

# Banking Regulation

Third Edition

# Global Legal Insights

## Banking Regulation

Third Edition

Contributing Editors: Peter Hsu & Rashid Bahar

Published by Global Legal Group

# GLOBAL LEGAL INSIGHTS - BANKING REGULATION

## THIRD EDITION

Contributing Editors  
Peter Hsu & Rashid Bahar, Bär & Karrer AG

Editor  
Sam Friend

Senior Editor  
Rachel Williams

Group Consulting Editor  
Alan Falach

Group Publisher  
Richard Firth

*We are extremely grateful for all contributions to this edition.  
Special thanks are reserved for Peter Hsu & Rashid Bahar for all of their assistance.*

Published by Global Legal Group Ltd.  
59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 207 367 0720 / URL: [www.glgroup.co.uk](http://www.glgroup.co.uk)

Copyright © 2016  
Global Legal Group Ltd. All rights reserved  
No photocopying

ISBN 978-1-910083-96-3  
ISSN 2051-9621

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations. The information contained herein is accurate as of the date of publication.

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY  
May 2016

## CONTENTS

<b>Preface</b>	Peter Hsu & Rashid Bahar, <i>Bär &amp; Karrer AG</i>	
<b>Albania</b>	Aida Maho, <i>Frost &amp; Fire Consulting</i>	1
<b>Andorra</b>	Miguel Cases & Laura Nieto, <i>Cases &amp; Lacambra</i>	12
<b>Argentina</b>	Javier L. Magnasco & Daniel Levi, <i>Estudio Beccar Varela</i>	24
<b>Bosnia &amp; Herzegovina</b>	Sanja Voloder & Emina Mameledžija, <i>CMS Reich-Rohrwig Hainz</i>	30
<b>Canada</b>	Pat Forgione, Darcy Ammerman & Sean Brandreth, <i>McMillan LLP</i>	37
<b>China</b>	Dongyue Chen & Xingyu Wu, <i>Zhong Lun Law Firm</i>	46
<b>Congo – D.R.</b>	Liliane Mubanga Wetungani & Blaise Lunda Masudi, <i>Thambwe-Mwamba &amp; Associates Law Firm</i>	53
<b>Ecuador</b>	Dr. Boanerges Rodríguez Freire & Boanerges Rodríguez Velásquez, <i>Coronel &amp; Pérez</i>	60
<b>Egypt</b>	Hossam Gramon & Nadia Abdallah, <i>Matouk Bassiouny</i>	66
<b>Finland</b>	Niina Nuottimäki & Janni Hiltunen, <i>Borenius Attorneys Ltd</i>	71
<b>France</b>	Jean L’Homme & Gaël Rousseau, <i>Fidal</i>	80
<b>Germany</b>	Sebastian Tusch & Dr. Benjamin Herz, <i>Gleiss Lutz</i>	89
<b>Ghana</b>	Ekua Hayfron-Benjamin, Johnnie Klutse & Helena Ayensu-Maikido, <i>Ashong Benjamin &amp; Associates</i>	99
<b>Greece</b>	George Bersis & Smaragda Rigakou, <i>Potamitis Vekris</i>	108
<b>India</b>	Shuchi Sinha, Pallavi Meena & Pragya Sood, <i>AZB &amp; Partners</i>	118
<b>Italy</b>	Emanuele Grippo & Andrea Banfi, <i>Gianni, Origoni, Grippo, Cappelli &amp; Partners</i>	128
<b>Japan</b>	Koichi Miyamoto, <i>Anderson Mori &amp; Tomotsune</i>	140
<b>Macedonia</b>	Dragan Dameski & Ana Hadzieva Angelovska, <i>Debarliev, Dameski &amp; Kelesoska, Attorneys at Law</i>	149
<b>Malta</b>	Louis de Gabriele, Andrei Vella & Stephanie Soler, <i>Camilleri Preziosi</i>	158
<b>Netherlands</b>	Roderik Vrolijk & Rogier Raas, <i>Stibbe</i>	166
<b>Singapore</b>	Regina Liew & Larry Lim, <i>Rajah &amp; Tann Singapore LLP</i>	175
<b>Spain</b>	Fernando Mínguez Hernández, Íñigo de Luisa Maíz & Rafael Mínguez Prieto, <i>Cuatrecasas, Gonçalves Pereira</i>	184
<b>Switzerland</b>	Peter Hsu, <i>Bär &amp; Karrer AG</i>	198
<b>Ukraine</b>	Oleksandr Zavadetskyi, <i>Zavadetskyi Advocates Bureau</i>	208
<b>United Kingdom</b>	Peter Snowdon, Simon Lovegrove & Matthew Gregory, <i>Norton Rose Fulbright LLP</i>	213
<b>USA</b>	Reena Agrawal Sahni & Timothy J. Byrne, <i>Shearman &amp; Sterling LLP</i>	226

## PREFACE

**B**anking has long had a global reach. It is also a heavily regulated industry. In the wake of the financial crisis of 2008, it has become the object of a number of regulatory initiatives which are being rolled out at a stunning rate across the globe. Simply staying abreast of these ongoing developments is a challenge even for the most dedicated specialist.

This is where this book comes in. It provides general counsels, regulators and lawyers with a comprehensive insight into banking regulation in 26 countries around the world. The chapters have been written by leading practitioners in each jurisdiction, who provide their analysis and views on the current state of regulation and ongoing developments. To facilitate comparisons, the structure of each chapter is the same: it starts by introducing the readers to the architecture of banking regulation, covering both regulations that are applicable to banks and the regulators in charge of supervising and enforcing them in each jurisdiction. It describes the key requirements for governance of the board of directors and senior management, as well as the internal control environment of the entire institution. It carries on with an overview of new trends in regulation and legal developments in the area. Furthermore, it presents regulatory capital requirements, analysing the role of national and international standards in defining these requirements, as well as the impact of international initiatives to improve capital and liquidity requirements in the jurisdictions that are surveyed. The chapters then extend to rules protecting clients, covering not only rules that apply to the conduct of banks when dealing with clients, but also rules on cross-border services and anti-money laundering initiatives. Overall, our hope is that this book will prove a stimulating and insightful read, which will prepare banks and their advisers not only to overcome but to master the challenges they and their clients are facing at a global level.

Peter Hsu & Rashid Bahar  
Bär & Karrer AG

# Japan

Koichi Miyamoto  
Anderson Mori & Tomotsune

## Introduction

Until the advent of the recent global financial crisis, the Japanese government have tended toward deregulation with the aim of increasing the competitiveness of Japan's financial sector. However, in line with the worldwide movement to tighten financial regulation in response to the global financial crisis, the Japanese government also seems (notwithstanding the relaxation of certain rules) to be moving in the general direction of stricter regulations to ensure a more stable financial system.

## Regulatory architecture: overview of banking regulators and key regulations

### Key legislation and regulations

#### *Banking Act*

The principal legislation regulating banks in Japan, including bank holding companies and foreign bank branches, is the Banking Act (Act No. 59 of 1981, as amended (**Banking Act**)). The Banking Act, together with the orders and ordinances issued thereunder, primarily govern the following matters in respect of banks: licensing; organisation and governance; business scope; customer protection; prohibited acts; capital adequacy; subsidiaries and shareholders; accounting; disclosure; and mergers and acquisitions. The Financial Services Agency of Japan (**FSA**) also issues various guidelines (**Guidelines**) concerning banking activities. Although the Guidelines do not have legal enforceability, banks in Japan are, in practice, required to comply with them.

#### *Financial Instruments and Exchange Act*

The financial regulatory framework in Japan is similar to that in the US, and does not adopt a universal banking system like the EU, although banks and bank-holding companies in Japan are allowed to hold subsidiaries that provide a broad range of financial services. Banks in Japan may engage in securities-related services within the prescribed scope. Securities-related services that banks in Japan are allowed to provide include brokering and dealing in securities, sale of securities, underwriting of securities and derivative transactions. The key legislation regulating banks' provision of securities-related services is the Financial Instruments and Exchange Act (Act No. 25 of 1948, as amended; the **FIEA**), the orders and ordinances issued thereunder and the Guidelines.

### Regulatory body

The principal regulator that exercises oversight of banks in Japan is the FSA, whose authority to supervise banks is delegated by the Prime Minister. The FSA supervises banking activities, issues banking licences, and imposes administrative sanctions on banks for wrongdoing or lack of adequate internal control systems.

Off-site monitoring and on-site inspections of banks in Japan are also primarily performed by the FSA. On the other hand, inspections in respect of banks' securities-related services are conducted by the Securities and Exchange Surveillance Commission of Japan.

### Key restrictions

#### *Licensing*

No person is allowed to engage in any Banking Businesses in Japan or with a person in Japan without having first obtained a banking licence from the FSA. "**Banking Businesses**" refer to: (i) the (a)

acceptance of deposits, and (b) lending of funds or discounting of bills or notes; or (ii) the conduct of exchange transactions.

There are two ways by which a foreign bank may engage in the Banking Businesses in Japan. The first is to establish a local subsidiary or a local affiliate in the form of a joint-stock company (*kabushiki kaisha*). The second is to establish a foreign bank branch in Japan, and obtaining a banking licence for such bank branch.

Banks in Japan are, in principle, required to obtain a licence from the FSA if they wish to provide securities-related services in Japan. Such licensing requirement is in addition to the banking licence that banks in Japan have to obtain for the provision of banking services.

#### *Scope of business*

Banks in Japan are only permitted to engage in Banking Businesses, businesses incidental to Banking Businesses, and such other businesses expressly permitted under the Banking Act and other legislation.

#### *Limitations of holding voting rights of other companies*

Under the Banking Act, local banks are, in principle, prohibited from holding more than 5% (or, in the case of bank-holding companies, 15%) of the voting rights of any company in Japan other than companies engaging in certain finance-related businesses or businesses ancillary to the banking business (**5 Percent Rule**).

#### *Permitted business by banks' subsidiaries*

Under the Banking Act, businesses in which the subsidiaries of local banks are permitted to engage are limited to certain finance-related businesses or businesses ancillary to the banking business.

#### *Large exposure limits*

The large exposure rules under the Banking Act prescribe a limit to a bank's aggregate credit exposure to a single counterparty or a group of connected counterparties. Pursuant to this regulation, a local bank cannot have aggregate credit exposure to a single person (including that person's group companies) that exceeds, in principle, 25% of the bank's non-consolidated regulatory capital (calculated with certain adjustments).

#### *Proprietary transactions*

Although banks are not prohibited from engaging in proprietary transactions, they need to be mindful of the following regulations.

##### (i) Insider trading

The FIEA prohibits the sale and purchase of the securities of an entity listed on a securities exchange in Japan by (a) persons affiliated with the listed entity, and (b) persons who have received information from those affiliated with the listed entity and who therefore know or have access to significant insider information concerning the securities of the listed entity prior to the disclosure of such information.

##### (ii) Short selling

Naked short selling of securities is prohibited in principle, and certain short selling that exceeds the amount prescribed under the FIEA must be reported to the relevant securities exchange.

##### (iii) Other wrongful acts

The following acts, which are considered wrongful, are generally prohibited:

- the use of wrongful means, schemes or techniques;
- misrepresentation of important matters, or omissions of material matters, the disclosure of which is necessary for the avoidance of misunderstanding;
- the use of false quotations;
- the spreading of rumours;
- fraudulent practices;
- commission of assault or intimidation; and
- market manipulation.

#### *Investment in funds*

Banks are not prohibited from investing in funds.

## Recent regulatory themes and key regulatory developments in your jurisdiction

### The 2013 amendments to the Banking Act

In accordance with the recommendations of a report entitled “Method of Regulations on Banks which Contribute to the Stability of the Financial System, etc.” issued in January 2013 by the Financial System Council, which is a consultative body reporting to the Japanese Prime Minister, the Commissioner of the FSA and the Minister of Finance, the Banking Act and the subordinate regulations have been amended. Most of the amendments came into force on 1 April 2014. Others, such as amendments with respect to the large exposure limit, came into force on 1 December 2014.

#### *Relaxation of the 5 Percent Rule*

The time limits and the holding ratio limits in respect of the acquisition or holding of voting rights in a company in Japan (other than companies engaging in certain finance-related businesses or businesses ancillary to the banking business) by a local bank have been amended in the following ways:

- the duration for which banks are permitted to hold voting rights acquired through the conduct of a debt-equity swap transaction has been extended from one to three years (or, in the case of a small or medium-sized companies, five years), and the 50% holding ratio limit in respect of such holdings has been abolished;
- a bank is now permitted to directly acquire or hold voting rights in a company that is undergoing a business revitalisation procedure (as prescribed in the Banking Act). The duration for which a bank may directly hold voting rights in such a company is essentially three years (or, if such company is small or medium-sized, five years);
- the duration, as stipulated in the Banking Act, for which banks may (through their investment-specialised subsidiary) hold voting rights in a company that conducts venture businesses has been extended from 10 years to 15 years;
- a bank’s investment-specialised subsidiary may hold voting rights in a special exception company (being a company that conducts business and activities that contribute to the development of local and rural areas) for up to 10 years, unless such special exception company is a subsidiary (*kohoujin tou*) of said bank;
- the duration for which a bank is permitted to hold voting rights as a limited partner under the Limited Partnership Act for Investment (Act No. 90 of 1998, as amended), which used to be 10 years, has been abolished; and
- the one-year limit on the duration for which a trust bank is permitted to hold voting rights as trust property under a trust agreement wherein compensation for losses of principal is not agreed has been abolished. The 50% holding ratio limit in respect of such holdings has also been abolished.

#### *Tightening of large exposure limits*

To be consistent with the international standards countenanced under “The Basel Core Principles” published by the Basel Committee and to respond to the calls for reinforcement by the IMF Financial Sector Assessment Program, the amendments aim to tighten the existing large exposure rules in the following ways:

- undrawn amounts in commitment line transactions, interbank transaction amounts (including call loan amounts) and amounts deposited with other financial institutions, publicly offered bond amounts, trading account balances in banks, and amounts equivalent to credit risk in derivative transactions are now subject to large exposure rules;
- for purposes of determining the companies in a consolidated group of companies (as a debtor group), subsidiaries which are effectively controlled by a company and affiliated companies are now included in the consolidated group of companies (in addition to subsidiaries in which a company directly or indirectly holds more than 50% of the voting rights);
- additionally, the amendments have established safeguards that prevent any non-compliance with the regulations, such as through the use of multiple names or circumventive financing; and
- the aggregate exposure limit of a consolidated group of companies (as a debtor group) has been lowered from 40% to 25%.



### *Tightening of regulations on foreign bank branches*

The amendments have also tightened regulations applicable to foreign bank branches as follows:

- in order to ensure the soundness of foreign bank branches in Japan, the FSA clarified its supervisory guidelines with respect to matters to be monitored such as the circumstances of fund transfers within the foreign bank group (including transfers to and from its head offices and branch accounts), the foreign bank branch's assets in Japan, deposit types provided by the foreign bank branch and the foreign bank branch's manner of treating deposits in Japan. The FSA also clarified that these points of consideration are applicable not only to criteria for licensing but also the daily monitoring of foreign bank branches;
- foreign bank branches in Japan are required to maintain at all times assets equal to the minimum capital amount that local banks are required to maintain (i.e., JPY 2bn);
- foreign bank branches are now also required to explain certain matters to customers (such as the fact that deposits in foreign bank branches are not covered under Japan's deposit insurance system); and
- the penalty for breach of an order to maintain assets in Japan, which may be issued by the FSA to a bank (including a foreign bank branch) has been augmented.

### *Relaxation of requirements in respect of agency and intermediary services for foreign banks*

In principle, the Banking Act requires a foreign bank to be licensed when it solicits banking transactions in Japan, including deposits, loans and fund remittances. The framework of agency or intermediary services for foreign banks, which is subject to the approval of the Commissioner of the FSA, is designed to provide an exception to this principle by permitting a foreign bank to arrange for a Japanese entity, which possesses a Japanese banking licence, to function as an agent or intermediary of a foreign bank. Following the amendments, the capital ties requirement between the agent or intermediary bank in Japan and the foreign bank no longer applies, as long as the solicitation activities of the bank in Japan are conducted outside Japan.

### *Relaxation of regulations on the scope of permitted business for local banks' subsidiaries in respect of outbound M&A transactions*

Following the amendments, local banks may now hold foreign subsidiaries which conduct businesses that are not permitted under the Banking Act for a period of five years so long as these subsidiaries are held as pursuant to a transaction involving a merger or acquisition.

### The 2016 amendments to the Banking Act

On 4 March 2016, a bill to amend, among others, the Banking Act in response to advances in information technology was submitted to the 190<sup>th</sup> Session of the Diet. A brief summary of the bill, which has not yet been passed (as of March 2016) is set forth below.

#### *Management of bank group*

A bank holding company (or the ultimate banking entity of the group) will be required to manage its banking group by means that include the establishment and proper implementation of group policy, effective management of intra-group conflicts of interest, and development of a group compliance system.

#### *Aggregation of operations*

Currently, a bank holding company is only permitted to manage its subsidiaries. Following the amendments, a bank holding company will be able to engage in activities that are considered the regular functions of the group or that are at the same time also performed by other entities within the group, such as system management or asset management. In addition, a subsidiary of the bank holding company will be permitted to do the same subject to the supervision of the bank holding company (instead of the relevant bank, as outsourcer of such functions).

#### *Relaxation of the arm's length rule*

Currently, the arm's length rule applies to intra-group transactions. Following the amendments, however, such rule will be relaxed with respect to intra-group transactions, subject to certain conditions being fulfilled and approval being obtained from the Commissioner of the FSA. This relaxation is expected to facilitate intragroup fund transfers.

### *Facilitation of investments in FinTech companies*

Currently, local banks are, in principle, prohibited from holding more than 5% of voting rights in companies engaging in FinTech businesses. Following the amendments, local banks will be able to acquire and hold more than 5% of such voting rights, subject to the approval of the Commissioner of the FSA.

### *Comprehensive permission for bank's agency and intermediary services*

As stated above, the framework of agency or intermediary services for foreign banks, which is subject to the approval of the Commissioner of the FSA, is designed to provide an exception to Banking Act provisions requiring foreign banks to be licensed when soliciting banking transactions in Japan. Specifically, a foreign bank is permitted under such framework to arrange for a Japanese entity, which possesses a Japanese banking licence, to function as the foreign bank's agent or intermediary. Following the amendments, the approval of the Commissioner of the FSA for entry into such an arrangement will be obtainable as part of a comprehensive approval granted to a foreign bank group (in addition to individual approvals that are granted on an entity-by-entity basis).

## **Bank governance and internal controls**

Under the Banking Act, a local bank must have (i) a board of directors, (ii) a board of corporate auditors, audit and supervisory committee or nominating committee, and (iii) an accounting auditor. Directors and executive officers engaging in the ordinary business of a local 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". For local banks with a board of corporate auditors, the representative director is required to 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. 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.

With respect to foreign bank branches, although there is no required specific corporate governance structure applicable to them as is the case for local banks, the branch manager of foreign bank branches must also have the knowledge and experience to manage and control the branch appropriately, fairly and efficiently, and must also have sufficient social credibility. 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.

There is no explicit 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. The regulators, however, 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: (i) have an independent committee or other type of organisation to sufficiently monitor the remuneration of management and employees; (ii) ensure financial sufficiency, appropriate risk control, consistency between incentive bonuses and actual performance and contribution to long-term profits in determining remuneration structures; and (iii) disclose important matters regarding remuneration.

## **Bank capital requirements**

The framework for regulating local 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 to the FSA administrative notice.

Local banks with international operations are required to maintain a minimum common equity Tier I ratio of 4.5% and Tier I ratio of 6% on and after 31 March 2015. This is in accordance with the FSA administrative notice, which is in line with the Basel III regulatory framework.

Local banks without international operations are required to have a core capital ratio of 4% (on both a non-consolidated and consolidated basis) from 31 March 2014, and those banks employing the IRB approach are required to have a core capital ratio of 4.5% 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. 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.

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.

### **Rules governing banks' relationships with their customers and other third parties**

#### Arm's length rule

A bank is prohibited from entering into certain transactions with related persons (such as the bank's subsidiaries and affiliates) or the customers of such related persons. Specifically, a bank is prohibited from entering into:

- a transaction with a related person that is less beneficial to the bank compared to the benefits that the bank would obtain if it had entered into a transaction under the same conditions (in terms of transaction type and amount), with a person similar to the related person (but does not fall within a related person) in type, size, and creditworthiness;
- a transaction with a related person's customer that is less beneficial to the bank compared to the benefits that the bank would obtain if it had entered into a transaction under the same conditions (in terms of transaction type and amount), with a person similar to the related person's customer (but does not fall within a related person's customer) in type, size, and creditworthiness (in exchange for the execution of the contract between the related person and the related person's customer);
- a transaction with a related person under terms that are unjustly disadvantageous to the bank in light of the typical terms of similar transactions entered into by bank; or
- a transaction or act, in whatever name, that is intended to evade the prohibitions above.

#### Bank confidentiality

##### *Duty of confidentiality*

There is no substantive law that imposes any duty of confidentiality on banks with respect to customer information in Japan. However, the Supreme Court of Japan has affirmed, based on commercial practice or contract, that financial institutions owe a duty of confidentiality to their customers with respect to customer information (such as information on customers' transactions and creditworthiness) that is obtained in connection with transactions with their customers.

A bank's duty of confidentiality is generally considered to be a duty that prohibits a bank from disclosing information obtained from its customers in connection with transactions with such customers without justifiable reasons. In other words, if there are "justifiable reasons", the bank may be exempt from the duty of confidentiality. There are no clear rules on exemptions to a bank's duty of confidentiality. However, the general view is that a bank will be exempt from the duty of confidentiality where: (a) a customer consents to the bank's disclosure of the customer's information; (b) disclosure of the customer information by the bank is required under the law; and (c) disclosure of the customer information is necessary for the bank to protect its rights and interests.

From a regulatory perspective, the Banking Act requires a bank to appropriately handle customer information acquired in relation to its business. More specifically, the Guidelines require every officer and employee of a bank to be well-informed about the bank's standards in the handling of customer information, its review system for the appropriate management of customer information, and its reporting system when customer information has been inadvertently leaked. These regulations are based on the understanding that a bank owes a duty of confidentiality to its customers under civil law and require banks to establish appropriate internal management systems to handle customer

information from a regulatory perspective. Accordingly, it is necessary for a bank to carefully consider whether the disclosure of customer information is appropriate given its duty of confidentiality under civil law even when such disclosure is permissible under the relevant regulations.

#### *Personal information*

If customer information falls within the definition of Personal Information under the Act on the Protection of Personal Information (Act No. 57 of 2003, as amended) (**PIPA**), a bank needs to comply with the rules therein on appropriate handling of personal information to protect personal information. The purpose of the PIPA is to establish a basic principle for the fair handling of personal information, to prescribe the basic governmental policy considerations for protecting personal information, to make clear the obligations of national and local authorities, and to impose obligations that business operators which handle personal information are required to comply with. The purpose and scope of the general duty of confidentiality referred to above, and the provisions of the PIPA are not the same, but overlap to some extent. Accordingly, a bank which complies with the provisions of the PIPA also needs to carefully consider whether it can disclose customer information given its general duty of confidentiality under civil law.

There are no restrictions under Japanese law on the international transfer of Personal Information.

#### Alternative dispute resolution (ADR)

Banks are required to enter into an agreement with the Japanese Bankers Association for dispute resolution with respect to Banking Businesses. This financial ADR system is intended to provide banks' customers with an easier and faster way of resolving claims as compared to filing lawsuits against banks.

#### Deposit insurance system

The deposit insurance system in Japan protects depositors and other parties against the insolvency of banks in Japan. The Deposit Insurance Act (Act No. 34 of 1971, as amended; the **DIA**) governs the deposit insurance system. The Deposit Insurance Corporation of Japan (**DICJ**), which was established pursuant to the DIA, provides a public safety net to protect depositors. The deposit insurance system covers the banks whose headquarters are located in Japan. Insured banks annually pay insurance premiums to the DICJ.

There are certain limitations to the coverage. For example, while ordinary deposits are covered under the deposit insurance system, foreign currency deposits and derivative deposits are not covered. Furthermore, while deposit accounts for settlement purposes will generally receive full coverage, other insured deposit accounts are generally covered by up to JPY 10m per person and per bank.

#### Anti-money laundering

##### *Verification upon Transaction*

The Act on Prevention of Transfer of Criminal Proceeds (Act No. 22 of 2007, as amended) (**APTCP**) requires a bank to adequately perform verification of the identity of its customer upon commencement of the specified transaction (such as acceptance of deposits, lending of funds, transactions under which a customer acquires securities and derivative transactions) (**Verification upon Transaction**).

In performing Verification upon Transaction, a bank is required, at the time of the transaction, to verify the following matters with respect to its customers and the customer's personnel who are in charge of the transaction:

- name;
- domicile (or location of principal office);
- date of birth (or date of birth of the representative);
- purpose of the transaction;
- occupation (or description of business); and
- identification of every shareholder of the customer which holds more than 25% of the voting rights in the customer.

The Verification upon Transaction must be conducted through the use of prescribed official identification documents (such as a registration certificate, an insurance certificate, a driver's licence, or a resident card).

*Report of suspicious transactions*

The APTCP requires a bank to report suspicious transactions to the FSA if any property accepted from customers in connection with the bank's business is suspected to be criminal proceeds, or if the customer is suspected to have committed the crime of concealment of criminal proceeds or drug-related criminal proceeds.

The matters required to be reported to the FSA include:

- information on the bank filing the report (such as name, address and telephone number);
- information regarding the suspicious customer (such as the name, address, telephone number, nationality and the date of establishment); and
- the reason for the report.

Cross-border activities*Banking businesses*

Foreign banks may not, in principle, enter into the Banking Businesses in Japan or with persons in Japan without establishing a branch in Japan and obtaining a banking licence for a foreign bank branch.

Under the "foreign bank agency business" framework, 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 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 bank or foreign bank branch to obtain separate approval from the FSA.

*Securities-related services*

Foreign banks are, in principle, required to be registered pursuant to the FIEA to provide securities-related services (including dealing in public offerings or secondary distributions, dealing in private placements, or underwriting) in Japan or with persons in Japan.

Notwithstanding the above, foreign banks providing securities-related services in a foreign jurisdiction may provide the following services:

- securities-related services, including solicitation of securities, to a registered financial instruments business operator under the FIEA (**Financial Instruments Business Operator**) operating securities-related services;
- securities-related services from outside of Japan to financial institutions (only for their investment purpose or for account of settlor under trust agreement) and investment management companies (only for their investment management);
- sale and purchase of already-issued securities to or from banks upon request from customers of such banks for account of such bank;
- sale and purchase and intermediary, brokerage or agency services for sale and purchase of already-issued securities from outside of Japan with a person in Japan upon order from such person on condition that the offshore entity does not engage in any solicitation;
- sale and purchase of already-issued securities with a person in Japan via agency and intermediary by the relevant Financial Instruments Business Operator;
- negotiation with an issuer or a holder of the securities in Japan to determine the terms and conditions of a wholesale underwriting agreement with respect to public offerings, private placements or secondary distributions of such securities only when such public offering, private placement or secondary distribution is to be conducted outside Japan subject to notification to the Commissioner of the FSA as it involves a party in Japan; and
- participation in a wholesale underwriting agreement (an underwriter syndicate) in Japan if it meets the following requirements: (a) a foreign bank has a history of underwriting securities outside Japan for three years or more; (b) the foreign bank has a total capital and net assets of JPY 500m or more; (c) a wholesale underwriter (and not the foreign bank) will negotiate with an issuer or a holder of the securities in Japan; (d) marketing of securities to be issued must be made outside of Japan; and (e) the foreign bank must obtain the approval of the Commissioner of the FSA.

**Koichi Miyamoto****Tel: +81 3 6888 5839 / Email: [koichi.miyamoto@amt-law.com](mailto:koichi.miyamoto@amt-law.com)**

Mr. Miyamoto is a partner at Anderson Mori & Tomotsune. He specialises in financial regulatory issues, including those under the Financial Instruments and Exchange Act and the Banking Act of Japan. He also advises on private equity investments, venture capital investments and a wide variety of financial transactions.

Mr. Miyamoto graduated from Keio University in 2003 and received his LL.M. from the University of Chicago in 2012. He was seconded to the Securities and Exchange Surveillance Commission from 2008 to 2010, where he was in charge of the inspection of financial instruments business operators.

He is a member of the Dai-ni Tokyo Bar Association and the New York Bar Association. Mr. Miyamoto has also authored the following academic articles:

- “*Investment funds in Japan: regulatory overview*” (Practical Law – A Thomson Reuters Legal Solution, February 2016).
- The Japan chapter in “*Neate and Godfrey: Bank Confidentiality 6<sup>th</sup> Edition*” (Bloomsbury Professional, January 2015).

## Anderson Mori & Tomotsune

Akasaka K-Tower, 2-7, Motoakasaka 1-chome, Minato-ku, Tokyo 107-0051, Japan

Tel: +81 3 6888 1000 / URL: <http://www.amt-law.com/en>

Other titles in the *Global Legal Insights* series include:

- Bribery & Corruption
- Cartels
- Commercial Real Estate
- Corporate Tax
- Employment & Labour Law
- Energy
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions

Strategic partners:



[www.globallegalinsights.com](http://www.globallegalinsights.com)