

## Japan Information Access Project

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### Regulatory Transparency in Japan: Half Full or Half Empty?

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The issue of regulatory transparency in Japan has been a contentious issue between the United States and Japan for several years. The United States Trade Representative has submitted to the Japanese government repeated requests to increase transparency<sup>1</sup> in order to stimulate economic growth in Japan and ease trade tensions. While much of the emphasis has been in the telecommunications sector, the same issue comes up in most areas of government regulation in Japan. In the past decade, the Japanese government has made significant improvements in transparency but the adequacy of this improvement depends much on the side of the Pacific from which it is viewed.

Transparency refers to both the clarity of government regulatory policies and the ability of affected parties to participate in the formulation of new policies. A transparent regulatory system also has some predictability with respect to decisions as opposed to being arbitrary. Transparent regulatory systems encourage economic growth by facilitating capital formation and efficient competition. Transparency also helps promote international trade by making clear the legal requirements for imported products and foreign investment. This article examines the growth of regulatory transparency and recent trends in Japan in this area. It is based on both the author's experience as a Mike Mansfield Fellow in Japan and additional research.

The basic civil law system in Japan is derived from late nineteenth century Prussian law and gives great authority to the Emperor's civil servants with relatively few checks and balances. Such a model had many advantages for the rapid industrialization that was needed during the Meiji era and the economic reconstruction that took place after World War II. The extent of transparency in the present Japanese regulatory system lags behind most other industrialized countries and thus has attracted the criticism of the U.S. government, mentioned earlier. However, the last decade has included significant progress in this area. The purpose of this article is to outline recent gains and the remaining issues.

Japanese agencies have codified their regulations in government ordinances (*seirei*) and ministerial ordinances<sup>2</sup> (*shourei*), although these documents are not as definitive as their U.S. counterparts in that they may not give explicit criteria for approving applications. In the past, the Japanese government has allowed its officials significant discretion in giving the private sector "administrative guidance" (*gyosei shidou*)<sup>3</sup> on how to run their businesses and in dealing with applications for licenses and permits.

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\* The views expressed in this article are those of the author and not necessarily those of the Federal Communications Commission or U.S. Government.

<sup>1</sup> See <http://www.ustr.gov/regions/japan/initiative.shtml> , <http://www.ustr.gov/releases/2000/10/japanprop.pdf>

<sup>2</sup> The legislation and regulations of each agency are published in a volume called a *roppou* (literally "six laws," from the original six laws of nineteenth century Japan). These convenient volumes offer some advantages over the U.S. practice of publishing the United States Code and Code of Federal Regulations separately.

<sup>3</sup> Michael K. Young, "Judicial review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," *Columbia Law Review*, vol. 84 (1984), 923-983.

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The Administrative Procedure Law<sup>4</sup> (APL), adopted in 1994, was a first major step in improving transparency. Although similar in name to the U.S. Administrative Procedure Act<sup>5</sup> (APA), it is much more narrow in scope and does not deal with rulemaking. The APL requires that administrative guidance must be given in writing to be binding and then can be appealed to the courts. [*Postpublication note*: There is some disagreement among Japanese legal experts about how binding such guidance is and whether it can be appealed.] It also requires that agency action on applications for licenses and permits must take place within a reasonable amount of time. Finally, it requires that agencies publish and use judgement standards (*shinsei kijun*) for reviewing applications that give the actual criteria to be used.<sup>6</sup> While these provisions might seem rather elementary in the present U.S. context, they marked the beginning of a real journey for Japanese officials.

The cabinet order (*kakugi kettei*) on public comment,<sup>7</sup> which went into effect in April 1999, was the next major step in the evolution of transparency. Since this policy is not a statute, agency actions under it are not appealable to the courts—a source of concern to U.S. trade negotiators who had asked for the introduction of public comment. This order requires agencies adopting new regulations, modifying existing regulations, or deleting regulations to ask for public comment. However, compared to U.S. procedures under the APA there are several key differences: 1) there are no provisions for reply comments and comments are not publicly available until the new rule is finalized; 2) the provisions for making comments public after the decision contain major loopholes; 3) there is no provision for documenting *ex parte*<sup>8</sup> contact so there is the possibility that parties might provide the agency with little or no public comments and then state their views in private meetings where no one can rebut erroneous facts; and 4) there is no quality control mechanism that performs the function of the courts in the United States in checking that the regulatory agency made reasonable attempts to address the comments received.

Prefectural governments in Japan have all adopted freedom of information policies in the past two decades but the national government only recently adopted the Law Concerning Access to Information Held by Administrative Organs,<sup>9</sup> which will become effective April 2001. While this law has more exceptions than the U.S. Freedom of Information Act,<sup>10</sup> it is a major step in the direction of improving transparency and hopefully will have a positive impact just as similar local laws in Japan have had. Effective implementation of this new legislation will require a major change of thinking by Japanese government officials, long accustomed to selectively protecting information. It is unclear if the government recognizes the magnitude of the needed culture shift for effective implementation.

One possible impediment to transparency in Japan is a prohibition against waivers of regulations, which is implicit in civil law. While such a prohibition might seem consistent with transparency, the author believes that the opposite is true in practice. When one writes regulations one tries to be as general as possible. But the reality is that it is impossible to cover all circumstances, so there will be special, unpredictable situations where the regulation will be unreasonable. In the United States, regulators deal

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<sup>4</sup> See <http://www.somucho.go.jp/gyoukan/kanri/pro.htm>

<sup>5</sup> 5 U.S.C. 551

<sup>6</sup> When the author was at the Ministry of Posts and Telecommunications in 1998-99, that agency's judgement standards for radio licensing were recognized internally to be unreasonably vague and a rewrite was underway. For example, the functional equivalent to the minimum distance between FM stations given in the U.S. by 47 C.F.R. 73.207 was a combination of a vague judgement standard that new stations must not cause interference and a nonpublic document that gave the very specific criterion.

<sup>7</sup> See <http://www.somucho.go.jp/gyoukan/kanri/990422.htm>

<sup>8</sup> *Ex parte* contact refers to written or verbal discussion between the regulatory agency and outsiders on the matter of the rulemaking.

<sup>9</sup> See <http://www.somucho.go.jp/gyoukan/kanri/translation.htm>  
<http://www.somucho.go.jp/gyoukan/kanri/mainpoint.htm>

<sup>10</sup> 5 U.S.C. 552

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with these cases with waivers that are issued in a transparent way. It appears that Japanese regulators prevent such problems by writing vague regulations that give them the flexibility to handle all cases.

While U.S. statutes do not explicitly provide for waivers, the courts have ruled that “a regulation which is not required by statute may, in appropriate circumstances, be waived and *must be waived* where failure to do so would amount to an abuse of discretion.”<sup>11</sup> Further the courts have pointed out that waivers are a needed part of an effective regulatory system, stating:

a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation.... We have examined the significance of the waiver procedure and pointed out that it is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together.<sup>12</sup>

Japanese officials may well fear the type of transparency advocated by the United States because they are afraid that regulatory gridlock would result from explicit codification of all standards in a legal system where there are no. Better explanations of how waivers to make the whole system work together and that waivers can themselves be administered in a transparent way<sup>13</sup> might facilitate transparency improvements in Japan.

Finally, no discussion of transparency would be complete without a mention of the *amakudari* issue. *Amakudari*, literally meaning “descent from heaven,” is a Japanese government employment practice that results in outplacement of government officials in their 50s to private firms. The causes of *amakudari* are complex and include poor retirement benefits for government officials and personnel practices based on Confucian values that forbid one from working for a younger person in the same employment category. But the net effect of *amakudari* is that government officials depend on regulated entities to hire workers who must be outplaced. This dependency seriously threatens transparency.<sup>14</sup> Significant progress in improving transparency will require attacking *amakudari* and its root causes.

In the author’s view the most fertile areas for transparency improvement in the next few years are addressing the underlying causes of *amakudari*, public disclosure of *ex parte* contact during rulemakings, improving understanding of how waivers increase transparency by permitting the codification of the actual rules while allowing flexibility in exceptional cases, and exploring approaches for quality control of agency rulemaking transparency that are consistent with the Japanese legal system.<sup>15</sup>

So, is the glass half full or half empty? During the past decade in Japan, there has been significant progress in improving transparency. Much of this resulted from foreign pressure (*gaiatsu*).

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<sup>11</sup> *NTN Bearing Corp. v. U.S.*, 74 F3d 1204,1207 (Fed. Cir. 1995)

<sup>12</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

<sup>13</sup> In U.S. administrative law, all waivers are publicly announced along with their justification, and public comment is used for novel and significant waivers.

<sup>14</sup> From time to time, the mutual dependency associated with *amakudari* is revealed in scandals. An example is the 1998 Defense Agency/NEC scandal where officials overlooked over \$10 million owed by NEC to the government in exchange for NEC hiring Defense Agency staffers. “Former Top Official for Defense Procurement Arrested,” *Tokyo Kyodo* 1458 GMT September 4, 1998.

<sup>15</sup> Thus while court review of rulemaking decisions, similar to what is 5 U.S.C 701,706, is unlikely in Japan in the near term, an independent review of each agency’s rulemaking in the past year with a “report card” on transparency achieved might be a positive first step to implementing quality control.

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However, the leadership of the prefectural governments in adopting freedom of information policies before the national government shows that there is some grass-root support for transparency also. Trade negotiators from both countries might be tempted to spend time arguing of the “half full/half empty,” but a well-crafted, transparent regulatory system consistent with Japanese society will probably improve investment, productivity and the Japanese economy as a whole.

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