

FINANCIAL REGULATION BULLETIN

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FAQ regarding Foreign Bank Agency Services

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I. Introduction

On 26 June 2014, the Japanese Financial Services Agency (the “FSA”) published a “FAQ regarding Foreign Bank Agency Services” (the “FAQ”). Five years have passed since the Foreign Bank Agency Services scheme was introduced and since then various inquiries have been made to the FSA on the practice of Foreign Bank Agency Services. Such inquiries have been organized, arranged and have been published in the form of the FAQ, which consists of 21 inquiries. Of these inquiries, we have featured the key points below.

II. Key points of the FAQ

1. Scope of “Foreign Bank Agency Services”

(1) Definition of “Foreign Bank Agency Services”

“Foreign Bank Agency Services” are defined as an agency or intermediation for the business of a foreign bank being entrusted by a foreign bank (Article 52-2, Article 10, Paragraph 2, Item 8-2 of the Banking Act) whilst “Bank Agency Services” are defined as acting as an agent or intermediary for the conclusion of a contract on stipulated core banking businesses, such as deposit taking and the provision of loans and on behalf of a bank licensed in Japan (Article 2, Paragraph 14 of the Banking Act).

The FAQ confirmed that the meaning of “being entrusted by a foreign bank” and “agency or intermediation for the business of a foreign bank” with regards to Foreign Bank Agency Services, and the meaning of “on behalf of

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a bank” and “acting as an agent or intermediary” with regards to Bank Agency Services, can respectively be considered in the same way.

In particular, it has been further clarified that: (a) “being entrusted by a foreign bank” means acting “on behalf of a foreign bank”; (b) acting as an agent or intermediary “for a customer” will not be seen as Foreign Bank Agency Services; and (c) “for a customer” means “to be requested by a customer, for the interest of the customer, to act on the side of customer” (VIII-3-3-1-1(3)^① of the Comprehensive Guidelines for Supervision of Major Banks, etc) and these interpretations are in line with those of Bank Agency Services (Q2^④ of the FAQ).

In addition, the FAQ has made it clear that an agency or intermediation of the follow-up services to a customer to be performed after a foreign bank and its customer have entered into a contract do not fall within the “agency or intermediation for the business” as used in the definition of Foreign Bank Agency Services and therefore will not be seen as Foreign Bank Agency Services (Q2^⑥ of the FAQ). This interpretation is also in line with that of Bank Agency Services.

(2) Global booking

As mentioned above, “agency or intermediation for the business” in the definition of Foreign Bank Agency Services is the same concept as “acting as an agent or intermediary” in the definition of Bank Agency Services (Q7 of the FAQ). The FAQ has further indicated that global booking¹ will not be instantly seen as an “agency or intermediation for the business” (i.e., it will not be seen as Foreign Bank Agency Services), but rather a decision will be made by considering whether there is substantially an entrustment of the business of the foreign bank (Q14 of the FAQ).

2. Involvement of a principal foreign bank in Foreign Bank Agency Services

Q15 of the FAQ has addressed the following interpretative guidelines regarding the involvement of a principal foreign bank², which is not licensed to conduct banking business in Japan, in Foreign Bank Agency Services, which

¹ Booking of all transactions of a global bank in one office regardless of the office or jurisdiction where such transactions are conducted for the purpose of global uniform management.

² A foreign bank which entrusted Foreign Bank Agency Services to a bank or a branch of a foreign bank in Japan.

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should be performed by an authorized foreign bank's agency bank³:

- (i) Apart from cases where a foreign bank's agency bank is conducting Foreign Bank Agency Services with approval, if a principal foreign bank itself is acknowledged to be conducting banking business in Japan, it will violate the banking license requirements under the Banking Act.
- (ii) Assuming a foreign bank's agency bank is conducting Foreign Bank Agency Services with approval, if the support from staff of the principal foreign bank will benefit the customer (e.g., the customer wishes to receive explanations from such staff) and the role of such staff remains supportive to Foreign Bank Agency Services provided by the foreign bank's agency bank (e.g., (a) staff of the principal foreign bank accompany the staff of the foreign bank's agency bank to support such staff, or (b) the staff of the principal foreign bank secondarily joins a conference call organized by staff of the foreign bank's agency bank) such activities by staff of the principal foreign bank will be deemed to be part of the activities of the foreign bank's agency bank and therefore there will be no violation of the banking license requirements under the Banking Act by the principal foreign bank.
- (iii) On the other hand, in the event that the services provided by the staff of the principal foreign bank go beyond the supportive role as mentioned in (ii) above (e.g., if staff of the principal foreign bank accompany staff of the foreign bank's agency bank and proactively solicit customers) the principal foreign bank will violate the banking license requirements under the Banking Act, which in turn will pose a question as to the responsibility of the supervision over staff of the principal foreign bank by the foreign bank's agency bank.
- (iv) Therefore, if a foreign bank's agency bank has a principal foreign bank support its Foreign Bank Agency Services, the foreign bank's agency bank is required to take record of the activities of the staff of such principal foreign bank, as well as to supervise and control such staff adequately (including the strict compliance of the various Japanese financial laws and regulations).

In the public comments published in 2008 when the Foreign Bank Agency Services scheme was introduced, with regards to the issue as to what extent a

³ A bank or a branch of a foreign bank in Japan which provides Foreign Bank Agency Services to a foreign bank.

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principal foreign bank can itself be involved in Foreign Bank Agency Services, only a general response was provided by the FSA stating that if the principal foreign bank is acknowledged to be directly conducting business in Japan, it will constitute a violation of the Banking Act and other relevant laws.

However, in the FAQ (as mentioned in (ii) to (iv) above), it has been made clear that for as long as the role of the principal foreign bank remains supportive to Foreign Bank Agency Services, such supportive services are permitted without constituting a violation of the Banking Act. In practice, it should be considered further whether a brighter line should be drawn on the boundary of such supportive services.

3. Guarantee and security provided by the Japanese parent company

When a loan transaction takes place between an office/entity of a foreign bank outside Japan and a subsidiary of a Japanese company outside Japan, a guarantee and/or security interests are often required to be provided by the Japanese parent company as a condition precedent. An issue which should be considered in such cases is: whether the approval of Foreign Bank Agency Services will be necessary when an office/entity of a foreign bank in Japan is entrusted by an office/entity of the same foreign bank group outside Japan to act as an agency or intermediary for guarantee/security agreements between such offshore office/entity and the Japanese parent company.

If necessary, the office/entity of the foreign bank in Japan would need to obtain separate approvals for Foreign Bank Agency Services for each of the overseas entities in its foreign bank group which provides finance to an overseas subsidiary of a Japanese company, which poses a large burden.

Q21 of the FAQ states that in principle an approval of Foreign Bank Agency Services will be required when agency or intermediation by the office/entity of a foreign bank in Japan takes place, even if the transaction is between an overseas office/entity of a foreign bank group and an overseas entity (including an overseas subsidiary of a Japanese company). Q21 of the FAQ also indicates the following interpretative guidelines:

- (i) If it is acknowledged that an office/entity of a foreign bank in Japan is substantially acting as an agency or intermediary for the loan transaction between an overseas office/entity of the foreign bank group and a Japanese company (e.g., (a) cases where an office/entity of a

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foreign bank in Japan solicits a Japanese company on behalf of an overseas office/entity of the foreign bank group to enter into a loan transaction between the foreign bank and an overseas subsidiary of a Japanese company, or (b) cases where an office/entity of a foreign bank in Japan negotiates with a Japanese company on behalf of an overseas office/entity of the foreign bank group and the conditions of the loan to an overseas subsidiary of the Japanese company is practically agreed between the office/entity of the foreign bank in Japan and the Japanese company), such activities will be seen as an intermediation of the loan and will be subject to the approval of Foreign Bank Agent Services.

- (ii) On the other hand, for example, in cases where, without situations as described in (i) above having occurred, the conditions of the loan are decided between an overseas office/entity of an foreign bank group and an overseas subsidiary of a Japanese company and an office/entity of the foreign bank in Japan is entrusted by the overseas office/entity of the foreign bank group only to perform the execution of the guarantee/security agreements (including the explanation required for the execution of such agreements), such acts will not be subject to the approval of Foreign Bank Agency Services.

These interpretative guidelines will be useful for foreign banks that provide finance to overseas subsidiaries of Japanese companies with guarantee and/or security provided by a Japanese parent company.

III. Conclusion

In addition to the key points discussed above, the FAQ provides useful guidance on a variety of transactions, such as the interbank market and syndicated loans. It is hoped that the FAQ will improve the transparency and predictability of the application of the regulations thereby enabling foreign banks to provide more efficient financial services to businesses expanding globally.

NEWS

- [Firm ranked 4th in the FT Law 25 Asia-Pacific Headquartered Law Firms](#)
The Financial Times published its first Asia-Pacific Innovative Lawyers Report on 12 June 2014. Mori Hamada & Matsumoto was ranked 4th in the FT Law 25 list of Asia-Pacific Headquartered Law Firms. In the

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Financial Times report, we received commendations for our work in practice areas of corporate, real estate and finance and for our strategy to serve clients more effectively in the ASEAN region.

Although in its first year in Asia-Pacific, the FT Innovative Lawyers Report is regarded as one of the top legal rankings, running into its ninth year in Europe and the rankings are widely respected.

➤ **Firm received awards at ALB Japan Law Awards 2014**

Mori Hamada & Matsumoto earned 10 awards at the ALB Japan Law Awards 2014 organized by Asian Legal Business (ALB), an internationally-recognized legal journal and a part of the Thompson Reuters Group. Our awards included Japan Deal of the Year and Japan Law Firm of the Year.

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