

SECURITIES ACTIVITIES OF JAPANESE BANKS

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1. Introduction

The extent to which Japanese banks are permitted to engage in securities activities has been a touchy question historically, as the banking and securities industries have waged a cutthroat struggle to obtain the advantage in the context of somewhat blurred legal guidelines. However, this question affects not only each industry's interest, but also affects capital market structure. For example, the extent to which banks are permitted to engage in securities activities relates to issues such as the protection of savers and investors, corporate finance, competition among financial institutions, and fiscal policy.

Recently, the controversy over this question focused on whether banks should be permitted to engage in underwriting and dealing in national bonds. This issue arose because of a tremendous increase in the amount of national bonds, which were issued to provide badly needed government financing. The Securities and Exchange Law specifically excluded government bonds from the general prohibition against banks' involvement in securities business [1]. The Bank Law of 1927 [2], on the other hand, was not clear on this point. The Bank Law of 1981 [3], after many changes in drafting, finally gave birth to an express statutory provision regarding banks' involvement in securities business, which was a product of compromise. The Securities and Exchange Law was likewise amended with respect to securities activities by banks [4].

In light of these recent changes, this is a good time to review the historical development of Japanese banks' securities activities. The history of overall bank legislation is beyond the scope of this article and past statutes will be referred to only when necessary to understand later changes.

2. Early legislation

The *Meiji* government enacted the National Bank Ordinance of 1872 for the purpose of establishing the modern banking facilities needed for industrial

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development [5]. This statute, which, despite its name, governed privately chartered banks, used the national banks in the United States as a model. However, the statute reflected English banking philosophy as embodied in the sound banking principle governing British clearing banks. Alexander Allan Shand, an Englishman invited to work for the Japanese Treasury Department at the time, had substantial influence in drafting the statute [6].

While the National Bank Ordinance of 1872 provided that the regular business of banks, included dealings in notes and other securities [7], it prohibited banks from engaging in industrial or commercial business and from holding shares in such enterprises [8]. It is not clear to what extent national banks were permitted to deal in securities. The 1872 National Bank Ordinance required that banks maintain reserves for deposits [9], imposed lending limits [10], and, as a rule, prohibited banks from sales of immovables [11].

The National Bank Ordinance of 1876 [12] clarified somewhat the extent to which banks were permitted to engage in securities business. It permitted banks to buy and sell government bonds as part of their regular business, but prohibited them from engaging solely in such sales without also engaging in lending, deposit-taking, and exchange business [13]. That ordinance retained the earlier prohibition against banks' engaging in industrial or commercial business and their holding shares in such enterprises [14]. Under the 1876 National Bank Ordinance banks participated in a public offering of government bonds as members of a selling group [15]. There was also a loophole in the statute's prohibition against banks' holding shares which led to evasion under the guise of holding shares as collateral for loans [16].

The Bank Ordinance of 1890 was enacted in order to bring unchartered banks within the regulatory framework as well [17]. During the legislative process, some pointed out that a number of unchartered banks were engaged in non-banking business to the detriment of their creditors and shareholders [18]. However, the 1890 Ordinance did not prohibit banks' shareholding or non-banking side business, but it did impose lending limits [19]. The 1916 amendment to the 1890 Ordinance added the requirement that banks obtain permission from the Finance Minister in order to engage in non-banking business [20]. This permission was easily obtained, for over twenty banks engaged in warehousing and several engaged in transportation [21].

Securities firms had not yet fully developed at that time and banks were the central figures in underwriting debt securities, both government bonds and corporate debentures. The prototype of the underwriting syndicate was molded in 1910 when the government issued 100 million yen of 4% bonds. Fifteen major banks formed a syndicate and underwrote seventy-five million yen of the issue (the remainder was underwritten by the Bank of Japan) [22]. Major securities firms also formed syndicates, but they acted as mere sub-underwriters [23]. Thus, it is fair to say that underwriting was not regarded as non-banking business at that time.

The panic of 1896 drove those banks that had held substantial shares or had loaned heavily, holding shares as collateral, into severe difficulty because of reductions in stock prices. This led to the promulgation of special statutes in 1897 and 1902 which provided for the establishment of long-term credit banks [24]. Even after this development, however, ordinary banks did not choose to specialize in purely commercial banking.

3. The Bank Law of 1927

A number of bank failures took place during the financial panic of the mid-1920s. The common cause of such failures was that these banks had taken advantage of the repeal of lending limits by the 1895 amendment and loaned heavily to their affiliated companies [25]. Many of the banks that failed had concentrated their investments in specified companies by holding shares and debentures, as well as making loans with or without shares as collateral [26].

The Bank Law of 1927 [27] appeared in the midst of this financial panic. This law defined the regular business of banks to consist of deposit-taking, money-lending, discounting of bills and notes, and exchange transactions [28]. It flatly prohibited banks from engaging in other business, except trust business relating to secured debentures, safekeeping, or business incidental to banking [29]. It also required that a managing director of a bank or a general manager obtain the Finance Minister's permission to engage in the daily business of other companies [30]. On the other hand, this law did not forbid banks from holding shares in other companies, nor did it impose any lending limit on loans, whether secured with shares or not.

The 1927 Bank Law survived for more than half a century, with minor amendments to the text itself and extensive interpretation by means of ministerial rules and administrative guidance issued thereunder. One of the reasons this law lived such a long life was that it was formulated to be quite flexible. Nevertheless, the 1927 Bank Law was the cause of the later controversies regarding securities activities of banks. The recent arguments referred to the legislative history of the 1927 law, as well as to policy considerations regarding the eventual effects of banks' securities business. Thus, it would be appropriate to glance at the legislative history of the 1927 Bank Law.

The question under consideration during the legislative process was whether or not and to what extent "business incidental to banking" covered securities activities. To the extent this question was affirmatively answered, banks could engage in securities business without the necessity of getting approval from the Finance Minister. If the answer was negative, there was no way for banks to engage in securities business because the law lacked a provision authorizing the minister to give banks approval to engage in non-banking business.

This question was repeatedly discussed during the committee sessions in the

Diet. The Ministry of Finance officials did not take consistent positions when they replied to questions regarding the construction of the bill's provision on "business incidental to banking", which became law without any change. At the outset, the officials took the position that dealing in and underwriting securities would fall within "business incidental to banking" if these activities were necessary or useful for regular banking business [31]. One committee member argued for the necessity of legitimizing banks' dealings in debt securities, pointing out that banks then held debt securities amounting to approximately 1.9 billion yen in their portfolios or as collateral, whereas their aggregate paid-in capital was 1.5–1.6 billion yen and total deposits were around 8 billion yen. The Ministry of Finance officials acceded to this argument [32]. In the end they admitted that it was virtually impossible to draw a line between dealings falling within "business incidental to banking" and those beyond that category, regardless of the amount [33].

Under the Bank Law of 1927, especially during the recession period after 1929, securities firms found it more and more difficult to act as managing underwriters. Members of underwriting syndicates were by and large fixed: sixteen banks, including three long-term credit banks, such as Japan Industrial Bank, were the dominant figures [34].

When the Securities Underwriters Law of 1938 [35] first introduced a license requirement for underwriters, forty-four banks, thirteen trust companies, eight securities firms, and one other company were engaging in the underwriting business. While the securities firms were licensed pursuant to this law, other underwriters were exempted on the ground that they were already supervised pursuant to other regulatory statutes such as the Bank Law of 1927 [36]. The Securities Broker-Dealer Law of 1938 [37] also exempted banks and other already regulated firms on the same grounds [38].

As of 1936, underwriting by the eight securities firms accounted for approximately a quarter of the total corporate debentures issued [39] and exempted underwriters, such as banks, accounted for three-quarters. Moreover, since secured debentures became the rule as a result of a movement to banish unsound issues, trustees underwrote the issues and securities firms again were reduced to mere sub-underwriters. Beginning around 1940, underwriting syndicates for corporate debentures consisted exclusively of major banks and trust companies [40].

4. Post-war legislation

The Bank Law of 1927 itself survived the occupation period after World War II. However, antimonopoly and securities legislation, both unknown to pre-war Japan, put fetters on the securities activities of banks.

The Antimonopoly Law of 1947 [41], in its original version, prohibited

financial institutions, including securities firms, from acquiring shares in rival financial institutions [42]. It also prohibited financial institutions with gross assets exceeding five million yen from acquiring and holding more than 5% of the outstanding shares in any company [43]. The acquisition of shares by financial institutions, other than securities firms, through underwriting for the purpose of distribution was among the exceptions from these prohibitions [44]. Thus, we can infer that underwriting by banks was not illegal at that time. The 1953 amendment [45] expanded the provision concerning acquisition of shares in rival institutions into a general provision prohibiting any corporation from acquiring shares in other corporations if such acquisition would substantially lessen competition [46]; it relaxed the 5% restriction to 10% [47]; at the same time, it repealed the aforementioned exemption for acquisition of shares through underwriting.

The limit for banks' shareholdings in other corporations was again reduced to 5% of the outstanding shares by the 1977 amendment to the Antimonopoly Law of 1947 [48]. This restriction, needless to say, is not based upon the philosophy of sound banking, but upon a policy of maintaining competition by preventing banks from exerting control over industries. This restriction, if accompanied by imposition of lending limits, does foster banks' soundness, however, by preventing the concentration of bank funds in specified enterprises [49]. On the other hand, since such a restriction does not refer to a proportion of the bank's total assets, a bank may be substantially affected by stock market fluctuations if it invests in many corporations.

The Securities and Exchange Law of 1948 [50] introduced a controversial provision prohibiting banks and other financial institutions from engaging in securities business [51]. It exempts the following transaction from this prohibition: (1) selling and buying securities for the account of customers pursuant to their written orders; and (2) selling and buying securities for the purpose of investment, or for the account of a beneficiary based upon a trust agreement, in accordance with provisions of other statutes [52]. In addition, dealings in national government bonds, municipal bonds, and corporate debentures and other debt securities guaranteed by the government are totally exempted from the prohibition [53]. At the same time, "securities business" under the law, by definition, excludes business done by financial institutions [54].

Although the above-mentioned provisions of Article 65 of the Securities and Exchange Law were modeled after the U.S. Glass-Steagall Act of 1933 [55], since Article 65 does not restrict banks' holding securities for investment purpose, it cannot be said that the protection of depositors was the primary purpose of that article [56]. An official at the time in the Securities Exchange Commission, who might have been one of the draftsmen, stressed the importance of nurturing securities firms for the purpose of democratization of the nation's economy by having banks abstain from securities business [57].

After promulgation of the Securities and Exchange Law, as its effective date

drew near, the Federation of Bankers Associations and the Association of Trust Companies petitioned the Securities Exchange Commission for a one year postponement of the effective date of Article 65, on the ground, among others, that their selling activity was needed for the then government agency (S.C.L.C.) to dispose of unsold shares worth over 20 billion yen which had been expropriated from *zaibatsu* families and holding companies as a result of compulsory dissolution of *zaibatsu* combines [58]. The Federation of Securities Dealers Associations was strongly opposed to such postponement on the ground, among others, that it would only extend for one year the inadequate protection of investors and depositors. This struggle ended in an amicable settlement when the bank and trust groups withdrew their petitions after the Federation of Economic Organizations (*Keidanren*) interceded [59].

Around the time when the Securities and Exchange Law was enacted, a separate statute was being drafted pursuant to the recommendation of the occupation forces, which would have brought about complete segregation between the banking and securities industries by means of restricting shareholdings and prohibiting interlocking directorates between these industries [60]. This draft was dropped for reasons unknown to the writer.

The 1950 Law Concerning Issuance of Debentures by Banks [61] enabled every bank to issue bank debentures (*kin'yūsai*) which was theretofore permissible only for long-term credit banks. This statute was epoch-making in that it ended the policy of separating long-term financing from commercial banking [62]. However, this statute was abolished two years later when the Long-Term Credit Bank Law of 1952 [63] was enacted. Thus, the stage was set for a revival of the banking system of pre-war times, with a significant difference, however, in that big securities firms gained strength incomparable with pre-war days, mainly because of Article 65 of the Securities and Exchange Law which excluded banks from the underwriting business [64].

In connection with the bill which became the Long-Term Credit Bank Law of 1952, there was considerably detailed discussion in the Diet as to the scope of securities business permissible for banks [65]. Taking this discussion into account, that statute clarified somewhat the extent to which long-term credit banks were permitted to engage in securities business: long-term credit banks could acquire securities in any manner, but they were not allowed to acquire corporate shares or debt securities for the purpose of distribution without government guaranty [66].

In summary, the Securities and Exchange Law did not prohibit banks from dealing in government bonds, national or municipal. Although it may be argued that banks could not engage in such business due to the restrictions imposed by the Bank Law of 1927, there was no doubt that long-term credit banks could lawfully underwrite and sell government bonds. Nevertheless, banks, including long-term credit banks, abstained from engaging in such business. This is because the Ministry of Finance, by means of so-called

“administrative guidance” issued for the purpose of helping the securities industry to develop, suggested that banks abstain [67].

The result has been that big securities companies have underwritten government bonds, obtaining underwriters' fees, while a large portion of each issue has ended up in the hands of banks, some of which are members of the underwriting syndicates. As for corporate debentures, banks have been acting merely as trustees charged with protecting debenture holders and administering collateral [68]. Securities companies are not permitted to engage in these kinds of activities [69]. In addition, banks have been holding substantial portions of corporate debentures as investors, *i.e.* they purchase these securities that were underwritten by securities companies.

5. Recent controversies

Article 65 of the Securities and Exchange Law created problems from the start. Even after the enactment of the Long-Term Credit Bank Law of 1952, that provision often aroused controversies between the industries concerned. Among the occasions that triggered controversies, two merit mentioning: (1) the overseas expansion by both the securities and banking industries in the late 1960s and early 1970s; and (2) the market increase in the amount of government bond issues since the late 1970s that culminated in the recent statutory amendments.

5.1. Overseas expansion

In 1969, a European subsidiary of the Bank of Tokyo participated in underwriting Honda debentures offered in Europe. Presidents of the “Big Four” securities companies submitted a protest to the Finance Minister questioning the legitimacy of such conduct. The Ministry of Finance responded by issuing an administrative guidance to the subsidiary advising it not to engage in underwriting debentures issued by Japanese corporations [70].

In 1971, two international investment banks were established in London, both of them being joint ventures formed by Japanese banks and securities companies. Their business includes, among others, long- and medium-term loans and securities underwriting [71]. Thus, banks are engaging in securities business and securities companies are engaging in banking business through these overseas offshoots. In addition to these, there is a host of joint ventures formed by Japanese banks and foreign merchant banks for the purpose of engaging in securities business. Also, securities companies participate in multinational banks. One of the above-mentioned London-based international investment banks, in which Nomura Securities Company participates, restricts its securities underwriting business by excluding underwriting of securities

issued by corporations established pursuant to Japanese law [72]. This shows Nomura's strength in relation to banks.

In 1974, the Ministry of Finance announced a policy of permitting overseas subsidiaries of Japanese banks to engage in underwriting on two conditions: (1) that the parent bank refrain from any help whatsoever with regard to the subsidiary's underwriting activity; and (2) that the issuer of foreign currency-denominated debentures underwritten by the overseas subsidiary of the parent bank employ the proceeds only abroad [73]. This policy may reflect a political compromise rather than a theoretical consideration as to the extraterritorial application of Japanese law.

5.2. Increase in government bond issues

In the 1970s, government bond issues considerably increased to cope with increased budgetary needs arising when tax revenues failed to keep pace with the budget as economic growth slowed down. Since banks were assigned to subscribe for a certain portion of each issue, their holdings of government bonds increased accordingly. In order to avoid depressing the market price of government bonds, the Ministry of Finance dissuaded banks from disposing of these bonds. The market price did fall, nevertheless, because the government insisted on issuing bonds bearing low interest rates even though interest rates had increased in general. This resulted in substantial losses to banks that followed the evaluation rule of the Commercial Code, which requires that bonds be valued at the current price if the current price is significantly lower than the acquisition price and is not expected to recover [74]. Some banks switched to evaluation on a historical cost basis, as permitted by a special statute relating to evaluation of government bonds [75], so that they could erase losses on the face of their balance sheets.

These circumstances spurred anew the banks' campaign to recover their lost territory – underwriting and dealing in government bonds. By underwriting they could earn fees. By dealing they could unload their holdings. Bank customers would more likely purchase bonds if they could sell them back to banks when necessary. The banks found support for their position in the provision of the Securities and Exchange Law which explicitly exempts government bonds [76]. Under this provision, it was believed that banks could engage in the government bond business, but they refrained from doing so because of the Ministry of Finance's administrative guidance, which expanded the segregation between the securities and banking business based on the *spirit* of the Securities and Exchange Law provision [77].

This common understanding was shared by Mr. Tanimura, President of the Tokyo Stock Exchange. He argued that the legislative history of the Bank Law of 1927 required a limited construction of the exemptive provision of the Securities and Exchange Law along the following lines. Business relating to

government bonds, notwithstanding the broad exemption in article 65, paragraph 2, of the Securities and Exchange statute, was confined to the scope specifically exempted by the proviso clause, paragraph 1, of the same article, *i.e.* selling and buying securities for customers' accounts pursuant to their written orders, for the banks' own investment purposes, or for the account of a beneficiary based upon a trust agreement [78]. The ground for his argument was that business relating to government bonds was nothing but a "business incidental to banking" within the meaning of the Bank Law of 1927 and that the debates in the Diet showed that such business should be narrowly limited [79].

Since Mr. Tanimura had experience in bank regulation as well, his argument exerted considerable influence in the debate on this issue. His argument raised the necessity of examining the extensive Diet records regarding the Bank Law of 1927. An outstanding academician supported Mr. Tanimura's view [80], whereas another prominent scholar disagreed, finding no grounds in the Diet records to support any such argument [81]. The writer finds the latter view more persuasive. The position taken by the Ministry of Finance officials changed to a great extent during the discussion in the Diet [82]. Therefore, it would not be fair to rely on any one of the answers given by the officials during the course of the discussion, except that given at the end, which accorded a rather broad interpretation to the scope of "business incidental to banking".

Moreover, if banks' business in government bonds is exempted only to the extent stipulated by the proviso clause of article 65, paragraph 1, of the Securities and Exchange Law, it would not make sense to have the provision contained in paragraph 2 in addition to the proviso clause of paragraph 1. Even if the Bank Law of 1927 should have been construed as Mr. Tanimura argues, it was modified by virtue of the later enactment of the Securities and Exchange Law of 1948. Unless this view is taken, the provision (article 65, paragraph 2) added by the legislature would be without any force from the outset.

Aside from statutory construction arguments, both the bank and securities industries employed policy arguments as well. The banking industry contended that banks' underwriting and dealing would help distribute government bonds among the public at large, something that was badly needed for the national economy [83]. The securities industry argued that government bonds had already been well distributed among the general public through the securities companies, and that allowing banks to engage in the government bond business would open the door for their involvement in the securities business in general, which would be sure to lead to banks controlling other industries as in pre-war times [84]. Behind these controversies is visible a vehement struggle between the two industries regarding their business interests, similar to that seen in the United States [85]. The difference, however, is that in Japan the

issue of protection of depositors never came to the forefront because banks have been allowed to hold securities for their own investment purposes within the limits imposed by the Antimonopoly Law [86].

6. The new Bank Law of 1981

The Securities Council, an advisory body for the Finance Minister responsible for making proposals concerning amendments to the Securities and Exchange Law [87], had never touched upon the problem of banks' involvement in securities dealings before it vaguely mentioned the necessity of examining the question in its 1973 report [88]. The report was epoch-making in that it broke the taboo, but the council did not even decide whether or not it should commence examination of Article 65 of the Securities and Exchange Law [89]. It said virtually nothing about the issue.

When the overhaul and revision of the rather outdated Bank Law of 1927 was set in motion, the Financial System Investigation Council, also an advisory body to the Finance Minister and responsible for making proposals for laws relating to banks and other financial institutions, had to say something in connection with this touchy issue. A subcommittee of that Council presented the following proposal: as an accommodation, the acquisition of securities by banks should be considered a part of the inherent business of banks, whereas underwriting, dealing, and other securities business should be regarded as "business incidental to banking" [90]. The plenary Council, however, did not take any definite position on the issue, but rather left examination of the subject to the Ministry of Finance staff [91].

The Securities Council, when it had to consider the issue in connection with amending the Securities and Exchange Law to conform to the eventual reform of the Bank Law of 1927, also left the examination of the problem to the Ministry of Finance staff, but hinted at its rather negative position with regard to banks' dealing in government bonds [92]. Both the Financial System Investigation Council and the Securities Council are composed of representatives of the industries concerned as well as academicians, so it may have been difficult for them to take a specific position which would favor one of the two industries concerned.

The Ministry of Finance set up the following basic principles when it began drafting the new version of the Bank Law: (1) the new statute should have express provisions on banks' business relating to public debt securities (national and municipal government bonds, and debt securities guaranteed by the government); (2) banks' engagement in such business should be subject to a licensing requirement pursuant to the Securities and Exchange Law and should be governed by relevant provisions of that law; and (3) the above-mentioned principles relate only to revision of the statutory provisions, and other consid-

erations might govern when implementing them [93].

After many difficulties in attempting to fit the contentions of both the banking and securities industries within the so-called three principles referred to above, the new Bank Law [94] and amendments to the Securities and Exchange Law [95] were promulgated on June 1, 1981, both of which took effect on April 1, 1982.

The new Bank Law defines the term "bank" as a person who engages in the banking business with a license granted by the Finance Minister [96]. The term "banking business" in turn is defined as a business composed of either of the following activities: (1) both taking deposits (or accumulating time deposits) and making loans (or discounting bills and notes); or (2) engaging in exchange transactions [97]. Thus, these activities are viewed as inherent banking business.

In addition to these activities of inherent banking business, a bank may engage in any of several enumerated businesses as well as other business incidental to the banking business [98]. Among the explicitly enumerated businesses which are incidental to the banking business, the following are especially relevant in connection with our topic: (1) sales of securities (confined to those made for the purpose of investment of those made on account of customers upon their written orders) [99]; and (2) underwriting (except those made for the purpose of distribution) of national government bonds, municipal bonds or bonds with government guaranty, or handling of public offerings of such underwritten bonds [100].

The new Bank Law also provides that a bank may, in addition to the inherent banking business activities and business incidental to banking, engage in underwriting, handling public offerings or secondary distributions of, sales and other transactions in, national government bonds, municipal bonds, or bonds with government guaranty, to the extent that such business does not hinder its performance of inherent banking business activities [101]. On the other hand, banks are prohibited from engaging in business other than those permitted by the Bank Law, the Secured Debenture Trust Law [102], or other statutes [103].

Thus, it is now clear that banks may engage in certain types of securities business with regard to national government bonds, municipal bonds, and bonds with government guaranty. However, in order for a bank to commence or alter this kind of business (except those incidental to banking) to a significant extent, it is necessary to obtain a license from the Finance Minister [104]. Under the new Bank Law, such a license is required only "for the time being". It is for this reason that this requirement is stipulated in the Supplementary Provisions instead of in the body of the law.

However, the Securities and Exchange Law, as amended at the same time as the new Bank Law was enacted, requires a license without the "for the time being" qualification [105]. In short, a bank must have a separate license

whenever it engages in underwriting, selling, dealing, or brokering national government bonds, municipal bonds, or bonds with a government guaranty. The amended Securities and Exchange Law also made it clear that its relevant provisions apply *mutatis mutandis* to banks doing business in such securities [106]. The Finance Minister is empowered to inspect banks engaging in government securities business when necessary for the protection of investors [107]. Transactions by banks in other securities, such as corporate shares or debentures, are permitted only where they are made for the purpose of investment or based upon customers' written order, pursuant to the new Bank Law as was discussed above [108].

According to both the new Bank law and the amended Securities and Exchange Law, it is possible now for a bank to engage in certain securities business by obtaining a license from the Finance Minister. However, it does not seem likely that the Finance Minister will grant such licenses as soon as the relevant statutes come into effect. It is reported that a committee composed of three disinterested knowledgeable persons will advise the Minister on when such licenses should be granted [109].

Aside from banks' securities business, the new Bank Law expressly provides lending limits [110]. The limits are left to cabinet order and ministerial rule but, compared with the present situation where lending limits are imposed by so-called administrative guidance [111], it would be fair to say that the rule of law principle expanded its scope. The new Bank Law also stipulates stricter requirements regarding banks' loans to directors than those imposed by the Commercial Code [112].

7. Conclusion

The Bank Law of 1981 and relevant amendments to the Securities and Exchange Law achieved progress in that they made clear the extent to which banks may engage in the securities business. Also, it is an improvement that banks are subject to the same securities regulations insofar as they engage in securities business. Unlike the United States, where bank regulators and the securities agency (SEC) are quite separate [113], both banks and securities companies are regulated by the Ministry of Finance in Japan, although day-to-day supervision is carried out by separate bureaus. This ensures equality in competitive conditions between the two industries.

On the other hand, the 1981 reform was, like almost all legislation, a product of political compromise. In order to establish a durable legal system regarding banks' involvement in securities business, it is necessary to have a persuasive policy goal based upon empirical studies and theoretical analysis.

Notes *

- [1] *Shōkētorishūhō* (Securities and Exchange Law), Law No. 25 of 1948, art. 65, para. 2.
- [2] *Ginkōhō* (Bank Law), Law No. 21, of 1927.
- [3] *Ginkōhō* (Bank Law), Law No. 59 of 1981. The new statute was promulgated on June 1, 1981, and took effect on April 1, 1982.
- [4] *Shōkētorishūhō no ichibu o kaiseisuru hōritsu* (Law Amending a Part of the Securities and Exchange Law), Law No. 62 of 1981.
- [5] *Kokuritsu ginkō jōrei* (National Bank Ordinance), Great Council of State Proclamation No. 349 of 1872.
- [6] T. Kato, *Hompō Ginkōshiron* (History of Japanese Banks) 16 (1957); S. Gotō, *Futsiginkō no Rimen to Genjitsu* (Idea and Reality of Commercial Banks) 24 (1977).
- [7] *Kokuritsu ginkō jōrei* (National Bank Ordinance), Great Council of State Proclamation No. 349 of 1872, Art. 10, §1.
- [8] *Id.* Art. 10, §2, cl. 2.
- [9] *Id.* Art. 11 §6.
- [10] *Id.* Art. 11, §1.
- [11] *Id.* Art. 10.
- [12] *Kokuritsu ginkō jōrei* (National Bank Ordinance), Great Council of State Proclamation No. 106 of 1876.
- [13] *Id.* Arts. 52, 53.
- [14] *Id.* Art. 54, cl. 2.
- [15] K. Ishizuka, *Shōken* (Securities) 77 (1958).
- [16] Hoshino, *Nippon Shihonshugi Kakuritsu-katei ni okeru Kabushiki Tampo-kin'yū* (*Loans with Share Collateral During the Developing Stage of Capitalism in Japan*), in *Nippon Shihonshugi: Tenkai to Ronri* (Capitalism in Japan: Its Development and Logic) 69 (1978).
- [17] *Ginkō jōrei* (Bank Ordinance), Law No. 72 of 1890.
- [18] *12 Meiji Zaiseishi* (Fiscal History of the Meiji era) 589 (Ōkurashonai Meiji Zaiseishi Hensankai, 1939 ed.).
- [19] *Ginkō jōrei* (Bank Ordinance), Law No. 72 of 1890, Art. 5.
- [20] *Id.* as amended by Law No. 13 of 1916, Art. 2, para. 2.
- [21] *13 Nippon Kin'yūshi Shiryō: Shōwa-Hen* (Materials on Financial History of Japan: Shōwa Era) 416 (Nippon Ginko Chosakyoku (Research Bureau, Bank of Japan) 1965 ed.).
- [22] K. Ishizuka, *supra* note 15, at 81.
- [23] *Yamaichi Shoken-shi* (History of Yamaichi Securities Company) 78, 111 (1958).
- [24] *Nippon Kōgyōginkō Gōjūnenishi* (Fifty Years of Japan Industrial Bank) 2–4, 21, 23–32 (1957).
- [25] T. Kato, *supra* note 6, at 62–65.
- [26] *13 Nippon Kin'yūshi Shiryō*, *supra* note 21, at 180, 430–31, 452, 462, 480.
- [27] *Ginkōhō* (Bank Law), Law No. 21 of 1927.
- [28] *Id.* Art. 1.
- [29] *Id.* Art. 5.
- [30] *Id.* Art. 13.
- [31] *13 Nippon Kin'yūshi Shiryō*, *supra* note 21, at 313–14, 316–17. The standard given in the officials' earlier answer was "necessary and useful" instead of "necessary or useful".
- [32] *Id.* at 317–18.

* In the romanized Japanese in these notes, an accent above a letter (e.g. á, ó, ú) indicates a long vowel.

- [33] *Id.* at 319–20.
- [34] *Yamaichi Shōken-shi*, *supra* note 23, at 290.
- [35] *Yūkashōken hikiukeyōhō* (Securities Underwriters Law), Law No. 54 of 1938.
- [36] 17 *Nippon Kun'yūshi Shiryō*, *supra* note 21, at 348, 364 (1967); *Yamaichi Shōken-shi*, *supra* note 23, at 232.
- [37] *Yūkashōkengyō torishimarihō* (Securities Broker-Dealer Law), Law No. 32 of 1938.
- [38] 17 *Nippon Kin'yūshi Shiryō*, *supra* note 21, at 301 (1967).
- [39] *Id.* at 354.
- [40] *Yamaichi Shōken-shi*, *supra* note 23, at 232, 267–79 (Table 31).
- [41] *Shiteki dokusen no kinshi oyobi kōseitōrihiki no kakuho ni kansuru hōritsu* (Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade). Law No. 54 of 1947.
- [42] *Id.* Art 11, para. 1.
- [43] *Id.* Art. 11, para. 2.
- [44] *Id.* Art. 11 para. 3, item 2.
- [45] Law No. 259 of 1953.
- [46] *Shiteki dokusen no kinshi oyobi kōseitōrihiki no kakuho ni kansuru hōritsu* (Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade). Law No. 54 of 1947, as amended by Law No. 259 of 1953, Art. 10, para. 1.
- [47] *Id.* Art. 11, para. 1.
- [48] Law No. 63 of 1977.
- [49] With regard to imposition of lending limits, *see infra* note 109 and accompanying text.
- [50] *Shōkēntōrihikihō* (Securities and Exchange Law), Law No. 25 of 1948.
- [51] *Id.* Art. 65, para. 1, main clause.
- [52] *Id.* Art. 65, para. 1, proviso clause.
- [53] *Id.* Art. 65, para 2.
- [54] *Id.* Art. 2, para. 8, introductory clause.
- [55] Banking Act of 1933, ch. 89, §16, 48 Stat. 162, 184 (current version at 12 U.S.C. §24 (1976 and Supp. III 1979)).
- [56] T. Suzuki and I. Kawamoto, *Shōkēntōrihikihō* (Securities and Exchange Law) 68–69 (1968).
- [57] Tanaka, *Kin'yūkikan no Shōkengyōmu no Kinshi ni tsuite* (*On Prohibition of Securities Business by Financial Institutions*), Zaisei Keizai Koho, No. 98, at 4 (1948).
- [58] S.C.L.C. stands for the Securities Coordinating Liquidation Committee. M. Tatsuta, *Securities Regulation in Japan*, 2 n. 10 (1970). For a discussion of the dissolution of *zaibatsu* combines, *see* Bisson, *Zaibatsu Dissolution in Japan* (1954); E.M. Hadley, *Antitrust in Japan* (1970).
- [59] Tanaka, *supra* note 57, at 5.
- [60] *Id.* at 4.
- [61] *Ginkō tō no saiken hakkō tō ni kansuru hōritsu* (Law Concerning Issuance of Debentures by Banks), Law No. 40 of 1950.
- [62] S. Gotō, *supra* note 6, at 173.
- [63] *Chōki shin'yō ginkōhō* (Long-Term Credit Bank Law), Law No. 187 of 1952. This statute allows a long-term credit bank to issue debentures up to an aggregate amount of twenty times its net worth. *Id.* Art. 8. Ordinary corporations, including banks, may not issue debentures amounting to more than double the total amount of the stated capital and the reserve fund, or the amount of net assets. *Shōhō* (Commercial Code), Law No. 48 of 1899, Art. 297; *Shasai hakkōgendo zantē-sochihō* (Law Taking Temporary Measures for a Ceiling on Issuance of Corporate Debentures), Law No. 49 of 1977. A long-term credit bank, on the other hand, may not take deposits from the general public. *Chōki shin'yō ginkōhō* (Long-Term Credit Bank Law), Law No. 187 of 1952, Art. 6, para. 1, item 3. At present three banks are doing business pursuant to this statute: Japan Industrial Bank (Nippon Kōgyō Ginkō); Japan Long-Term Credit Bank (Nippon Chōkisin'yō Ginkō); and Debenture Credit Bank (Saiken Shin'yō Ginkō).

[64] Tatsuta, *Ginkō no Shōkengyōmu (Securities Business by Banks)*, 31 Imbesutomento, No. 4, at 102 (1978).

[65] T. Suzuki and I. Kawamoto, *supra* note 56, at 53.

[66] *Chōki shun'yō ginkōhō* (Long-Term Credit Bank Law), Law No. 187 of 1952, Art. 6, para. 1, item 2.

[67] Fujisawa, *Securities Activities of Banks*, in *Lectures on Japanese Securities Regulation* 225 (1980).

[68] *Id.* at 224.

[69] *Shōhō chū kaisei hōritsu shūkōhō* (Law Enacting the Amendments to the Commercial Code), Law No. 73 of 1938, Art. 56, para. 1; *Shōkentōrihikihō* (Securities and Exchange Law), Law No. 25 of 1948, Art. 45, para. 1. *See also* M. Tatsuta, *supra* note 58, at 41–42.

[70] A. Sakai, *Kokusai Tōshiginkō to Shōtōrihō Rokuyūjōjō* (*International Investment Banks and Article 65 of the Securities and Exchange Law*), *Zaikei Shōhō*, No. 852, at 13 (1970).

[71] *Id.*

[72] *Id.*

[73] *Nippon Keizai Shinbun* (Japan Economic Journal), Feb. 9, 1974, at 1.

[74] *Shōhō* (Commercial Code), Law No. 48 of 1899, Art. 285-5, para. 3; Art. 285-2, para. 1, proviso clause.

[75] *Kokusai no kagaku keisan ni kansuru hōritsu* (Law Concerning Evaluation of National Government Bonds), Law No. 16 of 1932.

[76] *See supra* note 53 and accompanying text.

[77] T. Suzuki and I. Kawamoto, *supra* note 56, at 76; Fujisawa, *supra* note 67, at 224; 1 *Kin'yū Kanketō* (Laws Relating to Finance) 94 (*Ōkrashō Ginkōkyoku* (Bank Bureau, Ministry of Finance), 1953 ed.); H. Satake and O. Hashiguchi, *Ginkō Gyōsei to Ginkōhō* (Bank Administration and Bank Law) 154 (1967); S. Tanaka and W. Horiguchi, *Kommentāru Shōkentōrihikihō* (Commentary on the Securities and Exchange Law) 286 (1978); K. Kanzaki, *Shōkentōrihikihō* (Securities and Exchange Law) 389–90 (1980).

[78] *See supra* note 52 and accompanying text.

[79] Mr. Tanimura first made his argument in unpublished memoranda dated June 10, 1978 and May 25, 1979. He later published these memoranda in an expanded form. Tanimura, *Ginkō Gyōmu to Shōken Gyōmu (Banking Business and Securities Business)*, *Kin'yū Zaisei Jijō* (Journal of Financial and Fiscal Affairs), Oct. 1, 1979, at 14; *Id.*, Oct. 8, 1979, at 14.

[80] Yazawa, *Ginkō ni yoru Kokusai Baibai Gyōmu no Hōritsu Mondai* (*Legal Problems Concerning Banks' Business of Buying and Selling National Government Bonds*), *Shoji Hōmu*, No. 811, at 6 (1978).

[81] Kawamoto, *Ginkō no Shōken Gyōmu o meguru Hōkaishaku no Araso ni tsuite* (*On Debates Relating to Legal Construction in Connection with Securities Business by Banks*) (pt. 2), *Kin'yū Hōmu Jijō* (Journal of Financial Law), No. 936, at 8 (1980).

[82] *See supra* notes 31–33 and accompanying text.

[83] Inoue, *Shun Ginkōhō wa Gyōmuhan'i no bapponteki Kaisei o: Rekishiteki Yakuwari o oeta Shōtōrihō Rokuyūjōjō no Minaoshi wa Fukahi* (*The Case for Drastic Changes in the Scope of Business Under the New Bank Law: Inevitable Reexamination of Article 65 of the Securities and Exchange Law which has Completed its Historical Role*), *Kin'yū Zaisei Jijō* (Journal of Financial and Fiscal Affairs), Nov. 10, 1980, at 14.

[84] Hasegawa, *Shōken Gyōmu Shinshutsu wa Keizai Shihairyoku no Kyōka o maneku: Kangyō Kin'yū o fukumeta Kin'yū-Shihon Shijōron Kara no Tenkai o* (Banks' Expansion into Securities Business will Strengthen their Control over the Economy: The Case for Examination from the Viewpoint of Financial and Capital Markets Taking Governmental Financial Business into Account), *Kin'yū Zaisei Jijō* (Journal of Financial and Fiscal Affairs), Nov. 10, 1980, at 19.

[85] *See, e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971).

[86] *See supra* notes 41–48 and accompanying text.

- [87] *Shōkentorihikihō* (Securities and Exchange Law), Law No. 25 of 1948, Arts. 165–170.
- [88] *Shōken torihiki Shingikai Tōshin: Shiryō* (Report of the Securities Council: Materials) 9 (Shōkenseido Kenkyūkai (Study Group for Securities System), 1973 ed.).
- [89] Mizuno, *Shōkentorihiki Shingikai Tōshin no Igi to Tokuchō* (Meaning and Nature of the Report of the Securities Council), 24 *Kn'yū Zaisei Jijō* (Journal of Financial and Fiscal Affairs), No. 7, at 48 (1973).
- [90] *Futsuginkō no Arikata to Ginkōseido no Kaisei: Kin'yūseido Chōsakai no Tōshin* (The Way of Commercial Banks and Reform of the Banking System: Report of the Financial System Investigation Council) 45 (Kin'yūseido Kenkyūkai (Study group for financial systems), 1979 ed.).
- [91] *Id.* at 25.
- [92] *Shōkentorihiki Shingikai Ikensho, "Kōshasai-shijō Tōmen no Shomondai ni tsuite"* (Report of the Securities Council "On Problems Regarding Bond Markets"), in Okurashō Shōkenyoku Nempō, Shōwa Gojūgonen-ban (Securities Bureau, Ministry of Finance, 1980 Annual Report) 61–65 (1981).
- [93] Tsuchida, "Shōken San-gensoku" wa Kin'yūkai Zenshin e no Fuseki ("Three Principles on Securities" are an Advanced Base for Financial Industry), *Kn'yū Hōmu Jihō* (Journal of Financial Law), No. 950, at 8–10 (1981).
- [94] *Ginkōhō* (Bank Law) Law No. 59 of 1981.
- [95] *Shōkentorihikihō no ichibu o kaiseisuru hōritsu* (Law Amending a Part of the Securities and Exchange Law), Law No. 62 of 1981.
- [96] *Ginkōhō* (Bank Law), Law No. 59 of 1981, Art. 2, para. 1.
- [97] *Id.* Art. 2, para. 2.
- [98] *Id.* Art. 10, para. 2 introductory clause.
- [99] *Id.* Art. 10, para 2, item 2.
- [100] *Id.* Art. 10, para. 2, item 4.
- [101] *Id.* Art. 11.
- [102] *Tampotsuki Shasai Shintakuhō* (Secured Debenture Trust Law), Law No. 52 of 1905.
- [103] *Ginkōhō* (Bank Law), Law No. 59 of 1981, Art. 12.
- [104] *Id.*, Supplementary Provisions, Art. 5.
- [105] *Shōkentorihikihō* (Securities and Exchange Law), Law No. 25 of 1948, as amended by Law No. 62 of 1981, Art. 65-2, para. 1.
- [106] *Id.*, Art. 65-2, para. 3.
- [107] *Id.*, Art. 65-2, para. 5.
- [108] See *supra* note 99 and accompanying text.
- [109] Shiraiishi, *Ginkōhō tō no Kaisei ni tsuite* (On Amendments to the Bank Law and Other Statutes), *Shōji Hōmu* (Commercial Law Review), No. 909, at 4 (1981).
- [110] *Ginkōhō* (Bank Law), Law No. 59 of 1981, Art. 13.
- [111] Director, Bank Department, Ministry of Finance, Release, *Ginkō no Ōguchi Yūshi Kisei ni Kansuru Ryūjikkō ni tsuite* (On Matters to be Taken Into Account as to Regulation of Big Loans by Banks) (Dec. 2, 1974).
- [112] *Ginkōhō* (Bank Law), Law No. 59 of 1981, Art. 14.
- [113] See, e.g., 1 Securities and Exchange Commission, Bank Securities Activities 5, 7 (1977); 3 *id.* 5–8.

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