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

Ken Duck*

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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-transparent¹ and anti-competitive² regulatory methods of Japan's economic bureaucracy³ impede new entrants

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1. Peter B. Edelman, *Japanese Product Standards as Non-tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue*, 24 STAN. J. INT'L L. 389 (1988). Edelman contends that:

[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.

Id. at 390; Masu Uekusa, *Government Regulations in Japan: Toward Their International Harmonization and Integration*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 237 (Kozo Yamamura ed., 1990); MUNEYUKI SHINDO, GYOSEI SHIDO [ADMINISTRATIVE GUIDANCE] 17 (1994) (detailing U.S. criticism in SII Talks of Japan's non-transparent regulatory procedures). Transparency is defined as clarity in the contents of intended administrative determinations. KATSUYA UGA, GYOSEI TETSUZUKI HO NO RIRON [THE THEORY OF ADMINISTRATIVE PROCEDURE LAW], 17 (1995) [hereinafter APL THEORY]. The non-transparency of administrative guidance in Japan is cited as a non-tariff barrier. MASASHI KANEKO, GYOSEI TETSUZUKI HO 1-2 (1995).

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 action⁶ or inaction⁷ 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 system¹⁰ and other institutional ar-

Eamonn Fingleton, *Japan's Invisible Leviathan*, FOR. AFF., Mar./Apr. 1995, at 69, 70-73 (discussing breadth of MOF's influence over economy). Two ministries, MITI and the MOF, regulate a large part of the Japanese economy. SHINDO, *supra* note 1, at 90-91.

4. *Gaishikei Kigo 'Bijinesu Konnan' 52% [Fifty-two Percent of Foreign Firms Find Doing Business in Japan Difficult]*, YOMIURI SHIMBUN, Nov. 20, 1994, at 6 [hereinafter *Doing Business in Japan*] (reporting that 92% of foreign firms cite regulations, laws, and administrative guidance as reasons for their competitive difficulties in doing business in Japan); Edelman, *supra* note 1, at 389 (discussing application criteria and product licensing standards as barriers to market entry in Japan).

5. FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POST WAR JAPAN 166-68* (1987) [hereinafter *LAW AND SOCIAL CHANGE*] (discussing influence of informality on cooperative government-business relations).

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).

8. MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 60* (1993) [hereinafter *TRADE AND COMPETITION LAW*] (describing administrative guidance as core around which regulatory system in Japan is centered); see Stephen M. Spaeth, *Industrial Policy, Continuing Surveillance, and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States*, 20 OHIO N.U. L. REV. 931, 933 (1994) (noting that most MITI policy directives are put into effect by use of 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* system¹¹ and the *shingikai* councils,¹² which emphasize close, informal ties between government and business, perpetuate Japan's informal regulatory system and enhance compliance with administrative guidance.¹³

Responding to criticism¹⁴ of Japan's regulatory practices and the shift of Japan's industrial base overseas,¹⁵ Japan enacted

mal means of regulation via ministries' broad statutory authority and lack of judicial review of ministerial action).

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.*

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.*

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 co-operation 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.*

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 TOYO 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).

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 unremitting 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-

16. *Gyosei Tetsuzuki Ho [Administrative Procedure Law]*, Law No. 88 of 1993 (Japan) [hereinafter APL].

17. Katsuya Uga, *Gyosei Tetsuzuki Ho ni Tsuite [Concerning the Administrative Procedures Law]*, KIKAN GYOSEI KANRI KENKYU [ADMINISTRATIVE MANAGEMENT RESEARCH QUARTERLY], Mar. 1994, at 41 [hereinafter *Concerning the APL*].

18. APL art. 1(1), Law No. 88 of 1993 (Japan). In relevant part, Article 1 stipulates that:

This law concerning procedures for dispositions, administrative guidance, and notifications, and providing for universality for matters relating to such actions, seeks to advance a guarantee of fairness and progress towards transparency (here meaning, that there be clarity in the public understanding of the contents and processes of administrative determinations . . .) in administrative process, and thereby to promote the protection of the rights and interests of the public.

Id.; see Toshimichi Yagi, *Ima, Naze 'Kiseikanwa' ka [Why deregulate now?]*, KIKAN GYOSEI KANRI KENKYU [ADMINISTRATIVE MANAGEMENT RESEARCH QUARTERLY], Sep. 1994, at 3 (discussing APL's purpose and scope of application); *Making Government More Transparent*, DAILY YOMIURI, Nov. 16, 1993, at 6 (citing application of APL to all applications, dispositions, and administrative guidance).

19. APL art. 2(3), Law No. 88 of 1993 (Japan). "Applications refer to requests, made pursuant to Statutes, for permission, authorization, license, or some other Disposition by an administrative agency granting some benefit to the applicant . . . and to which requests the administrative agencies should respond in the affirmative or negative." *Id.*

20. *Id.* art. 2(2). "Dispositions refer to the rendering of dispositions and other acts involving the exercise of public authority by administrative agencies." *Id.* The APL specifically addresses adverse dispositions which "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.*

21. *Id.* art 2(6). Administrative Guidance refers to "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 ſpecific persons in order to realize administrative aims, where ſuch acts are not Dispositions." *Id.*

22. *Id.* art. 2(7). Notifications are "actions taken to notify administrative agencies of given matters (excluding applications) as may be expressly obligated by Statutes (including those notification which become necessary by virtue of being prerequisite for bringing about some hoped-for legal effect)." *Id.*

23. KANEKO, *supra* note 1, at i-v.

pan'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 Industry²⁴ ("MITI") and the Ministry of Finance²⁵ ("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.²⁶ The standard reaction to informal requests made by Japanese ministries, however, is compliance.²⁷ Japanese ministries, despite existing formal statutory authority,²⁸ prefer to use informal and legally voluntary²⁹ methods to achieve compliance with their administrative goals.³⁰

A. *The Prevalence of Informality*

Commentators on administrative guidance view the informality of the process as peculiar to Japan.³¹ 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.³² Interlocking interests of the Gov-

26. LAW AND SOCIAL CHANGE, *supra* note 5, at 166 (noting pervasiveness of informality in Japanese industrial policy and relative lack of conflict and challenge of ministries' guidance).

27. ENIGMA OF JAPANESE POWER, *supra* note 6, at 450; see Mitsuo Matsushita, *The Legal Framework of Trade and Investment in Japan*, 27 HARV. INT'L L.J. 361, 376-77 (1986) [hereinafter *Legal Framework of Trade*] (discussing general deference to ministry policy decisions).

28. ENIGMA OF JAPANESE POWER, *supra* note 6, at 450-51.

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.*

31. John O. Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in LAW & TRADE ISSUES OF THE JAPANESE ECONOMY 107, 109 (Gary Saxonhouse et al. eds., 1986) [hereinafter *Paradox of Industrial Policy*].

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:

[T]he 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 businesses³³ and the legal system within which administrative guidance operates further perpetuate the legal informality of the Japanese regulatory system.³⁴

1. Historical Roots Of Informality

The origins of governmental informality date back to local governance of village life in pre-modern Japan.³⁵ On a local level, village rule emphasized the attainment of full community consensus.³⁶ There was no concept of legal rights that could be used to challenge an administrative authority.³⁷ Neo-Confucian³⁸ influences in Japan further obstructed the development of formal laws.³⁹

On the national level, Japan lacked adequate judicial institutions and instead relied on administrative agencies for informal dispute resolution.⁴⁰ The bureaucracy's central role in pre-mod-

ernance that help explain the peculiar contours and multifaceted paradox of law and social control in contemporary Japan.

AUTHORITY 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 (*goningumi*), 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.⁴¹ 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.⁴² Through the consistent subordination of individual and village interests, the Japanese Government eventually developed a near monopoly over the exercise of authority.⁴³ This monopolization of authority permitted the Government to control a substantial portion of the Nation's commercial activity.⁴⁴ The existence of a sophisticated administrative system in Japan's early development suggested that administrators were gaining useful managerial experience.⁴⁵

Japan entered into a period of rapid modernization during the Meiji Era.⁴⁶ The style of governance during the Meiji Era and for several generations of bureaucrats that followed was characterized as rule by consensus.⁴⁷ 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.⁴⁸ As the Government pushed the nation to develop economically at the start of the Meiji Era, the role of government became more pervasive.⁴⁹ The number

was the "mixture of Confucian and feudal emphasis on hierarchy, cooperation, and loyalty" that made formal means of settling disputes unnecessary. *Id.*

41. *Id.* at 55. "Well before the end of . . . premodern eras . . . Japan . . . had forged a high degree of political unity and governmental control." *Id.*

42. *Id.* "To a far greater extent than the earlier modernizing states, [Japan's] governmental organs were able to dominate intermediate interests and authorities." *Id.*

43. *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.⁵⁰

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.⁵¹ 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.⁵² This resulted in a homogeneous elite across all sectors of public and private life.⁵³ Japan's elite remained influential under the patronage system, where those in power distributed influential positions to friends and allies.⁵⁴ The patronage system cultivated closer relations among various levels of government and industry in Japanese society.⁵⁵

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-

50. *Id.* The increase of bureaucrats continued from 1860-1941. *Id.*; see generally CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975*, at 1 (1982) [hereinafter *MITI AND THE JAPANESE MIRACLE*] (focusing on continuity of industrial policy and careers of government officials who shaped policy from pre-war period through wartime and post-WWII periods).

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.

tem.⁵⁶ Several institutional arrangements that exist within the Japanese Government evolved from Japan's historical roots which emphasized informality.⁵⁷ These institutional arrangements generate much informal contact between businesses and ministries and increase the effectiveness of administrative guidance.⁵⁸ The close ties between the public and private sectors unite the interests of government and business, and portend harmful results⁵⁹ for companies that challenge or ignore an agency's guidance.⁶⁰

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.⁶¹ The members of the upper house, however, were all representatives of the privileged class and Japan continued to be ruled by an absolute monarchy.⁶² In 1946, the present Constitution was promulgated, and a democratic system of government was adopted.⁶³ Japan's present system is built upon the principle of

56. See IPMS GROUP, KASUMIGASEKI DEETA HANDBOKKU [AN INSIGHT INTO JAPAN'S BUREAUCRACY] 8-9 (1994) (discussing prevalence of informal relations among elected officials, businesses, and bureaucrats).

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 143. "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.⁶⁴ The Legislative Branch includes the Diet, consisting of an upper and lower house.⁶⁵ 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.⁶⁶ The Prime Minister's Office and the various ministries, including MITI and MOF, comprise the Executive Branch.⁶⁷ The Supreme Court heads the Judicial Branch, which includes several lower levels of courts.⁶⁸ 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.⁶⁹

b. Ties That Bind: The *Amakudari* System

The *amakudari*,⁷⁰ or descent from heaven, system is an institution of modern Japan that is inseparable from Japan's historical development.⁷¹ 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.⁷² 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.⁷³ In many important industries,⁷⁴ 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,

mer bureaucrats.⁷⁵ 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-

and banking — 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.

79. JAPAN: WHO GOVERNS?, *supra* note 74, at 144.

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).

81. JAPAN: WHO GOVERNS?, *supra* note 74, at 145.

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.⁸⁴ Former bureaucrats admit that agencies create *tokushu hojin*, or special corporations,⁸⁵ to expand the agencies' jurisdiction and to provide employment for retired officials.⁸⁶ In addition, retired senior ranking bureaucrats serve as senior executives in nearly all public enterprises in Japan.⁸⁷

Because Japan was subject to much governmental control in the 1950's,⁸⁸ many firms actively sought *amakudari* to help gain access to bureaucrats in charge of licensing, approvals, and investment funds.⁸⁹ 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.⁹⁰ 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.⁹¹ 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

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.*

93. Jathon Sapsford, *Japan Tries to Stem Anger Over Bailout of Financial Firms*, WALL ST. J., Jan. 22, 1996, at A9 [hereinafter *Bailout of Financial Firms*]. *Jusen* are home mortgage companies. *Id.* MOF has received a lot of criticism for its handling of the bad-debt crisis caused by the bankruptcy of seven *jusen*. Benjamin Fulford, *Ministry Wants to Craft Its Own Reforms*, NIKKEI WKLY., Mar. 4, 1996, at 2 [hereinafter *Ministry Reforms*].

94. *Stricter Rules Planned On Amakudari*, NIKKEI WKLY., Mar. 11, 1996, at 2.

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-

process. *Id.* The true role of *shingikai* has been "to legitimate policy made elsewhere." *Id.*

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.¹⁰⁸ Businesses ensured their role in the Iron Triangle by making political contributions and stressing their ability to deliver voting blocs.¹⁰⁹

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.¹¹⁰ The politicians exert political pressure and lobby on behalf of the business by pressuring the agency to grant certification or other special treatment.¹¹¹ Common examples include: granting of permission to do business despite lacking qualifications or failing to meet the statutory requirements,¹¹² issuing a license to do business without proper examination of the application,¹¹³ and generally overlooking serious legal violations.¹¹⁴

e. The MOF-Tan Network: Brokers As Intermediaries

Japanese banks and securities companies station permanent employees at MOF to obtain information from MOF bureaucrats.¹¹⁵ These employees, nicknamed MOF-Tans,¹¹⁶ are responsible for culling information from ranking MOF bureaucrats regarding inspections of banks or MOF's position on a particular new product or service.¹¹⁷ Stationed at the Banking Bureau¹¹⁸

Diet passed a non confidence resolution and dissolved the cabinet in 1993. *Id.* The LDP failed to maintain its majority hold, and eventually a coalition government, led by Prime Minister Hosokawa, was inaugurated in August 1993. *Id.*

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.*

115. *Yutsuma Pawaa Okurasho [Ministry of Finance - Power Down in the Dumps]*, ASAHI SHIMBUN, Apr. 4, 1995, at 11 [hereinafter *Power Down in the Dumps*]; see SHINDO, *supra* note 1, at 8, 106-07 (describing types of information garnered from MOF officials by MOF-Tans, employees of banking and securities firms permanently stationed at MOF).

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,¹¹⁹ MOF-Tans' role includes following the Bureau's movements and obtaining opinions on matters important to the company.¹²⁰ Banks and securities companies utilize MOF-Tans to maintain close ties to MOF.¹²¹

MOF-Tans receive a salary from their own company, but spend all day at MOF.¹²² 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.¹²³ MOF-Tans sometimes assist MOF in implementing administrative guidance by helping ensure smooth implementation.¹²⁴

The MOF-Tan system, under public and media pressure, was reformed because of excesses¹²⁵ revealed in 1995.¹²⁶ Since the 1995 reform, there are few examples of lavish entertainment of MOF officials by financial institutions.¹²⁷ As financial liberalization progresses and MOF's approval and certification systems become less arbitrary, the need for and position of MOF-Tans are diminishing.¹²⁸ 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. *Id.* 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. *Id.* 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. *Id.*

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

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

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. *Id.*

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 need¹³⁶ for close, amicable relations with bureaucrats, generally do not challenge administrative guidance.¹³⁷ 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰

i. Administrative Acts and Justiciability

Prior to the enactment of the APL, two statutes provided the primary avenues for challenging administrative actions: the Ad-

of formal statutory powers in cases of non-compliance because of the speed and flexibility with which policy can be implemented. *Paradox of Industrial Policy*, *supra* note 31, at 111; see Edelman, *supra* note 1, at 436 (discussing bureaucrats use of informal regulatory methods in most circumstances, even where actual statutory authority exists).

136. Rachael Field, *Japanese Cultural Trade Barriers and the Search for an Appropriate Dispute Settlement Forum — An Australian Perspective*, 21 *AUSTL. BUS. L. REV.* 173, 176 (1993). Non-compliance with a ministry's guidance usually translates into the denial of certain benefits only available to firms that defer to the bureaucrats' wishes. *Id.*

137. *Id.* "[C]ompliance is virtually assured because of the pressure on the parties not to affect the traditional authority of the bureaucracy and because non-compliance translates into a rejection of certain benefits made available only to those who defer to the administration." *Id.*

138. *LAW AND SOCIAL CHANGE*, *supra* note 5, at 169 (discussing judicial preference for ministries' interpretation of their scope of authority). Agencies use the implied threat of other statutory powers that the party is subject to in order to effectuate compliance with their policy. *Id.* To be sure, some policies implemented by agencies are favorable to recipient parties, yet ministries continue to rely on informal guidance in cases where the goals of the ministry and the recipient party diverge. *ENIGMA OF JAPANESE POWER*, *supra* note 6, at 449-50.

139. *LAW AND SOCIAL CHANGE*, *supra* note 6, at 169.

140. *Id.* at 169-72; see Spaeth, *supra* note 8, at 937 (analyzing barriers to judicial review of administrative actions in Japan); Edelman, *supra* note 1, at 394 (discussing effect of judicial deference to agency discretion and narrow views of standing and justiciability in Japan).

ministrative Case Litigation Law¹⁴¹ ("ACLL"), and the Administrative Complaint Inquiries Law ("ACIL").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 3¹⁴³ of the ACLL.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.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.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.¹⁴⁷ A ministry's oral guidance does not constitute a disposition or other exercise of power because it is unwritten¹⁴⁸ and based on voluntary compliance.¹⁴⁹

141. *Gyosei jiken sosho ho* [Administrative Case Litigation Law], Law No. 139 of 1962 (Japan) [hereinafter ACLL]. See generally Robert W. Dziubla, *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")).

142. *Gyosei fufuku shinsa ho* [Administrative Complaint Inquiries Law], Law No. 160 of 1962 (Japan) [hereinafter ACIL].

143. ACLL art. 3, Law No. 139 of 1962 (Japan).

144. LAW AND SOCIAL CHANGE, *supra* note 5, at 170-71.

145. *Id.*

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." Dziubla, *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.*

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.*

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.¹⁵⁰

ii. Standing to Challenge

Article 9¹⁵¹ of the ACLL limits standing to parties with a legal interest in an administrative disposition.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.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.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.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

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).

149. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 *COLUM. L. REV.* 923, 953 (1984) (describing voluntary nature of administrative guidance and disadvantages non-complying parties face).

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.

151. ACLL art. 9, Law No. 139 of 1962 (Japan).

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).

153. *LAW AND SOCIAL CHANGE*, *supra* note 5, at 171-72

154. *Id.*

155. *Id.* at 172; see *supra* note 152 and accompanying text (discussing Supreme Court decision denying standing to party with factual interest).

convince the court of the illegality of the agency's actions.¹⁵⁶ The plaintiff must demonstrate that the act went beyond the agency's scope of discretion.¹⁵⁷ While Japanese courts do not hesitate to act decisively when the Government acts unjustly,¹⁵⁸ courts are not very receptive to challenges of agency actions.¹⁵⁹ Rather, Japanese courts grant ministries very broad discretion under the ministries' enabling statutes, making a successful challenge unlikely.¹⁶⁰

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.¹⁶¹ Japanese regulators issue warnings, requests, encourage-

156. LAW AND SOCIAL CHANGE, *supra* note 5, at 173.

157. *Id.*

158. *Declining Industries Policy*, *supra* note 135, at 432. Blatant injustice is unlikely in industrial policy matters. *Id.* Challenges would likely involve allegations that the agency used improper procedure in making a decision or reached a decision inconsistent with the relevant statute. *Id.* This is a simpler task if the statute is specific and unambiguous. *Id.* Statutes are, however, rarely specific in economic areas. *Id.* Article 52 of the Foreign Exchange Control Law, for example, provides for the "healthy development of the national economy." *Gaikoku Kawase Oyobi Gaikoku Boeki Kanri Ho [Foreign Exchange and Foreign Trade Control Law]*, Law No. 28 of 1949 (Japan) [hereinafter FEFTCL].

159. Edelman, *supra* note 1, at 436. Institutional arrangements impeded judicial review in Japan. *Id.* at 436. "Even after surmounting all the procedural hurdles, Japanese courts are still not receptive to legal challenges to agency action." *Id.* at 436.

160. *Id.* at 438. Even though the formulation of industrial policy is inherently informal, implementation often must use the implied threat of formal powers under statutory provisions. LAW AND SOCIAL CHANGE, *supra* note 5, at 173. Broadly worded provisions make this task easier for the agencies. *Id.* at 170. In addition, businesses are concerned about their ongoing relationship with the agency, so that any challenge of an agency's authority will have negative repercussions in the future. Young, *supra* note 149, at 951-52 (analyzing absence of litigation against ministries' use of administrative guidance because of long-term relationship between regulators and regulated parties).

161. MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 31-33 (1989) (discussing compulsory power of informal requests and suggestions as administrative guidance and companies general deference to guidance). While the Western emphasis is on the rule of law and the use of non discretionary governmental controls, the "Japanese economic bureaucracy has long found that its most effective powers are tailor-made, verbal, ad hoc agreements implemented through 'administrative guidance.'" Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 136, 159 (Frederic C. Deyo ed., 1987) [hereinafter *Political Institutions*].

ment, and suggestions, all of which fall under the general heading of administrative guidance, to parties within a particular ministry's jurisdiction.¹⁶² Administrative guidance is supported by implied threats of action or inaction.¹⁶³ The Japanese bureaucracy relies heavily on administrative guidance, the effects of which are felt throughout all aspects of business in Japan.¹⁶⁴

For parties that receive administrative guidance, the end result is typically compliance.¹⁶⁵ Compliance is the norm even where ministries lack explicit statutory authority to persuade parties to comply with ministerial guidance.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

162. MITI AND THE JAPANESE MIRACLE, *supra* note 50, at 265 (defining administrative guidance).

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. *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).

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 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.

Id.; see Mark A. Levin, *Here's Your Butter Knife, Happy Slashing*, ASIAN WALL ST. J., Nov. 28, 1994, at 16 [hereinafter *Happy Slashing*] (describing effect of guidance on issues like corporate hiring practice, size of text on business cards, and permissible office layout).

165. ENIGMA OF JAPANESE POWER, *supra* note 6, at 450.

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). See MATSUSHITA & SCHOENBAUM, *supra* note 161, at 33 (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 wrongful.

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 (describing positive uses of administrative guidance to promote economic viability of firms and settle inter-firm disputes).

170. *Id.*

171. *Id.* at 62-63; 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.¹⁷⁶ Bureaucrats use promotional guidance, sometimes in the form of financial assistance from government financial institutions,¹⁷⁷ to aid small enterprises in improving production, research and development, and management.¹⁷⁸ In addition, ministries operate governmental agricultural research facilities for the benefit of Japan's farmers.¹⁷⁹ The primary goal of promotional administrative guidance, therefore, is to promote or protect the recipients of such advice.¹⁸⁰

b. Adjudicatory Guidance

Government agencies sometimes use adjudicatory administrative guidance to help private parties resolve disputes among themselves.¹⁸¹ 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.¹⁸² A prominent example of such guidance is MITI's mediation of conflicts between large and small enterprises.¹⁸³ Japanese Government agencies, as informal mediators, have succeeded in settling many disputes, thus helping resolve issues and avoid judicial proceedings.¹⁸⁴

c. Regulatory Guidance

Japanese bureaucrats use regulatory administrative guidance as a non-statutory means of regulating private conduct.¹⁸⁵ Regulatory guidance is used as a substitute for legal compulsion.¹⁸⁶ 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.¹⁸⁷ Even when there is no formal statutory power to enforce a ministry's guidance, Japanese businesses generally comply with regulatory administrative guidance.¹⁸⁸ Technically, there is no compulsory power to enforce the guidance, but ministries use various means of persuasion to achieve compliance.¹⁸⁹ Regulatory guidance, therefore, is a powerful tool used by government agencies.¹⁹⁰

2. MITI and MOF: Powerhouses of Regulatory Informality

MITI and MOF are Japan's two most influential economic ministries.¹⁹¹ Both ministries maintain highly educated and well-trained staff,¹⁹² and exert far-reaching authority over large portions of the Japanese economy.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.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).

187. TRADE AND COMPETITION LAW, *supra* note 8, at 62.

188. *Id.* at 63. Government agencies have different types of persuasion techniques available to insure compliance. *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. *Id.*

189. *Id.* Ministries threaten to delay processing or to reject a party's application in order to achieve compliance with its guidance. 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. *Id.*

190. 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).

191. KANEKO, *supra* note 1, at 13-18; SHINDO, *supra* note 1, at 90-91; *see supra* note 3 and accompanying text (discussing high degree of control over Japanese economy by MITI and MOF).

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).

193. *See* SHINDO, *supra* note 1, at 90-91 (describing degree of ministerial control in Japanese economy)

194. *See generally* Roger Buckley, *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, *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, *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.¹⁹⁵ MITI has since been a major factor in planning and implementing national policies to expand Japanese trade and industry.¹⁹⁶ Aided by close ties to the business world, MITI bureaucrats are viewed as the primary architects of Japan's successful post-war economic policy.¹⁹⁷

MITI enforces over 130 statutes encompassing a wide range of industrial sectors, including international trade, oil, and safety standards.¹⁹⁸ MITI's regulatory powers are, however, relatively limited, forcing MITI to rely on administrative guidance.¹⁹⁹ 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.²⁰⁰ 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.*

ity.²⁰¹ MITI's influence over Japan's industrial sector from the 1950's through the 1970's allowed MITI to achieve compliance through informal pressure.²⁰²

Commentators argue that MITI has declined in power since the height of its authority in the 1960's.²⁰³ 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.²⁰⁴ Furthermore, Japan's manufacturing base continues to shift overseas.²⁰⁵ 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, KISEIKANWA 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.*

203. Hirakawa, *supra* note 199; TRADE AND COMPETITION LAW, *supra* note 8, at 68; see LAW AND SOCIAL CHANGE, *supra* note 5, at 176, 203 (noting that MITI's legal influence peaked in 1960's and has since declined); Chalmers Johnson, *MITI, MPT, and the Telecom Wars: How Japan Makes Policy for High Technology*, in POLITICS AND PRODUCTIVITY: HOW JAPAN'S DEVELOPMENT STRATEGY WORKS 177, 183 (Chalmers Johnson et al. eds., 1989) [hereinafter *Telecom Wars*] (noting decline in MITI's jurisdiction since helping Japanese firms attain global competitiveness).

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.* Analysts 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.²⁰⁶

b. MOF

MOF occupies a central position in the Japanese bureaucracy.²⁰⁷ The primary sources of MOF's influence in the Japanese economy are its control over budget, tax, and monetary policy.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.²⁰⁹ Therefore, MOF has jurisdiction over both the public and private financial sectors.²¹⁰ In governing the public sector, MOF annually determines all government agencies' spending budgets,²¹¹ forcing all government agencies to negotiate with MOF for their share of the na-

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. *Id.* In addition, "many industrialists seem to be continuing to shift their operations out of Japan." Shijuro Ogata, *On the Brink of Bigger Role: Japan's Economy May Have Peaked as It Becomes More International*, *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." *Id.* See generally Madoka Takai, *Vanishing Point Ahead: Industry Begins to Disappear*, *TOKYO BUS. TODAY*, Aug. 1995, at 8 (discussing rush of Japanese industry overseas to avoid yen fluctuation); Norifumi Tsukada, *Structural Change: As the Yen Ratchets Higher, We're Running Out of Time*, *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).

207. KAZUO TATEWAKI, *BANKING AND FINANCE IN JAPAN* 175 (1991); Curtis J. Milhaupt, *Managing the Market: The Ministry of Finance and Securities Regulation in Japan*, 30 *STAN. J. INT'L L.* 423, 423 (1994); *MOF Rules Japan's Public Policy*, *U.S. Magazine Says*, *Kyodo Newswire Service*, Feb. 20, 1995, available in *LEXIS*, *ASIAPC Library*, *CURNWS File* [hereinafter *MOF Rules Public Policy*]; see Fingleton, *supra* note 3, at 72 (discussing expanse of MOF's powers and control over public and private financial sectors). MOF is at the apex of the Japanese administrative system. *MOF Rules Public Policy*, *supra*. "In regulating the financial system alone, it gathers under one roof powers that in the United States are dispersed among the Federal Reserve, the Department of the Treasury, the Federal Deposit Insurance Corporation, the Office of the Comptroller, and the Securities and Exchange Commission." Fingleton, *supra* note 3, at 72.

208. Jin Nakamura, *King of Ministries Under Fire*, *DAILY YOMIURI*, Feb. 28, 1995, at 8 [hereinafter *King of Ministries*].

209. TATEWAKI, *supra* note 207, at 175; Milhaupt, *supra* note 207, at 446.

210. TATEWAKI, *supra* note 207, at 175.

211. Shigeki Kakinuma & Hiroshi Fukunaga, *Yes, We're Serious — BREAK UP the Ministry of Finance*, *TOKYO BUS. TODAY*, Jan. 1995, at 9 [hereinafter *Break Up MOF*]. See, e.g., Takao Toshikawa, *Inside MOF: The Men from the Ministry*, *TOKYO BUS. TODAY*, Jan. 1995, at 13 [hereinafter *Inside MOF*] (explaining that large part of MOF's authority derives from its control over national budget).

tional budget.²¹² With regard to the private financial sector, MOF controls taxes and monetary policy for all financial institutions operating in Japan.²¹³ MOF uses formal and informal guidance to exert influence over financial institutions in order to meet certain MOF goals.²¹⁴ Some of MOF's principal functions include ensuring that financial companies follow legal requirements²¹⁵ and regulating the flow of money from banks into the private sector.²¹⁶

MOF's guidance usually consists of a number of notifications or official letters issued to banks and financial institutions under its jurisdiction.²¹⁷ MOF informs banks of its policy directives and generally the private banks alter their behavior accordingly.²¹⁸ MOF's guidance affects rules of bank management, bank accounting, credit ceilings, and branch establishment.²¹⁹

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

212. ENIGMA OF JAPANESE POWER, *supra* note 6, at 158-59; Karel van Wolferen, *Japan's Non-Revolution*, FOR. AFF., Sept. 1993, at 54 [hereinafter *Japan's Non-Revolution*].

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.²²⁰ MOF's expedition of the approval process for non-domestic borrowers seeking to utilize yen markets²²¹ was one example of this attitudinal shift.²²² Since 1993, banks, insurance companies, and securities companies can participate in one another's markets.²²³ This reform was designed to promote competition and efficiency in Japan's financial markets.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.²²⁵

Bank-based financing has traditionally characterized the Japanese financial system.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.²²⁷ MOF has traditionally maintained more con-

220. TATEWAKI, *supra* note 207, at 176.

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.*

222. *Id.*

223. IPMS GROUP, *supra* note 56, at 152. Legislative revision in 1992 granted companies access to markets previously closed to the companies. *Id.*

224. *Id.*

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.*

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.

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.²²⁸ 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.²²⁹ Securities and banking scandals²³⁰ have bolstered public criticism of MOF and further weakened MOF's control over the Japanese financial sector.²³¹ 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.

229. *Hollowing Out Japan's Financial Markets*, *ECONOMIST*, Aug. 13, 1994, at 67. Financial business is leaving Japan for Singapore, London, and Hong Kong. *Id.* Japan's strict rules regarding listing on the Tokyo Exchange deter foreign and local investors. *Id.* "Cash-hungry Chinese firms, for instance, are listing in Hong Kong and New York, rather than in Tokyo." *Id.* Futures and options based on Japanese securities are increasingly traded on the Singapore Exchange. *Id.* The number of foreign firms listed on the Tokyo Exchange in 1994 dropped to 97 from 125 in 1993. *Id.*

230. See Milhaupt, *supra* note 207, at 423 (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. WKLY.*, 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.²³²

3. Administrative Guidance in Practice

MITI and MOF regulate companies within their jurisdiction using administrative guidance and licensing authority.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.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.²³⁵

a. The Sumitomo Metals Incident

MITI's authority was at its peak in the 1950's and 1960's.²³⁶ Control over imports via the Foreign Exchange and Foreign Trade Control Law²³⁷ ("FEFTCL") combined with its authority to grant or deny permits to do business under statutes like the Petroleum Industry Law²³⁸ ("PIL") to permit MITI to exercise absolute control over its jurisdiction.²³⁹ Not surprisingly, challenges to MITI's authority were rare during this period.²⁴⁰ One notable exception, involving the Sumitomo Metals Corporation, underscores MITI's influence through its use of administrative

of Daiwa Bank Ltd.'s \$1.1 billion loss, to shocking cases of influence-peddling by two top ministry officials." Williams, *supra*, at A10.

232. *Break Up MOF*, *supra* note 211, at 6 (advocating dissolution of MOF); *Finance Ministry Breakup*, *supra* note 230, at 9 (discussing growing criticism of MOF and public and political pressure to break MOF into several smaller bodies).

233. OMIYA, *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. *Sekiyugyo 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.

guidance.²⁴¹

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.²⁴² MITI, in response to this decline in demand and pursuant to the PIL, sought to stabilize the domestic price of steel.²⁴³ MITI determined that all domestic steel companies in Japan's steel production cartel, which MITI helped coordinate, should decrease production by ten percent.²⁴⁴

Sumitomo Metals was the only firm in the cartel that refused to adhere to MITI's guidance.²⁴⁵ The other leading firms decided to maintain the cartel and pressured MITI to force Sumitomo to comply.²⁴⁶ MITI sought Sumitomo's compliance, but the company refused to yield.²⁴⁷ MITI responded that it would use its legal authority under the FEFTCL²⁴⁸ to limit Sumitomo's importation of necessary raw materials to the amount needed to meet the company's allotment as a cartel member.²⁴⁹

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.²⁵⁰ 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.²⁵¹ Pressure on Sumitomo to comply continued to grow as the steel market weakened and financial circles began to lose confidence in the economy.²⁵² 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.²⁵³

b. The Lions Oil Incident

In December 1984, the Petroleum Council,²⁵⁴ an advisory body to the Minister of MITI, urged MITI to prevent Japanese gas stations from importing less expensive, non-domestic gasoline.²⁵⁵ Lions Oil filed an application to import 3000 kiloliters of gasoline from Singapore on December 3, 1984.²⁵⁶ MITI later sent Lions Oil instructions calling for the company to stop its planned imports.²⁵⁷ 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.*

256. *Id.*; Susan Chira, *Japan's Oil Import Argument*, N.Y. TIMES, Jan. 20, 1985, at D10.

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.²⁵⁸

Lions Oil brought one shipment of gasoline into Japan despite MITI's instructions.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.²⁶⁰ An inability to arrange financing, thus, made it impossible for Lions Oil to continue importing gasoline.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.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.²⁶³ Lions Oil sought a loan from its primary bank, which refused the loan because it felt the imports conflicted with national policy.²⁶⁴

The Lions Oil Incident drew foreign criticism that Japan's petroleum market was a closed market.²⁶⁵ *Keidanren*²⁶⁶ led do-

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. *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. *Id.*

259. *Lions Oil Pressured Into Giving Up Gasoline Import*, Jiji Press Ticker Serv., Jan. 1, 1985, available in LEXIS, ASIAPC Library, ARCNWS File.

260. *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. *Id.*

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. *Id.*

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. *Id.* Sato criticized MITI's policy as contrary to liberalized trade. *Id.* MITI threatened to use its statutory powers under an import trade control ordinance to block the gasoline imports. *Gasoline Import Allegedly Suspended Under MITI's Pressure*, Japan Econ. Newswire, Jan. 9, 1985, available in LEXIS, ASIAPC Library, ARCNWS File.

263. *Out-roared by MITI*, *ECONOMIST*, Jan. 19, 1985, at 66.

264. *Id.* President Sato said MITI pressured the bank to deny the loan, after failing to talk Sato out of importing the foreign gasoline. *Id.*

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. *Id.* The Singapore media publicly supported Lions Oil's efforts and criticized MITI's policy as protectionist. *Id.*

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

266. *Keidanren Official Raps MITI's Pressure on Gasoline Imports*, Jiji Press Ticker Serv., Jan. 28, 1985, available in LEXIS, ASIAPC Library, ARCNWS File [hereinafter *Keidanren Official*]. *Keidanren*, the Federation of Economic Organizations, is a major pro-business lobby in Japan. *Id.*; OMIYA, *supra* note 122, at 193-95.

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.

271. KANEKO, *supra* note 1, at 15-16. The Big Four securities houses include: Nomura Securities, Daiwa Securities Co., Yamaichi Securities Co., and Nikko Securities. *Id.*; *The Securities Scandal*, REP. FROM JAPAN, June 25, 1991, available in LEXIS, ASIAPC Library, ARCNWS File [hereinafter *Securities Scandal*].

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.*

274. *MOF Penalizes 'Big Four' Brokerages Over Scandal*, Japan Econ. Newswire, Oct. 8, 1991, available in LEXIS, ASIAPC Library, ARCNWS File.

275. SHINDO, *supra* note 1, at 7.

necessary evil in order to quickly close the specified accounts.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.²⁷⁷

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

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.*

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.

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\$117.9 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.

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.*

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

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.*

282. KANEKO, *supra* note 1, at 16; Clay Chandler & Masayoshi Kanabayashi, *Japan's Securities Flap Causes Tension Between Big Brokers and Finance Ministry*, WALL ST. J., July 1, 1991, at A10.

regulating financial markets.²⁸³

In the wake of the scandal, MOF clarified and reduced the number of rules governing Japan's securities markets.²⁸⁴ MOF hoped to improve the fairness and transparency of regulations in the securities industry by deregulating and formalizing the financial sector.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.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.²⁸⁷ Given the level of bureaucratic resistance, passage of the APL in 1993 attracted much attention.²⁸⁸ Corruption scandals in the financial sector,²⁸⁹ largely blamed on informal regulatory methods, bolstered by increased foreign and domestic criticism, added to the pres-

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.*

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.*

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.*

286. *Id.*

287. *Happy Slashing*, *supra* note 164, at 16.

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

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).

291. Bob Davis et al., *Red-Tape Traumas: To All U.S. Managers Upset by Regulations: Try Germany or Japan*, WALL ST. J., Dec. 14, 1995, at 1 (showing that firms operating in Japan face multiplicity of regulations in all facets of their business operations). Reports show that by fiscal year 1993, MITI led the field, with 1769 regulations, a drop of over 210 from Fiscal Year 1992, and MOF governed 1391 regulations, a rise of four from Fiscal Year 1992. Hiroshi Nakame, *Numbers Show Deregulation, Management Agency Says*, NIKKEI WKLY., Dec. 19, 1994, at 3.

292. *Doing Business in Japan*, *supra* note 4, at 6.

293. *Bureaucratic Regulations Blamed For Japan's High Cost of Living*, NIKKEI WKLY., Nov. 28, 1994, at 2. See *Structural Problems Hinder Rapid Recovery*, NIKKEI WKLY., Dec. 12, 1994, at 6 [hereinafter *Structural Problems*] (citing pro-reform MITI bureaucrat conceding that Japan must deregulate to be competitive internationally); David P. Hamilton et al., *A Revival of Japan's Economy Is Said to Depend On Tokyo's Willingness to Cut Regulatory Noose*, ASIAN WALL ST. J. WKLY., May 1, 1995, at 16.

294. See Hamilton, *supra* note 293, at 16 (discussing negative effect of over-regulation on Japanese economy and resulting drive to deregulate). Deregulating markets increases investor flexibility, improves efficiency, shrinks transaction costs, creates a fairer market, and attracts capital investment. SARKIS J. KHOURY, *THE DEREGULATION OF THE WORLD FINANCIAL MARKETS* 54 (1990); see Taichi Sakaiya, *Deregulation Would Spur Industry, Enhance Life*, NIKKEI WKLY., July 11, 1994, at 7 (arguing that new growth and preventing hollowing out of industries are only achievable through deregulation).

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.²⁹⁸ 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.²⁹⁹

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.³⁰⁰ 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.³⁰¹ Domestic and overseas pressure was essential to the push for deregulation and administrative reform.³⁰²

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).

300. Yasushi Nakayama, *Gyosei Tetsuzuki Ho no Gaiyo [An Outline of the Administrative Procedures Law]*, 537 NBL [NEW BUSINESS LAW] 6 (1994) (recounting increasing foreign and domestic pressure to enact APL).

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

302. Interview with Christopher Wells, Attorney, White & Case, Tokyo, Japan (June, 1995) [hereinafter Wells]; Interview with Matthew Goodman, U.S. Dept. of Treasury, Financial Attache, U.S. Embassy, Tokyo, Japan (July, 1995) [hereinafter Goodman] (noting that Japanese Government sought United States' input regarding contents of new APL prior to final drafting).

3. Legislative History

The Japanese Diet enacted the APL on November 12, 1993,³⁰³ to officially take effect on October 1, 1994.³⁰⁴ Despite decades of bureaucratic resistance and political infighting,³⁰⁵ after three administrative reform councils³⁰⁶ and years of foreign pressure,³⁰⁷ Japan passed its first comprehensive law designed to formalize administrative procedures.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.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.³¹⁰ From 1948 through the early 1960's, the Japanese Government always had one or more *shingikai*³¹¹ debating bureaucratic reform and the need for an APL.³¹² Although administrative procedures were simplified during this period, administrative reform *shingikai* failed to lead to the en-

303. *Kosei de tomeina gyosei tetsuzuki ho no kakuritsu [The Establishment of a Fair, Transparent Administrative Procedures Law]*, TOKI NO HOREI, Nov. 15, 1994, at 7 [hereinafter *Fair, Transparent APL*] (listing chronology of major events during thirty-year period before enactment of APL).

304. Boling, *supra* note 7, at 7.

305. Nobumichi Izumi, *Bureaucrats, 'Tribal' Politicos Threatened by Procedures Bill; 'Administrative Guidance' is Technically Over*, NIKKEI WKLY., June 21, 1993, at 7. "Ministries, faced with the possibility that their considerable influence might be diminished, have put up stiff opposition." *Id.*; see 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).

306. *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. KANEKO, *supra* note 1, at 55-57.

307. *Happy Slashing*, *supra* note 164, at 16; see Nakayama, *supra* note 300, at 6 (describing increased pressure from United States and Europe for Japan to address transparency problems in regulatory processes).

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 . . ." *Id.*

309. Boling, *supra* note 7, at 12.

310. *Id.*; KANEKO, *supra* note 1, at 36 (discussing effect of U.S. Occupation of Japan after WWII on development of Japanese administrative law).

311. See LAW AND SOCIAL CHANGE, *supra* note 5, at 199 (discussing composition and role of government deliberation councils in policy making); see *supra* notes 96-104 and accompanying text (discussing *shingikai* deliberation councils).

312. JAPAN: WHO GOVERNS?, *supra* note 74, at 118-19; Boling, *supra* note 7, at 12-13.

actment of the APL.³¹³

The first *shingikai* report of the First Provisional Commission to Investigate Administration,³¹⁴ published in 1964, failed to result in legislation of an administrative procedures bill.³¹⁵ The Second Provisional Commission³¹⁶ issued a report in 1983 outlining substantive areas to be included in an APL.³¹⁷ Several years later, in 1990, the Second *Gyokakushin*,³¹⁸ or Reform Council, released its report.³¹⁹ 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.³²⁰ The Third Reform Council's report,³²¹ submitted to the Management and Coordination Agency³²² ("MCA") in 1991, included draft legislation.³²³ 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 (*kyoninkaken*) 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.*

315. *Fair, Transparent APL*, *supra* note 303, at 7; Boling, *supra* note 7, at 13; Izumi, *supra* note 305, at 7.

316. *Dainiji rinji gyosei chosakai no 'Gyosei kaikaku ni kan suru daigoji toshin'* [*Second Provisional Commission to Study Administration's Fifth and Final Report on 'Administrative Reform'*], reprinted in DEETABUKKU GYOSEI TETSUZUKI HO [ADMINISTRATIVE PROCEDURE LAW DATABOOK] 346 (1995) [hereinafter APL DATABOOK].

317. *Fair, Transparent APL*, *supra* note 303, at 7; Boling, *supra* note 7, at 13.

318. *Dainiji rinji gyosei kaikaku suishin shingikai no 'Saishu toshin'* [*Second Provisional Administration Reform Deliberation Council's Final Report*], reprinted in APL DATABOOK, *supra* note 316, at 350.

319. *Fair, Transparent APL*, *supra* note 303, at 6; Boling, *supra* note 7, at 13.

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

321. *Daisanji rinji gyosei kaikaku suishin shingikai no 'Kosei tomeina gyosei tetsuzuki hosei no seibi ni kan suru toshin'* [*Third Provisional Administrative Reform Council Report*], reprinted in APL DATABOOK, *supra* note 316, at 350 [hereinafter *Third Reform Council Report*].

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."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 1994.³²⁵ 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.³²⁶ The Hosokawa Administration succeeded in its pledge when the Government enacted the APL³²⁷ based on the draft law submitted to the administration in the Third Reform Council Report.³²⁸

II. WHAT DOES THE APL DO?

The APL is designed to increase the level of transparency in administrative process.³²⁹ Divided into four main sections, the APL is designed to improve clarity and transparency of administrative guidance,³³⁰ secure speedy and transparent processing of applications,³³¹ establish guidelines for acceptance of notifications,³³² and provide just and fair procedure regarding adminis-

324. *Fair, Transparent APL*, *supra* note 303, at 8; Boling, *supra* note 7, at 13. Compare APL, Law No. 88 of 1993 with *Gyosei Tetsuzuki Ho Yokoan [Administrative Procedure Law Draft Outline]*, reprinted in APL DATABOOK, *supra* note 316, at 354-79.

325. Boling, *supra* note 7, at 7.

326. *Id.*

327. APL, Law No. 88 of 1993 (Japan).

328. *Id.*; Ködderitzsch, *supra* note 148, at 105.

329. APL art. 1(1), Law No. 88 of 1993 (Japan). Article 1(1) defines the APL's purpose as seeking to "advance a guarantee of fairness and progress towards transparency (here meaning, that there be clarity in the public understanding of the contents and processes of administrative determinations . . .) in administrative process." *Id.* Article 1(2) states, however, that where other statutes have special provisions that already provide for transparency with respect to dispositions, notifications, and administrative guidance, the other statutes will govern. *Id.* art. 1(2). One commentator noted that Japan has 1600 laws, but only one (the APL) that mentions transparency. *Gyosei Tetsuzuki Ho ni Tamashi Ireyou [Let's Keep with the Spirit of the Administrative Procedures Law]*, Nihon Keizai Shimbun, Oct. 1, 1994, at 2; see Yagi, *supra* note 18, at 2-3 (describing APL's purpose as improving fairness and transparency of administrative management); *Making Government More Transparent*, *supra* note 18, at 6 (stating that goal of APL is to make administrative processes of government agencies more transparent).

330. APL arts. 32-36, Law No. 88 of 1993 (Japan).

331. *Id.* arts. 5-11.

332. *Id.* art. 37.

trative dispositions.³³³ Administrative guidance and the screening of licenses and approvals receive criticism for being unclear and arbitrary.³³⁴ There is also evidence that applications for a license or approval are left unreviewed for an indefinite period or are rejected without explanation.³³⁵ 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.³³⁶

A. Regulation of Administrative Guidance

The APL is the first statute to specifically address the process of administrative guidance.³³⁷ 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 feascance or non-feascance 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.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.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.³⁴⁰ The Council, therefore, submitted its recommendations for rules to formalize agencies' use of administrative guidance.³⁴¹

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

lished the agency. Mark Levin, *Administrative Procedure Act: Translated and Annotated*, 25 L. IN JAPAN 141, 144 n.3 (1995) [hereinafter *APA Annotated*].

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).

339. *Third Reform Council Report*, *supra* note 321, at 352.

340. *Id.*

341. *Id.*

342. Yoshinobu Kitamura, *Gyosei Tetsuzuki Hosei Jidai no Jichitai 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.*

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.*

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

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).

349. Ködderitzsch, *supra* note 148, at 127-28.

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.³⁵³

B. Codification of Administrative Processes

The APL includes criteria for processing applications for government permits and licenses.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.³⁵⁵ Notifications are technically submitted to notify agencies of action the company plans to take.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.³⁵⁷ Agencies also revoke permits and approvals with no explanation, adding another element of arbitrariness to administrative procedure in Japan.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.³⁵⁹ The APL implores agencies to create and publish standards for accepting and judging applications, accepting notifications, rendering adverse dispositions,³⁶⁰ and for allowing parties the opportunity to respond to an impending disposition, either in a formal hearing or in writing.³⁶¹

ity, it cannot use its perceived authority as leverage to force an applicant to obey administrative guidance." 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.*

353. Boling, *supra* note 7, at 15.

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

355. APL THEORY, *supra* note 1, at 4 fn 1.

356. *Id.* at 27.

357. *Id.*

358. *Id.* at 24-26 (discussing need for adverse disposition rules in Japanese administrative system).

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

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).

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.³⁶² The Third Reform Council reported in 1991 that in order to develop public trust in the bureaucracy, the application process must be transparent.³⁶³ The Council also emphasized the importance of standard filing procedures and time-periods in order to increase predictability and efficiency in the application process.³⁶⁴

The APL's provisions regarding applications address the previous problems involving the application process.³⁶⁵ Past criticism focused on the lack of transparency in application processes and long processing periods for licenses.³⁶⁶ Agencies must now adopt and publicize³⁶⁷ application standards.³⁶⁸ 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.³⁶⁹ These standards should be posted at the office designated to receive the application.³⁷⁰ Upon receipt

362. See KANEKO, *supra* note 1, at 68-107 (analyzing APL's application provisions).

363. *Third Reform Council Report*, *supra* note 321, at 350-51.

364. *Id.* at 351.

365. Ködderitzsch, *supra* note 148, at 119.

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.³⁷¹ When an agency receives a non-conforming application, it must promptly³⁷² notify the applicant and provide a suitable³⁷³ time limit for the correction to be made.³⁷⁴

When an agency rejects an application for a license or approval, it must indicate the reasons for the denial.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.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.³⁷⁷

2. Notifications

Many laws in Japan require parties to submit prior notification of any action the parties plan to take.³⁷⁸ Prior to the APL, however, notifications were treated the same as applications.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.³⁸⁰ Agencies, thus, refused to accept notifications and indicated that as long as the party did not comply with certain re-

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" *Id.*

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." *Id.*

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." *Id.*

374. *Id.*

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." *Id.* The APL exempts agencies from this requirement if the guidelines for the application process are clear and already public knowledge. *Id.* In these cases, reasons are provided only upon request of the applicant. *Id.*

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).

377. *Id.*

378. *Sumo Wrestling*, *supra* note 369, at 18.

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." *Id.*

380. *Id.*

quirements the notification would remain unaccepted.³⁸¹ 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.³⁸² The APL addresses this practice and states that notifications from parties to the administration, like applications,³⁸³ are effective upon receipt at the designated agency's office.³⁸⁴

3. Adverse Disposition Procedures

The APL's goals regarding adverse³⁸⁵ 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.³⁸⁶ 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.³⁸⁷ The APL articulates procedures for general rules regard-

381. Ködderitzsch, *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,³⁸⁸ statement of reasons for that action,³⁸⁹ and rules concerning the opportunity for potential recipients of adverse dispositions to present arguments prior to the final disposition.³⁹⁰

a. General Rules

The APL requests agencies to endeavor³⁹¹ to enact standards³⁹² for judging whether adverse dispositions should be rendered.³⁹³ The agencies must attempt to make such standards public knowledge.³⁹⁴ The APL implores government agencies to make these standards as specific and unambiguous as possible.³⁹⁵ The APL requires agencies rendering adverse dispositions to provide the recipient with the reasons for the disposition.³⁹⁶

b. Opportunity To Be Heard

Prior to issuing an adverse disposition, the APL stipulates

cations. *Third Reform Council Report*, *supra* note 321, at 350. A unifying legal regime was, therefore, necessary. Boling, *supra* note 7, at 14.

388. APL art. 12, Law No. 88 of 1993 (Japan).

389. *Id.* art. 14.

390. *Id.* arts. 15-31.

391. *Id.* art. 12. Article 12 states that:

Administrative agencies shall endeavor to enact standards . . . such standards being necessary for judging, in accordance with the provisions of relevant Statutes, whether Adverse Dispositions shall be rendered, and as the case may be, what kind of Adverse Dispositions shall be rendered, and the agencies shall endeavor to make such standards available to the public.

Id. art. 12(1).

392. *Id.* The standards referred to in this provision are “[d]isposition [s]tandards,” and refer to agency decisions regarding renewal or revocation of licenses, approvals, and permits. *Id.*

393. *Id.*

394. *Id.* Article 12(1) states that “agencies shall endeavor to make such standards available to the public.” *Id.*

395. *Id.* art. 12(2). Agencies, in creating disposition standards, “shall make them as concrete as possible in light of the nature of the particular Adverse Disposition in question.” *Id.*

396. *Id.* art. 14(1). Agencies, however, do not have to give reasons when there are compelling needs. *Id.* According to the APL, “[a]t the time of rendering Adverse Dispositions, administrative agencies shall indicate to the subject parties the reasons therefor; provided however, the preceding shall not apply when there are compelling needs for rendering Adverse Dispositions without setting forth the reasons concerned.” *Id.* In cases where there are compelling needs, however, the APL requires that reasons must be provided within an appropriate period of time after rendering the disposition. *Id.* art. 14(2).

that the concerned party must first be granted an opportunity to explain their petition and hear the agency's reasons for the disposition.³⁹⁷ The APL requires agencies to establish procedures for hearing statements and arguments of persons who will become the subject of an adverse disposition.³⁹⁸ Applications, meanwhile, are exempted from the hearing procedures established by the APL.³⁹⁹ Rejected applications are not adverse dispositions to which the hearing procedures apply.⁴⁰⁰ If an application is denied or conditionally approved, only the application procedures in Articles 5 to 11⁴⁰¹ apply, not the procedures for adverse dispositions in Articles 15 to 31.⁴⁰²

The APL delineates two categories of hearing procedures regarding adverse dispositions.⁴⁰³ All adverse dispositions, with the exception of certain more serious cases, are subject to informal, written hearing procedures.⁴⁰⁴ 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.⁴⁰⁵ In cases involving lighter sanctions, the APL requires less formal rules for presenting opinions and hearing reasons prior to the rendering of adverse dispositions.⁴⁰⁶

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 337, at 143 n.2; *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 "[d]ispositions 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 337, at 143 n.2; *Happy Slashing*, *supra* note 164, at 16.

401. APL arts. 5-11; Law No. 88 of 1993 (Japan).

402. *Id.* arts. 15-31.

403. Ködderitzsch, *supra* note 148, at 124.

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.* This includes where it is necessary for an

The procedures concerning formal hearings are enumerated in the APL.⁴⁰⁷ 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)(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 retract 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.⁴⁰⁸

Following a formal hearing, the presiding official⁴⁰⁹ writes and submits a report to the agency, including all relevant materials and the official's recommendation.⁴¹⁰ Parties may request inspection of the report prior to the agency's decision.⁴¹¹ The issuing agency is required to consider the presiding official's opinion prior to issuing an adverse disposition.⁴¹² Once an adverse disposition is issued following a hearing, it cannot be appealed under the Administrative Complaint Investigation Law ("ACIL").⁴¹³

C. MITI and MOF Reactions to the APL

Ministries and businesses reacted immediately to the APL's enactment.⁴¹⁴ 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 taikou suru kirifuda [Trump*

1993 enactment and the 1994 start date, government agencies promulgated clarified procedural guidelines to comply with standards articulated in the APL.⁴¹⁵ Businesses in Japan, emboldened by the enactment of the APL and its constraints on administrative guidance, acted contrary to administrative guidance.⁴¹⁶ Some businesses, without seeking prior ministerial approval, offered new products and services that were previously barred by administrative guidance.⁴¹⁷ In addition, market access negotiations within the ongoing U.S.-Japan Framework Talks⁴¹⁸ in 1994 and 1995 led to new trade measures in insurance and financial services that incorporated the language and principles of the APL.⁴¹⁹

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 shanseisho o kyohi* [*Gas Company's Application Rejected*], NIHON KEIZAI SHIMBUN, 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 91-314 (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.

419. Japan-United States: Measures Regarding Insurance, Oct. 1, 1994, Japan-U.S., 34 I.L.M. 661 [hereinafter *Insurance Measures*]; Japan-United States: Measures Re-

1. Promulgation of Clarified Guidelines

The APL calls for agencies to promulgate newly clarified guidelines and procedures.⁴²⁰ 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.⁴²¹ MITI issued a press release explaining, *inter alia*, new rules concerning the use of administrative guidance.⁴²² MITI and MOF publicly issued ministerial orders clarifying hearing procedures regarding adverse dispositions.⁴²³

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.⁴²⁴ 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, 1994.⁴²⁵ In addition, the Release established specific guidelines regarding MITI's use of administrative guidance.⁴²⁶

The Release reaffirmed the applicability of APL Article 36⁴²⁷

garding 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).

422. *Tsushosangyosho (Kisha Haifu Shiryo) [MITI Press Release]*, Sept. 27, 1994, reprinted in APL DATABOOK, *supra* note 284, at 46 [hereinafter *MITI Press Release*].

423. *Tsushosangyosho Chomon Tetsuzuki Kisoku [MITI Hearing Procedure Rules]*, Sept. 28, 1994, reprinted in APL DATABOOK, *supra* note 286, at 149-53 [hereinafter *MITI Order No. 62*]; *Okurasho Chomon Tetsuzuki Kisoku [MOF Hearing Procedure Rules]*, Sept. 30, 1994, reprinted in APL DATABOOK, *supra* note 286, at 135-38 [hereinafter *MOF Order No. 98*].

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.⁴²⁸ The Release emphasized the need for prior notification, description of contents, and publication of the names of officials responsible for any administrative guidance.⁴²⁹ 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.⁴³⁰ 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.⁴³¹ Finally, the Release included MITI's plans to announce future guidelines regarding administrative guidance in certain areas.⁴³²

b. Clarified Hearing Procedures

MITI and MOF issued official statements containing newly clarified adverse disposition hearing procedures promulgated to comply with the APL.⁴³³ 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.⁴³⁴ The Orders codify procedures required by the APL, thereby confirming the APL's applicability to MITI and MOF's rules governing adverse dispositions.⁴³⁵

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

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 423, at 149-53; *MOF Order No. 98*, *supra* note 423, at 135-38.

434. *MITI Order No. 62*, *supra* note 423, at 149-53; *MOF Order No. 98*, *supra* note 423, at 135-39.

435. *MITI Order No. 62*, *supra* note 423, at 149-53; *MOF Order No. 98*, *supra* note 423, at 135-39.

nesses.⁴³⁶ Interested parties, when due to uncontrollable circumstances, may also request a change of date or location of the hearing.⁴³⁷ 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.⁴³⁸ In addition, parties wanting to use an agent⁴³⁹ 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.⁴⁴⁰ Notice of this decision must be provided to the interested party.⁴⁴¹

A party requesting to inspect agency records, pursuant to APL Article 18(1),⁴⁴² must submit a written request including name, address, and materials to be inspected.⁴⁴³ The selection of the presiding official must be decided prior to the date that notice of the hearing is provided.⁴⁴⁴ Pursuant to the APL's Article notice requirements,⁴⁴⁵ the name of the presiding official must be included in the notice statement.⁴⁴⁶ Ministries may replace a presiding official pursuant to the ministry's general authority.⁴⁴⁷ There is an obligation to replace officials in cases where conflicts of interest exist pursuant to APL Article 19,⁴⁴⁸ however, notice is required for any and all replacements.⁴⁴⁹

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.

438. *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).

440. *MITI Order No. 62, supra* note 423, at 149; *MOF Order No. 98, supra* note 423, at 136.

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).

443. *MITI Order No. 62, supra* note 423, at 150; *MOF Order No. 98, supra* note 423, at 136.

444. *MITI Order No. 62, supra* note 423, at 150; *MOF Order No. 98, supra* note 423, at 136.

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.

447. *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).

449. *MITI Order No. 62, supra* note 423, at 150; *MOF Order No. 98, supra* note 423, at 136.

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 423, 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 423, at 137.

453. *MITI Order No. 62*, *supra* note 423, at 151-52; *MOF Order No. 98*, *supra* note 423, at 138.

454. *MITI Order No. 62*, *supra* note 423, at 152; *MOF Order No. 98*, *supra* note 423, 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 "Gyosei 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.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.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.⁴⁶⁰ A controversy began on October 1, 1994, when a propane gas supplier first submitted its petition to MITI for an expanded service area.⁴⁶¹ Local MITI officials directed the company to consult in advance with competing propane gas companies that would be affected by this move.⁴⁶² MITI refused to act on Amakusa's application for expanded service without an attached report documenting negotiations with the local competition.⁴⁶³ The gas company officials asked the ministry to put this request in writing⁴⁶⁴ but MITI refused.⁴⁶⁵ Amakusa re-submitted its application,⁴⁶⁶ and informed *Keidanren*,⁴⁶⁷ which noti-

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

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

460. *Application Rejected*, *supra* note 414, at 5; *City Gas Company*, *supra* note 414, at 3; 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).

461. David Hulme, *A Victory for Transparency*, *ASIAN BUS.*, Feb. 1995, at 12; *Application Rejected*, *supra* note 414, at 5; *City Gas Company*, *supra* note 414, at 3.

462. WHY CAN'T JAPAN DEREGULATE, *supra* note 202, at 232; Hulme, *supra* note 461, at 12.

463. WHY CAN'T JAPAN DEREGULATE, *supra* note 202, at 232-33; *Application Rejected*, *supra* note 414, at 5. MITI protects small and mid-size propane gas companies by informally directing larger companies to negotiate in advance if they want to expand their service area. *City Gas Company*, *supra* note 414, at 3.

464. *Application Rejected*, *supra* note 414, at 5; *City Gas Company*, *supra* note 414, at 3. The APL obligates agencies, when requested by parties, to present to the recipient of the guidance the purpose, content, and parties responsible for the administrative guidance. APL art. 35(2), Law No. 88 of 1993 (Japan); *Application Rejected*, *supra* note 414, at 5.

465. WHY CAN'T JAPAN DEREGULATE, *supra* note 202, at 233.

466. *Application Rejected*, *supra* note 414, at 5; *City Gas Company*, *supra* note 414, at 3; WHY CAN'T JAPAN DEREGULATE, *supra* note 202, at 233.

467. *Application Rejected*, *supra* note 414, at 5; *City Gas Company*, *supra* note 414, at 3.

fied MITI of its position in support of Amakusa.⁴⁶⁸ *Keidanren* called for MITI to comply with the newly enacted APL.⁴⁶⁹ MITI ultimately changed its mind and approved the firm's application, thus avoiding further conflict.⁴⁷⁰

Keidanren, a quasi-public group traditionally operating to help MITI govern industries,⁴⁷¹ recently shifted gears in support of deregulating Japan's markets and improving transparency in regulatory processes.⁴⁷² *Keidanren* now supports recipients of non-transparent or unfair guidance by publicizing the guidance and lobbying on behalf of the recipient party.⁴⁷³ The group set up a phone and fax hotline on October 1, 1994, when the APL went into effect.⁴⁷⁴ Companies may now call to report receipt of administrative guidance from ministries,⁴⁷⁵ and *Keidanren* vows to support the companies against the bureaucracy.⁴⁷⁶

b. Lottery-Based Bank Accounts and MOF

Following MOF's deregulation of interest rates on October 17, 1994, the Jonan Shinkin Bank broke with tradition⁴⁷⁷ and

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 OMIVA, *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 3 (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.*

474. *110 Hotline*, *supra* note 456, at 3; *Government Rescinds "Administrative Guidance" in 3 Cases*, JAPAN ECON. NEWSWIRE, May 19, 1995, available in LEXIS, ASIAPC Library, CURNWS File [hereinafter *Government Rescinds Guidance*].

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.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.⁴⁷⁹ Rather than issuing administrative guidance, MOF formed a commission to study the issue.⁴⁸⁰ Media reports and academic commentary attribute the banks' action and MOF's inaction to the recently enacted APL.⁴⁸¹

ing industry through informal guidance. *APL Opens Airhole*, *supra* note 414, at 44. Banks would normally seek approval and the entire industry would then act in concert. *Id.* "The deeply-rooted 'protection-regulation' relationship with the controlling ministry" guaranteed uniformity in products and services offered by the various financial institutions as well as the institutions' continued existence. Eiichiro Iwasa, *Deregulation — It's in the Balance*, LOOK JAPAN, Mar. 1995, at 6.

478. *Suupaa Teiki ni Kenshokin [Super Fixed Term Lottery]*, NIHON KEIZAI SHIMBUN, Nov. 7, 1994, at 1 [hereinafter *Fixed Term Lottery*]; Iwasa, *supra* note 477, at 6. Nearly a month after the interest rate liberalization, the Jonan Bank began offering chances to win a lottery prize equal to approximately US\$500 for customers holding deposit accounts of more than US\$1000. *Id.*; *Fixed Term Lottery*, *supra*, at 1.

479. *Fixed Term Lottery*, *supra* note 478, at 1. The bank made more than US\$1 billion in new accounts in 20 working days. *Id.* The other banks following Jonan's lead included Shonan Shinkin Bank, Kyoto Chuo Shinkin Bank, and Cosmo Bank. *Lottery Bank Accounts*, *supra* note 414, at 16.

480. *Okurasho, kondankai mokeru kento; Raishun, giron matomeru [MOF Sets Up Study Group; Debate to be Settled Next Spring]*, NIHON KEIZAI SHIMBUN, Nov. 15, 1994, at 7; Kaoru Morishita, *Defiant Small Banks Suddenly Big on New Products*, NIKKEI WKLY., Nov. 28, 1994, at 19 [hereinafter *Defiant Small Banks*]. An official in MOF's Banking Bureau publicly stated that MOF was not in a position to judge whether the banks' products were right or wrong. *Id.*; *Lottery Bank Accounts*, *supra* note 414, at 16.

481. *Lottery Bank Accounts*, *supra* note 414, at 16. "The Ministry of Finance, which previously insisted on approving each new financial product, is in the unaccustomed role in today's partially deregulated climate of letting events run their course." *Defiant Small Banks*, *supra* note 480, at 19. "Under the newly enacted law (the APL), ministries must provide written explanation for any instance of administrative guidance. MOF could not impose any penalty on Jonan." Iwasa, *supra* note 477, at 6. Other banks denounced Jonan's move because they felt Jonan threatened the financial sector with the specter of rampant competition. Minoru Nakamura, *Lies, Damned Lies, & Financial Liberalization*, TOKYO BUS. TODAY, Mar. 1995, at 12 [hereinafter *Financial Liberalization*]. The National Society of Shinkin Banks, the major trade association for credit associations, like the Jonan Shinkin Bank, initially denounced Jonan's move. *Defiant Small Banks*, *supra* note 480, at 19. After Japan's Fair Trade Commission intimated the society's position could violate the Japanese monopoly statute, however, numerous other banks followed Jonan. Tatsuya Inoue, *Banks Offer Gift Lotteries as Competition Goes Bare Knuckle*, NIKKEI WKLY., Dec. 18, 1995, at 12 [hereinafter *Banks Go Bare Knuckle*]. A survey of shinkin banks revealed that 60% of Japan's shinkin banks are offering or plan to offer lottery accounts between November 1995 and March 1996. *Id.* Another explanation for Jonan's successful move is that the bank was relatively small and in good financial shape. Hirakawa, *supra* note 199. The bank, therefore, had the confidence to challenge the status quo. *Id.*

Some commentators felt that only small, financially sound banks would have the courage to do what Jonan Bank did.⁴⁸² However, Sumitomo and Dai-Ichi Kangyo, two of Japan's largest commercial banks, recently began offering similar promotional giveaways that include cash prizes.⁴⁸³ In addition, some brokerage firms are luring new investors with lotteries that were effectively banned until the APL's start date.⁴⁸⁴

3. U.S.-Japan Trade Measures Incorporate The APL

The APL represented one issue discussed in recent bilateral market access negotiations within the ongoing Framework Talks between the United States and Japan.⁴⁸⁵ Agreements reached in two rounds of negotiations confirm the applicability of the APL to the insurance and financial services sectors in Japan.⁴⁸⁶ The U.S. Government and U.S. businesses expect that these two agreements may enhance the impact of the APL.⁴⁸⁷

a. Japan-U.S. Measures Regarding Insurance

On October 1, 1994, Japan and the United States signed an agreement regarding the Japanese insurance market.⁴⁸⁸ The Agreement focused on market access and sought to lower ex-

482. Hirakawa, *supra* note 199.

483. *Banks Go Bare Knuckle*, *supra* note 481, at 12. Two of Japan's largest banks, Sumitomo Bank and Dai-Ichi Kangyo, recently started offering lottery based accounts and prizes. *Id.*

484. *Id.* "Some brokerages are also trying to lure new investors with lotteries that effectively had been banned until last year. Authorities feared that tacking chance onto deposits or investments would promote ungentlemanly competition among financial houses." *Id.* Thus far, the Big Four brokerage firms: (1) Nomura Securities Co.; (2) Yamaichi Securities Co.; (3) Daiwa Securities Co.; and (4) Nikko Securities Co. have not offered such products. *Id.* In a 1994 newspaper article regarding claims that Japanese regulators favor foreign finance firms and force domestic firms to rigidly comply with administrative guidance, a Big Four brokerage official recently commented that "Japanese brokerage houses dare not resort to legal measures, including the Administrative Procedure Law, which draws clear lines between written rules and administrative guidance." Kyoko Imagawa, *Japan Brokerages Cry Foul, Claim Regulators Favor Foreign Houses*, NIKKEI WKLY., Dec. 19, 1994, at 24. The Big Four brokerage official added that "[i]f we ask for any stipulations, our good relations with government officials will come to an end." *Id.*

485. Goodman, *supra* note 302; Radin, *supra* note 90.

486. Insurance Measures, *supra* note 419, at 666; Financial Services Measures, *supra* note 419, at 626-27.

487. Goodman, *supra* note 302; Radin, *supra* note 90.

488. Insurance Measures, *supra* note 419, at 661.

isting market barriers.⁴⁸⁹ Specifically, the Japan-U.S. Measures Regarding Insurance⁴⁹⁰ ("Insurance Measures") addressed the lack of transparency and poor procedural protections that characterize Japan's insurance sector.⁴⁹¹ Both governments welcomed the enactment of the APL by the Japanese Diet.⁴⁹² 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.⁴⁹³ The Japanese Government stated that implementation of the APL with respect to the insurance sector would be completed by November 1994.⁴⁹⁴

The Japanese Government confirmed that it would take other necessary actions to bring administrative processes in the insurance sector into conformity with the APL.⁴⁹⁵ 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.⁴⁹⁶ 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.⁴⁹⁷ The Insurance Measures

489. *Id.* at 661; Yasushi Kanzaki, *Nichibei hokatsu kyogi ni okeru hoken bunya kyogi de no kechaku no gaiyo* [Outline of the Conclusion of the U.S.-Japan Framework Talks in the Insurance Sector], SHOJI HOMU, Dec. 5, 1994, at 7.

490. Insurance Measures, *supra* note 419, at 661.

491. Kanzaki, *supra* note 489, at 9-10 (noting that Insurance Measures address lack of transparency and poor procedural guarantees in financial sector regulatory process).

492. Insurance Measures, *supra* note 419, at 666.

493. *Id.*

494. Kanzaki, *supra* note 489, at 10; Insurance Measures, *supra* note 419, at 666.

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.

Id.

495. Insurance Measures, *supra* note 419, at 666; Kanzaki, *supra* note 489, at 10.

496. Insurance Measures, *supra* note 419, at 666. "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." *Id.*

497. *Id.* "Administrative guidance that is delivered orally, upon request, will be delivered in writing, unless it causes undue hindrance to administration." *Id.*

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.*

499. Goodman, *supra* note 302; Naoki Uemura, *Nichibei kinyu saabisu kyogi kechaku no gaiyo* [Outline of the United States-Japan Talks Regarding Financial Services], SHOJI HOMU, Feb. 2, 1995, at 2; *Nichibei kinyu saabisu kyogi no kechaku* [Conclusion of the U.S.-Japan Financial Services Talks], SHOJI HOMU, Jan. 25, 1995, at 39.

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.⁵⁰⁵ 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.⁵⁰⁶

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.⁵⁰⁷ The unpredictability inherent in Japan's informal regulatory system⁵⁰⁸ impedes economic growth and provides incentive for domestic and foreign companies alike to bypass Japan and invest overseas.⁵⁰⁹ 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.⁵¹⁰ 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 kyochō; 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's⁵¹¹ 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,⁵¹² provide notice to interested parties prior to administrative actions,⁵¹³ and require agencies to publicize generally applicable rules and procedures.⁵¹⁴ Provisions regarding administrative guidance add transparency and clarify the source and nature of guidance.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.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-

511. See Buckley, *supra* note 194, at 12 (reporting sharp drop in favorable public opinion toward Japan's bureaucracy); *supra* notes 203-06, 226-32 and accompanying text (noting decline in prestige and influence of MITI and MOF in Japanese economy since early 1990's).

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).

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

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

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

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 guidance⁵¹⁷ and the prevalence of informality⁵¹⁸ made it difficult for parties to discern proper procedures and insulated the bureaucracy's control of the economy from any legal challenge.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.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.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.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,⁵²³

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

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

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

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." *Id.*; *see supra* notes 346-49 and accompanying text (discussing APL provision that provides parties ability to request oral guidance in writing).

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

522. *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).

523. *Sumo Wrestling*, *supra* note 369, at 17. Rulings concerning applications are exempted from the adverse disposition provisions. *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.⁵²⁴ 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 applications⁵²⁵ and for rendering adverse dispositions.⁵²⁶ 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,⁵²⁷ and standard time frames for review of applications were established for eighty percent of application dispositions.⁵²⁸ Only twenty-one percent of adverse dispositions regarding revocation of licensing approvals, however, were based on standard criteria.⁵²⁹

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.⁵³⁰ The APL emphasizes the voluntary nature of administrative guidance⁵³¹ and seeks fair treatment of parties that refuse compliance with guidance.⁵³² Moreover, the law requires government agencies to issue guidance only within their jurisdiction⁵³³ and put guidance in writing when requested.⁵³⁴ Formalizing administrative guidance curtails,⁵³⁵

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 not 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 nao 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-

Guidance: Guidelines Still Remain Non-Transparent; One Year after Enforcement of Administrative Procedures Law, ASAHI SHIMBUN, Dec. 21, 1995, at 4 [hereinafter *Guidelines Remain Non-Transparent*] (reporting incident of propane gas supplier, with *Keidanren*'s support, forcing regional MITI office to retract guidance regarding MITI's requirement that parties submit documentation of negotiations with competitors when applying to expand service area). Only few such cases, however, were successful. *Id.* *Keidanren* was consulted in 21 cases during the APL's first year of enforcement, five of which were successful. *Id.* See *supra* notes 460-76 and accompanying text (analyzing incident involving MITI, propane gas company, and *Keidanren*, where *Keidanren* supported gas company in challenging MITI's administrative guidance, and ultimately forced MITI to retract its guidance and approve gas company's application to expand its service area).

536. See *supra* notes 477-84 and accompanying text (discussing MOF's tentative reaction to banks' offering previously banned lottery bank accounts in order to improve competitiveness). Jonan Shinkin Bank, the first to offer the lottery accounts, made US\$1 billion in just twenty working days. *Banks Go Bare Knuckle*, *supra* note 481, at 12. Many of Japan's banks, including Sumitomo and Dai-Ichi Kangyo, two of the largest, are now "actively courting customers with lottery-connected deposit schemes that offer winners cash prizes or gifts." *Id.* Brokerage firms in Japan have begun to offer similar products now that the effective ban on such products appears to have been lifted. *Id.*

537. *Financial Liberalization*, *supra* note 481, at 7. "Indications are that Japanese bureaucrats have come to a historic turning point. This is evidenced by three factors: a decline in bureaucrats' sense of duty to country, a weakening of their power over politicians, and a decline in their ability to formulate effective economic policies." *Id.* See *supra* notes 203-06, 226-32 and accompanying text (reporting decline in ministerial influence in Japanese economy).

538. See *supra* notes 269-86 (analyzing role of MOF's guidance in illegal stock losses compensation scandal, where MOF issued guidance for securities firms to quickly close out certain accounts, and MOF's tacit authorization of illegal client compensation in order to expedite closure).

539. See *supra* notes 230-31 and accompanying text (discussing banking scandals involving *jusen* housing loan corporations and Daiwa Bank's New York Branch, blamed on MOF's informal regulatory style and corrupting influence of *amakudari* system).

540. See Hirsh, *supra* note 231 (reporting flight of financial business from Japan to overseas markets in Hong Kong, United States, and England).

sure MOF to reform its informal and constrictive regulatory style. MITI receives a double blow as industrial capacity continues to shift overseas⁵⁴¹ and businesses maintain that they no longer need MITI's assistance.⁵⁴²

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 pressure⁵⁴³ 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 reform⁵⁴⁴ 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 Puremiamu ga Kokunai Kinri o Hikiageru* [*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 230, 298 and accompanying text (reporting growing pressure on MOF to reform its informal, paternalistic regulatory style).

544. *Ministry Reforms*, *supra* note 93, 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.⁵⁴⁵ Decreases in corporate acceptance of *amakudari* officials into the ranks of private companies⁵⁴⁶ and plans to extend the length of a ban on employment of *amakudari* officials from two years to five years⁵⁴⁷ 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 overseas⁵⁴⁸ and MOF appears unable to cope with the problem. The difficulty⁵⁴⁹ and expense⁵⁵⁰ 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 deregulation⁵⁵¹ 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*).

548. *Hollowing Out Japan's Financial Markets*, *supra* note 229, at 67 (reporting flight of financial activity from Japan to Singapore, Hong Kong, London, and New York).

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.⁵⁵² This hollowing out will strengthen the push for deregulation in Japan, as firms and therefore jobs continue to shift elsewhere.⁵⁵³

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.⁵⁵⁴ 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.⁵⁵⁵ Moreover, there are no guidelines for granting a party's request to inspect the proceedings report and presiding official's opinion.⁵⁵⁶ The adverse disposition hearing procedures, furthermore, do not apply to rejected applications.⁵⁵⁷ 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 method⁵⁵⁸ and establishing guidelines for its use in the APL authorizes a technique that has no legal basis.⁵⁵⁹ 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.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.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,⁵⁶² companies have begun to take advantage of tentative responses by ministries in the wake of the APL.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

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).

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).

562. See *e.g.*, TATEWAKI, *supra* note 207, at 176 (discussing considerable slowdown in approval process when companies seek innovative and unprecedented changes).

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.