	<ul style="list-style-type: none"> • Conditions of the Bonds • Subscription Agreement • Fiscal Agency Agreement 	<ul style="list-style-type: none"> • Conditions of the Bonds • Subscription Agreement • Fiscal Agency Agreement
Governing Law	Japanese Law	Japanese Law	Japanese Law ²
Language of Legal Contracts	Japanese	Japanese	English acceptable
Requisite Disclosure Document	Securities Registration Statement (in the form prescribed by Japanese law)	Foreign Company Securities Registration Statement (for issuer's corporate information, its existing disclosure documents in English such as the Annual Report or Base Prospectus can be used, together with requisite supplementary documents)	Specified Securities Information (flexible form)

- 2 For the purpose of this table, we focus on this feature (i.e. Japanese Yen-denominated Japanese law governed bonds as an alternative to Samurai Bonds). However, various types of bonds (including non-Japanese law governed bonds) can be listed on the TOKYO PRO-BOND Market for establishing a Japanese MTN programme or selling bonds issued under an existing MTN programme.
- 3 "Specified Professional Investors" include, among others, qualified institutional investors such as financial institutions, listed Japanese companies and Japanese joint stock companies with capital of 500,000,000 Japanese Yen or more.

	Classic Samurai Bonds	English Disclosure Samurai Bonds	TOKYO PRO-BOND MARKET
Language of Disclosure Document	Japanese only <ul style="list-style-type: none"> translation into Japanese requires time to ensure accuracy issuer responsible for Japanese language disclosure document 	<ul style="list-style-type: none"> Securities information: Japanese only Corporate information: English (with Japanese summary) acceptable 	Japanese, English or mixture of both
Availability of Shelf Programme	Available after a certain period from the first-time offering	Available after a certain period from the first-time offering	Issuer can list its programme for its first-time issuance
Availability of incorporating corporate disclosure by reference	Available after a certain period from the first-time offering	Available after a certain period from the first-time offering	Available after: <ul style="list-style-type: none"> the programme listing; or a certain period from the first-time offering
Disclosure liability⁴ (civil/criminal/administrative)	<ul style="list-style-type: none"> Issuer Submitters Directors Underwriters 	<ul style="list-style-type: none"> Issuer Submitters Directors Underwriters 	<ul style="list-style-type: none"> Issuer Submitters Directors Underwriters
Method of filing/disclosure	Via EDINET, with Japanese authorities (Printer's involvement required ⁵)	Via EDINET, with Japanese authorities (Printer's involvement may be required)	Email to TOKYO PRO BOND Market and uploading on issuer's website
Acceptable Accounting Standards	Case-by-case screening (in practice, U.S. GAAP used by an U.S issuer and EU IFRS used by an EU issuer are acceptable virtually without any screening)	Case-by-case screening (in practice, U.S. GAAP used by an U.S issuer and EU IFRS used by an EU issuer are acceptable virtually without any screening)	U.S. GAAP and IFRS Other GAAPs can be negotiated
Audit Report	Required	Required	Required
Consent Letter	Not required	Not required	Not required
Parties involved in marketing	<ul style="list-style-type: none"> Underwriters Issuer (road show) 	<ul style="list-style-type: none"> Underwriters Issuer (road show) 	<ul style="list-style-type: none"> Underwriters Issuer (road show targeting qualified institutional investors only)
Precedents	Many	None ⁶	None ⁷

4 Note that parties are responsible for the Japanese language disclosure as well as any English disclosure.

5 Printers are used to convert documents into html for filing via EDINET.

6 The new regulations which enable English Disclosure Samurai Bonds will come into force on 1 April 2012.

7 TOKYO PRO-BOND Market was set up in May 2011, and no listing has yet taken place as of the date of this document.

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