Now That the Fog Has Lifted: The Impact of Japan’s Administrative Procedures Law on the Regulation of Industry and Market Governance

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Abstract

This Comment argues that the APL will help transform Japan’s informal regulatory style into a market-based regulatory structure that will foster improved efficiency and other benefits associated with market-based regulations. Part I discusses the development of informal administrative decision-making methods within Japan, analyzes the lack of judicial review of administrative guidance, and examines the process of administrative guidance. Part I also examines the factors that contributed to the enactment of the APL, to both limit and refine the administrative guidance process. Part II discusses the APL in light of the previous procedural inadequacies of the administrative guidance process, highlights new procedural guidelines promulgated by the Ministry of International Trade and Industry (“MITI”) and the Ministry of Finance (“MOF”), and analyzes these ministries’ compliance with the APL. Part III argues that the APL is a positive first step towards the establishment of fair and transparent administrative processes in Japan. This Comment concludes that, despite the APL’s weaknesses, growing business conviction and the declining influence of Japan’s regulatory agencies will supplement the impact of the APL in pushing Japan towards a market-driven regulatory system.
COMMENTS

NOW THAT THE FOG HAS LIFTED: THE IMPACT OF JAPAN'S ADMINISTRATIVE PROCEDURES LAW ON THE REGULATION OF INDUSTRY AND MARKET GOVERNANCE

Ken Duck*

INTRODUCTION

The non-transparent\(^1\) and anti-competitive\(^2\) regulatory methods of Japan's economic bureaucracy\(^3\) impede new entrants

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[T]he system lacks 'transparency': the drafting and application of standards are frequently so inaccessible that foreign firms can affect neither their content nor implementation. These conditions have led foreigners to charge that the standards are systematically used as trade barriers, and to press for changes to the regulatory process.


2. Edelman, supra note 1, at 389-90 (discussing foreign criticism of Japanese regulatory standards as non-tariff barriers that prevent or impede competition); KANEKO, supra note 1, at 1-2 (discussing Structural Impediments Initiative Talks ("SII Talks") and claims that Japan's regulatory system lacks transparency and constitutes non-tariff barrier).

3. KANEKO, supra note 1, at 13-18 (detailing control of Ministry of Finance ("MOF"), and Ministry of International Trade and Industry ("MITI") over Japanese economy as illustrated in famous uses of administrative guidance since 1980's); SHINDO, supra note 1, at 90 (discussing prevalence of administrative guidance by MITI, MOF, and Ministry of Transport ("MOT") in regulating economic activities in Japan); see
to Japanese markets.\(^4\) Japan's regulatory system emphasizes close, informal contacts between the regulators and the firms they regulate.\(^5\) Gyosei shido, or administrative guidance, the process by which ministries use implied threats of future action\(^6\) or inaction\(^7\) in seeking a party's compliance with an administrative goal, is the primary regulatory method in Japan.\(^8\) Japan's informal style of regulatory governance, including administrative guidance, evolved from informal means of governance in Japanese history.\(^9\) The Japanese legal system\(^10\) and other institutional ar-

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4. See Karel Van Wolferen, The Enigma of Japanese Power 450 (1991) [hereinafter ENIGMA OF JAPANESE POWER] (discussing leverage ministries have over companies by choosing to act or refrain from acting in order to compel compliance with administrative guidance).

5. See KAREL VAN WOLFEREN, THE-ENIGMA OF JAPANESE POWER 450 (1991) [hereinafter ENIGMA OF JAPANESE POWER] (discussing leverage ministries have over companies by choosing to act or refrain from acting in order to compel compliance with administrative guidance).

6. See KAREL VAN WOLFEREN, THE-ENIGMA OF JAPANESE POWER 450 (1991) [hereinafter ENIGMA OF JAPANESE POWER] (discussing leverage ministries have over companies by choosing to act or refrain from acting in order to compel compliance with administrative guidance).

7. David Boling, Administrative Procedure Law Makes Inroads on Bureaucracy But Leaves Web Largely Intact, E. ASIAN EXEC. REP., July 15, 1994, at 7, 16. "Bureaucracies derive much of their power from simple inaction — for example, just sitting on an application for a permit until the applicant alters his behavior to comport with the ministry's desires." Id. at 16. See ENIGMA OF JAPANESE POWER, supra note 6, at 450 (discussing leverage ministries have over companies by choosing to act or refrain from acting in order to compel compliance with administrative guidance).


9. Cyril E. Black et al., The Modernization of Japan and Russia 50 (1975); see Kent E. Calder, Crisis and Compensation: Public Policy and Political Stability in Japan, 1949-1986, at 141-42 (1988) [hereinafter CRISIS AND COMPENSATION] (discussing power of 19th century Japanese administrative state). Bureaucratic power was enhanced by a traditional political culture that emphasized respect for "scholarly men of affairs." Id. Neo-Confucian traditions in seventeenth century Tokugawa Japan strengthened bureaucratic power and continued to be influential later in Japanese history. Id.

10. LAW AND SOCIAL CHANGE, supra note 5, at 168 (discussing prevalence of infor-
rangements, like the *amakudari* system\(^\text{11}\) and the *shingikai* councils,\(^\text{12}\) which emphasize close, informal ties between government and business, perpetuate Japan's informal regulatory system and enhance compliance with administrative guidance.\(^\text{13}\)

Responding to criticism\(^\text{14}\) of Japan's regulatory practices and the shift of Japan's industrial base overseas,\(^\text{15}\) Japan enacted

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\(^\text{11}\) *Id.* at 167. Literally defined as "descent from heaven," *amakudari* refers to former bureaucrats descending from the ministry after retirement into the ranks of one of the companies that the ministry is responsible for regulating. *Id.*

\(^\text{12}\) *Id.* at 168. Defined as "deliberation councils," the use of *shingikai* is an informal process by which the government sets and implements industrial policy with the constant participation of industry. *Id.* *Shingikai* are composed of academics, business representatives, consumer group representatives, political figures, and bureaucrats. *Id.*

\(^\text{13}\) *Id.* at 168-69. Informality in industrial policy begins with the formulation of policy and continues throughout its implementation. *Id.* at 168. In focusing on MITI's use of administrative guidance, one commentator notes that:

> Even in areas where it has specific legal power, MITI rarely exercises it formally. Instead it prefers to use various informal, legally voluntary modes of persuasion, generically known as administrative guidance, to convince individual firms or groups of firms to comply with Ministry policy . . . . What is interesting about Japanese industrial policy is the degree to which MITI gains compliance in areas where it has broad, jurisdictional competence but no specific statutory authority. Part of the explanation lies in the interlocking interests of the government-business relationship . . . .

*Id.* at 168-69; *Enigma of Japanese Power*, supra note 6, at 450-51. "For the bureaucrats, it is very important that an illusion of voluntary cooperation be maintained, so officials nearly always prefer to approach a potentially recalcitrant company informally, and offer it freedom from 'red tape' in return for compliance . . . even where there is a law regulating the issue at hand." *Id.*

\(^\text{14}\) *Doing Business in Japan*, supra note 4, at 6 (citing Japanese regulatory practices as main difficulty of doing business in Japan); Seishi Shibaita & Hiroshi Fukuei, *Gyosei no futomeisa ga shinrai o ushinau* [The Administration's Lack of Transparency Leads to a Loss of Confidence], *Shukan Tovo Keizai*, May 26, 1990, at 4 (blaming bureaucratic regulations and lack of transparency in administrative processes for declining confidence in Japanese business and financial markets).

\(^\text{15}\) Prepared statement of Kent E. Calder Before the House Committee on Banking and Financial Services (Oct. 16, 1995), available in LEXIS, ASIAPC Library, CURNWS File [hereinafter Calder Testimony]. "[I]n a borderless global economy, continued overregulation will increasingly provoke both multinational and increasingly even some Japanese firms to bypass Japan, and to migrate elsewhere — a prospect that should exert its own unrelenting pressure for reform." *Id.*; Prepared statement of Merit E. Janow Before the House Subcommittee on International Economic Policy and Trade of the Subcommittee on Asia and the Pacific of the House Committee on International Relations (Oct. 30, 1995), available in LEXIS, ASIAPC Library, CURNWS File [hereinafter Janow Testimony]. "Market-based and other pressures are chipping away at barriers and are resulting in a relatively more open and incrementally changing Japanese economy." *Id.* There are long-term political and economic forces pushing Japan towards a deregulated, market-driven economy. Calder Testimony, supra.
the *Gyosei Tetsuzuki Ho*, or Administrative Procedures Law16 ("APL") on November 12, 1993.17 The design of the APL is to clarify regulatory procedures in Japan by promulgating uniform rules regarding government procedures18 for applications,19 dispositions,20 administrative guidance,21 and notifications.22 The APL’s enactment embodies Japan’s efforts to formalize regulatory processes and remove impediments to open markets in Japan.23

This Comment argues that the APL will help transform Ja-
Japan's informal regulatory style into a market-based regulatory structure that will foster improved efficiency and other benefits associated with market-based regulations. Part I discusses the development of informal administrative decision-making methods within Japan, analyzes the lack of judicial review of administrative guidance, and examines the process of administrative guidance. Part I also examines the factors that contributed to the enactment of the APL, to both limit and refine the administrative guidance process. Part II discusses the APL in light of the previous procedural inadequacies of the administrative guidance process, highlights new procedural guidelines promulgated by the Ministry of International Trade and Industry ("MITI") and the Ministry of Finance ("MOF"), and analyzes these ministries' compliance with the APL. Part III argues that the APL is a positive first step towards the establishment of fair and transparent administrative processes in Japan. This Comment concludes that, despite the APL's weaknesses, growing business conviction and the declining influence of Japan's regulatory agencies will supplement the impact of the APL in pushing Japan towards a market-driven regulatory system.

I. PRINCIPLES UNDERLYING JAPAN'S REGULATORY SYSTEM

MITI and MOF regulations influence, guide, and control

24. Trade and Competition Law, supra note 8, at 7-9. The organization of Japan's executive branch is based on the National Government Organization Law, Law No. 120 of 1947. Id. at 7. Under this law, there are the Prime Minister's Office, the Ministries, the Commissions, and the Agencies. Id. Ministries were established by enabling statutes that provide for the ministries' powers and responsibilities. Id. MITI is responsible for:

[P]romoting and supervising industrial policy concerning manufacturing industries and small business, granting industrial property rights such as patents through the Patent Office, licensing and regulating public utilities such as electricity and gas through laws such as the Electricity Business Law and the Gas Business Law, and enforcing foreign trade policy, for such things as export and import, under the Foreign Exchange and Foreign Trade Control Law.

Id. at 9.

25. Id. at 7-9. MOF is responsible for:

[P]reparing the budget for the government, securing governmental revenue by taxation, supervising tariffs under the Customs and Tariff Law, regulating foreign investment and foreign exchange under the Foreign Exchange and Foreign Trade Control Law, and promoting and regulating such business sectors as banking, insurance, and securities under the relevant laws.

Id. at 9.
decisions made by privately-owned businesses in a manner that would be met with resistance and legal challenge if attempted in a country other than Japan. The standard reaction to informal requests made by Japanese ministries, however, is compliance. Japanese ministries, despite existing formal statutory authority, prefer to use informal and legally voluntary methods to achieve compliance with their administrative goals.

A. The Prevalence of Informality

Commentators on administrative guidance view the informality of the process as peculiar to Japan. The use of informal methods of governmental control and decision-making throughout Japan's history set the stage for the informality of Japan's current regulatory system. Interlocking interests of the Gov-


29. Id. “Voluntary” means that compliance is not affected through the exercise of formal statutory power. Id. Firms comply with bureaucratic guidance regarding suggested courses of action in order to maintain good relations with the ministry and not incur any negative repercussions for not complying with administrative guidance. Id. In addition, “ministries dole out favours such as tax privileges and financial help in return for obedience to administrative guidance.” Id. at 451.

30. Law and Social Change, supra note 5, at 168. Even where MITI has formal statutory powers, it rarely exercises it. Id. MITI instead prefers to use administrative guidance. Id.


32. John O. Haley, Authority Without Power: Law and the Japanese Paradox 51 (1991) (hereinafter Authority Without Power). The legal tradition of present-day Japan derives from the institutions and processes of Tokugawa governance. Id. In 1603, Ieyasu Tokugawa became Shogun, and the Tokugawa family's administration at Edo (now called Tokyo) remained the de facto seat of Japanese government until the Meiji Era in 1868. Janet E. Hunter, Concise Dictionary of Modern Japanese History 228 (1984). This period represents the successful consolidation of control by the Tokugawa Bakufu over most of Japan. Id. The name Bakufu signifies a military government headed by a Shogun, the emperor's military deputy. Id. The major achievements of Tokugawa governance include:

The fusion of elements of a sinicized bureaucratic tradition with the institutions of judicial governance in a context that included a critical new element, the semiautonomous village. In this combination we find paradigms of gov-
ernment and private businesses and the legal system within which administrative guidance operates further perpetuate the legal informality of the Japanese regulatory system.

1. Historical Roots Of Informality

The origins of governmental informality date back to local governance of village life in pre-modern Japan. On a local level, village rule emphasized the attainment of full community consensus. There was no concept of legal rights that could be used to challenge an administrative authority. Neo-Confucian influences in Japan further obstructed the development of formal laws.

On the national level, Japan lacked adequate judicial institutions and instead relied on administrative agencies for informal dispute resolution. The bureaucracy’s central role in pre-modern Japan helped explain the peculiar contours and multifaceted paradox of law and social control in contemporary Japan.

Authoritative Without Power, supra, at 51.

33. Law and Social Change, supra note 5, at 168-69.
34. Id. at 169.
35. Black, supra note 9, at 50. Pre-modern refers to the period beginning with the rule of the Tokugawa Shogunate in the 1600’s and ending with the start of the Meiji Era in 1868. Hunter, supra note 32, at 126-27. This period is viewed as the beginning of Japan’s rush to modernize and catch up to the rest of the developed world. Id.
36. Black, supra note 9, at 50. “Each village possessed numerous ‘mutual responsibility units,’ made up of five families each (gongingumi), which further strengthened the element of collectivity.” Id.
37. Id. at 51. Customary law, not written rules, were the standards for regulating all affairs. Id. at 51-52. “Official regulations were compiled periodically, but less as abstract prescriptions to be applied to all behavior than as guidelines for state officials to enforce justice in a highly personalistic manner.” Id. at 52. Japan “relied more on an ethical ‘natural law’ that had evolved and was interpreted by the litigants themselves” as opposed to formal court procedures designed to fit all circumstances. Id.
38. Edwin Reischauer & Albert M. Craig, Japan: Tradition and Transformation 26 (1978). A general deference to authority and a desire to maintain harmonious relations reflected Neo-confucian influences. Id. In modern Japan, these attributes created the perception that Japanese are obedient to the bureaucracy that governs them. Id.
39. Black, supra note 9, at 51. Japan has been greatly influenced by Confucianism throughout its history. Reischauer & Craig, supra note 38, at 26. Deference to authority and obedience to the ruling bureaucracy preempted the need for formal laws. Id.
40. Id. at 52-53. The main adjudicatory functions of the Japanese Government were carried out by administrative personnel rather than an independent judicial system. Id. Collective responsibility prevented the collapse of the civil order under this informal system that had no official channels of redress. Id. Formal institutions played less significant roles than did the system of self-regulation by collective units within premodern Japanese society. Id. at 53. Enhancing the reliance on an informal system...
ern Japan fostered a high degree of governmental control. Consequently, the National Government was able to dominate decision making processes and promote the interests of the National Government over the interests of individual villages. Through the consistent subordination of individual and village interests, the Japanese Government eventually developed a near monopoly over the exercise of authority. This monopolization of authority permitted the Government to control a substantial portion of the Nation’s commercial activity. The existence of a sophisticated administrative system in Japan’s early development suggested that administrators were gaining useful managerial experience.

Japan entered into a period of rapid modernization during the Meiji Era. The style of governance during the Meiji Era and for several generations of bureaucrats that followed was characterized as rule by consensus. Citizens’ deference and loyalty to governing officials, in addition to a belief in the importance of consensual leadership continued to define Japanese society throughout the Meiji Era. As the Government pushed the nation to develop economically at the start of the Meiji Era, the role of government became more pervasive. The number was the “mixture of Confucian and feudal emphasis on hierarchy, cooperation, and loyalty” that made formal means of settling disputes unnecessary. Id. at 55. “Well before the end of ... premodern eras ... Japan ... had forged a high degree of political unity and governmental control.” Id. at 56 (discussing Japanese Government’s complete monopoly on power and successful administering of significant portion of total national production).

43. Id. “To a far greater extent than the earlier modernizing states, [Japan’s] governmental organs were able to dominate intermediate interests and authorities.” Id. at 56 (discussing Japanese Government’s complete monopoly on power and successful administering of significant portion of total national production).

44. Id. “Many of the tasks of national and local government in Japan ... were the normal functions of autonomous guilds, town corporations, or independent merchants in Western Europe and North America.” Id.

45. Id. “In the context of many newly created states of the present era it is far less noteworthy that certain governmental functions in Japan ... were imperfectly or incompletely executed than that they were indeed executed by a long maturing administrative network.” Id.

46. AUTHORITY WITHOUT POWER, supra note 32, at 68. This period of rapid development began in the late 1860’s and continued until the early 1900’s. Id. Meiji Era leaders realized Japan’s vulnerability to external forces and hurriedly sought to build Japan into a strong, independent nation. Id.

47. BLACK, supra note 9, at 147. Formal institutions, like the Diet, or Japanese Legislature, played a lesser role in decision making than did the “consensus of the managerial elite.” Id.

48. Id. at 147-48.

49. Id. at 148 (discussing spread of bureaucratic influence during Meiji Era).
of bureaucrats needed to guide Japan’s economic development continually increased and the influence of these bureaucrats added continuity to Japan’s economic development policy.\(^5\)

Concurrent with the growth in the number of bureaucrats was an increase in the number of supportive, like-minded individuals in industry who, like the bureaucrats, graduated from the national universities.\(^5\) During the Meiji Era, family ties, in addition to friendship ties, formed while in attendance at Japan’s national universities, developed informal working relations among prominent industry representatives and their colleagues in the Government.\(^5\) This resulted in a homogeneous elite across all sectors of public and private life.\(^5\) Japan’s elite remained influential under the patronage system, where those in power distributed influential positions to friends and allies.\(^5\) The patronage system cultivated closer relations among various levels of government and industry in Japanese society.\(^5\)

2. Modern Institutional Arrangements That Evolved From Japan’s History of Informality

Although Japan has a formal parliamentary style of democratic government, informal intermingling between business and government interests characterizes the Japanese political sys-

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51. Black, *supra* note 9, at 149. The trend of bureaucratic and industrial elites attending the same universities has continued through to the present. Clyde V. Prestowitz, Trading Places: How America Allowed Japan to Take the Lead 112 (1988). At first, Tokyo University graduates automatically qualified to become bureaucrats. Edwin O. Reischauer, Japan: The Story of a Nation 144 (1981) [hereinafter Story of a Nation]. Soon, however, an excess number of graduates led Japan to institute more formal criteria, such as a qualifying examination and the opening of the process to graduates of all universities in Japan. *Id.* While no longer a formal requirement, over 90% of Japan’s civil servants are graduates of Tokyo University’s Law Department. Prestowitz, *supra*, at 112. Tokyo University is the most prestigious institution of higher learning in Japan and is the end goal for individuals seeking a role in either the bureaucratic or industrial elite. *Id.*; Story of a Nation, *supra*, at 144.

52. Black, *supra* note 9, at 149.

53. *Id.* at 149-50.

54. *Id.* at 150.

55. *Id.* Close ties and strong bonds allowed Japan’s Government to exercise an indirect influence on the economy because political and business leaders were usually friends and allies, often in pursuit of similar interests. *Id.* at 173.
Several institutional arrangements that exist within the Japanese Government evolved from Japan's historical roots which emphasized informality. These institutional arrangements generate much informal contact between businesses and ministries and increase the effectiveness of administrative guidance. The close ties between the public and private sectors unite the interests of government and business, and portent harmful results for companies that challenge or ignore an agency's guidance.

a. The Structure of the Modern Japanese Government

The Imperial Diet was established in 1880, making Japan the first Asian country to institute a parliamentary government. The members of the upper house, however, were all representatives of the privileged class and Japan continued to be ruled by an absolute monarchy. In 1946, the present Constitution was promulgated, and a democratic system of government was adopted. Japan's present system is built upon the principle of


57. Authority Without Power, supra note 32, at 51. "For most Japanese today the institutions and processes of Tokugawa governance appear to define their legal tradition." Id.; see Douglass C. North, Institutions and Economic Growth: An Historical Introduction, 17 World Dev. 1319, 1321-24 (1989) (contending that institutions that exist in particular society are linked to that society's historical development).

58. Law and Social Change, supra note 5, at 167-69 (illustrating effect of informal arrangements on effectiveness of administrative guidance). "The essential condition for the survival of the Japanese System is continued protection of the administrator class by keeping . . . the rules governing transactions among the administrators . . . informal." Enigma of Japanese Power, supra note 6, at 149. "The System is what it is by virtue of informal relations that have no basis in the constitution, in any other laws or in any formal rules of the ministries . . . or any other of the administrator institutions." Id.

59. Enigma of Japanese Power, supra note 6, at 450. "Although there is no legal obligation for a business to abide by the guidance, all abide by it simply because they want to continue to function." Id. "Government officials are responsible for approval of applications for almost every conceivable business activity. If they do not like an applicant, for whatever reason, they can hold off a decision on that person's applications." Id.

60. Trade and Competition Law, supra note 8, at 68-69 (arguing that businesses foster close relationship with agencies because they fear future repercussions if they do not comply with administrative guidance); Enigma of Japanese Power, supra note 6, at 450.

61. IPMS Group, supra note 56, at 18.

62. Id.

63. Id.
the separation of powers between three branches of government: legislative, executive, and judicial. The Legislative Branch includes the Diet, consisting of an upper and lower house. The Diet is the sole legislative organ of the state and the highest organ of state power, vested with such powers as designating the Prime Minister, approving non-confidence resolutions in the cabinet, passing laws, and approving the budget. The Prime Minister's Office and the various ministries, including MITI and MOF, comprise the Executive Branch. The Supreme Court heads the Judicial Branch, which includes several lower levels of courts. The Supreme Court is authorized to determine the constitutionality of any law, order, regulation, or official act and to nominate judges of the other courts.

b. Ties That Bind: The Amakudari System

The amakudari, or descent from heaven, system is an institution of modern Japan that is inseparable from Japan's historical development. The idea of maintaining close ties between government and private business by using influence to provide positions to friends and allies began in pre-modern Japan. Because the amakudari system cultivates close ties between government agencies and the businesses they regulate, this arrangement helps explain the successful and pervasive use of informal regulatory methods in Japan. In many important industries, the businessmen who deal with the ministries are themselves for-

64. Id. at 20.
65. Id. at 19.
66. Id. at 110.
67. Id.
68. Id.
69. Id. at 143.
70. See Law and Social Change, supra note 5, at 167-68 (discussing retirement of former bureaucrats into ranks of private-sector industries their ministry formerly governed); see supra note 11 and accompanying text (defining amakudari system).
71. See Black, supra note 9, at 150 (describing use of patronage system to establish close ties between government and industry).
72. Id.
73. Law and Social Change, supra note 5, at 167-68. Upham contends that the amakudari system, where retiring bureaucrats shift into the private sector, has the effect of unifying interests and smoothing relations between agencies and the firms they regulate. Id.
74. Chalmers Johnson, Japan: Who Governs?: The Rise of the Developmental State 141 (1995) [hereinafter Japan: Who Governs?]. "[I]n industries where there are large numbers of retired bureaucrats — such as steel, petroleum, electric power,
Relations between businesses and the bureaucracy are closer in industries that employ amakudari bureaucrats, than in industries that do not hire amakudari bureaucrats.76

Upon retirement, bureaucrats obtain one of three types of post-ministry employment: (1) in a private enterprise; (2) in a public corporation or special legal entity, established by law and funded with public money; or (3) in politics, called position exploitation, where former bureaucrats use their influence and gain political office.77 Every year, between two hundred and three hundred former bureaucrats retire into senior positions in the firms they once regulated.78 A Government report released in 1974 showed MOF and MITI ranked first and second, respectively, for total amakudari.79 This trend continues as MITI and MOF placement of retired bureaucrats constitute a majority of the total amakudari in the 1990’s.80 MITI amakudari descend into the steel, electric power, petroleum, and automobile industries,81 while MOF officials retire into banking and politics.82

The retirement age for government bureaucrats is fifty-five and, therefore, many of the former bureaucrats have another ten to twenty active years in which to help smooth relations between the government and business.83 A continuity of interests among bureaucratic and industrial elites binds the government—there is much more 'government-business consensus' than in industries where such relations do not exist." Id.

75. Id.
76. See id. (discussing closer ties between firms and bureaucracy in industries which employ former bureaucrats than in industries that do not employ former bureaucrats). Important industries, such as steel, petroleum, electric power, and banking, employ many retired bureaucrats and maintain close ties to the regulating ministries. Id.
77. Id. at 142.
78. IPMS Group, supra note 56, at 8-9; Enigma of Japanese Power, supra note 6, at 59. Statistics for fiscal years 1992 and 1993 show that MOF and MITI amakudari combined for nearly half of the total amakudari including those from 22 other government agencies. IPMS Group, supra note 56, at 8-9.
80. Fewer Ex-Bureaucrats Take Private Posts, Nikkei Wkly., Apr. 1, 1996, at 2; see IPMS Group, supra note 56, at 8-9 (discussing MITI and MOF as top two sources of amakudari officials despite decrease in overall number of former bureaucrats entering ranks of private businesses).
82. Id.
83. IPMS Group, supra note 56, at 8-9; Ezra F. Vogel, Japan As No. 1: Lessons for America 74-75 (1979) (discussing utility of employing former MITI officials to facilitate communication between MITI and companies).
business relationship together. Former bureaucrats admit that agencies create *tokushu hojin*, or special corporations, to expand the agencies' jurisdiction and to provide employment for retired officials. In addition, retired senior ranking bureaucrats serve as senior executives in nearly all public enterprises in Japan.

Because Japan was subject to much governmental control in the 1950's, many firms actively sought *amakudari* to help gain access to bureaucrats in charge of licensing, approvals, and investment funds. Resistance to *amakudari* grew in the 1960's and 1970's, and today commentators foresee decreases in corporate acceptance of retiring bureaucrats into upper tier corporate positions. Decreases in corporate profits and the financial drain of hiring high-salaried *amakudari*, often at the expense of younger workers, bolsters corporate resistance to the *amakudari* system. Moreover, because Japanese companies are now sub-

84. *Law and Social Change*, supra note 5, at 167. The resulting effect of the *amakudari* system is an "identity of views between government and business that arises imperceptibly not only from the bureaucrats' self-interest, but also from the fact that the Ministry views some industries as partially its own creation." *Id.* at 167-68.

85. *Japan: Who Governs*, supra note 74, at 134. The Government creates these corporations by special law to serve as instruments for state activities. IPMS GROUP, supra note 56, at 54. The establishment of a special corporation involves strict legislative control, and also must gain the approval of MOF and the Management and Coordination Agency. *Id.*

86. *Id.* The number of special corporations has grown continually from the end of WWII. *Id.* at 137. In 1946, there were six special corporations and in 1972 the number grew to 113, with 1968 the only year showing a decrease from the previous year. *Id.* Active-duty bureaucrats receive praise for thinking up new ways to create special corporations and generate parliamentary support. *Id.* at 136.

87. *Id.* at 137.

88. *Id.* at 151. "During the 1950s, when the Japanese economy was still subject to strict governmental controls, many firms sought out and welcomed retired bureaucrats as a means of improving their access to official agencies where critical approvals, import and export licenses, and investment funds were obtained." *Id.*

89. *Id.* at 151. The main benefit of accepting former ministry officials was and continues to be the officials' knowledge of the licensing approval system. *Id.* at 154. If an industry is receiving administrative guidance it is beneficial to accept several *amakudari* into the ranks of the business. *Id.* Commentators believe that ministries benefit from this relationship and actively seek placement of their retiring officials because the *amakudari* system enhances compliance with administrative guidance. *Id.*

90. *Id.* at 154; Telephone Interview with Robert Radin, General Counsel, CS First Boston, Tokyo, Japan (July 1995) [hereinafter Radin]; Benjamin Fulford, *Anger Buffets Mandarins' Golden Parachutes*, NIKKEI WKLY., Mar. 25, 1996, at 1 [hereinafter *Golden Parachutes*] (discussing growth of public criticism of *amakudari* system in wake of recent scandal involving housing loan corporations and retired MOF officials).

91. Radin, supra note 90.
ject to shareholder liability, businesses are less apt to employ highly-paid retiring bureaucrats at the expense of profitability.\(^92\) In March 1996, the amakudari system came under heavy criticism in the wake of a scandal involving retired MOF officials serving as executives in Japan's jusen,\(^93\) or housing loan companies.\(^94\) MOF reports plans to strengthen laws concerning the entry of retiring bureaucrats into the private sector.\(^95\)

c. The Shingikai Process

Government policy is made and instituted through constant interaction with the private sector.\(^96\) Ministries create shingikai,\(^97\) or deliberative councils, to investigate some problem, draft legislation to deal with the problem, or recommend alternative means of dealing with the problem.\(^98\) The goal of this system is to gather expert opinions and provide an open forum from which recommendations for appropriate actions emerge.\(^99\)

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92. Id. Mr. Radin noted that MOF typically pressures healthy finance firms to buy up ailing firms in order to prevent financial institutions from failing. Id. Japanese companies are now, however, liable to shareholder lawsuits for breach of fiduciary duties and are, therefore, less likely to buy up shares in failing and unprofitable companies. Id. In addition, firms are fighting the amakudari system because they can no longer afford to hire highly paid former MOF officials at the expense of younger, less expensive workers. Id. Firms complain of having to force their own employees into early retirement or forego hiring new employees because of the economic drain of employing highly-paid former bureaucrats in executive positions. Id.


95. Id. MOF plans to extend from two years to five years the length of the effective ban on retired MOF officials working for private companies they previously regulated. Id. Japanese law stipulates that a retired government official cannot accept employment by a profit-making company in the private sector that has close ties with the official's former ministry for two years after retirement from the bureaucracy. IPMS GROUP, supra note 56, at 8. Such a move is acceptable if approved by the National Personnel Authority, an office of the Government. Id.

96. LAW AND SOCIAL CHANGE, supra note 5, at 168.

97. Id. at 168; see supra note 12 and accompanying text (defining shingikai deliberation councils).

98. LAW AND SOCIAL CHANGE, supra note 5, at 168; see MITI AND THE JAPANESE MIRACLE, supra note 50, at 47-48 (discussing bureaucratic domination of law making and use of shingikai, or deliberation councils).

99. LAW AND SOCIAL CHANGE, supra note 5, at 199. The reality is, however, that shingikai rarely serve their designed purpose because of bureaucratic domination of the
Bureaucrats frequently, however, use *shingikai* to diminish opportunities for open conflict in policy adjustments that are likely to face stiff opposition with either the public or the Diet.\(^{100}\)

Deliberation councils usually consist of scholars, journalists, business representatives, and representatives of interest groups specifically affected by a policy.\(^{101}\) Ministry bureaucrats and industry representatives, however, constitute the largest part of the council.\(^{102}\) The focal point of *shingikai* is to achieve consensus.\(^{103}\) Participation by some of Japan's top academics and thinkers in the resulting consensus alleviates criticism that the use of *shingikai* to make public policy is undemocratic.\(^{104}\)

**d. Structural Corruption: The Iron Triangle**

The Iron Triangle,\(^ {105}\) made up of politicians, bureaucrats, and businesses, is the traditional structure of the political system in Japan.\(^ {106}\) This arrangement owes its strength to the tangling of interests that resulted from a long period of one-party rule by the Liberal Democratic Party ("LDP").\(^ {107}\) The LDP's elected of-

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\(^{100}\) ENIGMA OF JAPANESE POWER, *supra* note 6, at 191. *Shingikai* are often used by Japanese bureaucrats to reduce or eliminate opposition to their plans. *Id.* at 201.

\(^{101}\) *Id.* at 191.

\(^{102}\) LAW AND SOCIAL CHANGE, *supra* note 5, at 168.

\(^{103}\) *Id.* Opinions are usually influenced by bureaucrats who also participate in the council, so the end result is a consensus that reflects the opinion of the bureaucrats. *Id.* Industry trade associations generally play the part of a *shingikai*. *Id.* "In the weeks between formal meetings of the council, Ministry bureaucrats and trade association members are in constant contact in order to ensure that, by the time the council formally convenes, the substantive questions will have been settled." *Id.*

\(^{104}\) ENIGMA OF JAPANESE POWER, *supra* note 6, at 444. *Shingikai* gather representatives of those concerned with the particular issue and make them a party to the consensus opinion that emanates from these councils. *Id.* "Occasionally they [shingikai] may evolve a fresh — or a first — approach to a pressing issue, but mostly they are symbolic expressions of 'consensus', a proof that the public has been served by having a variety of the best minds thoroughly mull over a course of action." *Id.*

\(^{105}\) IPMS GROUP, *supra* note 56, at 5 (discussing system of influence peddling between politicians, businesses, and bureaucrats as "Iron Triangle").

\(^{106}\) LAW AND SOCIAL CHANGE, *supra* note 5, at 14; IPMS GROUP, *supra* note 56, at 5; see ENIGMA OF JAPANESE POWER, *supra* note 6, at 173-77 (discussing influence and openness of Japan's "money politics").

\(^{107}\) Nobuhito Kishi, *Ministry of Ministries: Leader of Japan's Bureaucracy Rushes to Keep Up With Current of Change*, *By The Way*, July/Aug. 1994, at 47. Japan experienced political stability for nearly 40 years in the Post-WWII period under the Liberal Democratic Party ("LDP"). IPMS GROUP, *supra* note 56, at 2. After a series of political scandals involving LDP members and the LDP's inability to carry out political reform, the
officials occupied a position above the bureaucrats, who regulate industry via permits, licenses, and guidance. Businesses ensured their role in the Iron Triangle by making political contributions and stressing their ability to deliver voting blocs.

The interplay of these differing interests and influences generate a system of give and take, where businesses, hoping to circumvent some legal requirement, offer money to politicians. The politicians exert political pressure and lobby on behalf of the business by pressuring the agency to grant certification or other special treatment. Common examples include: granting of permission to do business despite lacking qualifications or failing to meet the statutory requirements, issuing a license to do business without proper examination of the application, and generally overlooking serious legal violations.

e. The MOF-Tan Network: Brokers As Intermediaries

Japanese banks and securities companies station permanent employees at MOF to obtain information from MOF bureaucrats. These employees, nicknamed MOF-Tans, are responsible for culling information from ranking MOF bureaucrats regarding inspections of banks or MOF's position on a particular new product or service.

Diet passed a non confidence resolution and dissolved the cabinet in 1993. The LDP failed to maintain its majority hold, and eventually a coalition government, led by Prime Minister Hosokawa, was inaugurated in August 1993. Kishi, supra note 107, at 47. Id. The collapse in 1993 of strong one-party rule led to a diminution of politician's influence over the bureaucracy and a commensurate increase in the bureaucracy's power. Kishi, supra note 107, at 49. Political rule via coalition governments since the early 1990's created a power void that the bureaucracy, particularly MOF, filled. Id. The MOF-Tan's job begins after normal working hours, when they invite MOF officials to traditional Japanese restaurants to find out times for ministerial approval of new products or services, or to

108. Kishi, supra note 107, at 47.
109. Id.
110. IPMS Group, supra note 56, at 5.
111. Id. The collapse in 1993 of strong one-party rule led to a diminution of politician's influence over the bureaucracy and a commensurate increase in the bureaucracy's power. Kishi, supra note 107, at 49. Political rule via coalition governments since the early 1990's created a power void that the bureaucracy, particularly MOF, filled. Id.
112. IPMS Group, supra note 56, at 5.
113. Id.
114. Id.
116. SHINDO, supra note 1, at 107. The full name is Okurasho Tanto Shain, or workers responsible for relations with MOF. Id.
117. Power Down in the Dumps, supra note 115, at 11. The MOF-Tan's job begins after normal working hours, when they invite MOF officials to traditional Japanese restaurants to find out times for ministerial approval of new products or services, or to
and Securities Bureau, MOF-Tans' role includes following the Bureau's movements and obtaining opinions on matters important to the company. Banks and securities companies utilize MOF-Tans to maintain close ties to MOF.

MOF-Tans receive a salary from their own company, but spend all day at MOF. During busy periods for MOF, MOF-Tans lend assistance by doing work for MOF, however, their primary job is to obtain information regarding upcoming inspections of financial institutions. MOF-Tans sometimes assist MOF in implementing administrative guidance by helping ensure smooth implementation.

The MOF-Tan system, under public and media pressure, was reformed because of excesses revealed in 1995. Since the 1995 reform, there are few examples of lavish entertainment of MOF officials by financial institutions. As financial liberalization progresses and MOF's approval and certification systems become less arbitrary, the need for and position of MOF-Tans are diminishing. MOF-Tans also face increasing antagonism from fellow employees as the finance industry struggles to cut

obtain information that will help set the company's management strategy. A member of this elite network revealed that he entertained ranking MOF officials two to three times per week with a typical evening running US$300-400 per person. This is not considered extravagant because important information can be obtained, like when an on-the-spot inspection will be carried out or at which branch the inspection will take place.

118. IPMS GROUP, supra note 56, at 37-38. The MOF is divided into several internal bureaus including the Banking Bureau. MOF's Banking Bureau is responsible for regulating Japan's banking industry.

119. Id. MOF's Securities Bureau regulates activity in Japan's capital markets.

120. Power Down in the Dumps, supra note 115, at 11.

121. SHINDO, supra note 1, at 8 (describing influential role of MOF-Tans in 1991 Securities Compensation Scandal involving financial institutions).

122. TOMONOBU OMIYA, KEIZAI TO GYOSEI NO KANKEI GA HITOSUME DE WAKARU JITEN [ENCYCLOPEDIA OF BUSINESS ADMINISTRATION RELATIONS] 84 (1993).

123. Id. If MOF-Tans are able to gather such information, the banks or securities firms can adapt their policies to hide any legal defects in business operations. Id.

124. Id.

125. Power Down in the Dumps, supra note 115, at 11. Nightly entertainment costs normally amounted US$300 to US$400 per person. Id. One employee conceded that he spent US$600 per person when he entertained three deputy division directors of the Banking Bureau.

126. Id.

127. Id. MOF is refraining from lavish activities because of criticism that MOF maintains collusive ties to the finance industry. Id.

128. Id.
costs and improve profitability.129

3. Legal Structures That Perpetuate Japan’s Informal Regulatory System

The Japanese legal environment increases the effectiveness of administrative guidance in industrial policy.130 Japan’s informal regulatory process functions within a legal system that consists of a ministry’s statutory authority limited by administrative rules and doctrines of judicial review that are designed as a check against arbitrary policies.131 In Japan, courts grant ministries broad discretion in their regulatory methods because of vaguely worded statutes.132 Combined with low levels of judicial review, this broad discretionary authority insulates much of Japan’s industrial policy from challenge.133

a. Broad Scope of Authority

The underlying characteristics of Japanese statutes are the broad scope of authority provided to ministries and vague standards with which ministries are to exercise that authority.134 Ministries’ broad-based authority and uncertainty regarding whether agencies’ actions are legal improves the effectiveness of administrative guidance.135 Recipients of guidance, because of

129. Id.
130. LAW AND SOCIAL CHANGE, supra note 5, at 168-71 (discussing role of legal system and difficulty of gaining judicial review of administrative guidance in enhancing compliance with guidance).
131. Id. at 169.
132. Id. (supporting broad discretion for ministries because of vague statutory wording). For example, “[o]verriding characteristics of all statutes are the wide scope of authority delegated to MITI and the vagueness of the standards by which MITI is to exercise that authority.” Id. “When it comes to how, when, or toward what end that legal power should be used, most economic statutes are so broad as to be virtually meaningless.” Id.
133. Id.
134. Id. The wording used in Japanese statutes is vague and ambiguous. Spaeth, supra note 8, at 937.
135. TRADE AND COMPETITION LAW, supra note 8, at 68; Frank K. Upham, The Legal Framework of Japan’s Declining Industries Policy: The Problem of Transparency in Administrative Processes, 27 HARV. INT’L. L.J. 425, 432 (1986) [hereinafter Declining Industries Policy]. Traditionally, courts grant ministries a lot of leeway in interpreting statutory authority, thus providing agencies with ministerial discretion in their market governance. LAW AND SOCIAL CHANGE, supra note 5, at 176. Japanese courts tend to rule in favor of an agency’s interpretation regarding the scope of their statutory authority. Declining Industries Policy, supra, at 432. Despite judicial leeway in agencies’ discretionary power, agencies continue to prefer informal administrative guidance reinforced by implied threats
the need for close, amicable relations with bureaucrats, generally do not challenge administrative guidance. In cases where the recipient of guidance has no way to discern the legality of the agencies' action, barring public challenge through litigation, there is less incentive to jeopardize the firm's relations with the ministry.

b. Judicial Review of Administrative Guidance

Japan's legal infrastructure consists of government ministries, with broad statutory authority, and principles of administrative law that define the limits of that authority. Ministries generally exercise their influence informally and, thus, do not act in a way that creates legal rights for parties to challenge administrative decisions. The prevalence of administrative guidance and judicial interpretation of doctrines of justiciability, standing, and scope of agency discretion, therefore, deny judicial review of most Japanese industrial policy decisions.

i. Administrative Acts and Justiciability

Prior to the enactment of the APL, two statutes provided the primary avenues for challenging administrative actions: the Ad-
ministrative Case Litigation Law\textsuperscript{141} ("ACLL"), and the Administrative Complaint Inquiries Law ("ACIL").\textsuperscript{142} Despite further supplementation in other specialized regulatory statutes, under the above statutes, parties may only challenge actions that are gyosei shobun, or administrative dispositions, or some other exercise of public power as stipulated in Article 3\textsuperscript{143} of the ACLL.\textsuperscript{144} If the act is a disposition or exercise of public power, the issue is justiciable and the inquiry becomes whether the plaintiff is an appropriate person to challenge the action.\textsuperscript{145} Judicial interpretation of this issue limits application of Article 3 to acts that immediately and directly create or establish boundaries of private rights and duties.\textsuperscript{146}

The difficulty for those seeking review of an agency’s guidance is that the informal nature of most guidance does not constitute an administrative disposition or other exercise of public power as defined by the ACLL.\textsuperscript{147} A ministry’s oral guidance does not constitute a disposition or other exercise of power because it is unwritten and based on voluntary compliance.\textsuperscript{148}

\textsuperscript{141} Gyosei jiken sosho ho [Administrative Case Litigation Law], Law No. 139 of 1962 (Japan) [hereinafter ACLL]. See generally Robert W. Dzuibla, The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation, 18 Cornell Int’l L.J. 37 (1985) (discussing doctrine of shobunsei and litigation against administrative agencies under Administrative Case Litigation Law ("ACLL").

\textsuperscript{142} Gyoseifufuku shinsa ho [Administrative Complaint Inquiries Law], Law No. 160 of 1962 (Japan) [hereinafter ACIL].

\textsuperscript{143} ACLL art. 3, Law No. 139 of 1962 (Japan).

\textsuperscript{144} LAW AND SOCIAL CHANGE, supra note 5, at 170-71.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 171; see Sasaki v. Atami City Agricultural Council, 9 Minshu 217 (1955) (S. Ct.) (Japan) (holding that notice from defendant did not constitute administrative disposition). "The effect of the Sasaki rule is that supervisory orders, permissions, approvals, and regulations among agencies or within a single agency cannot be the object of litigation because they do not directly create or form the rights and duties of citizens." Dzuibla, supra note 141, at 45. Therefore, it is not only informal acts that are beyond judicial scrutiny. LAW AND SOCIAL CHANGE, supra note 5, at 171. Numerous formal actions are beyond review because they are considered internal government behavior that do not directly effect the private rights or duties of private citizens. Id. The list of internal government behavior that is beyond review includes shingikai. Id. "Thus, even a final shingikai report that recommends specific criteria for a production or price cartel would not be reviewable until its provisions were formally implemented, and then only if they legally restrained private action." Id.

\textsuperscript{147} LAW AND SOCIAL CHANGE, supra note 5, at 171. "MITI almost invariably acts informally in a legal sense, and only a final and legally formal act directly creates legal rights and duties." Id.

\textsuperscript{148} Lorenz Ködderitzsch, Japan’s New Administrative Procedure Law: Reasons for its Enactment and Likely Implications, 24 L. in JAPAN 105, 110 (1991) (detailing prevalence of
Japanese ministries typically use oral guidance, rendering most bureaucratic policy decisions non-reviewable because judicial interpretation places administrative guidance outside the scope of the doctrine of justiciability.\textsuperscript{150}

ii. Standing to Challenge

Article 9\textsuperscript{151} of the ACLL limits standing to parties with a legal interest in an administrative disposition.\textsuperscript{152} The ACLL requires the plaintiff’s injury to be a legal interest, whereas an injury to a non-legal or factual interest will not suffice to give the injured party standing to challenge an administrative act.\textsuperscript{153} Judicial interpretation of ACLL Article 9 concludes that standing is not granted to individual interests except where an administrative agency is specifically required by statute to protect those individual interests.\textsuperscript{154} Courts in Japan hold, therefore, that where an agency acts in the name of general public interest, individual interests injured by the government act are only factual interests and, thus, do not convey standing.\textsuperscript{155}

iii. Scope of Agency Discretion

If a party successfully establishes the existence of a justiciable issue and the party has standing to litigate, they must then

\footnotesize{oral guidance and difficulty of alleging infringement of rights); LAW AND SOCIAL CHANGE, supra note 5, at 171 (discussing use of informal guidance and, where necessary, bureaucratic pressure to reach consensus).
\textsuperscript{150} Declining Industries Policy, supra note 135, at 430; Ködderitzsch, supra note 148, at 110. The agency issues requests or suggestions, so that a recipient often has no means to allege a violation. Id. “The institutional arrangements serve to make judicial review of administrative action very difficult in Japan. Many agency operations are characterized by a degree of informality so extensive that official administrative dispositions often do not occur.” Edelman, supra note 1, at 436.
\textsuperscript{151} ACLL art. 9, Law No. 139 of 1962 (Japan).
\textsuperscript{152} LAW AND SOCIAL CHANGE, supra note 5, at 171-72; see Sakamoto v. Japan, 16 Minshu 57 (1962) (S. Ct.) (Japan) (holding that personal interests injured by government action are not legal interests which convey standing to sue when government acts in general public interest).
\textsuperscript{153} LAW AND SOCIAL CHANGE, supra note 5, at 171-72
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 172; see supra note 152 and accompanying text (discussing Supreme Court decision denying standing to party with factual interest).}
The plaintiff must demonstrate that the act went beyond the agency’s scope of discretion. While Japanese courts do not hesitate to act decisively when the Government acts unjustly, courts are not very receptive to challenges of agency actions. Rather, Japanese courts grant ministries very broad discretion under the ministries’ enabling statutes, making a successful challenge unlikely.

B. What Is Administrative Guidance?

Administrative guidance, the process whereby bureaucratic agencies request certain conduct and exert other forms of statutory or non-statutory pressure to achieve compliance, is the primary method of enforcing regulations and implementing policy. Japanese regulators issue warnings, requests, encourage-
ment, and suggestions, all of which fall under the general heading of administrative guidance, to parties within a particular ministry's jurisdiction.\textsuperscript{162} Administrative guidance is supported by implied threats of action or inaction.\textsuperscript{163} The Japanese bureaucracy relies heavily on administrative guidance, the effects of which are felt throughout all aspects of business in Japan.\textsuperscript{164}

For parties that receive administrative guidance, the end result is typically compliance.\textsuperscript{165} Compliance is the norm even where ministries lack explicit statutory authority to persuade parties to comply with ministerial guidance.\textsuperscript{166} The flexibility or extra-legal nature of administrative guidance means that its exercise is not always constrained by any legal limits. The lack of

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  \item \textsuperscript{162} MITI and the Japanese Miracle, supra note 50, at 265 (defining administrative guidance).
  \item \textsuperscript{163} Enigma of Japanese Power, supra note 6, at 450. The agencies' threats often involve matters unrelated to the subject of the guidance, but which fall under the jurisdiction of the particular ministry and effect the recipient of the guidance. \textit{Id.; see Law and Social Change, supra note 5, at 171 (noting MITI's use of threats of collateral future action against non-complying firms)}.
  \item \textsuperscript{164} Paradox of Industrial Policy, supra note 31, at 111. Noting the reach of administrative guidance, Haley states:

  What distinguishes Japan is the persuasive resort to informal enforcement in contexts that seem to require formal regulation in other industrial states. In Japan informal enforcement is not a process of governing, but has become \textit{the} process of governing. It is used to implement nearly all bureaucratic policy, whether or not expressed in statute or regulation, at all levels of government and all administrative offices. Japanese officials use informal enforcement to implement policy in every conceivable situation from antitrust violations and price controls to regulation of financial institutions and bowling alley business hours to reduce juvenile crime.


  \item \textsuperscript{165} Enigma of Japanese Power, supra note 6, at 450.
  \item \textsuperscript{166} Law and Social Change, supra note 5, at 176-84 (explaining MITI's use of extra-legal guidance in 1965 Sumitomo Steel Incident, where MITI, lacking statutory authority, forced overall decrease in steel production despite Sumitomo's initial refusal). \textit{See Matsushita & Schoenbaum, supra note 161, at 35 (discussing compliance with guidance where ministry lacks legal authority to compel compliance). In discussing the potential negative repercussions for parties that ignore guidance, the authors point out that:}

  Despite its informality and a recent decline in its effectiveness, administrative guidance is still a powerful governmental tool. Japanese businessmen generally feel that government directives must be respected, whether they are based on legal authority or not. Business in Japan prefers to submit to government direction and avoid confrontations, even if the government direction is wrong-

  \textit{Id.}
clearly defined boundaries within which guidance operates, therefore, results in an exercise of *de facto* rather than *de jure* governmental power.\(^{167}\)

1. Categories of Guidance

Although agencies frequently use administrative guidance,\(^{168}\) not all administrative guidance involves agencies seeking conduct with which recipient parties disagree.\(^{169}\) Agencies often issue guidance that promotes or protects the recipient, or helps mediate a dispute between parties desiring to avoid formal adjudication.\(^{170}\) Administrative guidance as a substitute for actual statutory authority is when guidance is most likely to evoke negative reactions from the private sector.\(^{171}\) The various examples of guidance fall into one of three categories: (a) promotional;\(^{172}\) (b) adjudicatory;\(^{173}\) and (c) regulatory.\(^{174}\)

a. Promotional Guidance

Government agencies in Japan provide advice, known as promotional administrative guidance, to a company in order to promote the company's interests.\(^{175}\) The Japanese bureaucracy uses promotional administrative guidance to offer assistance in a

\(^{167}\) *Trade and Competition Law*, supra note 8, at 69; see Edelman, *supra* note 1, at 436 (discussing cases where ministry wants firm to take action that ministry has no legal authority to compel, such as to reduce production).

\(^{168}\) Edelman, *supra* note 1, at 436-37; *Trade and Competition Law*, supra note 8, at 60. “[G]overnment agencies in Japan often choose not to use laws directly to accomplish their policy goals but to utilize the more informal process of persuasion when they wish to control the conduct of private enterprises. This informal process of persuasion is often called 'administrative guidance.'” *Id.*

\(^{169}\) *Trade and Competition Law*, supra note 8, at 61-65 (discussing positive uses of administrative guidance to promote economic viability of firms and settle inter-firm disputes).

\(^{170}\) *Id.*

\(^{171}\) *Id.* at 62-65; see *supra* note 166 (discussing regulatory guidance in context of 1965 Sumitomo Metals Incident where MITI informally enforced decrease in steel production in order to stabilize domestic steel price).

\(^{172}\) *Trade and Competition Law*, supra note 8, at 61-62 (discussing agencies' use of guidance to support business activities of private parties).

\(^{173}\) *Id.* at 63-64 (describing government role as mediator in disputes between two private parties).

\(^{174}\) *Id.* at 62-63 (analyzing ministries' substitution of guidance for actual statutory authority in controlling private party conduct).

\(^{175}\) *Id.* at 61. The ministry's policies generally reflect or support those of the party that received the promotional guidance. *Id.*
variety of sectors. Bureaucrats use promotional guidance, sometimes in the form of financial assistance from government financial institutions, to aid small enterprises in improving production, research and development, and management. In addition, ministries operate governmental agricultural research facilities for the benefit of Japan’s farmers. The primary goal of promotional administrative guidance, therefore, is to promote or protect the recipients of such advice.

b. Adjudicatory Guidance

Government agencies sometimes use adjudicatory administrative guidance to help private parties resolve disputes among themselves. While formal legal disputes are left to the judicial system, an agency’s adjudicatory guidance allows parties to avoid the public and adversarial aspects of court proceedings. A prominent example of such guidance is MITI’s mediation of conflicts between large and small enterprises. Japanese Government agencies, as informal mediators, have succeeded in settling many disputes, thus helping resolve issues and avoid judicial proceedings.

c. Regulatory Guidance

Japanese bureaucrats use regulatory administrative guidance as a non-statutory means of regulating private conduct. Regulatory guidance is used as a substitute for legal compulsion. The use of regulatory administrative guidance is particu-

176. Id.
177. Id. Examples include: the Medium and Small Enterprises Financial Bank, the Commerce and Industries Central Finance Bank, and the People’s Bank. Id.
178. Id.
179. Id.
180. Id.
181. Id. at 63.
182. Id.
183. Id. at 62-63.
184. Id. at 64. “[T]he role of the government is that of an informal mediator, advising and suggesting to the parties in the controversy ways of resolving a dispute. This has proved to be effective and many disputes which the parties would never have solved themselves have been resolved without utilizing court proceedings.” Id.
185. Id. at 64-65.
186. Id. at 62-63. The focus of most writing on administrative guidance is on the use of regulatory guidance where ministerial guidance substitutes for legal authority to force recipients to comply. Id. By emphasizing the practice of putting all information and requests in writing, issues addressed by the APL regarding fairness of procedure
larly common in areas that involve non-domestic trade, like import and export controls.\textsuperscript{187} Even when there is no formal statutory power to enforce a ministry's guidance, Japanese businesses generally comply with regulatory administrative guidance.\textsuperscript{188} Technically, there is no compulsory power to enforce the guidance, but ministries use various means of persuasion to achieve compliance.\textsuperscript{189} Regulatory guidance, therefore, is a powerful tool used by government agencies.\textsuperscript{190}

2. MITI and MOF: Powerhouses of Regulatory Informality

MITI and MOF are Japan's two most influential economic ministries.\textsuperscript{191} Both ministries maintain highly educated and well-trained staff,\textsuperscript{192} and exert far-reaching authority over large portions of the Japanese economy.\textsuperscript{193} Despite MITI and MOF's jurisdiction via broad statutory and non-statutory powers, there is evidence that bureaucratic influence over the Japanese economy is waning.\textsuperscript{194}

and transparency of administrative decision making processes constrain the use of arbitrary regulatory administrative guidance. APL arts. 5-37, Law No. 88 of 1993 (Japan).

\textsuperscript{187} \textit{TRADE AND COMPETITION LAW}, supra note 8, at 62.

\textsuperscript{188} \textit{Id.} at 63. Government agencies have different types of persuasion techniques available to insure compliance. \textit{Id.} Combined with the realization that successful business operations depend on close ties with the particular ministry, most businesses concede to the ministry's wishes. \textit{Id.}

\textsuperscript{189} \textit{Id.} Ministries threaten to delay processing or to reject a party's application in order to achieve compliance with its guidance. \textit{ENIGMA OF JAPANESE POWER}, supra note 6, at 450. The threatened application is often not directly related to the subject of the ministry's guidance. \textit{Id.}

\textsuperscript{190} \textit{LAW AND SOCIAL CHANGE}, supra note 5, at 176-83 (reporting MITI's use of this form of guidance to compel domestic steel industry to cut production and stabilize domestic steel price).

\textsuperscript{191} KANEKO, supra note 1, at 13-18; SHINDO, supra note 1, at 90-91; see supra note 8 and accompanying text (discussing high degree of control over Japanese economy by MITI and MOF).

\textsuperscript{192} PRESTOWITZ, supra note 51, at 112-15 (describing educational track for bureaucratic elite); see supra note 51 and accompanying text (discussing educational background for bureaucrats staffing government agencies).

\textsuperscript{193} See SHINDO, supra note 1, at 90-91 (describing degree of ministerial control in Japanese economy)

\textsuperscript{194} \textit{See generally} Roger Buckley, \textit{Signs of Decline and Fall for the Administrative State in Japan}, INT'L HERALD TRIB., Feb. 13, 1996, at 6 (discussing debate over break-up of MOF); David E. Sanger, \textit{Mighty MITI Loses Its Grip}, N.Y. TIMES, July 9, 1989, at 1 (detailing Japanese companies' decreasing reliance on MITI for protection and promotion); Tanya Clark, \textit{MITI's Dilemma: Reform or Be Reformed}, TOKYO BUS. TODAY, June 1995, at 28 (arguing that MITI faces choice to stay same and wither under deregulation, or re-engineer itself and help lead Japan);
a. MITI

MITI was established in May 1949 to organize and support the rebuilding of Japan’s industrial base after the Second World War. MITI has since been a major factor in planning and implementing national policies to expand Japanese trade and industry. Aided by close ties to the business world, MITI bureaucrats are viewed as the primary architects of Japan’s successful post-war economic policy.

MITI enforces over 130 statutes encompassing a wide range of industrial sectors, including international trade, oil, and safety standards. MITI’s regulatory powers are, however, relatively limited, forcing MITI to rely on administrative guidance. Traditionally, MITI’s administrative guidance, supported by licensing authority under which MITI did not have to provide reasons for granting or denying licenses, had a binding effect on companies likely to be affected by one or more of these 130 statutes. MITI has relied heavily on the use of extra-legal administrative guidance where the ministry lacked explicit statutory author-

195. HUNTER, supra note 32, at 132.
196. Id. at 132-33.
197. Id. at 133.
198. Legal Framework of Trade, supra note 27, at 377.
199. Interview with Osamu Hirakawa, Attorney, Anderson Mori, in Tokyo, Japan (July 1995) [hereinafter Hirakawa]; VOGEL, supra note 83, at 73. MITI does have some statutory authority in certain areas. Id. MITI officials can: reserve licensing for firms that adhere to standards set by MITI, control research funding, form cartels, subject to Japan’s Fair Trade Commission, and grant approval for licensing agreements between Japanese and foreign companies. Id. MITI’s successful control over the Japanese economy derives from the ministry’s administrative guidance and voluntary cooperation within industrial circles. Id.
200. TRADE AND COMPETITION LAW, supra note 8, at 68. Noting the effect of ministries’ wide-ranging authority on companies, the author argues that:

An enterprise with a wide range of operations (which is a feature of enterprises today) is likely to be affected by one or other of those powers possessed by the agency which has the supervisory authority over its activities. The enterprise which has been made the subject of administrative guidance takes into consideration possible consequences at present or in the future of ignoring the administrative guidance and generally judges that to comply with the guidance is a wise business policy.

Id.; see ENIGMA OF JAPANESE POWER, supra note 6, at 450 (discussing compliance with administrative guidance because of broad-based ministerial authority). Japanese ministries leverage firms with threats of denying future applications or revoking current licenses in cases where recipients hesitate to comply with guidance in other, unrelated matters. Id.
MITI's influence over Japan's industrial sector from the 1950's through the 1970's allowed MITI to achieve compliance through informal pressure. Commentators argue that MITI has declined in power since the height of its authority in the 1960's. Because MITI reached its goal of helping Japanese industry grow from nascent firms to globally competitive enterprises, MITI now has less leverage over the companies that once sought MITI's assistance and protection. Furthermore, Japan's manufacturing base continues to shift overseas. Consequently, MITI's power in

201. Hirakawa, supra note 199; see Law and Social Change, supra note 5, at 176-88 (recounting MITI's extra-legal use of administrative guidance in 1960's to compel reduction in steel production to stabilize domestic steel price); see supra note 166 (discussing steel production reduction incident).

202. Hirakawa, supra note 199. One commentator writes that MITI's guidance during this period was like a parent company directing the actions of its subsidiary. YOSHIo Suzuki, KEIKANWA HA NAZE DEKINAI NO KA [WHY CAN'T JAPAN DEREGULATE] 36-37 (1995) [hereinafter WHY CAN'T JAPAN DEREGULATE]. Since this period, MITI has changed its focus and the guidance MITI now provides relates to deregulation. Id. at 37. This change resulted from criticism of the bureaucracy's excessive intervention in the Japanese economy. Id. In fact, MITI has recently adopted an import-oriented approach, thus breaking from its past role as an export promoter and domestic market protector. Id.


204. Clark, supra note 194, at 28. MITI relies heavily on extra-legal administrative guidance. Hirakawa, supra note 199. MITI's guidance is most effective when most of a particular industry agrees with the nature of the guidance. Id. MITI's ability to achieve compliance is the weakest when an industry disagrees with the subject of the guidance. Id.

205. Tatsuya Inoue, Trading Companies Open Investment Units in Asia, Nikkei Wkly., Feb. 5, 1996, at 12 [hereinafter Trading Companies] (describing hollowing out as business and industry shift overseas). In describing why Japan's major trading companies are establishing investment affiliates and investment funds abroad, industry analysts point to the "hollowing out, or move offshore, of Japanese manufacturing." Id. Analysis concede that because the hollowing out of the manufacturing industry will lead to a decrease in business in Japan, that trading companies are forced to seek more business overseas. Id. Singapore has been a common destination for many trading companies, including Mitsubishi Corp. and Mitsui & Co. Id. Overseas output by Japanese companies is on pace to surpass exports from Japan in Fiscal Year 1995. Overseas Production May Outpace Exports, Nikkei Wkly., Apr. 1, 1996, at 3. The continuing shift to offshore production is attributed to the stronger yen. Id.
implementing industrial policy has diminished.\textsuperscript{206}

b. MOF

MOF occupies a central position in the Japanese bureaucracy.\textsuperscript{207} The primary sources of MOF's influence in the Japanese economy are its control over budget, tax, and monetary policy.\textsuperscript{208} MOF's enabling statute grants the ministry authority to raise and spend public funds, as well as control over the banking, securities, and insurance industries.\textsuperscript{209} Therefore, MOF has jurisdiction over both the public and private financial sectors.\textsuperscript{210} In governing the public sector, MOF annually determines all government agencies' spending budgets,\textsuperscript{211} forcing all government agencies to negotiate with MOF for their share of the na-

\textsuperscript{206} Hirakawa, supra note 199; Telecom Wars, supra note 203, at 183-84. Japan's big businesses no longer need MITI's assistance to compete globally. \textit{Id}. In addition, "many industrialists seem to be continuing to shift their operations out of Japan." Shijuro Ogata, \textit{On the Brink of Bigger Role: Japan's Economy May Have Peaked as It Becomes More International}, \textit{Fin. Times}, Jan. 5, 1996, at 14. "Government ministries used to be so powerful and effective that many observers believed Japan would have no problem as long as they remained in control. Those days are over, however. The bureaucracy has long been paralysed by inter-ministerial rivalry and ties of patronage and obligation to industrial interest groups." \textit{Id}. \textit{See generally} Madoka Takai, \textit{Vanishing Point Ahead: Industry Begins to Disappear}, \textit{Tokyo Bus. Today}, Aug. 1995, at 8 (discussing rush of Japanese industry overseas to avoid yen fluctuation); Norifumi Tsukada, \textit{Structural Change: As the Yen Ratchets Higher, We're Running Out of Time}, \textit{Tokyo Bus. Today}, Aug. 1995, at 4 (contending that Japan must deregulate and institute market-based regulatory scheme in order to stem tide of companies leaving Japan for overseas locations).


\textsuperscript{208} Jin Nakamura, \textit{King of Ministries Under Fire}, \textit{Daily Yomiuri}, Feb. 28, 1995, at 8 [hereinafter \textit{King of Ministries}].

\textsuperscript{209} TATEWAKI, supra note 207, at 175; MILHAUPT, supra note 207, at 446.

\textsuperscript{210} TATEWAKI, supra note 207, at 175.

With regard to the private financial sector, MOF controls taxes and monetary policy for all financial institutions operating in Japan. MOF uses formal and informal guidance to exert influence over financial institutions in order to meet certain MOF goals. Some of MOF's principal functions include ensuring that financial companies follow legal requirements and regulating the flow of money from banks into the private sector.

MOF's guidance usually consists of a number of notifications or official letters issued to banks and financial institutions under its jurisdiction. MOF informs banks of its policy directives and generally the private banks alter their behavior accordingly. MOF's guidance affects rules of bank management, bank accounting, credit ceilings, and branch establishment.

MOF has become more progressive since the late 1980's when MOF officials realized they needed to alter the Japanese


213. King of Ministries, supra note 208, at 8; Brian W. Semkow, Japanese Banking Law: Current Deregulation and Liberalization of Domestic and External Financial Transactions, 17 Law & Pol'y Int'l Bus. 81, 95 (1985) (citing MOF as key public authority empowered with regulating "directly or indirectly the activities of all financial institutions in Japan"); see Break Up MOF, supra note 211, at 6 (discussing MOF's domination of public and private finance). "In its role as supreme regulator of all financial institutions, MOF also dominates the private sector." Id.

214. Semkow, supra note 213, at 85. "Since there are neither legal checks to constrain the exercise of administrative guidance, nor formal legal remedies for its abuse, MOF has a flexible instrument to influence financial institutions in light of rapidly changing economic circumstances." Id. at 91. MOF's power goes beyond its statutory authority. Tatewaki, supra note 207, at 175. "[E]xtensive private-level contact and consultation with all participants in the industry" enhances MOF's influence. Id. Nothing happens without explicit or implicit approval from MOF. Id.; Hirakawa, supra note 199; Radin, supra note 90.

215. Tatewaki, supra note 207, at 177.

216. Enigma of Japanese Power, supra note 6, at 159. "Since the war Japanese corporations have had little choice but to rely for capital on bank borrowings rather than on equity raised in public markets." Id.

217. Tatewaki, supra note 207, at 175.

218. Semkow, supra note 213, at 91; Enigma of Japanese Power, supra note 6, at 159. Japanese banking law assumes that banks will always follow MOF's interpretation of the laws. Japan's Non-Revolution, supra note 212, at 58-59. Finance in Japan has evolved into a system where finance firms seek prior approval from MOF for all business decisions. Hirakawa, supra note 199. This includes instances where statutes are silent on the issue of whether prior approval is necessary. Id. The general rule is that an action not specifically provided for in the statute is prohibited. Id.; Radin, supra note 90.

219. Semkow, supra note 213, at 91.
financial system in order to allow Japanese firms to continue to expand overseas.\textsuperscript{220} MOF’s expedition of the approval process for non-domestic borrowers seeking to utilize yen markets\textsuperscript{221} was one example of this attitudinal shift.\textsuperscript{222} Since 1993, banks, insurance companies, and securities companies can participate in one another’s markets.\textsuperscript{223} This reform was designed to promote competition and efficiency in Japan’s financial markets.\textsuperscript{224} Despite liberalization, MOF continued to regulate the flow of new entrants into the Japanese financial sector and to require businesses to seek MOF’s approval prior to issuing a new financial instrument or service.\textsuperscript{225}

Bank-based financing has traditionally characterized the Japanese financial system.\textsuperscript{226} MOF’s authority in this area has diminished in recent years because the role of bank lending has declined as major companies increasingly turned to capital markets for funding.\textsuperscript{227} MOF has traditionally maintained more con-

\textsuperscript{220} Tatewaki, supra note 207, at 176.
\textsuperscript{221} Id. “The decision to speed up the approval process for foreign borrowers wishing to tap yen-markets is tangible evidence of the change of attitude . . . .” Id.
\textsuperscript{222} Id.
\textsuperscript{223} IPMS Group, supra note 56, at 152. Legislative revision in 1992 granted companies access to markets previously closed to the companies. Id.
\textsuperscript{224} Id.
\textsuperscript{225} Tatewaki, supra note 207, at 176. The approval process slows considerably for innovative and unprecedented changes, because MOF officials scrutinize every point prior to extending MOF’s approval. Id. “When foreign banks were proposing to introduce yen-yen swaps products, the MOF and the Bank of Japan held exhaustive discussions to clarify exactly the full implications of the proposal before allowing these deals to be marketed to domestic financial institutions in 1986.” Id. MOF receives criticism for its slow pace of deregulation. Id. MOF occasionally, however, acts quickly to prevent potential problems from effecting Japanese financial markets. Id. The Ministry’s actions during times of rapid action illustrate the flexibility built into MOF’s informal system of regulation. Id.
\textsuperscript{226} Political Institutions, supra note 161, at 148. The primary source of funding for Japanese companies between 1972-81 was banks. Id. Banks accounted for 75% of corporate funds in 1972, compared to 19% from shares, and the figures for 1981 were 68% from banks and 21% from shares. Id. “Indirect financing remains an intrinsic feature . . . of mature developmental states such as Japan. Although such a system undoubtedly restricts international capital flows, it remains in place because of the power, combined with low political visibility, it gives to Ministry of Finance bureaucrats.” Id. at 149.
\textsuperscript{227} Yumiko Suzuki, Companies Turn More to Capital Markets, Nikkei Wkly., Feb. 5, 1996, at 12 [hereinafter Yumiko Suzuki]. The volume of bond issuances in 1995, while still a fraction of total bank lending, increased 70% from the previous year. Id. The increase is attributed to deregulation of requirements in bond issuance, and further deregulation in 1996 will likely increase corporate reliance on capital markets. Id. Mitsubishi Electric Corp., Japan’s third largest electric-machinery maker, decreased its ratio of loan debt to total debt to 30% from 60% at the end of 1989. Id. Analysts note
trol over the banking industry than it has in the securities markets. Analysts also note that Japan’s financial markets are hollowing out as over-regulated, domestic financial markets provide incentive for companies to raise capital in non-domestic markets. Securities and banking scandals have bolstered public criticism of MOF and further weakened MOF’s control over the Japanese financial sector. Commentators call for major re-

that the “Japan Premium” in the Fall 1995 threatened the lending ability of Japanese banks. Id. “In international lending, non-Japanese banks imposed a premium of up to 0.5% on lending rates to their Japanese counterparts out of concerns that Japan’s troubled financial system presented extra risks.” Id. London branches of Japanese banks, for example, had trouble borrowing. Id. Japanese trading houses noted that they have been at an advantage with respect to banks since the early 1980’s when companies began to reduce bank borrowings. Id.

228. Milhaupt, supra note 207, at 440.


230. See Milhaupt, supra note 207, at 429 (describing MOF’s role in 1991 Securities Compensation Scandal); Jathon Sapsford, Bank Regulators in Japan May End the Honor System, WALL ST. J., Nov. 6, 1995, at A21 [hereinafter Ending the Honor System] (discussing stock trading scandal in New York Office of Daiwa Bank which MOF’s regulatory style received criticism); Seiichiro Saito, Atarashii Nihon no Kinyu Shisutemu no Shozo [Portrait of a New Japanese Financial System], EKONOMISUTO, Dec. 18, 1995, at 29-34 (discussing role of MOF’s inadequate regulatory controls in 1995 Daiwa Bank Incident, where New York Daiwa Bank Office hid US$1.1 billion of trading losses from U.S. regulators); Keikichi Honda, Jusen illustrate need for systemic reform, Nikkei WKLY., Jan. 22, 1996, at 6 (noting decline of MOF’s prestige because of role of jusen housing loan corporation issue) “MOF partly exempted jusen from its administrative guidance in 1990 which prohibited banks from increasing lending to property-related areas.” Id. MOF’s policies led to “wild property and stock-market speculation in the late 1980s and then it abruptly cut off the easy-money spigots in the early 1990s, causing land and stock prices to slide.” Jathon Sapsford, Japan Mulls Finance Ministry Breakup, ASIAN WALL ST. J., Feb. 12, 1996, at 9 [hereinafter Finance Ministry Breakup]. MOF’s image “has been tarnished by its role in creating Japan’s bad-loan crisis.” Id. Reports note that MOF plans to reform its rules regarding amakudari because of jusen issue. Fewer Ex-Bureaucrats Take Private Posts, supra note 80, at 2. “Amakudari . . . has been under fire because of possible links to the finance industry’s bad-loan crisis . . . .” Id.

231. Michael Hirsh, Japan: The Waning of the MOF, INST. INVESTOR, Dec. 30, 1993, available in LEXIS, ASIAPC Library, ARCNWS File (reporting decline of MOF’s influence because of confluence of scandals and poor financial conditions in Japan); Michael Williams, Wiping the Egg Off the Ministry’s Face, WALL ST. J., Oct. 27, 1995, at A10 (discussing negative effect on MOF’s authority and prestige because of Daiwa Bank’s New York Branch scandal and trading losses cover-up and jusen housing loan scandal). MOF has “suffered a slew of recent embarrassments, ranging from its clumsy handling
form of MOF's scope of authority, with some even calling for the total abolition of MOF.\footnote{232}

3. Administrative Guidance in Practice

MITI and MOF regulate companies within their jurisdiction using administrative guidance and licensing authority.\footnote{233} In practical terms, MITI and MOF's wide-ranging powers and pervasive informal ties to businesses provides leverage against companies and aids the ministries in regulatory governance.\footnote{234} Several examples of administrative guidance illustrate the respective powers of both MITI and MOF and their informal methods of pressuring firms to comply with administrative guidance.\footnote{235}

a. The Sumitomo Metals Incident

MITI's authority was at its peak in the 1950's and 1960's.\footnote{236} Control over imports via the Foreign Exchange and Foreign Trade Control Law\footnote{237} ("FEFTCL") combined with its authority to grant or deny permits to do business under statutes like the Petroleum Industry Law\footnote{238} ("PIL") to permit MITI to exercise absolute control over its jurisdiction.\footnote{239} Not surprisingly, challenges to MITI's authority were rare during this period.\footnote{240} One notable exception, involving the Sumitomo Metals Corporation, underscores MITI's influence through its use of administrative

\footnote{232. Break Up MOF, supra note 211, at 6 (advocating dissolution of MOF); Finance Ministry Breakup, supra note 220, at 9 (discussing growing criticism of MOF and public and political pressure to break MOF into several smaller bodies).

233. OHAYA, supra note 122, at 113-18 (discussing regulatory authority of MITI and MOF consisting of combination of administrative guidance and authority to grant or deny licenses, applications, permits, and approvals).

234. ENIGMA OF JAPANESE POWER, supra note 6, at 450-51 (discussing effectiveness of ministries using guidance to leverage firms to comply with industrial policy).

235. See LAW AND SOCIAL CHANGE, supra note 5, at 176-84 (discussing use of guidance to force reduction in steel production); KANeko, supra note 1, at 15-18 (describing MOF's role in 1991 securities scandal where securities firms compensated clients for stock losses after MOF requested closure of certain accounts).

236. LAW AND SOCIAL CHANGE, supra note 5, at 176.

237. FEFTCL, Law No. 28 of 1949 (Japan).

238. Sekiyogyo Ho [Petroleum Industry Law], Law No. 128 of 1962 (Japan).

239. LAW AND SOCIAL CHANGE, supra note 5, at 176; TRADE AND COMPETITION LAW, supra note 8, at 66.

240. LAW AND SOCIAL CHANGE, supra note 5, at 176.}
The price of steel in Japan in the mid-1960’s was dropping rapidly because a general recession resulted in an excess supply of steel and threatened to bankrupt several of Japan’s largest producers. MITI, in response to this decline in demand and pursuant to the PIL, sought to stabilize the domestic price of steel. MITI determined that all domestic steel companies in Japan’s steel production cartel, which MITI helped coordinate, should decrease production by ten percent.

Sumitomo Metals was the only firm in the cartel that refused to adhere to MITI’s guidance. The other leading firms decided to maintain the cartel and pressured MITI to force Sumitomo to comply. MITI sought Sumitomo’s compliance, but the company refused to yield. MITI responded that it would use its legal authority under the FEFTCL to limit Sumitomo’s importation of necessary raw materials to the amount needed to meet the company’s allotment as a cartel member.

241. Id. at 176-84 (analyzing 1965 Sumitomo Metals Incident where MITI compelled decrease in steel production via informal means); see ENIGMA OF JAPANESE POWER, supra note 6, at 451 (discussing effective use of MITI’s guidance in Sumitomo Metals Incident combined with ostracism from community of competitors to force recalcitrant firm to comply with production decrease).

242. LAW AND SOCIAL CHANGE, supra note 5, at 177; TRADE AND COMPETITION LAW, supra note 8, at 62.

243. LAW AND SOCIAL CHANGE, supra note 5, at 177.

244. Id. at 178; see TRADE AND COMPETITION LAW, supra note 8, at 62 (discussing MITI’s efforts to reduce steel production).

245. TRADE AND COMPETITION LAW, supra note 8, at 62; LAW AND SOCIAL CHANGE, supra note 5, at 177. Among the top six steel producers in Japan, Osaka-based Sumitomo Metals was the only firm that outright refused MITI’s requests to hire former MITI bureaucrats through the amakudari system. LAW AND SOCIAL CHANGE, supra note 5, at 177. See supra notes 70-95 and accompanying text (discussing effect of amakudari system on business-government relations). Adding to the closeness of business-government ties in this incident was the close cooperation that characterized MITI’s relationship with the steel industry in the Post-WWII period. LAW AND SOCIAL CHANGE, supra note 5, at 177. The importance of the steel industry and the relative volatility of the world steel market led corporate managers and MITI bureaucrats to coordinate the rate of expansion or rate of production. Id.

246. LAW AND SOCIAL CHANGE, supra note 5, at 179.

247. Id. at 178; TRADE AND COMPETITION LAW, supra note 8, at 62.

248. FEFTCL, Law No. 228 of 1949 (Japan).

249. TRADE AND COMPETITION LAW, supra note 8, at 62. “MITI had the power to allocate foreign currency to importers and, without such allocation it was impossible for the company to import the necessary coal and iron ore for production.” Id.; LAW AND SOCIAL CHANGE, supra note 5, at 179. This was the first time MITI publicly threatened
In the aftermath of this clash, Sumitomo and MITI tried to gather support for their respective positions within the economic community at large. MITI and the remaining cartel members ultimately prevailed because of their entrenched influence in Tokyo, the national capital, as compared to Sumitomo's localized influence among other business leaders in Osaka City. Pressure on Sumitomo to comply continued to grow as the steel market weakened and financial circles began to lose confidence in the economy. Sumitomo's representatives eventually met with MITI officials and reached a compromise where Sumitomo agreed to produce at the rates stipulated in MITI's directive.

b. The Lions Oil Incident

In December 1984, the Petroleum Council, an advisory body to the Minister of MITI, urged MITI to prevent Japanese gas stations from importing less expensive, non-domestic gasoline. Lions Oil filed an application to import 3000 kiloliters of gasoline from Singapore on December 3, 1984. MITI later sent Lions Oil instructions calling for the company to stop its planned imports. Lions Oil publicly stated that it would file

the exercise of formal statutory power against a firm that refused to comply with its informal administrative guidance. Law and Social Change, supra note 5, at 179. Sumitomo responded that MITI's actions violated its rights as a company to make its own business decisions and manage its own affairs. Id.

250. Law and Social Change, supra note 5, at 179. The goal was to isolate Sumitomo and force the firm back into line by building an overwhelming consensus within Japan's financial and economic elites to maintain the production cartel and decrease production of steel. Id.

251. Id.

252. Id.

253. Id. at 181; Trade and Competition Law, supra note 8, at 62.

254. MITI Urged to Halt Gasoline Imports, Jiji Press Ticker Serv., Dec. 24, 1984, available in LEXIS, ASIAPC Library, ARCNWS File. The Petroleum Council is an advisory body to the Minister of MITI. Id.

255. Id. (noting Japan's practice of importing crude oil for domestic refining and controlling supply to reflect demand). The Council maintained that imports of foreign gasoline supply would upset the stable supply of petroleum products. Id.


257. Gasoline Importer to Prepare Lawsuit Against MITI, Jiji Press Ticker Serv., Dec. 27, 1984, available in LEXIS, ASIAPC Library, ARCNWS File. MITI had no legal authority to compel what they were requesting of Lions Oil, but all importers must report import plans to MITI, which then issues administrative guidance. Chira, supra note 256, at D10.
suit against MITI if the ministry tried to prevent the imports.\footnote{258} Lions Oil brought one shipment of gasoline into Japan despite MITI's instructions.\footnote{259} After ordering the first import shipment from Singapore, however, Lions Oil reported that it was having trouble obtaining letters of credit from banks that were reluctant to extend credit to Lions Oil because of MITI’s recommendation.\footnote{260} An inability to arrange financing, thus, made it impossible for Lions Oil to continue importing gasoline.\footnote{261} In January 1985, Lions Oil announced that it had given up efforts to import gasoline because of MITI’s administrative guidance banning the imports.\footnote{262} During the period when Lions Oil imported the first shipment, the company owed a large sum in taxes and could not, therefore, financially afford to prolong resisting MITI’s guidance.\footnote{263} Lions Oil sought a loan from its primary bank, which refused the loan because it felt the imports conflicted with national policy.\footnote{264}

The Lions Oil Incident drew foreign criticism that Japan’s petroleum market was a closed market.\footnote{265} Keidanren\footnote{266} led do-

\begin{footnotesize}
\footnotetext{258}{Chira, supra note 256, at D10. Lions Oil President, Taiji Sato, said that MITI and the petroleum industry were "conspiring to hamper the import of lower-priced gasoline" even though imports of petroleum products were legal if the authorities were informed beforehand. \textit{Id.} Lions Oil sought to have MITI issue an official report showing the ministry’s authority to instruct Lions Oil not to import the gasoline. \textit{Id.}}
\footnotetext{259}{Lions Oil Pressured Into Giving Up Gasoline Import, Jiji Press Ticker Serv., Jan. 1, 1985, available in LEXIS, ASIAPC Library, ARCNWS File.}
\footnotetext{260}{\textit{Id.;} Chira, supra note 256, at D10. According to Lions Oil President, Sato, the bank lending the money to buy the gasoline withdrew its funding, thereby forcing the company to give up the project. \textit{Id.}}
\footnotetext{261}{Lions Oil Pressured Into Giving Up Gasoline Import, supra note 259. The company revealed that its financial standing prevented it from waging a long-term challenge to MITI’s instructions. \textit{Id.}}
\footnotetext{262}{Lions Oil Gives Up Gasoline Import, Jiji Press Ticker Serv., Jan. 8, 1985, available in LEXIS, ASIAPC Library, ARCNWS File. Lions Oil’s President Sato cited the primary reason for giving up as the banks' refusal to finance the imports because of MITI’s recommendation. \textit{Id.} Sato criticized MITI’s policy as contrary to liberalized trade. \textit{Id.} MITI threatened to use its statutory powers under an import trade control ordinance to block the gasoline imports. \textit{Gasoline Import Allegedly Suspended Under MITI’s Pressure, Japan Econ. Newswire, Jan. 9, 1985, available in LEXIS, ASIAPC Library, ARCNWS File.}}
\footnotetext{263}{\textit{Out-roared by MITI, Economist, Jan. 19, 1985, at 66.}}
\footnotetext{264}{\textit{Id.} President Sato said MITI pressured the bank to deny the loan, after failing to talk Sato out of importing the foreign gasoline. \textit{Id.}}
\footnotetext{265}{Japan Facing Pressure to Liberalize Petroleum Product Imports, Jiji Press Ticker Serv., Jan. 23, 1985, available in LEXIS, ASIAPC Library, ARCNWS File. A group of U.S. Senators and Congressmen visiting Japan criticized the existence of a de facto ban on petroleum imports. \textit{Id.} The Singapore media publicly supported Lions Oil’s efforts and criticized MITI’s policy as protectionist. \textit{Id.}}
\end{footnotesize}
mestic criticism of MITI’s control over Japan’s petroleum market.267 A ranking official in the trade organization criticized MITI for not allowing gasoline imports into Japan.268

c. The Securities Compensation Scandal

The Securities Compensation Scandal illustrates MOF’s informal regulatory style.269 This incident highlights problems in MOF’s regulatory enforcement, in particular, widespread amakudari and the use of administrative guidance.270 The scandal focused on illegal compensation of clients by Japan’s four largest (“Big Four”) securities houses.271

MOF issued a policy directive in December 1989 ordering brokerages to close out discretionary investment accounts managed by securities houses on behalf of their corporate clients.272 Clients demanded compensation for contracts that were broken when brokerages closed the accounts in the midst of poor market conditions in early 1990.273 The Big Four securities houses were later fined and had their services temporarily suspended because they disregarded MOF’s directive forbidding compensation of clients for investment losses.274 MOF’s administrative guidance in 1989 emphasized, however, the need for speedy closure of the accounts.275 Commentators, therefore, view MOF’s guidance as tacitly authorizing the illegal client compensation as a


267. Keidanren Official, supra note 266.

268. Id.

269. Shindo, supra note 1, at 7; Kaneko, supra note 1, at 15; Milhaupt, supra note 207, at 423.

270. Milhaupt, supra note 207, at 424.


272. Shindo, supra note 1, at 7; Securities Scandal, supra note 271.

273. Shindo, supra note 1, at 7-8. The clients sought to recover losses that resulted from a sharp drop in value of the stocks where the securities houses had invested money. Id.


275. Shindo, supra note 1, at 7.
necessary evil in order to quickly close the specified accounts.\textsuperscript{276} The ambiguity of later statements from MOF's Securities Bureau indicated that MOF tolerated the illegal practice of compensating clients for losses sustained on the Tokyo Stock Exchange.\textsuperscript{277}

The Big Four securities firms later revealed that MOF had occasionally pressured securities houses to compensate major clients for trading losses.\textsuperscript{278} The scandal resulted in the resignation of senior securities firms' executives,\textsuperscript{279} caused decreased confidence in the Tokyo Stock Market,\textsuperscript{280} and implicated unethical conduct by MOF officials.\textsuperscript{281} The Minister of Finance later resigned, admitting MOF's role in the scandal via the use of administrative guidance.\textsuperscript{282} The scandal led to criticism of MOF's loose style of governance and use of administrative guidance in

\textsuperscript{276} Steve Burrell, *Japan: Ministry of Finance 'Turned Blind Eye' in Share Scandal*, AUSTL. FIN. REV., June 26, 1991, available in LEXIS, ASIAPC Library, ARCNWS File. “At best, the exposure of the compensation deals - which breach ministry guidelines issued in 1989 - suggest that the ministry failed badly in its supervision of the market . . . But admissions that the schemes went ahead with the knowledge and tacit approval of the ministry will badly damage its standing.” Id. The compensation involved brokers buying back shares at artificially high prices from investment trusts they managed for their corporate clients. Id.

\textsuperscript{277} Securities Scandal, supra note 271. MOF officials admitted that a December 1989 pronouncement regarding the closure of the discretionary accounts was too vague because it did not specifically prohibit client compensation. Id. Later reports quoted senior MOF officials, confirming that the ministry had looked the other way as securities houses compensated clients for millions of dollars of trading losses. Burrell, supra note 276.

\textsuperscript{278} SHINDO, supra note 1, at 8; Securities Scandal, supra note 271. Daiwa claimed to have spent US$90 million to compensate 20 corporate clients. Securities Scandal, supra note 271. Yamaichi Securities paid US$5.4 million to four clients. Id. Nomura Securities paid US$17.9 million and Nikko Securities paid US$121.43 million. Id. Some claim that the MOF securities bureau knew of the payments since as early as 1990, yet MOF gave unofficial approval for brokers to shield major clients from major trading losses. Burrell, supra note 276.

\textsuperscript{279} Burrell, supra note 276. “The growing scandal led to the resignations . . . of the presidents of Nomura Securities, the world’s largest securities house, and Nikko Securities, Japan’s third-largest . . . .” Id.

\textsuperscript{280} Id. (discussing decrease in market confidence because of revelation concerning illegal stock losses compensation by Big Four securities firms).

\textsuperscript{281} Id. Much of the trouble resulted from the incompatible roles played by MOF. Bureaucratic ‘Guidance’ is Unwanted, UNWARRANTED, NIKKEI WKLY., Aug. 24, 1991, at 6 [hereinafter Guidance is Unwanted]. MOF seeks to protect and promote finance firms, supervise these firms, and keep the markets in good shape. Id. Editorials blame the scandal on these incompatible roles, and advocate the assignment of these roles to separate agencies. Id.

regulating financial markets.\textsuperscript{283}

In the wake of the scandal, MOF clarified and reduced the number of rules governing Japan’s securities markets.\textsuperscript{284} MOF hoped to improve the fairness and transparency of regulations in the securities industry by deregulating and formalizing the financial sector.\textsuperscript{285} While noting that codification and simplification of procedures are generally beneficial, MOF officials warned that formal rules allowed less leeway for firms that violate the rules.\textsuperscript{286}

C. Factors Contributing to Enactment of New APL and Legislative History

Efforts to enact a comprehensive APL in Japan began nearly forty years prior to the APL’s enactment.\textsuperscript{287} Given the level of bureaucratic resistance, passage of the APL in 1993 attracted much attention.\textsuperscript{288} Corruption scandals in the financial sector,\textsuperscript{289} largely blamed on informal regulatory methods, bolstered by increased foreign and domestic criticism, added to the pres-

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\textsuperscript{283} Kaneko, supra note 1, at 17; Guidance is Unwanted, supra note 281, at 6. Administrative guidance helped Japan during the rapid growth period after WWII. Id. Use of guidance in contemporary Japan, however, hinders and harms the Japanese economy “by widening the gap between the development of the national economy and individual citizens’ affluence.” Id.

\textsuperscript{284} Ministry of Finance Clarifies, Reduces Securities Market ‘Administrative Guidances,’ INT’L SEC. REG. REP., Aug. 25, 1992, available in LEXIS, ASIAPC Library, ARCNWS File. MOF revealed that the number of relevant regulations dropped from about 500 to 35. Id. MOF codified some of the guidelines, placed others under the responsibility of the Japan Securities Dealers Association (“JSDA”), and simply eliminated others. Id. Transferring authority to the JSDA transformed the JSDA from a “friendship association” into a self-regulating body. Id.

\textsuperscript{285} Id. MOF’s actions were attributed to the desire for MOF to place a buffer between the securities industry and the ministry following the Securities Compensation Scandal. Id. MOF was accused of operating in a collusive manner and of lax enforcement of securities rules. Id.

\textsuperscript{286} Id.

\textsuperscript{287} Happy Slashing, supra note 164, at 16.

\textsuperscript{288} Id. (noting importance of APL enactment in light of bureaucratic resistance); Ködderitzsch, supra note 148, at 135.

\textsuperscript{289} See Honda, supra note 230, at 6 (discussing jusen problem and role of MOF’s regulatory methods); Milhaupt, supra note 207, at 423 (describing MOF’s role in 1991 Securities Compensation Scandal); Ending the Honor System, supra note 230, at A21 (discussing stock trading scandal in New York Office of Daiwa Bank which MOF’s regulatory style received criticism); See supra note 230 and accompanying text (discussing MOF’s role in series of financial scandals in 1990’s).
sure on Japan to reform its regulatory system.290

1. Economic Situation

Businesses operating in Japan must comply with numerous regulations.291 Non-domestic firms cite the regulatory system and administrative guidance for difficulties encountered in daily business operations.292 Public opinion polls report that many Japanese share this sentiment, blaming economic ministries and too many regulations for the high cost of living in Japan.293

Over-regulation is blamed for Japan’s inability to recover from recent years of economic recession, which bolstered calls for deregulation.294 Moreover, Japan’s manufacturing and financial bases are shifting to other Asian countries, including Singapore and Hong Kong.295 Companies and potential investors seek markets with fewer regulations and markets where the regulatory system employs predictable market regulations.296

Corruption scandals increased calls to reform Japan’s administrative machinery.297 Reports of collusive relations between

290. Shindo, supra note 1, at 15 (noting increased pressure to reform Japan’s non-transparent regulatory system after SII Talks).
295. Ogata, supra note 206, at 14; Structural Problems, supra note 293, at 6.
296. See Khoury, supra note 294, at 54 (discussing positive effects of deregulation on financial activities).
297. Kaneko, supra note 1, at 18-20; Mari Koseki, Trade Pacts Throw Spotlight on Administrative Guidance, JAPAN TIMES Wkly. INT’L EDITION, Aug. 2-8, 1993, at 14; see supra
bureaucrats, politicians, and businesses drew criticism of bureaucratic governance in Japan. Criticism focused on the use of informal regulatory methods and the abuse of the system caused by businesses or politicians seeking to influence bureaucratic behavior.

2. Foreign and Domestic Criticism of Informal Guidance as Barrier to Market Access

Pressure from foreign countries, criticizing informality in administrative process, contributed to the drive that ultimately led to the APL. Foreign firms operating in Japan and domestic Japanese firms cite administrative guidance and the lack of transparency in regulatory process for the loss of business confidence in Japan. Domestic and overseas pressure was essential to the push for deregulation and administrative reform.

notes 269-86 and accompanying text (analyzing Securities Compensation Scandal and effect of MOF administrative guidance).

298. Finance Ministry issues plan to improve bank regulation, Nikkei Wkly., Nov. 13, 1995, at 3 [hereinafter Plan to Improve Bank Regulation]. The Daiwa Bank incident is a recent example of the abuse inherent in Japan's informal regulatory style. Id. Occurring late last year, this incident involved Daiwa's New York trading office, with MOF's knowledge, concealing from American regulators US$1.1 billion worth of stock losses incurred on the New York Stock Exchange. Sandra Sugawara, Japan Plans Major Overhaul of Banking Inspections, Wash. Post, Dec. 27, 1995, at B1. This incident illustrates Japan's informal regulatory style, which necessitates close ties between businesses and the government. Id. News sources reveal that Daiwa informed MOF of the problem at least six weeks before U.S. regulators found out about the cover-up. Finance Ministry Must Share Blame for Daiwa Bank Scandal, Nikkei Wkly., Nov. 13, 1995, at 6 [MOF Must Share Blame]. Editorials in the Japanese press cite Daiwa and MOF as both partly responsible for the cover-up. Id. The Japanese press views MOF as responsible for creating the atmosphere in which the Daiwa Bank Scandal developed. Id. In the wake of the scandal, MOF unveiled a plan to change to a regulatory system based on clearly defined rules and more dependent on outside inspections. Plan to Improve Bank Regulation, supra, at 3.

299. IPMS Group, supra note 56, at 5 (discussing Iron Triangle and efforts to influence bureaucratic decision making).


301. Doing Business in Japan, supra note 4, at 6 (discussing foreign firms' complaints regarding doing business in Japan); Shibata & Fukuei, supra note 14, at 4.

3. Legislative History

The Japanese Diet enacted the APL on November 12, 1993,\textsuperscript{303} to officially take effect on October 1, 1994.\textsuperscript{304} Despite decades of bureaucratic resistance and political infighting,\textsuperscript{305} after three administrative reform councils\textsuperscript{306} and years of foreign pressure,\textsuperscript{307} Japan passed its first comprehensive law designed to formalize administrative procedures.\textsuperscript{308} Debate over the need for an APL in Japan began in the late 1920’s, inspired by reports of Germany and France experimentation with laws concerning procedural and substantive fairness.\textsuperscript{309} The drive for an APL continued in the Post-World War II period, influenced by the occupation of the United States and the passage of a U.S. administrative procedure law.\textsuperscript{310} From 1948 through the early 1960’s, the Japanese Government always had one or more \textit{shingikai} \textsuperscript{311} debating bureaucratic reform and the need for an APL.\textsuperscript{312} Although administrative procedures were simplified during this period, administrative reform \textit{shingikai} failed to lead to the en-

\begin{itemize}
\item \textsuperscript{303}Kosei de tomeina gyosei tetsuzuki ho no hakuritsu \textit{[The Establishment of a Fair, Transparent Administrative Procedures Law]}, TOKI NO HOREI, Nov. 15, 1994, at 7 \textit{[hereinafter Fair, Transparent APL]} (listing chronology of major events during thirty-year period before enactment of APL).
\item \textsuperscript{304}Boling, \textit{supra} note 7, at 7.
\item \textsuperscript{305}Nobumichi Izumi, Bureaucrats, ‘Tribal’ Politicos Threatened by Procedures Bill; ‘Administrative Guidance’ is Technically Over, \textit{ Nikkei Wkly.}, June 21, 1993, at 7. “Ministries, faced with the possibility that their considerable influence might be diminished, have put up stiff opposition.” \textit{Id.}; see \textit{Michel Crozier, The Bureaucratic Phenomenon} 194 (1964) (describing bureaucratic infighting caused by attempts to preserve and enlarge upon areas over which bureaucrats have discretion as common trait to all bureaucracies).
\item \textsuperscript{306}\textit{Happy Slashing, supra} note 164, at 16. The Government set up these councils at various points in time to investigate administrative processes and make recommendations for ways to improve the regulatory system. \textit{Kaneko, supra} note 1, at 55-57.
\item \textsuperscript{307}\textit{Happy Slashing, supra} note 164, at 16; \textit{see Nakayama, supra} note 300, at 6 (describing increased pressure from United States and Europe for Japan to address transparency problems in regulatory processes).
\item \textsuperscript{308}APL art 1(1), Law No. 88 of 1993 (Japan). The APL “seeks to advance a guarantee of fairness and progress towards transparency ... in administrative process ...” \textit{Id.}
\item \textsuperscript{309}Boling, \textit{supra} note 7, at 12.
\item \textsuperscript{310}\textit{Id.; Kaneko, supra} note 1, at 36 (discussing effect of U.S. Occupation of Japan after WWII on development of Japanese administrative law).
\item \textsuperscript{311}See \textit{Law and Social Change, supra} note 5, at 199 (discussing composition and role of government deliberation councils in policy making); \textit{see supra} notes 96-104 and accompanying text (discussing \textit{shingikai} deliberation councils).
\item \textsuperscript{312}JO \textit{pan: Who Governs?}, \textit{supra} note 74, at 118-19; Boling, \textit{supra} note 7, at 12-13.
\end{itemize}
actment of the APL.  

The first *shingikai* report of the First Provisional Commission to Investigate Administration, published in 1964, failed to result in legislation of an administrative procedures bill. The Second Provisional Commission issued a report in 1983 outlining substantive areas to be included in an APL. Several years later, in 1990, the Second Gyokakushin, or Reform Council, released its report. Later in 1990, the Government set up a third reform council, charged by then-Prime Minister Toshiki Kaifu’s administration with the goal of improving the transparency and fairness of Japan’s administrative processes. The Third Reform Council’s report, submitted to the Management and Coordination Agency (“MCA”) in 1991, included draft legislation. The APL enacted in 1993 resembled, in large

313. *Japan: Who Governs?,* supra note 74, at 119. “[T]he government readjusted and consolidated some 1,641 permissions, approvals, licenses, and so forth (kyōinkaken) that the public previously had to obtain from bureaucratic offices . . . and did the same for some 1,636 reports that citizens had to make to ministries and agencies (about 22 percent of the total of 7,449 such reports).” *Id.* at 119-20.

314. *See Fair, Transparent APL,* supra note 303, at 7 (listing chronology of meetings and reports that predated APL’s enactment). The name of the *shingikai* was the Daiichiji rinji gyosei chosakai [The First Provisional Commission to Investigate Administration]. *Id.*


320. *Fair, Transparent APL,* supra note 303, at 6.


322. *Fair, Transparent APL,* supra note 303, at 6. The Management and Coordination Agency (“MCA”) is an administrative office established within the executive branch Office of the Prime Minister. IPMS GROUP, *supra* note 56, at 23. The office plays a key role in the campaign to achieve administrative reform in Japan. Interview with Katsuya Uga, Professor of Law, Tokyo University, Tokyo, Japan (June 1995) [hereinafter Uga Interview]. The MCA controls administrative counseling to ensure proper handling of the public’s complaints and requests concerning government work. IPMS GROUP, *supra* note 56, at 92.

323. IPMS GROUP, *supra* note 56, at 84.
part, the draft law submitted with the Third Reform Council Report entitled the "Report on Introducing Unified Legal Systems for Fair and Transparent Administrative Procedures."\(^\text{324}\)

Former Prime Minister Morihiro Hosokawa, who entered office shortly after publication of the Third Reform Council Report, championed the cause of administrative reform during his administration from 1993 to 1994.\(^\text{325}\) In his first major policy speech, Prime Minister Hosokawa pledged an intention to push for enactment of an administrative procedures bill to improve transparency and fairness in administrative processes.\(^\text{326}\) The Hosokawa Administration succeeded in its pledge when the Government enacted the APL\(^\text{327}\) based on the draft law submitted to the administration in the Third Reform Council Report.\(^\text{328}\)

II. WHAT DOES THE APL DO?

The APL is designed to increase the level of transparency in administrative process.\(^\text{329}\) Divided into four main sections, the APL is designed to improve clarity and transparency of administrative guidance,\(^\text{330}\) secure speedy and transparent processing of applications,\(^\text{331}\) establish guidelines for acceptance of notifications,\(^\text{332}\) and provide just and fair procedure regarding adminis-
trative dispositions. Administrative guidance and the screening of licenses and approvals receive criticism for being unclear and arbitrary. There is also evidence that applications for a license or approval are left unreviewed for an indefinite period or are rejected without explanation. The APL sets forth rules to restrict agencies' discretionary authority and obligates them to provide reasons, in writing when requested, about why they reject applications or cancel licenses or approvals.

A. Regulation of Administrative Guidance

The APL is the first statute to specifically address the process of administrative guidance. The Third Reform Council,

333. Id. arts. 12-31.
334. Kaneko, supra note 1, at 1-2; Shindo, supra note 1, at 15-17; Edelman, supra note 1, at 389; see Enigma of Japanese Power, supra note 6, at 450 (discussing ministries' ability to arbitrarily delay processing or denying application of non-complying party).
335. Enigma of Japanese Power, supra note 6, at 450 (discussing ministries' ability to hold off processing applications for whatever reason); Happy Slashing, supra note 164, at 16; see Kaneko, supra note 1, at 31-32 (discussing absence of laws and regulations designed to force ministries to provide reasons for administrative action prior to APL).
336. Happy Slashing, supra note 164, at 16. One commentator notes that: The law restricts off-the-cuff government rulings that are disadvantageous to a party; for example, ones that say your company's permission to sell insurance is canceled. In the past, agencies often took adverse action without hearing anything from their prey in advance. Now, parties are entitled to present their arguments, sometimes even at a formal hearing, before the agency hands down its decision. Id. Article 3 states, however, that the law is applicable to administrative actions and guidance, except where exempted by Art 3(1), which contains sixteen specialized exemptions, including actions by Diet members and courts, settlement, criminal procedures, acts of officers performing duties related to public safety, and immigration and naturalization procedures. APL art. 3, Law No. 88 of 1993 (Japan). Administrative actions taken by local administrative agencies are also beyond the scope of the APL. Id. art. 4; Ködderitzsch, supra note 148, at 119. This exemption was important to gain the local support for the passage of the APL, because local agencies typically rely heavily on the use of administrative guidance. Id. Note, however, that Article 38 implores these agencies to endeavor to adhere to the APL when using administrative guidance. APL art. 38, Law No. 88 of 1993 (Japan). Further, Article 4 exempts actions of the central government aimed at local authorities Id. art. 4.
337. Kaneko, supra note 1, at 140-41; Ködderitzsch, supra note 148, at 126. The APL defines administrative guidance as "guidance, recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or designated functions, certain feasance or non-feasance on the part of specified persons in order to realize administrative aims, where such acts are not Dispositions." APL art. 2(6), Law No. 88 of 1993 (Japan). The "designated functions" of an administrative organ, or agency, are those specifically found in the enabling statutes that initially estab-
in its report and draft APL, noted that the administrative guidance process preserves flexibility and enhances the ease and speed of implementing regulations.\textsuperscript{338} The Council criticized the process of administrative guidance, however, because it risks rendering the rule of law meaningless and fosters opaqueness in administrative and regulatory processes.\textsuperscript{339} The Council added that foreign criticism that cited administrative guidance as a trade barrier was increasing as Japan’s economy became more enmeshed in the global economy.\textsuperscript{340} The Council, therefore, submitted its recommendations for rules to formalize agencies’ use of administrative guidance.\textsuperscript{341}

The APL’s purpose is to clarify rules regarding the process called administrative guidance, not to abolish the process itself.\textsuperscript{342} The APL contains provisions that codify principles of transparency regarding the use of administrative guidance.\textsuperscript{343} As a general principle, an administrative agency cannot exceed its jurisdiction when issuing guidance.\textsuperscript{344} Any use of guidance must

\textsuperscript{338} Third Reform Council Report, supra note 321, at 350. See Nakayama, supra note 300, at 8 (discussing merits and demerits of administrative guidance process).

\textsuperscript{339} Third Reform Council Report, supra note 321, at 352.

\textsuperscript{340} Id.

\textsuperscript{341} Id.

\textsuperscript{342} Yoshinobu Kitamura, Gyosei Tetsuzuki Hosei Jidai no fichitai Gyosei [Municipal Administration in the Administrative Procedures Law Age], Kikan Gyosei Kanri [Administrative Management Quarterly], Mar. 15, 1995, at 27. Early debate regarding the drafting of an APL noted that the most serious problem was making regulatory administrative guidance more equitable. Gyosei tetsuzuki ho — horitsu yoko(an) [1985 Report of the Administrative Procedure Law Study Commission: Bill Outline (Tentative)], translated in 19 L. in Japan 93, 121 (1986) [hereinafter APL Study Commission]. The Commission chose to adopt the concept of “relying on writings and included the required provisions for specific forms, methods of delivery, petitions for delivery of writings by the recipient, record-keeping, and so forth.” Id. The Commission included opportunities to present arguments, especially where guidance worked to the disadvantage of the recipient party. Id.

\textsuperscript{343} APL arts. 32-36, Law No. 88 of 1993 (Japan). This section of the APL draws both praise and criticism. Izumi, supra note 305, at 7. Supporters contend that the clarified procedures will erase the arbitrary use of administrative guidance. Id. In addition, “clarifying the basic principles may be understood as a powerful signal to the administrative bodies to respect the boundaries of law and may be helpful to citizens when opposing a nonstatutory request by an administrative body.” Ködderitzsch, supra note 148, at 127. Critics believe including procedures for administrative guidance in the APL will have the effect of authorizing a system that lacks a legal basis. Id.

\textsuperscript{344} APL art. 32(1), Law No. 88 of 1993. The APL seeks to ensure that an agency’s use of administrative guidance remains strictly within the scope of the duties and functions of the administrative agency. Id.
include the purpose, contents, and name of the issuing official.345 In cases of oral guidance,346 the agency, upon request347 by the recipient party, shall provide the guidance in writing.348 The APL focuses principally on the criticism that, in many cases of administrative guidance, the content and purpose of the guidance and the agency responsible for the guidance are deliberately left vague.349

The APL's rules concerning administrative guidance also emphasize the voluntary nature of the guidance.350 Under the APL, a party's non-compliance may not disadvantageously affect guidance recipients.351 In this context, the APL stipulates that parties that do not comply with guidance may not be treated unfairly or be pressured by the ministry in this or other unrelated matters also within the ministry's jurisdiction.352 Agency officials

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345. Id. art. 35(1). “Persons imposing Administrative Guidance shall make clear to the subject party the purpose and content of, and the parties responsible for, the Administrative Guidance in question.” Id.

346. Ködderitzsch, supra note 148, at 110. Most administrative guidance is oral. Id.

347. APL art. 35(2), Law No. 88 of 1993 (Japan). The burden to request guidance in writing falls on the recipient party. APL THEORY, supra note 1, at 26. The individual recipient party must take the initiative and request the contents of the guidance in writing. Id.

348. APL art. 35(2), Law No. 88 of 1993 (Japan). The guidance must be in writing when requested, except in cases where written guidance would cause “extraordinary administrative inconvenience.” Id. Written guidance requests shall not apply to instances where “on the spot” guidance requires the immediate actions of the party. Id. art. 35(3)(1). These requests shall also not apply to guidance where the party has previously received written notification. Id. art. 35(3)(2).


350. APL art. 32(1), Law No. 88 of 1993 (Japan). “[T]he substance of the Administrative Guidance is, to the utmost degree, realized based solely upon the voluntary cooperation of the subject party.” Id.

351. Id. art 32(2). “Persons imposing Administrative Guidance shall not treat the subjects of Administrative Guidance disadvantageously owing to the subjects' non-compliance with the Administrative Guidance in question.” Id.

352. Id. arts. 33-34. Regarding guidance that seeks modification or withdrawal of an application, “persons imposing Administrative Guidance shall not act in disregard of an applicant's manifestation that he or she has no intent to comply with the Administrative Guidance in question to obstruct the applicant's exercise of rights by conduct such as continuing the Administrative Guidance in question.” Id. art. 33. Persons imposing guidance from agencies, that have the authority to grant permission or render dispositions denying such permission but which are unable to or have no intent to exercise its authority, may not engage in conduct to force compliance by either deliberately or misleadingly suggesting that they are capable of exercising said authority. Id. art. 34. In other words, “when a ministry is unable to exercise authority over the approval or denial of a license or permit or when the ministry has no intent to exercise such author-
must provide explanations for rejected applications and may no longer threaten to deny licenses, permits, or approvals in order to effect compliance with the agency's administrative goals.\textsuperscript{353}

B. Codification of Administrative Processes

The APL includes criteria for processing applications for government permits and licenses.\textsuperscript{354} There is evidence of cases where potential applicants are unable to discern the proper steps in the application process because the process is not codified, or parties' applications are rejected for no reason or left unaccepted for an indefinite period.\textsuperscript{355} Notifications are technically submitted to notify agencies of action the company plans to take.\textsuperscript{356} In Japan, however, agencies refuse to accept receipt of a notification and use administrative guidance to alter the content of the action described in the notification.\textsuperscript{357} Agencies also revoke permits and approvals with no explanation, adding another element of arbitrariness to administrative procedure in Japan.\textsuperscript{358} The APL's procedures are designed to constrain the ability of agencies to compel compliance through implied threats regarding applications, notifications, and adverse dispositions.\textsuperscript{359} The APL implores agencies to create and publish standards for accepting and judging applications, accepting notifications, rendering adverse dispositions,\textsuperscript{360} and for allowing parties the opportunity to respond to an impending disposition, either in a formal hearing or in writing.\textsuperscript{361}

\textsuperscript{353} Boling, supra note 7, at 15. One problem with administrative guidance is that it obscures responsibility. Koseki, supra note 297, at 14. "Operators have no way of knowing whether the demand comes from the ministry, the bureau or just the official with whom he is talking." Id.

\textsuperscript{354} APL arts. 5-11, Law No. 88 of 1993 (Japan).

\textsuperscript{355} APL Theory, supra note 1, at 4 fn 1.

\textsuperscript{356} Id. at 27.

\textsuperscript{357} Id.

\textsuperscript{358} Id. at 24-26 (discussing need for adverse disposition rules in Japanese administrative system).

\textsuperscript{359} APL arts. 5-11, Law No. 88 of 1993 (Japan).

\textsuperscript{360} Id. arts. 12-14; see Happy Slashing, supra note 164, at 16 (discussing relatively large number of agencies that have complied with this request); see generally APL Databook, supra note 316, at 91-314 (compiling newly clarified procedures).

\textsuperscript{361} APL arts. 15-31, Law No. 88 of 1993 (Japan).
1. Disposition of Applications

The APL’s application procedures are designed to increase fairness and transparency, as well as expedite the process of applying for licenses, permits, and approvals. The Third Reform Council reported in 1991 that in order to develop public trust in the bureaucracy, the application process must be transparent. The Council also emphasized the importance of standard filing procedures and time-periods in order to increase predictability and efficiency in the application process.

The APL’s provisions regarding applications address the previous problems involving the application process. Past criticism focused on the lack of transparency in application processes and long processing periods for licenses. Agencies must now adopt and publicize application standards. In addition, the APL calls for agencies to adopt standard periods for the review of applications and to publicize them along with the application standards. These standards should be posted at the office designated to receive the application. Upon receipt

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362. See Kaneko, supra note 1, at 68-107 (analyzing APL’s application provisions).
364. Id. at 351.
366. Id. Rather than flatly rejecting applications, agencies often try to convince parties to alter or withdraw them. Id. Agencies pressure applicants by not formally accepting the application, thus not beginning the review process or suspending the review process indefinitely at a later stage. Id. The APL’s rules regarding applications are specifically designed to alleviate this problem. Id.
367. APL art. 5(3), Law No. 88 of 1993 (Japan). The law exempts agencies in cases where publication would result in extraordinary administrative inconvenience. Id.
368. Id. art. 5(1)-(3).
369. Id. art. 6. The measured time for the standard review period begins from the time the application arrives at the administrative office and continues until the time a disposition is rendered. Id. This definition is designed to take into consideration the agencies’ standard operating procedure in dealing with applications, where agencies delay processing an application or do not act on them at all. Happy Slashing, supra note 148, at 16. Because there were no formal time guidelines or rules stating that agencies must begin processing an application immediately upon receipt at the agencies’ office, the APL stipulates that agencies must begin processing applications immediately. APL art. 7, Law No. 88 of 1993 (Japan). Establishing a time frame allows parties to know when to start inquiring or complaining. Mark Levin, Bureaucratic Sumo Wrestling, ASIAN L. J., Feb. 1995, at 17 [hereinafter Sumo Wrestling].
370. APL art. 6, Law No. 88 of 1993 (Japan). After establishing standard processing periods, agencies “shall make them available to the public by means of posting them at the administrative office which is designated to receive the subject Applications or by some other appropriate method.” Id.
of an application, the agency must begin to review the contents without delay.\textsuperscript{371} When an agency receives a non-conforming application, it must promptly\textsuperscript{372} notify the applicant and provide a suitable\textsuperscript{373} time limit for the correction to be made.\textsuperscript{374}

When an agency rejects an application for a license or approval, it must indicate the reasons for the denial.\textsuperscript{375} Prior to the APL, agencies threatened to deny applications in order to gain compliance with their administrative guidance because agencies could arbitrarily deny applications.\textsuperscript{376} According to the APL, the reasons for denial must be clear, in writing, and must state what modifications are necessary to gain approval if re-submitted.\textsuperscript{377}

2. Notifications

Many laws in Japan require parties to submit prior notification of any action the parties plan to take.\textsuperscript{378} Prior to the APL, however, notifications were treated the same as applications.\textsuperscript{379} Japanese agencies would mail back a party's notification unopened and issued administrative guidance seeking the party to alter the conduct about which the party was notifying the agency.\textsuperscript{380} Agencies, thus, refused to accept notifications and indicated that as long as the party did not comply with certain re-

\textsuperscript{371} Id. art. 7. "Upon the arrival of an Application at the administrative offices of an administrative agency, the agency shall commence its review of the Application without delay . . . ." \textit{Id.}

\textsuperscript{372} Id. art. 7. In cases of non-conforming applications, the APL Article 7 stipulates that "the agency shall promptly . . . request the persons who filed the Application . . . to correct the Application." \textit{Id.}

\textsuperscript{373} Id. The APL stipulates that in cases of non-conforming applications, agencies must "specify a suitable time limit for such correction to be made or deny the permission, etc. sought by the application." \textit{Id.}

\textsuperscript{374} Id.

\textsuperscript{375} Id. art. 8(1). "Administrative agencies shall, in cases where they render Dispositions denying the permission, etc. sought by Applications, concurrently set forth reasons for the subject Disposition." \textit{Id.} The APL exempts agencies from this requirement if the guidelines for the application process are clear and already public knowledge. \textit{Id.} In these cases, reasons are provided only upon request of the applicant. \textit{Id.}

\textsuperscript{376} See ENIGMA OF JAPANESE POWER, supra note 6, at 450 (discussing ministries' discretionary use of licensing authority to achieve compliance with other unrelated matters).

\textsuperscript{377} Id.

\textsuperscript{378} Sumo Wrestling, supra note 369, at 18.

\textsuperscript{379} Id. "Japanese agencies are renowned for transforming notice requirements into de facto discretionary approvals by refusing to accept filings until the involved party agrees to comply with some conditions that the agency wishes to impose." \textit{Id.}

\textsuperscript{380} Id.
quirements the notification would remain unaccepted. This bureaucratic practice transformed the statutory requirement of submitting notification to a government agency into a de facto licensing requirement by judging the acceptability of a particular notification based on its contents. The APL addresses this practice and states that notifications from parties to the administration, like applications, are effective upon receipt at the designated agency's office.

3. Adverse Disposition Procedures

The APL's goals regarding adverse dispositions are to ensure notice to parties and provide an opportunity for parties to present arguments against the disposition prior to cancellation or suspension of a permit or license. The Third Reform Council determined that a uniform system was necessary to ensure fairness and equal treatment because differing review standards for similar applications had evolved among various agencies. The APL articulates procedures for general rules regard-

381. Kōdderitzsch, supra note 148, at 128.
382. Id. "Frequently and systematically, the statutory requirements of notification are de facto transformed into a licensing requirement." Id. One commentator notes that Japan cannot achieve real deregulation unless the notification and application systems are changed so that agencies no longer have the discretionary authority to delay acting on a party's application or notification. APL Theory, supra note 1, at 27.
383. APL art. 6, Law No. 88 of 1993 (Japan). Applications are complete and the time frame for processing applications begins when applications are received at the relevant administrative office. Id.
384. Id. art. 37. Article 37 states:
Where Notifications conform to requirements that the contents of notification form be in order and the notification form be appended with necessary documents, and to other pro forma requirements provided by Statutes, procedural requirements for filing the Notification in question shall be fulfilled upon its arrival at the administrative office of the organ designated by Statutes to receive the Notification in question.
Id.
385. Id. art. 2. "Adverse Dispositions refer to Dispositions in which administrative agencies, acting pursuant to Statutes, designate specified persons as subject parties to the Disposition and directly impose duties upon them or limit their rights . . . ." Id. In other words, adverse dispositions refer to government actions that suspend, revoke, or cancel a previously granted license, permit, or approval. Happy Slashing, supra note 164, at 16.
386. APL Theory, supra note 1, at 11; Happy Slashing, supra note 164, at 16 (describing agencies' past practice of taking adverse action with no notice or hearing).
387. Boling, supra note 7, at 14. The Reform Council noted that procedures existed under a number of different laws, resulting in varying procedures for similar appli-
ing review standards for issuing adverse dispositions,\textsuperscript{388} statement of reasons for that action,\textsuperscript{389} and rules concerning the opportunity for potential recipients of adverse dispositions to present arguments prior to the final disposition.\textsuperscript{390}

\textbf{a. General Rules}

The APL requests agencies to endeavor\textsuperscript{391} to enact standards\textsuperscript{392} for judging whether adverse dispositions should be rendered.\textsuperscript{393} The agencies must attempt to make such standards public knowledge.\textsuperscript{394} The APL implores government agencies to make these standards as specific and unambiguous as possible.\textsuperscript{395} The APL requires agencies rendering adverse dispositions to provide the recipient with the reasons for the disposition.\textsuperscript{396}

\textbf{b. Opportunity To Be Heard}

Prior to issuing an adverse disposition, the APL stipulates

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\end{citations}
\end{quote}
that the concerned party must first be granted an opportunity to explain their petition and hear the agency's reasons for the disposition. The APL requires agencies to establish procedures for hearing statements and arguments of persons who will become the subject of an adverse disposition. Applications, meanwhile, are exempted from the hearing procedures established by the APL. Rejected applications are not adverse dispositions to which the hearing procedures apply. If an application is denied or conditionally approved, only the application procedures in Articles 5 to 11 apply, not the procedures for adverse dispositions in Articles 15 to 31.

The APL delineates two categories of hearing procedures regarding adverse dispositions. All adverse dispositions, with the exception of certain more serious cases, are subject to informal, written hearing procedures. The APL requires formal hearings in cases involving revocation of a license, infringement of a legal position other than a license, dispositions that affect the status of executive officers or special legal persons, and any other instances where the relevant agency deems formal proceedings necessary. In cases involving lighter sanctions, the APL requires less formal rules for presenting opinions and hearing reasons prior to the rendering of adverse dispositions.

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397. Id. art. 14(1).
398. Id. art. 13(1). Article 13(1)(1) provides for formal hearings in certain cases. Id. art. 13(1)(1)(a)-(d). Examples include cases where an adverse disposition revokes a permission or other previously conferred qualification or status. Id. art. 13(1)(1)(a).
399. APA Annotated, supra note 397, at 143 n2; Happy Slashing, supra note 164, at 16. Procedures for adverse dispositions apply in cases where unfavorable dispositions are rendered unless an exception applies. APL art. 2(4), Law No. 88 of 1993 (Japan). One of the four listed exceptions includes "dispositions which deny the permission, etc. requested by Applications and other Dispositions that are rendered based upon applications and which specifically designate those who made the Applications as the subject of the Disposition." Id. art. 2(4)(b).
400. APA Annotated, supra note 397, at 143 n2; Happy Slashing, supra note 164, at 16.
401. APL arts. 5-11, Law No. 88 of 1993 (Japan).
402. Id. arts. 15-31.
404. Id.
405. Id.
406. APL art. 13, Law No. 88 of 1993 (Japan). In certain cases, agencies do not have to provide for a formal hearing regarding an adverse disposition. Id. art. 13(1)(2). When none of the circumstances outlined in Article 13(1)(1) apply, agencies must only grant parties the opportunity for an explanation and rebuttal, as opposed to the formal hearing prescribed in Article 13(1)(1). Id.
The procedures concerning formal hearings are enumerated in the APL. Where a party is not provided a formal hearing, the agency to render a disposition quickly for the public interest and the procedures required by Article 13(1)(1) cannot be implemented in time. Id. art. 13(2)(1). Also included are cases where an adverse disposition is necessary after an agency realizes that despite initial approval the party did not actually meet, or no longer meets, the statutory requirements for that approval. Id. art. 13(2). Proof of the existence of this situation must be in the form of a written judicial judgment or decree, or by written documentation by one empowered with granting or denying such approval. Id. Another exemption from the formal hearing requirement includes cases where the operations in question should, but do not, accord with certain technical standards. Id. art. 13(2)(3). In these cases, the adverse disposition is rendered to order compliance and the agency confirms evidence of non-conformance by measurement or some other objective method. Id. Dispositions ordering payment of money owed, or which retrace a decision to pay money or otherwise restrict payment do not require a hearing. Id. art. 13(2)(4). The APL also exempts adverse dispositions specified by Cabinet Order as not subject to the hearing requirement. Id. art. 13(2)(5). This exemption only covers cases where the disposition imposes slight duties. Id. The APL provides that parties have the opportunity to hear and rebut an agencies' decision to deny a formal hearing after the agency determines that the particular subject matter falls outside the scope of Article 13. Id. art. 13(1)(1).

407. See Id. arts. 15-28 (listing APL's adverse disposition hearing procedures). Agencies must provide notice to the parties. Id. art. 15. Notice includes the date and time of the hearing and any other relevant information. Id. Parties may designate, in writing, agents capable of performing on behalf of the parties in all respects. Id. art. 16. All references in the APL to a party's rights or obligations applies equally to any designated agent. Id. Parties may request an inspection of the agencies' records documenting results of investigations or other materials relevant to the subject matter on which the disposition will be based, and agencies may not deny these requests unless there is a risk of harm to the interests of a third party or for some other justifiable reason. Id. art. 18; APL THEORY, supra note 1, at 13. An official presides over the formal hearing. APL art. 19(1), Law No. 88 of 1993 (Japan). This section also lists ineligible parties who may not preside, including interested parties, spouses, relatives, and parties' agents. Id. arts. 19(2)(1)-19(2)(6). Agency officials, when directed by the presiding official, must explain the contents of the proposed adverse disposition and the relevant statutes on which the decision is based. Id. art. 20(1). Parties can express their views and present documentary evidence at the hearing. Id. art. 20(2). Parties and agents, pursuant to Article 21, may submit written arguments and evidence instead of appearing in person. Id. art. 21. Parties failing to either appear in person or submit written arguments by the hearing date are barred from any further opportunity to express their views. Id. art. 23(1). This hearing is closed to the public except when the agency decides otherwise. Id. art. 20(6); APL THEORY, supra note 1, at 12. Upon completion of the hearing, the presiding official draws up a record of the proceedings, indicating the essential points of the party's arguments, and writes an opinion regarding the efficacy of the party's argument compared to the rationale for the anticipated adverse disposition. APL art. 24, Law No. 88 of 1993 (Japan). Consistent with Article 18, parties and agents may demand inspection of the official's reports. Id. art. 24(4). The presiding official then submits the opinion to the relevant administrative agency. Id. art. 24(3). If necessary, agencies may direct the presiding official to reopen a formal hearing by returning the official report to the presiding official. Id. art. 25. The APL allows this reopening option when necessary in light of information or circumstances
APL provides for the opportunity to submit a statement of explanation and rebuttal.  

Following a formal hearing, the presiding official writes and submits a report to the agency, including all relevant materials and the official's recommendation. Parties may request inspection of the report prior to the agency's decision. The issuing agency is required to consider the presiding official's opinion prior to issuing an adverse disposition. Once an adverse disposition is issued following a hearing, it cannot be appealed under the Administrative Complaint Investigation Law ("ACIL").

C. MITI and MOF Reactions to the APL

Ministries and businesses reacted immediately to the APL's enactment. In the year interim period between the APL's

which arise after the hearing's conclusion. Id. The APL requires agencies to delay their decision to issue an adverse disposition until after careful consideration of the hearing record and the official opinion. Id. art. 24(3). Regarding the appeals process, Article 27 bars the use of the ACIL to raise administrative appeals challenging dispositions. Id. art. 27(1). Requests for reconsideration are also barred under the ACIL. Id. art. 27(2). Article 28 contains special provisions that stipulate a formal hearing for adverse dispositions ordering dismissals of government officers. Id. art. 28(1)-(2).

408. APL art. 29(1), Law No. 88 of 1993 (Japan). The statement is to be in writing, unless the administrative agency authorizes an oral presentation. Documentary evidence may also be submitted at this time. Id. art. 29(2). As with the formal hearing, the agency must give the party written notice of certain information regarding the anticipated adverse disposition. Id. art. 30. Notice must allow time for the party to submit their statement of explanation and rebuttal. Id. Article 31 provides that Articles 15 and 16, regarding notice and use of agents in the formal hearing, also apply to the statement of explanation and rebuttal. Id. art. 31.

409. Id. art. 19.
410. Id. art. 24.
411. Id. art. 24(4).
412. Id. art. 26. "In deciding to issue an Adverse Disposition, administrative agencies shall do so only after careful consideration of the contents of the record provided for in Article 24, paragraph 1 and of the opinion of the presiding official entered in the report drafted pursuant to paragraph 3 of the same Article." Id.
413. Id. art. 27. One commentator notes that:
The APL's prohibition of appeals of unfavorable dispositions under the Administrative Complaints Inquiry Law is a tremendous disappointment. The fingerprints of bureaucrats are clearly discernible here. The unavailability of appeal significantly strengthens the hand of the bureaucrats during the license or permit revocation process. Although the applicant has the right to request a hearing, the leverage of appeal to a higher body is absent.

Boling, supra note 7, at 7.
414. Uga Interview, supra note 322 (noting events involving APL following soon after law's enactment); Yoshio Suzuki, Shiitekina gyosei shido ni taihou suru suru kirifuda (Trump
1993 enactment and the 1994 start date, government agencies promulgated clarified procedural guidelines to comply with standards articulated in the APL. Businesses in Japan, emboldened by the enactment of the APL and its constraints on administrative guidance, acted contrary to administrative guidance. Some businesses, without seeking prior ministerial approval, offered new products and services that were previously barred by administrative guidance. In addition, market access negotiations within the ongoing U.S.-Japan Framework Talks in 1994 and 1995 led to new trade measures in insurance and financial services that incorporated the language and principles of the APL.

Card to Oppose Arbitrary Administrative Guidance, Ekonomisuto, May 8, 1995, at 70 [hereinafter Trump Card] (detailing early use of APL against administrative guidance). An incident involving MITI’s rejection of a gas company’s application and subsequent issuance of administrative guidance began on October 1, 1994, the official start date of the APL. Gasu jigyosha no shinseisho o kyohi [Gas Company’s Application Rejected], Nihon Keizai Shim bun, Nov. 23, 1994, at 5 [hereinafter Application Rejected]; City Gas Company Accuses MITI of Excessive Regulatory Hand, Nikkei Wkly., Nov. 28, 1994, at 3 [hereinafter City Gas Company]; see Why Can’t Japan Deregulate, supra note 202, at 232-33 (discussing MITI’s rejection of gas company’s application for expanded service area). In addition, several banks ignored MOF’s administrative guidance and started offering previously banned savings accounts shortly after enactment of the APL. Kaoru Morishita, Lottery Bank Accounts Stir Super-Furor, Nikkei Wkly., Nov. 21, 1994, at 16 [hereinafter Lottery Bank Accounts]; Yoshio Suzuki, Kanryo shihai ni kazaana o aketa gyosei tetsuzuki ho [The Administrative Procedures Law Opens Airhole in Bureaucratic Control], Ekonomisuto, Dec. 27, 1994, at 44 [hereinafter APL Opens Airhole]. In the year interim period between the enactment date and the date the APL took effect, over 2000 government agencies, their local offices, and municipalities reviewed their administrative processes and promulgated new directives and guidelines designed to bring processes up to the APL’s standards of formality and transparency. Happy Slashing, supra note 164, at 16.

415. Happy Slashing, supra note 164, at 16; see generally APL Databook, supra note 316, at 91-914 (compiling all new directives, guidelines, and procedures of national agencies and local municipalities promulgated to coincide with APL’s official start date on October 1, 1994).

416. Application Rejected, supra note 414, at 5; City Gas Company, supra note 414, at 3; Why Can’t Japan Deregulate, supra note 202, at 232-33.

417. Lottery Bank Accounts, supra note 414, at 16; APL Opens Airhole, supra note 414, at 44.

418. See Japan-United States: Joint Statement on the Framework for a New Economic Partnership, Sept. 1993, Japan-U.S., 32 I.L.M. 1414, 1418 [hereinafter Framework Statement] (discussing regulatory reform in United States and Japan). “Measures undertaken in this area will address reform of relevant government laws, regulations, and guidance which have the effect of substantially impeding market access for competitive foreign goods and services, including financial services, insurance, competition policy, transparent procedures, and distribution.” Id. at 1418.

1. Promulgation of Clarified Guidelines

The APL calls for agencies to promulgate newly clarified guidelines and procedures. The Japanese Diet took into consideration that it would take time for this process and set the start date approximately one year after passage in the Diet. MITI issued a press release explaining, inter alia, new rules concerning the use of administrative guidance. MITI and MOF publicly issued ministerial orders clarifying hearing procedures regarding adverse dispositions.

a. New Rules On Administrative Guidance

On September 27, 1994, MITI issued a press release ("Release") detailing various changes taking place within MITI in response to the impending start date of the APL. The Release announced that new adverse disposition hearing procedures established by MITI to comply with the APL appeared in MITI's Ministerial Order No. 62 of September 28, 1994. In addition, the Release established specific guidelines regarding MITI's use of administrative guidance.

The Release reaffirmed the applicability of APL Article 36 regarding Financial Services, May 1995, Japan-U.S., 34 I.L.M. 617 [hereinafter Financial Services Measures].

420. APL art. 5, Law No. 88 of 1993 (Japan). The requirements of Article 5, in relevant part, provide that "[a]dministrative agencies shall enact standards (hereinafter referred to as 'review standards'), such standards being necessary for judging, in accordance with the provisions of relevant statutes, whether an application requesting permission, etc. will be granted." Id.

421. Ködderitzsch, supra note 148, at 105 (discussing APL enactment date and official start date one year later).


424. MITI Press Release, supra note 422, at 46.

425. Id.

426. Id. at 49.

427. APL art. 36, Law No. 88 of 1993 (Japan). Article 36 states that: When an Administrative Organ wishes to render Administrative Guidance to more than one person by applying standardized conditions in order to achieve a common administrative objective, then, in advance and in accordance with the circumstances of the particular case, the Organ shall, establish the contents and matters to be uniformly applied in the Administrative Guidance, and
to MITI's administrative guidance. The Release emphasized the need for prior notification, description of contents, and publication of the names of officials responsible for any administrative guidance. It also included an admission that MITI often enforces its guidance by pressuring industry associations or trade groups to force a consensus within a particular industry, and that such guidance does not always correspond to MITI's actual regulatory authority. In addition, MITI stated that many instances involving guidance directed at multiple parties require prior official pronouncement of the guidelines and reasons for the guidance. Finally, the Release included MITI's plans to announce future guidelines regarding administrative guidance in certain areas.

b. Clarified Hearing Procedures

MITI and MOF issued official statements containing newly clarified adverse disposition hearing procedures promulgated to comply with the APL. The Ministerial Orders ("Orders") state that adverse dispositions issued by ministry officials shall abide by the procedures contained within the ministry's particular Order, except where other laws specifically provide for hearing procedures. The Orders codify procedures required by the APL, thereby confirming the APL's applicability to MITI and MOF's rules governing adverse dispositions.

Officials presiding over the hearing may request agency officials, academic or industry experts, and others to serve as wit-

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so long as no extraordinary administrative inconvenience arises thereby, make such matters known to the public.

Id.
428. MITI Press Release, supra note 422, at 49.
429. Id.
430. Id.
431. Id.
432. Id. Examples include guidelines regarding product displays and instruction manuals, as well as other guidelines concerning Japan's new product liability law. Id.
433. MITI Order No. 62, supra note 425, at 149-53; MOF Order No. 98, supra note 423, at 135-38.
nesses. Interested parties, when due to uncontrollable circumstances, may also request a change of date or location of the hearing. In cases where the agency grants this request, the Orders require the agency to provide notice to the party and other participants in the hearing. In addition, parties wanting to use an agent in the hearing procedures must notify the presiding official of these plans at least two weeks prior to the hearing and is subject to the official's approval. Notice of this decision must be provided to the interested party.

A party requesting to inspect agency records, pursuant to APL Article 18(1), must submit a written request including name, address, and materials to be inspected. The selection of the presiding official must be decided prior to the date that notice of the hearing is provided. Pursuant to the APL's Article notice requirements, the name of the presiding official must be included in the notice statement. Ministries may replace a presiding official pursuant to the ministry's general authority. There is an obligation to replace officials in cases where conflicts of interest exist pursuant to APL Article 19, however, notice is required for any and all replacements.

Agencies must post the date, time, and place of hearings

436. *MITI Order No. 62*, supra note 423, at 149; *MOF Order No. 98*, supra note 423, at 137.
437. *MITI Order No. 62*, supra note 423, at 149; *MOF Order No. 98*, supra note 423, at 135.
439. APL art. 17, Law No. 88 of 1993 (Japan).
441. *MITI Order No. 62*, supra note 423, at 149; *MOF Order No. 98*, supra note 423, at 136.
442. APL art. 18(1), Law No. 88 of 1993 (Japan).
445. APL art. 15, Law No. 88 of 1993 (Japan).
446. *MITI Order No. 62*, supra note 423, at 150; *MOF Order No. 98*, supra note 423, at 136.
448. APL art. 19, Law No. 88 of 1993 (Japan).
that are open to the public, as well as provide notice to all interested parties.450 Pursuant to APL Article 21(1),451 parties may submit written arguments and evidence, which must include the party's name, address, and case name and do not appear in person.452 After the conclusion of the hearing, the presiding official must submit to the agency a completed and signed report of the hearing, including all statements, evidence, pictures, and other materials the official deems appropriate.453 Parties must include their name, address, and case name when requesting to view the presiding official's final report.454

2. Increased Business Conviction and Tentative Reaction From Ministries

In the wake of the APL's enactment, several Japanese companies adopted a less deferential approach to ministries' use of administrative guidance.455 Public criticism of MITI's administrative guidance by Keidanren,456 a major pro-business lobby, has aided at least one firm in its successful request to expand its service area, despite receiving administrative guidance to the contrary.457 In the financial sector, several banks have capitalized on the APL's enactment by utilizing methods of attracting new cus-

450. MITI Order No. 62, supra note 423, at 151; MOF Order No. 98, supra note 425, at 137.
451. APL art. 21(1), Law No. 88 of 1993 (Japan). "Parties ... in lieu of appearing on the assigned date of a formal hearing, submit written arguments and documentary evidence, etc. to the presiding official on or before the assigned date of the formal hearing." Id.
452. MITI Order No. 62, supra note 423, at 151; MOF Order No. 98, supra note 425, at 137.
453. MITI Order No. 62, supra note 423, at 151-52; MOF Order No. 98, supra note 425, at 138.
454. MITI Order No. 62, supra note 423, at 152; MOF Order No. 98, supra note 425, at 138.
455. Uga Interview, supra note 322 (discussing Amakusa gas company and Jonan Shinkin bank acting contrary to traditional guidance in wake of APL's enactment).
456. City Gas Company, supra note 414, at 3. Keidanren, Japan's Federation of Economic Organizations, is the most influential business lobby. Id. The group has been lobbying for deregulation and transparency in regulatory matters. Id. They have also established a phone and fax hotline for companies receiving administrative guidance. Id.; Keidanren ga "Gosei shido 110 ban" [Keidanren's Dial 110 Hotline], NIHON KEIZAI SHIMBUN, Oct. 1, 1994, at 3 [hereinafter 110 Hotline]. Keidanren, therefore, publicly criticizes MITI for resorting to extra-legal guidance and supports businesses in resisting administrative guidance. Id.
457. Application Rejected, supra note 414, at 5; City Gas Company, supra note 414, at 3; Why Can't Japan Deregulate, supra note 202, at 232-33.
tomers which were previously banned by administrative guidance.\textsuperscript{458} Whereas MOF traditionally issued guidance to prevent banks from breaking from established operating methods, when the banks began offering the prohibited products and services, MOF reacted tentatively by setting up a group to study the issue.\textsuperscript{459}

a. Amakusa Gas Company, Keidanren, and MITI

A recent incident involving MITI and the Amakusa Gas Company illustrates the initial impact of the APL on MITI’s market governance.\textsuperscript{460} A controversy began on October 1, 1994, when a propane gas supplier first submitted its petition to MITI for an expanded service area.\textsuperscript{461} Local MITI officials directed the company to consult in advance with competing propane gas companies that would be affected by this move.\textsuperscript{462} MITI refused to act on Amakusa’s application for expanded service without an attached report documenting negotiations with the local competition.\textsuperscript{463} The gas company officials asked the ministry to put this request in writing\textsuperscript{464} but MITI refused.\textsuperscript{465} Amakusa re-submitted its application,\textsuperscript{466} and informed Keidanren,\textsuperscript{467} which noti-
fied MITI of its position in support of Amakusa. Keidanren called for MITI to comply with the newly enacted APL. MITI ultimately changed its mind and approved the firm's application, thus avoiding further conflict.

Keidanren, a quasi-public group traditionally operating to help MITI govern industries, recently shifted gears in support of deregulating Japan's markets and improving transparency in regulatory processes. Keidanren now supports recipients of non-transparent or unfair guidance by publicizing the guidance and lobbying on behalf of the recipient party. The group set up a phone and fax hotline on October 1, 1994, when the APL went into effect. Companies may now call to report receipt of administrative guidance from ministries, and Keidanren vows to support the companies against the bureaucracy.

b. Lottery-Based Bank Accounts and MOF

Following MOF's deregulation of interest rates on October 17, 1994, the Jonan Shinkin Bank broke with tradition and

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468. 110 Hotline, supra note 456, at 3.
469. Id.
470. Id. MITI, however, denied it violated the new APL law. City Gas Company, supra note 414, at 3.
471. See Omiya, supra note 122, at 193-95 (discussing traditional role of Keidanren and its influence in helping MITI govern manufacturing sector); City Gas Company, supra note 414, at 5 (describing Keidanren's transformation into pro-deregulation lobby group).
472. Hulme, supra note 461, at 12. Keidanren recently underwent a "dramatic metamorphosis to position itself as the champion of deregulation..." and is supporting the business community against the government. Id.
473. Id.
475. 110 Hotline, supra note 456, at 3. Keidanren urges recipients of the bureaucracy's non-transparent or unfair administrative guidance to report the guidance to Keidanren. Id. The hotline represents Keidanren's policy shift in support of deregulation. Id. Keidanren reported several cases where guidance was rescinded because of their support against the ministries. Government Rescinds Guidance, supra note 474. The group reports that they have received over 30 calls on the phone hotline. Id.
476. 110 Hotline, supra note 456, at 3.
477. Suki Tsukareta? Okurasho yoso gai no hankyo ni tomadoi [Unexpected Attack? MOF Uncomfortable With Bank's Unanticipated Response], NIHON KEIZAI SHIMBUN, Nov. 10, 1994, at 7 [hereinafter Unexpected Attack]. This was a departure from the standard procedure of seeking prior approval from MOF for new products or services. Id. In the past, Jonan could not have offered its lottery accounts without explicit ministry approval. Lottery Bank Accounts, supra note 414, at 16. The MOF traditionally controlled the bank-
started offering lottery-based savings accounts.\textsuperscript{478} Despite receiving sharp criticism from other banks and the banking trade association, the Jonan Bank made a large profit and several other banks soon offered similar products.\textsuperscript{479} Rather than issuing administrative guidance, MOF formed a commission to study the issue.\textsuperscript{480} Media reports and academic commentary attribute the banks' action and MOF's inaction to the recently enacted APL.\textsuperscript{481}
Some commentators felt that only small, financially sound banks would have the courage to do what Jonan Bank did. However, Sumitomo and Dai-Ichi Kangyo, two of Japan's largest commercial banks, recently began offering similar promotional giveaways that include cash prizes. In addition, some brokerage firms are luring new investors with lotteries that were effectively banned until the APL's start date.


The APL represented one issue discussed in recent bilateral market access negotiations within the ongoing Framework Talks between the United States and Japan. Agreements reached in two rounds of negotiations confirm the applicability of the APL to the insurance and financial services sectors in Japan. The U.S. Government and U.S. businesses expect that these two agreements may enhance the impact of the APL.

a. Japan-U.S. Measures Regarding Insurance

On October 1, 1994, Japan and the United States signed an agreement regarding the Japanese insurance market. The Agreement focused on market access and sought to lower ex-
isting market barriers. Specifically, the Japan-U.S. Measures Regarding Insurance ("Insurance Measures") addressed the lack of transparency and poor procedural protections that characterize Japan's insurance sector. Both governments welcomed the enactment of the APL by the Japanese Diet. The two governments supported the APL's purpose of ensuring fairness and transparency in administrative processes, protecting the rights of Japanese citizens, and establishing generally applicable procedures regarding dispositions, administrative guidance, and applications. The Japanese Government stated that implementation of the APL with respect to the insurance sector would be completed by November 1994.

The Japanese Government confirmed that it would take other necessary actions to bring administrative processes in the insurance sector into conformity with the APL. Specifically, the Japanese Government would compile and publish standards regarding licensing to provide insurance and approval for new products and rates unless it caused undue hindrance to administration. In addition, pursuant to the APL, the Insurance Measures stipulated that oral administrative guidance would be offered in writing upon request unless it would cause undue problems to the particular agency.

According to the agreement:

Measures referencing the Administrative Procedures Law . . . will be implemented according to the Government-wide schedule for implementation of that law. The Government of Japan has explained to the Government of the United States that implementation of this law with respect to the insurance sector currently is expected by November 1994.

"Standards relating to licensing to provide insurance and approval of new products and rates will be compiled, published and made available to the public, unless it causes undue hindrance to administration." According to the agreement:

"Administrative guidance that is delivered orally, upon request, will be delivered in writing, unless it causes undue hindrance to administration."
also stated that when guidance is administered to multiple parties for the same purpose, the agency should let the recipients know in advance the elements in common, thereby establishing uniform standards of administrative guidance.498

b. Japan-U.S. Measures Regarding Financial Services

In May 1995, Japan and the United States reached another agreement within the ongoing Framework Talks.499 The United States wanted fair treatment, equal access, and liberalization of financial service markets in Japan.500 Seeking to liberalize Japan’s financial markets, the Japan-U.S. Measures Regarding Financial Services501 (“Finance Measures”) incorporated many of the underlying principles of the APL, as well as much of the actual wording.502 The United States hoped that by incorporating the APL, the Finance Measures would provide enforcement capabilities for non-Japanese firms.503

The Finance Measures emphasized transparency and procedural protections from arbitrary regulatory processes.504 The United States expressed support for the applicability of the APL to financial services, and the Japanese Government confirmed

498. Id. at 667. The undue hindrance exception applies to this Article as well. Id. The Insurance Measures state that the “undue hindrance to administration” exception is intended to be used only in exceptional cases. Id.


500. Goodman, supra note 302.

501. Financial Services Measures, supra note 419, at 617.

502. Id.; Radin, supra note 90. “The Government of Japan confirms the applicability of the provisions of the APL with regard to regulation, administrative measures, and other actions affecting the market for financial services and products in Japan.” Financial Services Measures, supra note 419, at 626.

503. Radin, supra note 90. U.S. firms may complain to the Treasury Department which may seek Japanese compliance. Id. Mr. Radin saw the incorporation of the APL into the Measures as a fundamental and straightforward attack on the use of bureaucratic power in Japan. Id. Mr. Radin sees great potential in the APL because of the law’s provisions addressing specific characteristics of the way markets have historically been regulated in Japan. Id.

504. Financial Services Measures, supra note 419, at 626. The respective Governments “confirm that fair and transparent regulations and policies governing the activities of financial services suppliers are important in facilitating both the access of foreign financial services suppliers to, and their operations in, domestic markets. Both Governments reiterate their commitments to continuing to promote transparency in financial services.” Id.
the APL's applicability regarding licensing, administrative actions, and other actions affecting financial services markets. As in the earlier Insurance Measures, the Finance Measures' provisions regarding transparency and procedural fairness in financial services markets stipulated the same principles found in the APL's provisions.

III. THE APL IS A POSITIVE FIRST STEP TOWARD FAIRNESS AND TRANSPARENCY IN ADMINISTRATIVE PROCESS IN JAPAN

The Japanese APL signifies Japan's efforts to formalize its regulatory process and eliminate criticism that Japan's markets are closed. The unpredictability inherent in Japan's informal regulatory system impedes economic growth and provides incentive for domestic and foreign companies alike to bypass Japan and invest overseas. The APL attempts to reverse this hollowing out by inhibiting the use of arbitrary and non-transparent administrative guidance and formalizing regulatory methods in areas regarding applications, dispositions, and notifications. A general decline in bureaucratic prestige and power since the

505. Id.; Interview with Ministry of Finance Official, Tokyo, Japan, August 1995 [hereinafter MOF Official]; Hokatsu kyogi yotsu no pointo; Okurasho, seika o kyocho; Ichiba kankeisha ha hiyayaku [Four Points Agreed Upon in Financial Services Negotiations; Ministry of Finance Emphasizes Results, But Markets are Cool], NIHON KEIZAI SHIMBUN, Jan. 17, 1995, at 5.

506. Financial Services Measures, supra note 419, at 626-28. The Financial Measures focus on establishing and publishing licensing and approval standards of financial activities. Id. at 626. Recipients of adverse dispositions must receive notice, as well as a written explanation for the disposition, except in cases of "extraordinary administrative inconvenience." Id. With regard to administrative guidance, the Measures emphasize that guidance must be within the agency's jurisdiction, that compliance is voluntary, and that oral guidance will be given in writing upon request. Id. at 627.

507. See supra notes 1-4 and accompanying text (indicating criticism that Japan's markets are closed to new market entrants because of non-transparent regulatory methods).

508. See supra notes 161-286 and accompanying text (discussing arbitrariness and lack of transparency in administrative guidance process).

509. Shibaita & Fukuei, supra note 14, at 4; see Hollowing Out Japan’s Financial Markets, supra note 229, at 67 (reporting concern in Japanese financial markets that business is shifting to Singapore, London, and Hong Kong); supra notes 205, 229 and accompanying text (discussing shift of business overseas because of regulatory impediments).

510. See supra notes 329-414 (analyzing APL's provisions and effect of formalizing Japanese regulatory system).
early 1990's\textsuperscript{511} supplements the APL's efforts to add transparency to Japanese markets. Notwithstanding the impact of formalizing regulatory procedures and the decline in bureaucratic influence, however, the APL fails to address key procedural inadequacies of the administrative guidance process.

A. Formalizing Rules and Procedures Represents Positive Reform of Japan's Administrative Machinery

The APL clarifies Japan's administrative process by instituting principles that emphasize the use of writings,\textsuperscript{512} provide notice to interested parties prior to administrative actions,\textsuperscript{513} and require agencies to publicize generally applicable rules and procedures.\textsuperscript{514} Provisions regarding administrative guidance add transparency and clarify the source and nature of guidance.\textsuperscript{515} The APL's principles are a good foundation on which to construct a more formal regulatory system and inhibit arbitrary administrative guidance. Cooperation by such national agencies as MITI and MOF in complying with the APL signified acceptance of the new law.\textsuperscript{516}

1. The APL's Emphasis on the Use of Written Requests and Responses Increases Clarity and Accountability in Administrative Process

The APL's emphasis on the use of written requests and responses facilitates both clarity in administrative process and accountability of bureaucratic agencies for their actions. Past reli-

\textsuperscript{511} See Buckley, supra note 194, at 12 (reporting sharp drop in favorable public opinion toward Japan's bureaucracy); supra notes 208-06, 226-32 and accompanying text (noting decline in prestige and influence of MITI and MOF in Japanese economy since early 1990's).

\textsuperscript{512} See supra notes 342-49, 370-74, 397 and accompanying text (analyzing APL provisions that stipulate use of written responses and requests in dealing with Japanese administrative agencies).

\textsuperscript{513} See supra note 386-414 and accompanying text (analyzing APL's adverse disposition procedures that require notice prior to issuance of administrative disposition).

\textsuperscript{514} See supra notes 367-68, 392-96 and accompanying text (stipulating establishment of clarified standards and procedures regarding applications and adverse dispositions).

\textsuperscript{515} See supra notes 337-53 and accompanying text (discussing APL's provisions that are designed to add transparency to administrative guidance process).

\textsuperscript{516} See supra notes 416, 421-54 and accompanying text (analyzing newly clarified procedures promulgated by MITI and MOF designed to comport with APL's adverse disposition hearing requirements).
ance on oral guidance\textsuperscript{517} and the prevalence of informality\textsuperscript{518} made it difficult for parties to discern proper procedures and insulated the bureaucracy's control of the economy from any legal challenge.\textsuperscript{519} Reliance on writings may, therefore, improve a party's chances of gaining judicial review of administrative actions. The APL stipulates that parties may request written confirmation of administrative actions, including administrative guidance.\textsuperscript{520} Agencies also must provide written responses to inform applicants of the progress of their application, and when denying applications, must provide a written explanation of the necessary modifications or the reasons for the denial.\textsuperscript{521} By requiring these actions, the APL adds written formality to the Japanese regulatory system.

2. Requiring Prior Notice and the Opportunity to Respond to Impending Dispositions Adds Fairness to the Japanese Regulatory System

The APL emphasizes the issuance of prior notice and opportunities for parties to present statements and arguments on their behalf.\textsuperscript{522} Absent notice requirements and the chance to respond to impending adverse dispositions, a party could be treated unfairly and receive notice only when their license was revoked. Although the APL exempts rejected applications,\textsuperscript{523}

\textsuperscript{517} Ködderitzsch, \textit{supra} note 148 (reporting that most administrative guidance is oral); \textit{see supra} note 346 and accompanying text (discussing prevalence of oral guidance in Japanese regulatory system).

\textsuperscript{518} \textit{See supra} notes 70-129 and accompanying text (discussing informal institutional arrangements that perpetuate regulatory rule by informal methods in Japan).

\textsuperscript{519} \textit{See supra} notes 355-59 and accompanying text (discussing unpredictability and arbitrariness that characterized Japanese regulatory system because of oral guidance and uncodified standards); \textit{supra} notes 144-50 and accompanying text (explaining difficulty of gaining judicial review of informal government actions, including administrative guidance).

\textsuperscript{520} APL art. 35(2), Law No. 88 of 1993 (Japan). The guidance must be in writing when requested except in cases of "extraordinary administrative inconvenience." \textit{Id.}; \textit{see supra} notes 346-49 and accompanying text (discussing APL provision that provides parties ability to request oral guidance in writing).

\textsuperscript{521} \textit{See supra} notes 365-74 and accompanying text (analyzing APL's requirements regarding publicized application criteria and notice requirements for non-conforming applications).

\textsuperscript{522} \textit{See supra} notes 387, 398-409 and accompanying text (discussing APL's requirements for providing prior notice and opportunity to respond to pending adverse disposition).

\textsuperscript{523} \textit{Sumo Wrestling, supra} note 369, at 17. Rulings concerning applications are exempted from the adverse disposition provisions. \textit{Id.} There is, therefore, no legal
the law requires agencies to provide notice to parties and an opportunity to be heard prior to the issuance of an adverse disposition. Accordingly, this adds fairness to the workings of the Japanese bureaucratic administration.

3. The Creation of Generally Applicable Standards and Procedures Further Enhances Predictability in the Japanese Regulatory System

The APL requests agencies to create and publicize generally applicable rules and procedures in order to facilitate the application and approval process. The law implores government agencies to enact concrete standards and criteria for judging the merits of applications and for rendering adverse dispositions. An MCA survey of the year after the enactment of the APL reported that over ninety percent of dispositions relating to licensing approvals were judged by standard review criteria, and standard time frames for review of applications were established for eighty percent of application dispositions. Only twenty-one percent of adverse dispositions regarding revocation of licensing approvals, however, were based on standard criteria.

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right to a hearing regarding a rejected application. Id. "Since so much business is done on the basis of applications, this represents an enormous loophole in this area of the law. Even where parties file applications to renew some permission, if the renewal is denied, the adverse disposition procedures do not apply." Id. See supra notes 400-03 and accompanying text (discussing exemption of rejected applications from APL's adverse disposition hearing procedures).

524. See supra notes 387, 398, 404-09 and accompanying text (describing APL's requirements to provide parties opportunity to present arguments on their behalf either in formal hearing or in writing before agency renders adverse dispositions).

525. See supra notes 368-70 and accompanying text (analyzing APL provisions requesting government agencies to enact and publicize standards for judging applications).

526. See supra notes 393-97 and accompanying text (requiring government agencies to create and make public review standards for determining when to issue adverse dispositions).

527. Kyoninka no kyu wari ni shinsa kijun settei [Examination Criteria Established for 90% of Licensing Approvals], NIHON KEIZAI SHIMBUN, Oct. 1, 1995, at 2. Of 4614 licensing approval dispositions rendered in the first six months following the APL's enactment, 4168, or 90.3%, were judged based on standard review criteria. Id. The difficulty of creating standard review criteria was cited as the reason why criteria were not established for the remaining 9.7%. Id.

528. See id. (reporting that standard review time frames were established for 80% of application procedures in 1995 MCA survey).

529. See id. (reporting that 79% of adverse dispositions that involved retraction of licensing approvals were not based on standard criteria).
Access to standardized review criteria improves predictability and efficiency because parties can discern and perform the steps necessary to gain approval.

4. Formalizing the Administrative Guidance Process Protects Businesses From Arbitrary Application of Administrative Guidance

The APL addresses the practice of purposefully keeping vague the contents, purpose, and relevant ministry involved with administrative guidance. The APL emphasizes the voluntary nature of administrative guidance and seeks fair treatment of parties that refuse compliance with guidance. Moreover, the law requires government agencies to issue guidance only within their jurisdiction and put guidance in writing when requested. Formalizing administrative guidance curtails, 

530. Ködderitzsch, supra note 148, at 128. Ködderitzsch notes that: Having to put in writing the content of administrative guidance will undoubtedly force the administrative body to think through the rationale and legal implications of its request. However, part of the success of administrative guidance has been the process of give-and-take between the administration and an addressee and the blurring of legal boundaries. The impact of art. 35 on the administrative style in Japan will essentially depend on whether the addressee will have either the interest or the courage to request a written statement.

Id.; see supra note 345 and accompanying text (analyzing APL’s provisions stipulating disclosure of purpose, content, and ministry responsible for issuance of administrative guidance)

531. See Sumo Wrestling, supra note 369, at 18 (noting that APL indicates compliance with administrative guidance “should only occur on the basis of truly voluntary choice by the concerned parties”); see supra notes 350-53 and accompanying text (discussing APL’s emphasis that compliance with administrative guidance is voluntary and non-complying parties may note be treated disadvantageously or pressured into compliance).

532. Boling, supra note 7, at 15 (reporting that APL stipulates that when agency issues guidance “with respect to an application (for example, seeking the withdrawal of an application or alteration of its contents), it must make efforts not to hamper the individual’s right to choose not to comply with such guidance”); see supra notes 351-53 and accompanying text (emphasizing voluntary nature of compliance with guidance and that refusal to comply should not disadvantageously affect parties).

533. See supra note 344 and accompanying text (discussing APL provision that restricts agencies’ administrative guidance to issues that fall under their jurisdiction, thereby banning extra-legal or non-statutory use of administrative guidance).

534. See supra note 347-48 and accompanying text (discussing burden on individuals to solicit written guidance and limitations of APL provision that does not provide written explanations of guidance for “on the spot” guidance or when issuing written guidance causes “extraordinary administrative inconvenience”).

535. Gyosei Shido kao Futomei; Shiko kara Ichinen Gyosei Tetsuzuki Ho [Administrative
therefore, arbitrary enforcement of a ministry's guidance and facilitates companies' efforts to change inefficient business practices and improve competitiveness.536

B. A General Decline in the Power of Japan's Economic Bureaucracy Supplements Japan's Attempt, With the APL, to Deregulate and Improve Transparency in the Japanese Economy

A general decline in the economic bureaucracy's influence537 supplements the APL's efficacy and provides companies more leverage in their relations with government agencies. Criticism regarding securities538 and banking scandals539 and the hollowing out of Japan's financial markets540 increasingly pres-
sure MOF to reform its informal and constrictive regulatory style. MITI receives a double blow as industrial capacity continues to shift overseas and businesses maintain that they no longer need MITI’s assistance.

1. International and Domestic Reproach of MOF’s Regulatory Style Will Loosen the Ministry’s Grip on Financial Markets

MOF’s prestige has been tarnished as the Ministry struggles with increasing pressure to reform the financial regulatory system in the wake of securities and banking scandals. Moreover, Japan’s financial markets are hollowing out as foreign and domestic firms seek to raise capital in more active foreign markets. MOF cannot avoid, therefore, serious efforts to both lessen its grip on the Japanese economy and reform its informal style of governance into a market-driven structure able to function within a more integrated international system.

a. Regulatory Reform in the Wake of Financial Scandals Will Reduce MOF’s Control Over Japan’s Financial Sector

Financial scandal stimulated MOF to reform its regula-

541. See Overseas Production May Outpace Exports, supra note 205, at 3 (reporting that overseas production by Japanese companies is on pace to surpass export production from Japan for first time in history); Trading Companies, supra note 205, at 12 (describing hollowing out as business and industry shift overseas). Industry analysts point out that Japanese manufacturing capacity is “hollowing out” or moving offshore. Trading Companies, supra note 205, at 12.

542. See Telecom Wars, supra note 203, at 183 (indicating decline in corporate reliance on MITI’s guidance as Japanese firms attain levels of competitive maturity); supra notes 203-04 and accompanying text (discussing global competitiveness of Japanese businesses and decreased reliance on MITI’s promotional guidance).

543. See Williams, supra note 231, at A10 (reporting decline in international and domestic confidence in MOF’s ability to govern Japanese economy in light of recent slew of scandals); Yushiro Ikuyo, Japan Premium Pulling Up Domestic Interest Rates, EKONOMISUTO, Nov. 14, 1995, at 28 (discussing negative effect of scandal at Daiwa Bank’s New York Branch on domestic and international bank borrowing for Japanese banks); supra note 298 and accompanying text (reporting growing pressure on MOF to reform its informal, paternalistic regulatory style).

544. Ministry Reforms, supra note 99, at 2. MOF has been “rocked by a series of scandals and, most recently, criticism of its handling of the bad-debt crisis caused by the jusen housing-loan companies.” Id. MOF is trying to internalize efforts to reform the ministry in light of calls to disband MOF entirely. Id. See supra note 298 and accompanying text (reporting plans by MOF to reform from informal to more market-oriented regulatory methods).
tory system in order to restore international confidence in the Japanese financial system. Moreover, MOF recently censured the influence-peddling practices of MOF-Tans. Decreases in corporate acceptance of amakudari officials into the ranks of private companies and plans to extend the length of a ban on employment of amakudari officials from two years to five years will mitigate further the inherent abuses of MOF’s informal regulatory style.

b. Hollowing Out of Japan’s Financial Markets Pressures MOF to Deregulate and Formalize the Domestic Regulatory System

Japan’s strongest financial firms and many foreign firms are shifting overseas and MOF appears unable to cope with the problem. The difficulty and expense of offering financial products in Japan causes firms to forego Japan and launch the product overseas. Pressure to reverse the hollowing out trend will lead MOF to continue deregulation and loosen its stran-

545. See supra notes 115-24 and accompanying text (discussing permanent employees of financial firms stationed at MOF in order to learn valuable information regarding inspections of financial institutions and MOF’s opinion on new products or services); supra notes 125-29 and accompanying text (reporting reform of MOF-Tan network because of excessive entertainment costs and charges of collusive ties between MOF-Tans and MOF officials).

546. See supra notes 90-92 and accompanying text (discussing decline in corporate willingness to accept former bureaucrats into executive positions in private industry).

547. See supra notes 93-95 and accompanying text (discussing plans to reform amakudari system because of suspected role of former bureaucrats in jusen housing loan scandal and growing criticism of use of public funds for bail-out plan of bankrupt jusen).


549. Hirakawa, supra note 199 (indicating need to gain MOF’s approval before launching new products or services); supra note 225 and accompanying text (discussing slowdown in MOF’s approval process for innovative products and criticism of slow pace of deregulation in financial markets).

550. See Hollowing Out Japan’s Financial Markets, supra note 229, at 67 (discussing exodus from Tokyo Exchange due to high costs of maintaining listing on Tokyo Stock Exchange in light of low volume of shares being traded, 0.3% tax levied on value of each share traded, and high brokerage commissions charged).

551. See Looser Foreign-Exchange Rules in Works: Easing of Control Proposed in Bid to Stem Financial Hollowing Out, Nikkei Wkly., Mar. 11, 1996, at 3 (reporting that MOF, “bowing to international financial reality,” is planning to “allow securities companies and other corporations to engage in a broader range of foreign exchange-related transactions.”); Kiho Yokoyama, Lid on Public Offerings to be Lifted, Nikkei Wkly., Mar. 11, 1996, at 13 (indicating MOF’s plans to allow listed companies free hand to offer new
glehold on Japan’s financial markets.

2. Corporate Self-Sufficiency and Hollowed Out Industries Have Left MITI Without a Meaningful Role

The global competitiveness of Japanese companies and the continuing shift of industry overseas correlates to a decline in MITI’s control over the manufacturing sector. Regulatory and currency rate unpredictability push many firms, domestic and foreign alike, to forego investing in Japan for more profitable opportunities overseas. This hollowing out will strengthen the push for deregulation in Japan, as firms and therefore jobs continue to shift elsewhere.

C. Despite the APL’s Good Intentions, the New Law Fails to Address Fully the Procedural Inadequacies of the Administrative Guidance Process

Enactment of the APL should not be the end goal in administrative reform. Reformers in Japan must view the principles and procedures codified by the APL as a starting point in deregulating and formalizing the Japanese economy. Despite commendable efforts, the current APL contains inadequacies that, unless amended in the future, will allow the traditional regulatory style to persist.

1. Vague Wording and Legislative Loopholes Dampen the APL’s Efficacy

A major weakness of the APL is that it places great confidence in the efforts of government agencies to establish clear shares to public, helping market forces to work in long run by lifting artificial control on supply); supra notes 477-84 and accompanying text (discussing MOF lifting ban on lottery-based banking and securities products).

552. See e.g., Takai, supra note 206, at 8 (reporting hollowing effect of rapidly rising yen on Japanese manufacturing sector and relocation of firms to nearby Asian countries); Tsukada, supra note 206, at 4 (reporting that many Japanese manufacturers are at breaking point and are being forced to shift production overseas because of uncertainty regarding yen rate and Japanese bureaucracy’s inability to stabilize rate and deregulate domestic market).

553. See Calder Testimony, supra note 14 (discussing effect of overregulation on investment and employment in Japan). “After all, in a borderless global economy, continued overregulation will increasingly provoke both multinational and increasingly even some Japanese firms to bypass Japan, and to migrate elsewhere — a prospect that should exert its own unremitting pressure for reform.” Id.
and definite criteria for rendering various administrative actions. This task, however, falls on individual agencies that have for years perfected the art of obfuscation. Many of the APL's provisions implore agencies only to strive or endeavor to enact criteria for judging and rendering administrative acts. The APL's aspirational language, therefore, leaves ample room for bureaucratic maneuvering.

The APL does not address certain key aspects of administrative process. Agencies are not bound to adhere to the finding in the presiding official's report following a formal hearing regarding an adverse disposition. Moreover, there are no guidelines for granting a party's request to inspect the proceedings report and presiding official's opinion. The adverse disposition hearing procedures, furthermore, do not apply to rejected applications. The APL's relevance is severely constrained, therefore, because a party has recourse to formal hearings only in cases where a license or approval is retracted in mid-stream or when seeking a licensing renewal.

2. Japan's APL Extends Legal Imprimatur to Administrative Guidance While Failing to Adequately Formalize the Process

Administrative guidance represents an extra-legal regulatory method and establishing guidelines for its use in the APL authorizes a technique that has no legal basis. The APL does not require all guidance to be in writing and made public, with

554. See supra notes 369, 392-96 and accompanying text (indicating aspirational wording of APL's provisions regarding application and adverse disposition standards).

555. See supra note 413 and accompanying text (discussing APL provision that requires agencies to render dispositions "only after careful consideration of the contents of the record... and opinion of the presiding official entered in the report").

556. See supra note 411 and accompanying text (discussing party's right to request inspection of report and opinion of presiding official). Regarding the record and report of the formal hearing, the APL states that "parties... may demand inspection of the records... and the report." APL art. 24(4), Law No. 88 of 1993 (Japan).

557. See supra notes 399-403 and accompanying text (exempting rejected applications from hearing procedures).

558. See supra notes 161-67 and accompanying text (discussing informality and flexibility of administrative guidance and absence of legal limits to constrain its use).

559. See Boling, supra note 7, at 16 (noting criticism of APL for codifying rather than prohibiting administrative guidance process); supra note 342 and accompanying text (discussing rationale of APL drafters for choosing to codify administrative guidance and emphasize use of writings, rather than calling for total ban on administrative guidance).
exemptions clearly listed. The APL, instead, only requires guidance to be issued in writing when requested by parties and at the discretion of the agencies.\textsuperscript{560} Because the APL fails to formalize all uses of administrative guidance, agencies will continue to informally pressure businesses to comply with administrative goals.

3. The APL Lacks the Support of Legal Sanctions With Which Businesses Can Challenge Administrative Guidance

The APL, designed to mitigate bureaucratic impediments, acts as a double-edged sword. Business leaders welcome the new law, but they also worry about who will have the conviction to challenge government agencies. A party seeking to challenge or ignore administrative guidance receives no assurance of outside or legal help because the APL fails to establish the support of legal sanctions. Keidanren's vow to support companies against non-transparent administrative guidance is certainly beneficial, however, only few cases have met with success.\textsuperscript{561} Japanese businesses will be able to shake off current performance woes only through innovation. While innovation is not normally the trademark of Japan's conservative bureaucracy,\textsuperscript{562} companies have begun to take advantage of tentative responses by ministries in the wake of the APL.\textsuperscript{563}

CONCLUSION

The arbitrary nature of regulatory procedures in Japan caused troubling unpredictability for companies attempting to enter or operate within the Japanese economy. The APL is one

\textsuperscript{560} APL art. 35(2), Law No. 88 of 1993 (Japan). Agencies do not have to comply with requests where to do so would result in "extraordinary administrative inconvenience." Id. See supra notes 347-48 and accompanying text (noting burden on parties to request guidance in writing and absence of guarantees that ministries will comply).

\textsuperscript{561} Guidelines Remain Non-Transparent, supra note 535, at 4. Keidanren was consulted on 21 cases during the first year after the APL went into effect. Id. Only five of those cases were successful. Id. See supra notes 456-57, 467-76 and accompanying text (discussing Keidanren's vow to support companies that receive administrative guidance and phone hotline established for companies to call and report receipt of such guidance).

\textsuperscript{562} See e.g., Tatewaki, supra note 207, at 176 (discussing considerable slowdown in approval process when companies seek innovative and unprecedented changes).

\textsuperscript{563} See supra notes 455-84 and accompanying text (discussing events after enactment of APL in which companies have successfully challenged or ignore administrative guidance).
attempt by the Japanese Government to stem the tide of financial and manufacturing corporations shifting operations out of Japan by improving the transparency of bureaucratic process. The effectiveness of the APL, however, rests in the hands of the business community. The law itself, with its inadequacies, cannot be expected to change age-old practices of Japan's bureaucrats overnight. In recognition of the APL's current weaknesses, the business community must, therefore, take advantage of declining bureaucratic influence and utilize the law to stand up to the bureaucracy, or else Japan will continue to fall from its position as a global economic power.