The Banking Regulation Review

Fifth Edition

Editor
Jan Putnis

Law Business Research

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EDITOR'S PREFACE

The past year has seen a number of critically important bank regulatory initiatives reach interim conclusions.

In the European Union we have seen the finalisation and coming into force of the primary measures that are required to implement Basel III, as well as – at long last – political agreement on the Recovery and Resolution Directive and the principal elements of the banking union proposals. We have also seen the first foray of the European Commission into bank structural reform, with its controversial proposal for EU legislation on that subject, after the enactment of detailed domestic bank structural reform measures in a number of member states.

In the United States, the past year has seen the culmination of a number of regulatory initiatives, including the issue of final rules implementing the Volcker Rule and the issue of rules that will require large foreign banking groups to establish intermediate holding companies for their US subsidiaries. Both of these sets of rules stem from the Dodd-Frank Act: predictions that numerous legal careers would be made by that legislation are so far proving to be accurate.

I refer to these developments above as 'interim conclusions' because, of course, even though a period of primary rule-making has reached a conclusion, the full implications are still emerging. That said, there are helpfully more certainties now about the future direction of banking regulation than was the case a year ago. The combination of that fact, generally improving western economies and shareholder pressure has made many banks take the plunge and start to reorganise and restructure.

Recovery and resolution planning work remains a powerful driver of structural reform. It does not, however, require a particularly sophisticated legal and regulatory view to conclude that the world remains far from a position where we can have confidence that a global systemically important bank could be resolved in an orderly manner today without significant disruption and damage to the world economy. The fact that some regulators occasionally argue to the contrary disregards the detailed work that still has to be done so that governments and regulators may have a good chance of attaining that confidence in the next few years. But that work is, in general, progressing and reassuringly shows no real sign of faltering yet as memories begin to fade of just how close the world came to economic calamity during the financial crisis.

Divergent approaches to structural reform in different countries could, however, make group-wide resolution more difficult to achieve. Localism, in the form of requirements that banking subsidiaries hold additional, more loss-absorbent capital and additional pools of liquidity, and have boards of directors with a significant independent membership, all have the potential to threaten the concept of a global banking group unless careful thought is given in such groups to how to address these challenges. The ways in which banking groups can best coordinate their relationships with multiple regulators are high on this agenda.

Perhaps the most difficult challenge facing banks in their relationships with their regulators is that of how to reconcile the need for close and cooperative working relationships with those regulators against the backdrop of seemingly never-ending conduct-related investigations and enforcement action. This difficulty varies according to which regulator is carrying out the investigation and the extent to which the investigation relates to matters that are historic and which the banking group concerned has taken steps to address. The challenge is clearly greatest where a major investigation concerns recent conduct and is led by a regulator with which the relevant bank requires good relations in order to achieve its commercial objectives to the satisfaction of its customers and shareholders.

It will be increasingly important for banks to appreciate the capacity of the more material investigatory and enforcement activity to shape business structures as much as structural reform itself. The changes to the ways in which certain markets and trading operations will be organised in the future in response to enforcement activity will be at least as significant as the changes that are brought to those markets and operations by, for example, resolution planning.

The upheaval that all of this implies for some banks' corporate and business structures, as well as for their staff, is combining with changes to previously held assumptions about the profitability of certain activities as Basel III capital requirements bite. The result is uncertainty, but with some grounds for cautious optimism, at least for those banking groups that are less seriously affected by conduct investigations and are firmly on the road to developing simpler, more capital-efficient structures.

Banks that have adopted a properly integrated and global approach to structural reform will, in my view, reap the benefits. While, in the short term, that is likely to be more expensive from a resourcing perspective, in the long term it should achieve savings. It is all too easy to address each regulatory initiative as it comes along, not recognising that this reactive approach runs the risk of structural muddle and missing out on developing business models that address multiple regulatory concerns at the same time. It is to be hoped that more regulators start to recognise positive proactivity on the part of banks not just as commercial astuteness but as a contribution to the restoration of trust that is required to make bank regulatory reform a success.

One increasingly important aspect of reform in the banking sector concerns the capital structures of banking groups. The requirement for more and higher quality loss-absorbing capital under Basel III, coupled with the introduction of bail-in as a resolution tool in a number of important banking jurisdictions, means that banking groups are having to rethink which company or companies they will use to raise capital and what form that capital will take. Particularly in Europe, the issue of additional Tier I capital and other contingent capital instruments has added complexity to banks' capital structures and a need for banks to engage with current and potential investors to explain those structures.

This fifth edition of *The Banking Regulation Review* contains submissions provided by authors in 56 jurisdictions between late February and mid-April 2014, as well as the chapters on 'International Initiatives' and the European Union. Preparing the chapters has been a particularly onerous task for the authors this year because many of their clients have now moved from observing the regulatory revolution that has taken place in the banking sector to taking tangible steps to reorganise in order to make themselves fit for the new world in which the sector finds itself. My thanks go to all of the authors for their dedication in completing their chapters.

Thank you also to Adam Myers, Shani Bans, Nick Barette and Gideon Roberton at Law Business Research Ltd for their patience, understanding and – above all – great effort in preparing this edition.

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Jan Putnis
Slaughter and May
London
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Chapter 31

JAPAN

Hirohito Akagami and Wataru Ishii[1]

I INTRODUCTION

As the world's third-largest economy, Japan has a well-developed banking industry of approximately 200 banks. As a result of several mergers among the larger banks before 2005, there are currently four 'mega' banking groups: Mizuho,[2] Sumitomo Mitsui, Mitsubishi UFJ and Resona. Approximately half of these 200 banks are 'local banks', which provide more locally based banking services (principally in one or more specific prefectures). There are also around seven internet banks providing services solely via the internet, and approximately 60 overseas bank branches.

Japan Post Bank, with ¥175 trillion of deposits, was formerly part of the Japanese government's postal division, and accepted deposits via its network of post offices scattered throughout the country. The bank, which is wholly-owned by the Japanese government at this time, is in the process of privatisation. Pursuant to this, the shares in the bank will, taking into consideration respectively the business conditions of the bank and the responsibilities of the affiliate companies of the bank, be disposed of as soon as possible in accordance with the relevant laws and regulations.

II THE REGULATORY REGIME APPLICABLE TO BANKS

i The Banking Act and the Financial Instruments and Exchange Act

The principal source of regulation for banks engaging in business in Japan is the Banking Act,[3] to which all banks are subject. This regulates their corporate governance, banking

1 Hirohito Akagami is a partner and Wataru Ishii is an associate at Anderson Mōri & Tomotsune.

2 Two large banks in the Mizuho group – Mizuho Corporate Bank Ltd and Mizuho Bank Ltd – merged in July 2013.

3 Act No. 59 of 1981.

business and capital adequacy as well as their principal shareholders and subsidiaries. The Banking Act also regulates holding companies that have banks as subsidiaries (bank holding companies).

An important note is that the Japanese regulatory framework regulates commercial banking activities and investment banking activities separately. The Banking Act is, in principle, applicable only to the former activities of banks (i.e., (1) acceptance of deposits; (2) provision of loans; and (3) transfer of funds: the 'core banking business'). A large number of banks also engage in investment banking activities, which generally include securities and derivatives-related businesses. These activities are subject to separate restrictions discussed at Section II.iii, *infra*, and these banks are concurrently regulated under the Financial Instruments and Exchange Act (FIEA)[4] for this purpose. Some banks also have affiliate securities companies engaging in the investment banking business, and these companies are also regulated by the FIEA.

ii Regulators

The principal regulator of the banking industry is the Financial Services Agency of Japan (FSA), whose authority to supervise banks in Japan is delegated by the Prime Minister. The Commissioner of the FSA also delegates a part of his or her authority to the directors of local finance bureaux in relation to local banks and the supervision of investment banking activities. The on-site and off-site inspection of investment banking activities is performed by the Securities and Exchange Surveillance Commission. The Bank of Japan (BoJ) also has supervisory authority over banks, based primarily on its contractual agreements and transactions with them.

The regulator's powers as prescribed in the Banking Act include receipt of various reports, the ability to carry out on-site inspections (where a bank must, in practice, disclose any and all information it holds to the regulator) and the power to make orders of business improvement and suspension.

iii Entry into banking industries

Two organisational structures are available to overseas banks for establishing a core banking business in Japan. One scheme consists of the establishment of a joint-stock company with limited liability in Japan as a subsidiary or affiliate in accordance with the Companies Act of Japan.[5] This subsidiary or affiliate must obtain a banking licence from the Prime Minister of Japan, pursuant to the Banking Act (a 'local entity bank'). The alternative consists of the establishment of branches of the foreign bank within Japan, and obtaining a 'foreign bank branch' banking licence. For the foreign bank branch scheme, the opening of subsequent branches (which are also known as sub-branches) is also subject to prior approval from the FSA.[6] The grant of the necessary licences and approvals is at the discretion of the relevant authority in each instance.

4 Act No. 25 of 1948.

5 Act No. 86 of 2005.

6 Article 47-2 of the Banking Act.

To engage in investment banking activities such as a securities and derivatives business, the bank must also be registered with the competent local finance bureau, pursuant to the FIEA.[7] Registered banks are generally permitted to operate a wider range of derivatives and securities businesses, such as brokerage of Japanese government bonds and sales of unit trusts or non-discretionary investment advisory services; however, for historical reasons, banks are generally prohibited from engaging in certain categories of securities business, including brokerage and underwriting of corporate stocks and corporate bonds, and discretionary investment management services.[8] To conduct such activities, banks must establish a subsidiary or affiliate that is a separate legal entity, and register it pursuant to the FIEA as a financial instruments business operator (FIBO).

iv Cross-border activities by overseas banks not having a branch

Overseas banks may not, in principle, enter into any part of the core banking business or investment banking business in Japan or with persons in Japan without establishing a branch and obtaining a banking licence as a foreign bank branch. Even where an overseas bank has a licensed foreign bank branch in Japan, it is generally understood that the other, unlicensed overseas branches of the bank are prohibited from engaging in transactions, or with persons, in Japan.

In connection with this, a new regulatory framework called the 'foreign bank agency business' was implemented in December 2008, under which both overseas banks without a licensed foreign bank branch and the unlicensed branches of an overseas bank may conduct a core banking business with persons in Japan through either a local entity bank within the same group, or a foreign bank branch of the bank acting as an agent or intermediary. Both of these options require the local entity bank or foreign bank branch to obtain separate approval from the FSA.[9]

III PRUDENTIAL REGULATION

i Relationship with the prudential regulator

Most banks have a close relationship with the regulators. We understand that the officials of the supervisory division of the FSA and local finance bureaus are each assigned to monitoring specific banks.

The regulators tend to focus their attention principally on appropriate management of banking businesses, maintenance of sufficient financial conditions including satisfaction of capital adequacy requirements, protection of customers, and the maintenance of robust internal control systems to ensure that the bank is always in compliance with applicable laws. It is fairly common that a bank will consult with regulators in advance of occasions when it expects to receive particular attention from regulators; for instance, if it launches a new business that is not covered clearly by existing legislation, or an issue has arisen that may affect the bank's financial condition.

7 Article 33-2 of the FIEA.

8 Article 33 of the FIEA.

9 Chapter 7-2 of the Banking Act.

ii Management of banks

Under the Banking Act, a local entity bank must have a board of directors and accounting auditors; and also a board of corporate auditors or a subcommittee of the board of directors (comprising an audit committee, remuneration committee and appointment committee) pursuant to the Companies Act.[10] Directors and executive officers engaging in the ordinary business of a local entity bank must have the knowledge and experience to be able to manage and control the bank appropriately, fairly and efficiently and must have 'sufficient social credibility' (the Banking Act requires a bank to appoint directors who are trusted within society; however, what precisely is meant by this criterion is ambiguous).[11] For local entity banks that have a board of corporate auditors, the representative director shall take command of the establishment and maintenance of the internal compliance framework, make risk management a primary concern, establish a sufficient internal control framework to properly disclose the bank's corporate information to the public, and ensure that appropriate internal audits are performed.[12] The board of directors must proactively oversee the representative directors, establish and review business management plans in line with the bank's business objectives, establish a clear risk management policy by taking these objectives into consideration, and ensure appropriate performance and review of internal audits.[13]

For foreign bank branches, although there is no required specific corporate governance structure such as for local entity banks, the branch manager must also have the knowledge and experience to manage and control the branch appropriately, fairly and efficiently, and must also have sufficient social credibility (as referred to above). In addition, officers with sufficient knowledge and experience must be appointed to manage the branch, and the proper authority to do so must be delegated to those officers by the overseas head office. Of course, the head office is likely to wish to oversee the management of the branch, and it is permissible for it to offer supervision and guidance. Therefore, it may be advisable to introduce appropriate systems for such oversight and approvals; for example, that any problematic issues occurring within the branch should immediately be reported to the head office as well as to the regulatory authority.

In addition, however, it must be kept in mind that oversight by the overseas branch or holding company must not undermine the governance framework, and the management responsibility for such, which must be established within the local entity bank or foreign bank branch to manage its business properly as a licensed financial institution. Administrative action (in the form of an order of suspension of a part of the business and an order of improvement of the business) taken against a local entity bank subsidiary of a US-based bank group illustrates the FSA's position on how each financial institution within the same group should be managed. An FSA press release dated 27 January 2006 regarding its action states that the US parent appointed a person who

10 Article 4-2 of the Banking Act.

11 Article 7-2 of the Banking Act.

12 III-1-2-1 (1) of 'Comprehensive Guidelines for Supervision of Major Banks, etc.' of the FSA (the FSA Supervisory Guidelines).

13 III-1-2-1 (2) of the FSA Supervisory Guidelines.

had no directorship of the local entity bank but was given the title of 'Representative in Japan', and gave that person the primary management and control of the businesses of the local entity bank. This thereby undermined the authority and responsibility of each director of the local entity bank (despite the fact that such authority and responsibility is required under Japanese corporation law and the Banking Act). The FSA ordered the creation and development of 'independent' governance and internal control systems, and the establishment of a clear system of responsibility within the local entity bank, predicated upon a fundamental re-evaluation of the present state of managerial involvement and monitoring of the bank by the US parent.

There is no express provision under the Banking Act that directly restricts the amount, form and manner of remuneration paid to the management or employees of banks or their affiliates. However, the regulators have been placing greater emphasis on ensuring appropriate remuneration in light of the need to avoid excessive risk-taking and to conform with the consensus of the Financial Stability Board. More specifically, as part of general prudential regulations, banks are expected to (1) have an independent committee or other type of organisation to sufficiently monitor the remuneration of management and employees; (2) ensure financial sufficiency, appropriate risk control, consistency between incentive bonuses and actual performance (i.e., the level of incentive bonuses should substantially decrease in the event of the bank's poor financial performance) and contribution to long-term profits in determining remuneration structures; and (3) disclose important matters regarding remuneration.[14]

iii Regulatory capital and liquidity

The framework for regulating local entity banks' capital adequacy under the Banking Act has been amended in line with the implementation of Basel II. By March 2008, the regulatory framework of Basel II had been fully introduced into Japanese banking laws through amendments of the FSA administrative notice[15] including, *inter alia*, the internal ratings based approach (IRB approach) and the advanced measurement approach (see below). Local entity banks are now permitted to employ, following approval by the FSA and the satisfaction of certain other conditions, an IRB approach that enables them to rely on their own measurements of counterparties' credit risks to determine their capital requirements (subject to strict data, validation and operational requirements). Of the IRB approaches, there are two subcategories: a foundation approach and an advanced approach. Local entity banks may now use not only the former approach but also the latter approach. This permits them to use their own measurements not only to estimate the possibility of default but also the loss that may be incurred in the event of default, *inter alia*.

Local entity banks with international operations are required to maintain a minimum common equity Tier I ratio of 4 per cent and Tier I ratio of 5.5 per cent until 31 March, 2015, which will be required to maintain a minimum common equity Tier I ratio of 4.5 per cent and Tier I ratio of 6 per cent on and after 31 March 2015. This

14 III-2-3-5 of the FSA Supervisory Guidelines.

15 FSA administrative notices No. 19 of 2006 and No. 20 of 2006.

is in accordance with the FSA administrative notice, which is in line with the Basel III regulatory framework. [16]

Those banks without international operations are required to have a minimum risk-adjusted capital ratio of 4 per cent (on both a non-consolidated and consolidated basis) and local entity banks employing the IRB approach must maintain a capital ratio of 8 per cent. Similar capital adequacy regulations are also imposed on bank holding companies. From 31 March 2014, however, the calculation formula has changed[17] in accordance with an amendment to the FSA administrative notice. Concurrent with this change, the requirement for those banks have also changed and local entity banks without international operations are required to have a core capital ratio of 4 per cent (on both a non-consolidated and consolidated basis) from 31 March 2014, and those banks employing the IRB approach will be required to have a core capital ratio of 4.5 per cent from 31 March 2015.

The status of the capital adequacy of banks, including the risk-adjusted capital ratio, must be reported and disclosed on a semi-annual basis.[18] If a bank's capital ratio falls short of the minimum mentioned above, the FSA may require the bank to prepare and implement a capital reform plan. In extreme cases, it may reduce the bank's assets, restrict the increase of its assets, prohibit the acceptance of deposits, or take any other measures it deems necessary.[19]

The regulatory capital framework mentioned above does not apply to foreign bank branches, on the grounds that the capital adequacy of these banks must be reviewed by their principal overseas regulators.

It should be noted that on occasion, a large transaction with any one bank may be restricted due to the 'large lending limit regulation'. Pursuant to this regulation, aggregate exposure of a local entity bank to a single person (including that person's group companies) by means of extending loans, purchasing debt instruments or equity investments, shall not exceed, in principle, 40 per cent of the amount of non-consolidated regulatory capital (with certain adjustments) of the local entity bank.[20]

The Banking Act does not contain an express provision that directly regulates banks' liquidity or any quantitative standards of liquidity, but the FSA Supervisory Guidelines provide some guidance on this point from a regulatory monitoring perspective. These guidelines require a bank, *inter alia*, to (1) establish an internal framework to appropriately control liquidity risk (e.g., by separating the treasury division from the liquidity risk control division); (2) maintain control methods as well as internal reporting procedures regarding the bank's liquidity that are subject to the approval of the board

16 FSA Administrative Notice No. 19 of 2006, as amended on 30 March 2012.

17 For example, exclusion of subordinated loans, subordinated bonds and certain types of preferred stock etc. from the numerator subject to certain transitional provisions applicable to existing ones.

18 Article 19 of the Banking Act.

19 Article 26, Paragraph 2 of the Banking Act.

20 Article 13 of the Banking Act.

of directors; and (3) monitor the status of its liquidity and be prepared for emergency circumstances.[21]

The Inspection Manual for Deposit-taking Institutions, which has been prepared by the FSA for use by their inspectors, also includes detailed checklists for banks' self-regulation as part of the framework for managing liquidity risk. These requirements apply not only to local entity banks but also to foreign bank branches. For the latter, however, it is understood that there will be broad variations as what constitutes acceptable levels of, and procedures for, liquidity risk management given that the business of foreign bank branches varies greatly from one to another.

iv Recovery and resolution

The Deposit Insurance Act[22] provides certain measures in case serious problems arise in the maintenance of stability of the financial systems in Japan or in regions where a bank operates its business. Such measures include capital injection, full deposit protection and temporary nationalisation. These measures may be initiated subject to deliberation by the Financial System Management Council.[23]

Capital injection is designed to allow a bank with positive net worth to increase the amount of its capital by way of having its shares subscribed by the Deposit Insurance Corporation of Japan. Full deposit protection is designed for banks with negative net worth or that suspend or may suspend the repayment of deposits. Temporary nationalisation is intended for banks with negative net worth that suspend or may suspend the repayment of deposits.

Laws and regulations for 'bail-in' powers have not yet been established in Japan.

IV CONDUCT OF BUSINESS

The Banking Act obliges banks to carry on their business in compliance with various regulations including a prohibition on abuse of a dominant bargaining position; management of conflict of interests; provision of explanation of risks associated with their products and other information to customers; and appropriate handling of personal information.

However, Japanese banking laws do not provide such comprehensive and strict banking confidentiality frameworks as those adopted in some jurisdictions. Questions of how and to what extent banks should protect and use their customers' information have been governed by general confidentiality laws and contractual arrangements between banks and their customers (including implicit agreements), the contents of which have been clarified and developed by court decisions made upon individual lawsuits alleging misconduct on the part of the relevant bank and by discussion within the banking industry.

21 III-2-3-4 of the FSA Supervisory Guidelines.

22 Act No. 34 of 1971.

23 Article 102 of the Deposit Insurance Act.

The handling of customer information of individual clients is mainly governed by a general law applicable to all industries, entitled the Personal Information Protection Act of Japan (PIPA),[24] although general principles thereof have been brought into the Banking Act. Under the PIPA, personal information may not, in general, be disclosed to third parties without the relevant individual's consent or providing that individual with the right to prohibit the disclosure (an 'opt-out' system).[25]

How banks should treat information held on corporate clients is discussed in the Study Group Report on Desirable Sharing of Corporate Customer Information between Banking and Securities Businesses published by the Japanese Bankers Association on 15 April 2008. This suggests that such information may be disclosed when (1) the explicit or implicit consent of the customer has been obtained; (2) the information is public information; or (3) the disclosure may be deemed legitimate, taking its necessity into account (leading to the conclusion that a rather wider range of disclosure to other companies within the same group for the purpose of, for instance, marketing activities, is permissible without the client's consent).

It should, however, be pointed out that banks may disclose the confidential information of both individual and corporate clients to Japanese governmental authorities without their consent, if it is deemed necessary and appropriate. This could also apply to foreign governmental authorities, but this may not necessarily be the case (for instance, the PIPA provides that it is permitted to disclose personal information if such disclosure is 'based on laws', and the term 'laws' for this purpose is interpreted to mean Japanese law only).

V FUNDING

Substantially, all types of funding methods, including equity and debt financing, call loans, repurchase transactions and central bank funding principally by way of open market operations, are available to banks.

Open market operations are provided by the BoJ. Both local entity banks and foreign bank branches may participate, to the extent they satisfy certain requirements prescribed by the BoJ.

VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

i Control regime

Shareholders of local entity banks may be subject to regulation pursuant to the Banking Act if they qualify as a 'bank principal shareholder' or 'bank holding company'.

A bank principal shareholder is generally defined as a shareholder having 20 per cent (or, in certain cases, 15 per cent) or more of the voting rights of a local entity bank.[26]

24 Act No. 57 of 2003.

25 Article 23 of the PIPA.

26 See Article 2, Paragraph 9 of the Banking Act.

A bank holding company is defined as a company that has paid an acquisition price for its Japanese subsidiaries' shares exceeding 50 per cent of the total assets of the company, and that holds more than 50 per cent of the voting rights in a local entity bank.[27] Once the shareholder qualifies as a bank holding company, it will be subject to regulations applicable to a bank holding company rather than a bank principal shareholder.[28]

Any person who wishes to become a bank principal shareholder must obtain prior approval from the FSA.[29] Such person is also required to satisfy the following criteria:

a in light of matters concerning funds for the acquisition, the purpose of holding shares or other matters concerning the holding of shares, there must be no risk of impairment to the sound and appropriate management of the business of the bank;

b in light of the status of property and income and expenditure of the person and its subsidiaries, there must be no risk of impairment to the sound and appropriate management of the business of the bank; and

c the person must have sufficient understanding of the public nature of the business of the bank and have sufficient social credibility.[30]

A bank principal shareholder may be required by the FSA to submit reports or materials, may be inspected by the FSA at its offices and have to answer questions put by an FSA officer, and have to present accounting books and other documents.[31] If a bank principal shareholder fails to satisfy any conditions given by the FSA in conjunction with the approval, the FSA may order the bank principal shareholder to take any actions the FSA considers necessary.[32] Further, a bank principal shareholder having more than 50 per cent of the voting shares of a local entity bank may be ordered by the FSA to submit an improvement plan or otherwise take necessary measures to ensure the sound and appropriate management and operation of the local entity bank.[33] 'Necessary measures' are interpreted to include certain kinds of 'keep well' directions aimed at the local entity bank, for instance, capital support to the local entity bank if it has any problems with capital adequacy.

The regulations applicable to a bank principal shareholder are generally applicable in the same way to a bank holding company and its shareholder.[34] Improvement plans and 'keep well' directions are also applicable to both. Further, the scope of business of a bank holding company and its subsidiaries is restricted to certain financial businesses.[35]

27 See Article 52-17, Paragraph 1 and Article 2, Paragraph 13 of the Banking Act.

28 Article 52-9, Paragraph 1 and Article 55, Paragraph 2 of the Banking Act.

29 Article 52-9, Paragraph 1 of the Banking Act.

30 Article 52-10 of the Banking Act.

31 Article 52-11 and 52-12 of the Banking Act.

32 Article 52-13 of the Banking Act.

33 Article 52-14 and 52-15 of the Banking Act.

34 Article 52-31 to 52-34 of the Banking Act and Article 1-7 of the Ordinance for Enforcement of the Banking Act.

35 Article 52-21, Paragraph 1, Article 52-23, Paragraph 1 of the Banking Act.

The maximum amount of credit that may be extended to a single group of persons by a bank holding company and its subsidiaries is the amount calculated in accordance with a formula specified in the Banking Act.[36]

ii Transfers of banking business

Local entity banks may transfer their banking businesses in one of three ways: (1) a business transfer for all or part of the bank's business; (2) a corporate merger of the whole business; or (3) a corporate split for part of its business. For foreign bank branches, the business transfer is commonly used to amalgamate the Japanese operations of two or more foreign banks. Other procedures of transfer may also be available pursuant to the laws of their home countries, but there is some ambiguity in how the special procedures required under the Banking Act to protect customers will apply to transfers conducted pursuant to foreign laws. Both local entity banks and foreign bank branches may be a transferee of the banking business of another bank. A banking business cannot be transferred to an entity other than a bank unless that entity obtains a banking licence prior to the closing of the transfer.

Business transfer

In summary, the procedure for a business transfer under the Banking Act is: (1) the execution of the business transfer agreement between the transferor and transferee; (2) in case of a transfer of a whole business, the completion of procedures for the creditors' protection (among other procedures);[37] (3) application to the FSA by both the transferor and the transferee for approval of the business transfer;[38] and (4) after approval has been obtained, closing can take place. Step (2) is performed by way of publishing a notice over a period of at least one month to creditors of the effect of the business transfer. This step essentially enables the transferor bank to replace individual consents (as would usually be required under the Civil Code) with the public notice.[39]

Corporate split and corporate merger

Corporate split and corporate merger procedures are similar to that of a business transfer: (1) the execution of the corporate split or corporate merger agreement; (2) procedures for creditors' protection as mentioned above;[40] (3) application for approval from the FSA;[41] and (4) the closing after FSA approval has been obtained. Step (2) must also be performed by way of making a public notice to creditors. By application of the provisions of the Companies Act, all contractual relationships pertaining to the transferred business

36 Article 52-22 of the Banking Act.

37 Article 34 of the Banking Act.

38 Article 30, Paragraph 3 of the Banking Act.

39 Article 34, Paragraphs 3 and 4 of the Banking Act.

40 Article 789, Paragraph 2; Article 799, Paragraph 2; Article 810, Paragraph 2; and Article 789 of the Companies Act; Article 33 and 33-2 of the Banking Act.

41 Article 30, Paragraphs 1 and 2 of the Banking Act.

are transferred to the transferee bank without individual consent of the counterparties;[42] All of the relevant steps required under the Companies Act and securities laws, as well as the rules of securities exchanges, remain applicable under these procedures.

VII THE YEAR IN REVIEW

i Potential changes to FSA inspection and supervision

Until 2012, the FSA annually updated its fundamental principle for inspection, which set out matters to be focused on under inspections conducted by its Inspection Bureau and other issues, at the beginning of each fiscal year, as well as its supervisory principles relating to supervision carried out by its Supervisory Bureau. In September 2013, however, the FSA issued a document detailing its 'fundamental principle for financial monitoring' (the Monitoring Principle) instead of the fundamental principle for inspection. In its Monitoring Principle, FSA states that its Inspection Bureau and Supervisory Bureau will work together to pursue (1) timely acquisition of information as to financial institutions and financial systems; (2) identification and resolution of cross-industrial issues; and (3) establishment of best practice for financial business operations. There may well be potential changes to the inspection method under the guise of the Monitoring Principle.

VIII OUTLOOK AND CONCLUSIONS

For more than a decade, the Japanese government has proceeded with a relaxation of regulations on financial institutions, aiming to increase the competitiveness of Japan's financial industries; however, in step with the worldwide movement to impose tougher constraints on the financial sector following the global financial crisis, the Japanese government also seems to be turning to stricter regulation.

Given the change in government in December 2012 to a coalition led by the Liberal Democratic Party (which had held power in Japan almost continuously since the 1950s until August 2009), it has become more difficult to predict the direction of banking regulation policies, particularly when coupled with the changes in financial regulatory environments worldwide. All participants in the Japanese banking industry are strongly recommended to closely observe any trends and changes in Japan's financial regulations.

42 Article 750, Paragraph 1; Article 754, Paragraph 1; Article 759, Paragraph 1; and Article 764, Paragraph 1 of the Companies Act.

Appendix 1

ABOUT THE AUTHORS

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Hirohito Akagami is a partner at Anderson Mōri & Tomotsune, engaged principally in the fields of financial, corporate and commercial law, with an emphasis on securities work and M&A. Typically, these transactions involve Mr Akagami representing the purchasers for a number of tender offers, which he has been doing for more than 15 years. He also advises clients on a number of domestic and cross-border syndicated loans, securities and other financial transactions, as well as on corporate governance-related matters and regulatory issues.

He graduated from Tokyo University in 1986 and received his LLM from University of London, London School of Economics and Political Science in 1993. He was also seconded to Slaughter and May in London and Brussels in 1993 and 1994.

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Wataru Ishii is an associate at Anderson Mōri & Tomotsune, engaging in a wide range of general corporate issues. He focuses his practice on financial transactions, including financial regulatory matters.

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