

# New Tools for Public Participation in the Japanese Regulatory System

## Prcis

By

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## **Japan Information Access Project US-Japan Friendship Commission**

Starting in the early-1990s, the Japanese Government has enacted a variety of laws and other measures designed to increase the transparency and accountability of its regulatory system, and to provide new opportunities for public participation in its system. Although these measures are improving the Japan's regulatory system, they have not invalidated the OECD's 1999 finding that: "Lack of transparency in regulatory and administrative processes is a major weakness of Japan's domestic regulatory system" (OECD, *The OECD Review of Regulatory Reform in Japan*, April 1999). These measures have also not appreciably increased the accountability of the Japanese bureaucracy.

This paper reviews five measures that have the potential for improving the Japanese regulatory system. These begin with the 1994 Administrative Procedure Law and include the just-adopted (March 2001) "no action letter" system. The ministries and agencies played the primary role in the development of the new measures. Because the bureaucrats have broad discretion in the implementation, and, are subject to very little, if any, effective oversight, the bureaucracy also holds the keys to the success or failure of the new measures.

### **I. Administrative Procedure Law (*Law No. 88 of 1993*)**

- After years of debate, Japan enacted an Administrative Procedure Law (APL) in 1993, which became effective the following year.
- The APL prescribes uniform rules that are to be followed by all central government ministries and agencies related to: (1) procedures for the approval or rejection of applications for permits and licenses; (2) procedures related to "adverse dispositions" such as the cancellation of permits and the suspension of business; (3) administrative guidance; and (4) notifications.

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- Among the requirements of the APL is that government agencies are to specify and make public the standards that they use to evaluate applications. Agencies are also to specify standard processing periods for the granting of licenses, permissions and approvals.
- As the first Japanese law to apply disciplines to administrative guidance, the APL requires the guidance to be put into writing in two situations: upon the request of the recipient of oral guidance and when it is issued to more than one person.
- The Law also sets out as “general principles” that the agencies issuing administrative guidance should not exceed their authority and that compliance with the guidance is voluntary.

**II. Information Disclosure Law (*Law Concerning the Disclosure of Information Retained by Administrative Agencies, Law No. 42 of 1999*)**

- On April 1, 2001, Japan implemented an Information Disclosure Law that applies to central government ministries and agencies. Japan is also taking steps to require information disclosure by public corporations (*tokushu hojin*).

**III. Public Comment Procedure (*Public Comment Procedure for Formulating, Amending or Repealing a Regulation, Cabinet Decision of March 27, 1998*)**

- Japan’s Public Comment Procedure (Procedure), which became effective on April 1, 1999, requires central government entities to give advance public notice of proposed regulations, to provide an opportunity for the public to comment on them, and to take the comments into account when they prepare the final regulations.
- The measures subject to the Procedure include cabinet orders (*seirei*), ordinances of the Prime Minister’s Office (*furei*), ministerial ordinances (*shorei*) and notifications (*kokujū*), as well as guidelines applied uniformly in administrative guidance issued to more than one person (unless the guidance is not made public).
- The Procedure exempts a number of activities, including advisory council reports and recommendations and the development of legislative proposals by the bureaucracy.
- When government agencies publish draft regulations, they are to include, to the extent possible, the purpose of the regulation and its legal authority, as well as an analysis of its probable impact.
- The period provided for public comments is to be approximately one month long, but the actual period is set by each entity, and is sometimes as short as two weeks.
- Following the conclusion of the public comment period, ministries and agencies finalize the regulation make public their views on the comments, indicating where they changed the draft regulation based upon the comments.
- While entities must make the comments (or a summary of them) public, they have the discretion to withhold all or part of the comments if disclosure may harm the rights of a person or a corporation, competitive position or other legitimate interests (and they cannot not identify the parties submitting comments unless the notice of the proposed regulation indicated they would do so).

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- While the government agencies are actively soliciting public comments, it does not appear that the comments that are submitted are having much, if any, impact on the final regulation. There is a concern that agencies are working out problems with proposed regulations before they put the draft regulations out for public comment.
- Unlike in the United States, where the courts and the Congress serve as watchdogs of the rulemaking process, there is no mechanism available in Japan to hold the bureaucracy accountable for complying with the Public Comment Procedure.

#### IV. **“No Action Letter” System** (*Prior Confirmation Procedures on the Application of Laws and Regulations by Government Agencies, Cabinet Decision of March 27, 2001*)

- The Japanese Government is in the process of establishing a so-called “No Action Letter” system.
- In March 2001, the Cabinet established Guidelines for a "No Action Letter" system that will apply government-wide.
- Under this new mechanism, businesses will be able to ask the relevant agency whether activities that they plan to undertake would fall under specified laws and regulations. The agency will be required to respond to the business and publish the response.
- To implement the new mechanism, the Guidelines require all ministries and agencies to establish their own “detailed rules” consistent with the Guidelines.
- The inquirer will be required to specify the action that it plans to take and the law or regulation that it would like to have clarified. In its response, the agency is to indicate, based on the specific facts presented, whether the proposed action is subject to the law or regulation cited by the inquirer.
- If the agency cannot respond within 30 days of the inquiry, it must provide the inquirer with the reason and an estimate when a response is likely.
- Agencies do not have to respond in certain cases, for example, where the facts set out by the inquirer are insufficient or the matter is subject to litigation.
- If Japan implements the new mechanism in a manner similar to the U.S. Securities and Exchange Commission’s “no action letter” process, it could be very useful to businesses trying to navigate the labyrinth of regulations in Japan.
- In 2000, Japan’s Financial Services Agency instituted a “no-action letter” process.
- One benefit of a “no-action letter” mechanism is that it provides businesses with some certainty as to how governmental agencies view their proposed activities. Another is that other businesses planning to undertake similar activities will have the benefit of the government’s response, which in the past would not have been available to them.

#### V. **Policy Evaluation System**

- In January 2001, the Japanese Government introduced a government-wide policy evaluation

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system that is intended to improve the transparency of the government, strengthen the bureaucracy's accountability to the public and improve the quality of public administration.

- Under the new system, ministries and agencies will be required to evaluate policies from the perspective of need, priority and effectiveness, and to make the evaluations public.
- The Ministry of Public Management, Home Affairs, Posts and Telecommunications is responsible for ensuring that the policy evaluations of the ministries and agencies are comprehensiveness and objective. The Ministry's evaluations are also to be made public.

### **Conclusion**

The Japanese regulatory system is becoming more transparent, although whether it is becoming more accountable is debatable. Implementation of the Administrative Procedure Law has brought greater uniformity and clarity to administrative procedures. But, complaints are still heard about the burdensome and unpredictable nature of procedures, including the frequent lack of specificity of regulations. Similarly, use of the Public Comment Procedure has made the rulemaking process more transparent by providing advance notice of proposed regulations. Despite the extensive efforts made by the private sector to provide public comments, in most cases, the results have been disappointing. The public comments do not appear to have changed appreciably the final regulations.

It is too early to judge the effectiveness of the regulatory measures that are being put into place. But, in the absence of independent mechanisms to oversee the bureaucracy's implementation of these measures, it is questionable how effective they will be. The burden is on the bureaucracy to demonstrate that the new measures are more than window-dressing and that they represent genuine change in the Japanese regulatory system.

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