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### **A Story of Three Bank-Regulatory Legal Systems: Contract, Financial Management Regulation, and Fiduciary Law**

Tamar Frankel

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## A Story of Three Bank-Regulatory Legal Systems: Contract, Financial Management Regulation, and Fiduciary Law

TAMAR FRANKEL<sup>†</sup>

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ABSTRACT: How should banks be regulated to avoid their failure? Banks must control the risks they take with depositors' money. If depositors lose their trust in their banks, and demand their money, the banks will fail. This article describes three legal bank regulatory systems: Contract with depositors (U.S.); a mix of contract and trust law, but going towards trust (Japan), and a full trust-fiduciary law regulating banks (Israel). The article concludes that bank regulation, which limits the banks' risks and conflicts of interest, helps create trustworthy banks that serve their country best.

KEYWORDS: *Banking; Trust; Regulation; United States; Japan.*

## 1. INTRODUCTION

Banks offer crucial services to society. First, they offer depositors a reliable and safe place to deposit their money, as well as a money transfer service. Second, they intermediate between depositors and borrowers, lending deposit money to reliable borrowers. Banks hold, and have power over, other people's money. Banks intermediate between short-term lenders (depositors) and long-term borrowers.

Yet, by definition, these two services create a risky structure for banks. Deposits are short-term and expect instant liquidity; loans are long-term and undertake payment on specific dates. Depositors expect truly low risk; the risk posed by the borrowers is likely to be higher. In addition to an inherently risky structure, the income from depositors and borrowers may be insufficient to cover banks' cost of services, which may raise another source of risks for banks. Banks attract additional capital by selling their underlying loans in the markets, and to the extent permitted, by offering other financial services. Banks use their profits as backups to protect themselves against "runs," and to reward their employees and managers.

Most importantly, banks cannot survive without their depositors' trust. By definition banks do not hold all their depositors' money in cash. A "bank run" in which more than the usual deposits is demanded by the depositors will cause a bank to fail. To gain the depositors' trust, banks are subject to constraints in using their lending power. Not only the laws, but also the public's view and trust, are crucial to banks' survival anywhere in the world.

The risks to banks cannot be evaluated without considering other financial services that are offered by bank holding companies, under the same roof. These are the bank conglomerates, to which the banks belong. The conglomerates offer underwriting and brokerage, financial advisory services and financial management (e.g. mutual funds), trust services and securitization services, insurance and alike: a one-stop financial service.

The financial services in Bank Conglomerates (BCs) are differently regulated, have different cultures and face different market competition and

need for customers' trust to a different extent. The purpose of a conglomerate bank is to provide its customers with all financial services. The issue, which these conglomerates face, is how to structure an *overall unified culture*, regardless of the particular laws that may govern each of their services and regardless of the market competition by singular services.

Because banks are crucial to both the economy and the financial system, as well as vulnerable to failures, various countries have regulated their banks. These regulations are designed (1) to prevent banks from making risky loans or engaging in other risky financial activities, and (2) to protect banks from depositors' demands, which the banks cannot meet and could not, perhaps, anticipate: that is, to protect banks from unexpected "bank runs;"<sup>1</sup> and (3) to support bank-stability in many other ways such as providing banks with monopolies over certain services to increase their returns.

Like many other fiduciaries, banks hold, and have power over, other people's money. Banks intermediate between short-term lenders (depositors) and long-term borrowers. To gain the depositors' trust, banks are subject to constraints in using their lending power. Not only the laws, but also the public's view and trust, are crucial to banks' survival anywhere in the world.

Banks are regulated differently in different countries. The regulation is affected by the history of the countries' financial systems, the past bank failures which they suffered, the size of the banks, as well as their national and internal culture. Because today most banks around the world are open to serve most people around the world, these differences may have greater

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<sup>†</sup> A long-time member of the Boston University School of Law faculty, she was a visiting scholar at the Securities and Exchange Commission (1995–1997) and at the Brookings Institution (1987). She has taught and lectured at Oxford University, Tokyo University, Harvard Law School, and Harvard Business School. She consulted with the People's Bank of China and lectured in Canada, India, Malaysia, and Switzerland. A native of Israel, she served as an attorney in the legal department of the Israeli Air Force, an assistant attorney general for Israel's Ministry of Justice and the legal advisor of the State of Israel Bonds Organization in Europe. She has been in private practice in Israel, Boston, and Washington, DC and is a member of the Massachusetts Bar, the American Law Institute, and The American Bar Foundation.

<sup>1</sup> See, e.g., John Morley, *The Regulation of Mutual Fund Debt*, 30 YALE J. ON REG. 343, at 361 (2013) (citing RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 296–307 (4th ed. 2009)) (noting that bank regulation restricts amount of debt banks may carry and regulates riskiness of banks' loans and other asserts); Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1, at 30–32 (2014) (noting role of reserve requirements and deposit insurance in mitigating risk of runs).

impact on many more people than the impact they had in the past. The purpose of this article is to learn from these differences.

All banks aim at gaining and maintaining their depositors' and their investors' trust and commitment. In the last analysis, the banks will maintain their trust by limiting their exposure to two main risks: the risk of losing assets, and the risk of losing the depositors' and investors' trust. The following three examples describe in general terms the legal systems in three countries, designed to gain and maintain the banks' depositors and investors' trust.

Like other institutions that hold other people's money, banks hold, and have power over, other people's money. Their services involve risks, and invite regulatory focus. To gain the depositors' trust, banks are subject to constraints in using their power. Not only the laws, but also the public's view and trust, are crucial to banks anywhere in the world.

This Article offers a short review of three different legal systems that regulate banks, and affect their culture. The three banking regulatory versions are the laws in the United States, in Japan, and in Israel. The descriptions focus on the principles forming the foundation of the banks' regulation, their regulators' attitude, and the banks' culture. Considering the importance of banks' trustworthiness, this Article highlights the means by which banks' culture is created, and the means by which their trustworthiness is achieved. These means reflect the culture of the countries in which the banks operate.

Part one of this Article describes bank regulation in the United States. The second part describes the design of banks and their regulation in Japan. The third part discusses bank regulation in the Israel. In conclusion, the comparisons offer food for thought.

## **2. WHY IS THE DEPOSITORS' TRUST CRUCIAL TO THE SURVIVAL OF ANY BANK?**

Banks offer crucial services to society, but these services involve risks, and regulatory focus. The first and foremost public service of banks is to offer depositors a reliable and safe deposit and money transfer service. The second

service is to lend deposit money to reliable borrowers. By definition, these two objectives create a risky structure for banks. Deposits are short-term, while loans are long-term. Depositors rely on the bank's credit strength, which might be higher than that of the banks' borrowers. The income from depositors and borrowers may not be adequate to fund and compensate bank services. A bank's failure, however, severely injures the financial system.

Hence, in one way or another, countries have regulated banks (1) to prevent them from making risky loans and engaging in other risky financial activities, and (2) to protect banks from depositors' demands, which the banks cannot meet and could not, perhaps, anticipate: that is, to protect banks from unexpected "runs."<sup>2</sup> The United States had its share of bank failures; and in the 1930s Congress designed laws to avoid such failures in the future.<sup>3</sup> Other countries have been engaged in similar preventive activities and regulations. Countries have used different legal systems and techniques to strengthen the depositors' trust in their banks.

Thus, all banks are supported by laws and regulations. Some laws are enabling bank activities (perhaps to increase their profitability), and some are restricting bank activities (to avoid bank risk-taking and losses that might undermine the banking system). Banks attract additional capital by selling their underlying loans in the markets, or by offering various services and by organizing bank holding companies, that issue securities to the public. Banks use their profits as backups to protect themselves against "runs," and to reward their employees and managers.

All banks aim at gaining and maintaining their depositors' and their investors' trust and commitment. In the last analysis, the banks will maintain the trust in them when they limit their exposure to two main risks: the risk of losing assets, and the risk of losing the depositors' and investors' trust. The following three examples describe in general terms the legal systems in three countries, designed to gain and maintain the banks' depositors and investors' trust.

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<sup>2</sup> *Id.*

<sup>3</sup> See Banking Act of 1933, ch. 89, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

### **3. THE U.S. BANKS, THEIR VIEW, AND THE VIEW OF THEIR REGULATORS IN MAINTAINING THE TRUST OF THEIR DEPOSITORS AND THEIR INVESTORS**

Banking law in the United States is based on the model of contractual relationships between the banks and their depositors on the one hand and their borrowers on the other hand. Banks borrow from depositors by contract and lend to borrowers by contract. Contract law applies to both types of transactions. Bank holding companies are issuing securities, like any other business. The purpose of the distribution is to raise funds from investors based on the profitability of the banking enterprise. Revenues are designed to satisfy their holding companies' shareholders, as well as their management and employees. The bank holding company is therefore viewed like any other holding company that owns one or more enterprises. Currently bank holding companies hold a variety of financial services. These may include trust services, money management services, brokerage, and underwriting.

#### **3.1. A BIT OF HISTORY**

The United States has had its share of bank failures; and in the 1930s Congress designed laws to avoid such failures in the future.<sup>4</sup> These laws have seen fundamental changes. Other countries have been engaged in similar preventive activities and regulations. Countries have used different legal systems and techniques to strengthen the depositors' trust in their banks.

Thus, with the demise of banks in the 1930s, Senator Glass and Representative Steagall led Congress and the bank regulators to enact the Glass-Steagall Act of 1933.<sup>5</sup> This statute prohibited banks from engaging in intermediation among borrowers and lenders in the markets. The statute limited bank intermediation to linking depositors and borrowers, whom the banks could examine and evaluate.

In order to reduce the risk of bank intermediation and to assure depositors, the Act provided banks not only with financial backup (Federal Deposit Insurance Corporation) (FDIC) that offers government guarantees to

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

deposits up to \$250,000.<sup>6</sup> In addition, the Glass-Steagall Act allowed banks to offer trustee-services for small trusts and fill the gap that opened when trust companies that offered these services failed.<sup>7</sup> Further, the Glass-Steagall Act limited the banks issuance of securities to the markets.<sup>8</sup> Thus, the method of ensuring the banks' stability and reliability was to restrict the ability of the banks to take risks with the depositors' money, as they did during the heyday of the 1920s, and to back bank deposits with government guarantees. In addition, the Act imposed limitations on banks' financial services. Brokerage, underwriting, mutual funds management and investment advisory services were outside the banks' authorized activities. Bank holding companies' activities and financial structure were limited as well.

However, underlying the Glass-Steagall Act was the legal characterization of bank acceptance of deposits as contract obligations of borrowers. Depositors obtained an IOU from their bank and banks were treated and are treated today as borrowers. Similarly, the bank lending was under a contract, with some additional bank rights.

Not surprisingly, the banks' culture in the years that followed the 1930s disaster was conservative. Many bankers served often as reliable and independent advisers to their depositors and others. They were the ultimate conservative borrowers.

Bank regulators' activities and approach reflected another aspect to the "reliable borrower" model. Presumably, in some respects, bank regulators, such as the Office of the Comptroller of the Currency, continued to believe that the more profitable business banks will engage in, the less risky banks' business will be. Therefore, the OCC, for example, continued to question the Glass-Steagall Act's limitations.

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<sup>6</sup> See Banking Act of 1933, ch. 89, Pub. L. No. 73-66, *see* 8, § 12B, 48 Stat. 162, at 168-80 (current version at 12 U.S.C. §§ 1811-1835a (2012)).

<sup>7</sup> See *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) (holding that Glass-Steagall Act does not prohibit bank from pooling trust assets).

<sup>8</sup> See Banking Act of 1933, ch. 89, Pub. L. No. 73-66, §§ 16, 20, 21, 32, 48 Stat. 162, at 184-85, 188-89, 194 (codified as amended at 12 U.S.C. § 24 (Seventh), § 78 (repealed 1999), § 377 (repealed 1999), § 378 (2012)).



Regulators pursued their approach prior to the demise of the markets in the 1930s, and continued to press for expanding the banks' financial services.<sup>9</sup> Moreover, throughout the years starting with the passage of the Glass-Steagall Act, and especially when the stock markets began to gain some of their former halo and trust, bank regulators pressed hard to reduce and eliminate the constraints of the Glass-Steagall Act. That pressure was finally successful in 1999. The Act was essentially eliminated.<sup>10</sup>

Even before the revocation of the Glass-Steagall Act, America's banks faced an internal conflict between lending officers, who were concerned with the reliability of the borrowers, and the salespersons, who were concerned with selling the banks' loans to other banks. These sales were achieved, first, by selling participations in large loans to other banks ("loan participations"). The main lender remained the lender of the large borrower, but could, as trustee to other banks, sell participations in the loans.<sup>11</sup>

After the demise of the Glass Steagall Act, the door was opened to bank business in brokerage, mutual funds, and various other financial services. That is when banks developed swaps in fixed interest rates with variable interest rates. Then they joined the horde of lenders who pooled the loans they held into a legal unit and caused the unit to distribute its securities representing interests in the loans and create a market in its securities. That process was entitled "securitization" and bears the name today.

However, when the banks were allowed to package the loans they made and sell them to the investors in the markets, the concern about the reliability of the borrowers was reduced. After all, the system allowed the banks to reduce their risks by both transferring the loans and by shortening the loan periods, depending on how fast they could package and sell the loans

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<sup>9</sup> For example, a bank regulator in 1916 demanded that banks be allowed to engage in insurance business. 53 Cong. Rec. 11,001, Letter from John Skelton Williams, Comptroller, Currency, to Robert L. Owen, Chairman & Currency Comm., Senate Bank (Jul., 1916), *quoted in* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, at 35-36 (1996). In 1916 Congress allowed national banks in places not exceeding 5,000 inhabitants to act as insurance agents or brokers. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, at 753-54 (codified as amended at 12 U.S.C. § 92 (2012)).

<sup>10</sup> See Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 101, 113 Stat. 1338, at 134 (repealing 12 U.S.C. §§ 78, 377).

<sup>11</sup> See TAMAR FRANKEL, SECURITIZATION 311-521 (Ann Taylor Schwing ed., 2nd ed. 2005).

by pooling and selling the securities of the pools in the markets. From the point of view of the law, this process helped the banks' financial reliability.

In addition to securitization, banks became engaged in collecting the payments from small borrowers (whether the borrowers were bank borrowers or the borrowers of other lenders) and paying the collected amounts to others (including banks) that acted as trustees to the securitization units.

Throughout this period and later, the view of the banks of the United States was that of lending and borrowing under contract. Banks borrowed by contract and lent by contract. Legally, a borrower is entitled to use the borrowed funds as it wishes, subject to constraints in the lending contract. Banks borrowed from depositors unconditionally. They were regulated to some extent with respect to their lending, in order to ensure that the borrowers will repay their loans. These rules could be viewed as substitutes for the lenders' conditions.

During the period of a few years before 2008, when large banks crashed, these banks were actively engaged in the securities markets and were under the bank holding companies' investors' pressure and probably insiders as well to "perform." That brought more risk. That caused at least to some extent their failure. That brought to a great extent the government's financial "bailout". That also brought the establishment of a high level committee to oversee the risk level of the banks and other large financial institutions. Thus, much has changed in the law regulating banks. What did not change was the fundamental view of bank depositors' rights. It remained a contract. What did not change was the banks legal relationship with their borrowers. This legal relationship remained contractual. The regulation of U.S. banks did not change in the sense that they were regulated in the way they could accept money, lend the money, or engage in other financial services. The change focused on the *level of risk* which the banks may take in any of these activities. Thus, the legal scheme relating to banks in the United States remained the same while the changes were made in the various parts of the scheme and the restrictions aimed at fixing the same problems that appeared in this scheme many years ago.

**When banks' services expand to other financial areas a legal-cultural problem arises.** For example, the advisory service to mutual funds subjects a bank to a fiduciary relationship. This relationship conflicts with the view of the bank as providing services under a contract. Section 15 of the Investment Company of 1940 describes the relationship of the adviser to a mutual fund with the fund as contractual, but the contract is subject to unusual conditions: it cannot be transferred except under very stringent conditions, and otherwise is eliminated. Other sections of the law impose on the adviser a tremendous list of constraints subject to criminal liabilities. This contract is as far from a contract under contract law as one could imagine.

**How do the bank regulators deal with these duties?** It seems that they see these duties as designed to assure the bank's reputation (and presumably avoid a run by the bank's depositors or a rise in the bank's risks—which is the same). However, this approach views the law as increasing the banks' risks, which conflicts with the main purpose of bank regulation—to reduce the banks' risks.

**Similarly, a bank that packages its loans and sells them in the market reduces the bank's risks and increases its returns.** From this point of view the securitization of loans is a good thing. In addition, if the bank makes risky loans and packages them for public consumptions, it may still do well for the bank. Disclosure of the high risk, which the loans represent, is not necessarily beneficial to the banks. It is not surprising that the bank regulators allowed banks to transfer the loans destined for marketing into subsidiaries and the value of these subsidiaries was not calculated in the level of risk that the banks had to maintain. It was only after the 2008 crash that banks suddenly found these loans on their balance sheets, which changed the picture of their assets. Yet, the fact that the regulators allowed banks to make such loans and avoid them from joining the banks balance sheets signals the regulators' approach. They were concerned as always with the banks' safety and soundness. Presumably, safety and soundness did not involve making these loans for sale.

**In sum, bank regulation in the United States is based on the assumption that the banks' contract with depositors and borrowers and that**

the risk in the banks' structure should be covered by: restrictions on risky lending and as many and as profitable financial services as they can handle, without, however, the full regulators burdens of those services. An overview of the bank regulation in the United States demonstrates that nothing has changed in this view, except the search for added sources of income and restrictions of bank risk.

#### 4. THE DESIGN OF BANKS AND THEIR REGULATION IN JAPAN

Like United States banks, Japan's banks aim at gaining and maintaining their depositors, as well as their investors, trust and commitment. Mitsubishi UFJ Trust and Banking Corporation offers banking as well as trust services.<sup>12</sup>

**A trust under Japanese law differs from a common law trust in that under Japanese law there is no equitable ownership.** A Japanese trust is defined by statute as “an arrangement in which the owner of property rights transfers such rights to a third party on the understanding that the transferee will administer, manage and/or dispose of the property in accordance with specific guidelines established by the transferor.”<sup>13</sup>

**A trust generally must be created by an agreement, rarely by a will, and should meet statutory requirements.**<sup>14</sup> As there is no equitable ownership, the trustee is the sole owner of the trust assets, subject to restrictions under the agreement and by statute, *e.g.*, “the trustee should not benefit from the trust assets,”<sup>15</sup> or “the trust assets do not belong to the trustee's personal estate,”<sup>16</sup> and “the trustee should not acquire any proprietary interest in the trust assets.”<sup>17</sup>

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<sup>12</sup> Mitsubishi UFJ Financial Group, Inc., Annual Report (2015), available at [http://www.mufg.jp/english/ir2015/v\\_c/trust\\_assets/](http://www.mufg.jp/english/ir2015/v_c/trust_assets/) (last visited July 25, 2016).

<sup>13</sup> See Jeremy Pitts, Shinji Toyohara, & Gavin Raftery, *Expanding the Use of Trusts and Trust Banking in Japan*, INT'L FIN. L. REV. GUIDE TO JAPAN, Jan. 2004 at 75; see also Shinji Toyohara, Jeremy Pitts, & Gavin Raftery, *Trusts and Trust Banking*, INT'L FIN. L. REV. (Jan. 5, 2004), <http://www.iflr.com/Article/2026736/Trusts-and-trust-banking.html> (last visited Dec. 30, 2015) (citing Trust Law [Shintaku-hou], Law No.62 of 1922, as amended).

<sup>14</sup> *Id.* (citing Trust Law; Trust Business Law [Shintakugyou-hou], Law No.65 of 1922, as amended).

<sup>15</sup> *Id.* (citing Trust Law art. 9).

<sup>16</sup> *Id.* (citing Trust Law art. 15).

<sup>17</sup> *Id.* (citing Trust Law art. 22).

**The beneficiary may be viewed to have “quasi-ownership rights” by statute,** e.g., “the beneficiary can object to the attachment of the trust assets by a court in proceedings against the trustee,”<sup>18</sup> “the beneficiary has a right to request the return of the trust assets upon the bankruptcy of the trustee,”<sup>19</sup> and “the beneficiary can apply to the court to nullify a disposal of the trust assets made by the trustee in violation of the tenor and purport of the trust agreement.”<sup>20</sup> These rights are “statutory and contractual rights against the trustee and the trust assets” rather than ownership rights.<sup>21</sup>

For a beneficiary to enforce these rights, the trust must be perfected. For some assets, perfection is achieved by registration; for securities, perfection is achieved by “booking in a separate account” and physical separation if possible.<sup>22</sup> In addition to perfection, there is an additional requirement of separation from other assets, to facilitate identification of the trust assets.<sup>23</sup> When third parties enter into a contract with the trustee the trustee acts as a principal, not as an agent.<sup>24</sup>

Only Japan-licensed trust banks may conduct trust business.<sup>25</sup> The permissible trust assets are “money, securities, monetary claims, moveable property, real estate and fixtures thereon and surface and land lease rights.”<sup>26</sup>

Under a specified money (tokkin) trust, the trustor appoints a registered investment adviser to instruct the trustee regarding trust asset investments. Under a designated money (shiteitān) trust, the trustee makes investment decisions subject to the trust’s investment guidelines.<sup>27</sup>

“[A] trustee must act in accordance with the tenor and purport of the trust agreement and with the due care of a good manager”, under statute.<sup>28</sup>

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<sup>18</sup> *Id.* (citing Trust Law art. 16(2)).

<sup>19</sup> *Id.* (interpreting Trust Law art. 16(2)).

<sup>20</sup> *Id.* (citing Trust Law art. 31).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing Trust Law).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing Trust Law; Trust Business Law).

<sup>26</sup> *Id.* (citing Trust Law; Trust Business Law).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing Trust Law).

The trustee may be liable to the trustor or beneficiaries for losses caused by the mismanagement of the assets or the disposal in violation of the agreement. The trustor or beneficiaries may have a claim for indemnification or restitution. The beneficiaries may also avoid disposal to third parties in violation of the agreement if the registration or recording requirements were met, or, if not applicable, the third party knew or should have known of the violation.<sup>29</sup>

The trustee is personally liable for trust obligations. To protect trustees, trust agreements generally include a clause limiting recourse to trust assets (or those of the trustee's other trusts) and an indemnity provision. To protect third parties, where there is limited recourse, there is generally a negative pledge clause to prevent the trustee from impairing the assets. In addition, the agreement often provides that limited recourse does not apply in case of certain misconducts by the trustee.<sup>30</sup>

With a specified money trust, the issue arises of whether the adviser may bind the trustee. This authority is determined by the trust agreement. Third parties should confirm that the adviser has binding authority. The agreement may also determine to whom the third party has recourse on default.<sup>31</sup>

In 1999, Japan authorized master trusts, which are used in securitization.<sup>32</sup> In 2000, Japan authorized JReits (real estate investment trusts).<sup>33</sup> Trusts have also been used to offer beneficial interests in reorganization claims.<sup>34</sup>

As of 2004, Japan was considering reforms including (1) expanding the classes of permissible trust assets<sup>35</sup> and (2) establishing three categories of trust business license with different requirements, for (1) passive trusts

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing amendments to Law Concerning Investment Trusts and Investment Companies (Investment Trust Law)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (proposing amendment to Trust Business Law).

(where the trustee has no discretion), (2) securitization trusts, and (3) active trusts (where the trustee has discretion).<sup>36</sup>

The law in Japan does not impose on Japanese banks fiduciary law but this Japanese Bank has decided to self-impose fiduciary law on its activities not only in Japan but also on its subsidiaries abroad, including the New York subsidiary

The important aspect of this Bank is its initiative. It expands its legal duties and its president and management have committed to instill in its employees the culture and principles of fiduciary principles and law, where its employees view themselves as trustees with respect to their services and their control over other people's money. This is a process which started about in 2011 and is taking shape and power currently, in 2015.<sup>37</sup>

## 5. TRUST-BASED BANKING LAW IN ISRAEL

Banking law in the State of Israel imposes fiduciary law on banks. There are no "ifs" and "buts" about it. The law is clear and the rules are similar to trust law. In any banking system, depositors hand their money to the bank. However, in Israel banks hold their depositors' money *not as obligors but as fiduciaries, similar to trustees*.<sup>38</sup> The banks' obligations to their depositors are not contractual obligations. They are trustees' obligations. Terms of the trusts are spelled out in the law and regulated and enforced by the government. They are not left to negotiations with the depositors nor are they left to disclosure about the use of the depositors' money. The banks may lend money to borrowers. But, again, they do that as trustees. They are subject to prohibitions of conflicts of interest, and to the duty of care, which is detailed by legislation and rules. The culture in Israel's banks reflects its

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<sup>36</sup> *Id.* (proposing amendment to Law Concerning the Concurrent Undertaking of Trust Business by Financial Institutions (Kin'yuukikan no shintakugyoumu no ken'ei-tou ni kan-suru houritsu), Law 43 of 1943, as amended).

<sup>37</sup> See generally Trust Assets Business, MUFG Report 2015, [http://www.mufg.jp/english/ir2015/v\\_c/trust\\_assets](http://www.mufg.jp/english/ir2015/v_c/trust_assets) (last visited May 23, 2016). Mitsubishi UFG Financial Group, Inc., *Trust Assets Business*, available at [http://www.mufg.jp/english/ir2015/v\\_c/trust\\_assets/](http://www.mufg.jp/english/ir2015/v_c/trust_assets/) (last visited May 2, 2016).

<sup>38</sup> Ruth Plato-Shinar, *An Angel Named 'The Bank': The Bank's Fiduciary Duty as the Basic Theory in Israeli Banking Law*, 36 COMM. L. WORLD REV. 27, at 33 (2007).

governing laws. When one is, for generations, called and expect to behave as a trustee one become a trustee and act as one.

## 6. CONCLUSION: FOOD FOR THOUGHT

A business regulated under contract law usually deals with people, who can fend for themselves. In fact, in the United States the sale of many goods (exchanging the goods for money) is accompanied by the buyer's option of rescinding the sale under certain conditions. This is a form of guarantee by the seller assuring the buyer that the seller's promises (and even the seller's sales persons who might have induced a sale) are truthful and trustworthy. Thus, control in those transactions is balanced between the parties.

In the case of financial services, however, control is not balanced, but shifts to the "seller" of the services (accompanied by control over the "buyer's" money). The government's backing of banks' obligations may reduce the depositors' anxiety but it increases the bank management and personnel's drive to gain more and inevitably, risk more. Hence, fiduciary law and its accompanying duties are more appropriate for banks, and would be far more effective by providing banks with more safety and becoming more trustworthy. In all cases, the law introduces bank cultures. While contract culture tends to justify self interest fiduciary culture tends to balance the parties interests. Thus, regulation that tends to impose on banks self-limitations as trustees might reduce the banks' risks and benefit the financial system.