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BOOK REVIEW

JAPANESE SECURITIES REGULATION. Edited by Louis Loss, Makota Yazawa, and Barbara Ann Banoff. Tokyo: University of Tokyo Press; Boston, Little Brown and Company, 1983. Pp. xxxv, 420. Index.

REVIEWED BY PERCY R. LUNEY, JR.*

*Japanese Securities Regulation*¹ is a comprehensive analysis and commentary of Japan's securities laws, which fills a significant gap in the available English language publications of the Japanese legal system. In addition to a thorough discussion and summary of Japan's securities laws and pertinent cases, the text includes six appendices containing translations of the Japanese Securities and Exchange Law, Enforcement Order of the Securities and Exchange Law, Law on Foreign Securities Forms, Enforcement Order of the Law on Foreign Securities Forms, Securities Investment Trust Law, and Banking Law. The joint team of Japanese and American authors and editors should be commended for their efforts in producing this significant contribution to legal education. For anyone interested in the Japanese securities industry, this book is mandatory reading.

Practitioners accustomed to dealing only in the American context may have difficulty initially in understanding Japanese securities regulation because of the different purposes underlying such regulation in the two countries. American stockholders typically provide working capital for business ventures and expect a high rate of return on their investment. The average debt to equity ratio is approximately thirty percent to seventy percent. American management seeks to maximize profits and to guarantee a high rate of return in the form of dividends to the stockholders-investors. Takeovers and mergers through stock ownership transfers are common business practices. The Securities and Exchange Commission and the securities laws are products of the Great Depression and Congress' reaction to the collapse of the United States securities market. Congress

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Professor Luney neither practices nor teaches securities regulation. He has, however, studied Japan and its legal system. This review does not attempt to comment on the quality of the translations.

¹ L. LOSS, M. YAZAWA & B. BANOFF, *JAPANESE SECURITIES REGULATION* (1983) [hereinafter cited as *JAPANESE SECURITIES REGULATION*].

sought to protect the investor and stabilize the securities market to provide capital for economic growth in the United States.

Securities laws in Japan and their administration by the Ministry of Finance were implemented for different reasons. The Meiji Government, which came to power in 1867, viewed a stable securities market as a means to encourage Japan's economic development and facilitate Japan's involvement in world trade. Even the current law, enacted with the assistance of United States occupation authorities, was considered necessary for Japan's economic development and effective participation in the international marketplace.

Japanese companies generally operate with debt equity ratios closer to eighty percent to twenty percent. Working capital is provided by financial institutions through loans. Banks and other institutions providing loans become major stockholders with a genuine interest in long-term corporate growth. Stockholders do not expect a high short-term rate of return on their investment. Dividends are small by United States standards and normally represent less than half of all corporate profits. Management and stockholders share common objectives aimed at increasing market share and guaranteeing continued long-term economic growth. Takeovers and mergers are rare in Japan because the major shareholders—the financial and business institutions—invest as a means of doing business. One commentator explains:

At any event the typical Japanese company today will have ten or twenty important institutional shareholders, in which it in turn will hold shares. Unlike Western institutional shareholders, which invest largely for dividends and capital appreciation, Japanese institutional shareholders tend to be the company's business partners and associates; shareholding is the mere expression of their relationship, not the relationship itself.²

The authors do not venture beyond the exploration of Japanese securities regulation. This approach has created an excellent, well-organized reference work, but it also may mislead the foreign reader who has little or no background in the Japanese political, social, and legal systems. The inclusion of a summary of Japanese political, legal, and administrative processes or a listing of reliable sources for this information, emphasizing the importance of reading background material would have been helpful. The authors' treatment of "administrative guidance," a unique aspect of Japanese administrative law, illustrates the need for more background information in the book.

Administrative guidance (*gyosei shido*) is an extralegal source of governmental power for the implementation of government regulation and supervision. It must be distinguished from the executive, legislative, and administrative powers in the United States. Professor Dan F. Henderson³ has described "administrative guidance" as power

² R. CLARK, *THE JAPANESE COMPANY* (1979).

³ University of Washington School of Law.

derived again from traditional concepts of inherent power of the administration, largely a carry-over from imperial theories, so that administrative guidance is more the mode of expressing these powers than their source By its very nature, guidance is not legally defined, nor are there rules or court precedents on such a subject⁴

Administrative guidance refers to actions by governmental agencies that result in voluntary compliance with government policies or objectives. Actions may take the form of instructions (*shiji*), requests (*yobo*), warnings (*keikoku*), suggestions (*kankoku*), and encouragements (*kansho*). The government agency's suggestions or recommendations are not enforceable in a court, and no legal sanctions against a noncomplying party are available. All forms of administrative guidance have no legal binding power or coercive authority.

Failure to comply with administrative guidance does not result in official punishment or judicial order to perform. Failure to comply does result, however, in a loss of face by the governmental agencies, which subsequently may become extremely uncooperative in providing future services, advice, regulatory exceptions, licenses, and permits to the noncomplying party.⁵ Government agencies also may publicize noncompliance as a sanction or use the threat of such actions to encourage compliance. Complying parties may be rewarded through government subsidies.

Although specific statutory authority for administrative guidance can be found in several legislative enactments,⁶ the common view is that administrative guidance does not require a statutory basis, and authority exists in the broad mandates in the legislation establishing each government agency.⁷ Normally, administrative guidance is considered a prerequisite to a government agency's exercise of a right to issue legally enforceable orders.⁸ Administrative guidance is used effectively to provide businesspersons with statements of government policy upon which they may rely in making business decisions. Sometimes administrative guidance in the form of a recommendation will prompt the business decision. Unfortunately, the authors do not adequately explain the concept of administrative guidance or its importance in the context of the Japanese legal system. Instead the authors assume familiarity with the concept and discuss it cursorily. For example, Makota Yazawa states:

[A]dministration of the law almost always takes the form of the Bu-

⁴ D. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN* 200-01 (1973).

⁵ Narita, *Administrative Guidance*, 2 *LAW IN JAPAN* 45 (Anderson Trans. 1968).

⁶ See, e.g., Noise Regulation Law (Articles 9, 12, & 15); Petroleum Supply Rationalization (Article 15); and Offensive Order Prevention Law (Article 10).

⁷ Yamanouchi, *Administrative Guidance and The Rule of Law*, 7 *LAW IN JAPAN* 22 (1974); Narita, *supra* note 5; Shioro, *Gyosei Shido (Administrative Guidance)* in 6 *GYOSEI HO KOZA (LECTURES IN ADMINISTRATIVE LAW)* 13-14 (Tancka, Hara & Yanase ed. 1966).

⁸ Yamunouchi, *supra* note 7, at 26-27.

reau's formal or informal recommendations to or disciplinary action against the issuers of securities or broker-dealers The authority vested in the Bureau to sue for injunctions against unlawful acts has never been invoked, and there have been very few issues raised by private litigants regarding construction of any clause of the Securities and Exchange law.⁹

Similarly, Katsuro Kanzaki describes the Minister of Finance's use of a recommendation rather than an order to amend a registration statement without explaining that such recommendation is an example of administrative guidance.¹⁰ Also, Misao Tatsuta briefly describes tender offers as being new to Japan and subject to the guidance of the Ministry of Finance.¹¹

Japanese securities laws rarely have been interpreted judicially, because few suits have been initiated. Ministry of Finance officials have provided administrative interpretations in their implementation of the regulatory process. These interpretations, often taking the form of administrative guidance, are important to the analysis of Japanese securities regulation. The editors perhaps should have expanded the preface to highlight the importance of these administrative interpretations to benefit the foreign reader who has no background in Japanese law and culture. The practitioner must be made aware that

[i]n Japanese culture and society, what is not expressed in words is equally important as what is written in black and white. Under certain circumstances the latter is considered less important than the former. This may be generally characterized as consensus or common understanding of the parties concerned. Accordingly, even certain statutory provisions or contractual provisions are often treated as inapplicable or inoperative (the Japanese term used in such instances is *ku-bun* which may be literally translated as "void sentence") without formal amendment thereof, because they have lost the substance thereof through the passage of time or drastic change in the circumstances which formed the socio-psychological

⁹ M. Yazawa, "A Synopsis of Securities Regulation in Japan," Chapter 1-B, JAPANESE SECURITIES REGULATION at 25. One author has noted:

As is common with other areas of economic regulation in Japan (with perhaps a very modest exception in the field of antimonopoly legislation administered by the Fair Trade Commission), there have been very few court precedents, civil or criminal, relating to securities regulation. Accordingly, with its supervisory function over the securities companies and listed companies, and also with its enormous influence on the national economy as a whole and the financial markets in particular, administrative interpretations of the relevant statutes by the Ministry in the format of directives, guidelines and *friendly persuasion* is of the utmost importance for day-to-day operation in the Japanese securities market, as well as long-term planning and even for financing by Japanese companies and banks outside Japan.

Hamada, *The General Structure of Securities Law*, in 5 DOING BUSINESS IN JAPAN § 1.02[4A] (Z. KITAGAWA ED. 1982) (EMPHASIS ADDED).

¹⁰ Kanzaki, "The Disclosure System and Regulation of the Distribution of Securities," Chapter 11, JAPANESE SECURITIES REGULATION at 51 n.26.

¹¹ Tatsuta, "Proxy Regulation, Tender Offers, and Insider Trading," JAPANESE SECURITIES REGULATION at 187.

or economic basis of the consensus or common understanding justifying such statutory or contractual provisions. Therefore, mere compliance with the wording of, say, the disclosure requirements under SEA (Securities and Exchange Act) does not give much mileage in the actual world of the Japanese securities market.¹²

The Japanese experience in securities regulation cannot be removed from the realities of the Japanese political and administrative processes. *Japanese Securities Regulation* provides an excellent survey of Japanese securities laws, although it frequently assumes that the foreign reader has knowledge of the administrative processes of Japan. Without such knowledge, the average American reader may interpret the work using American legal standards and may expect the Japanese courts to act like American courts. Although a one-volume reference work cannot be expected to explain every issue and its implications in detail, the interpretation and enforcement of the securities laws cannot be understood without a firm grasp of Japanese administrative processes and the attitudes, values, and modes of conduct governing the Japanese social system. Readers should have been made aware of the need for that understanding, either by way of explanation within the book or by way of encouragement to consult other sources.

¹² Hamada, *supra* note 9, § 1.02[46].

