THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Tenth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najob Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2021

Chapter 13

JAPAN

Kana Manabe, Hideaki Roy Umetsu and Shiho Ono[1]

I INTRODUCTION

Japan is ranked 19th on the 2020 Corruption Perceptions Index published by Transparency International and is perceived as a relatively 'clean' country in terms of bribery and corruption. However, bribery and corruption issues continuously arise, both domestically and internationally. As Japanese companies have increased their business activities outside Japan in recent years, anti-corruption compliance relating to dealings with foreign officials has become a serious issue for Japanese companies, and it is one of the most important topics for the legal community in Japan.

In Japan, both domestic and foreign bribery are regulated. The Criminal Code (CC) regulates domestic bribery of public officials and the Unfair Competition Prevention Law (UCPL) regulates bribery of foreign public officials. Private commercial bribery is not generally regulated, but there are laws that regulate private commercial bribery in specific circumstances, as discussed in Section II.iii. The Political Funds Control Act (PFCA) provides restrictions on political contributions.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Bribery of public officials

Article 198 of the CC prohibits giving, offering or promising bribes to public officials in connection with their duties.

Under Article 7(1) of the CC, public officials are defined as 'national or local government officials, members of an assembly or committee, or other employees engaged in performance of public duties in accordance with laws and regulations'. Not only current public officials, but persons who have resigned as public officials or who will become public officials are subject to the CC if they are bribed in relation to their duties. Additionally, officials or employees of certain special entities, such as the Bank of Japan, are deemed to be public officials in terms of bribery under the CC. In addition to the CC, there are other laws that have bribery provisions concerning officials and employees of certain entities; for example, certain railway companies in Japan are still state-owned and there are related regulations that have their own anti-bribery provisions.

Although there is no definition of 'bribery', any benefit could be bribery. In accordance with precedent cases, the provision of certain gifts or benefits could be deemed to be merely a 'social courtesy' if the gifts or benefits are not provided in connection with a public official's

1 Kana Manabe, Hideaki Roy Umetsu and Shiho Ono are partners at Mori Hamada & Matsumoto.

duties; however, there is no clear safe-harbour guideline or rule. Having said that, the National Public Service Ethics Act (NPSEA) and other relevant guidelines described below serve as useful guidelines when analysing these issues in practice.

Under the CC, a public official who accepts, solicits or promises to accept a bribe in connection with his or her duties shall generally be punished by imprisonment for not more than five years. The criminal penalties may vary depending on the nature of the bribery, including the manner of accepting the bribe; for example, exercising influence over other public officials' performance of their duties because of the bribe, rather than the bribe-taking public official modifying his or her own performance. A person who gives, offers or promises to give a bribe to a public official shall be punished by imprisonment for a maximum of three years or a fine that does not exceed ¥2.5 million. The relevant bribery provisions of the CC only apply to individual persons and do not apply to entities, such as companies.

ii Ethics for national government officials

The NPSEA and the National Public Service Ethics Code (the Ethics Code) apply to regular national public officials to maintain ethics and secure fairness in the execution of duties.

While the NPSEA provides various obligations applicable to national public officials, one of the main obligations requires national public officials at a certain level or higher to report quarterly any gift, entertainment or other benefit of more than ¥5,000 in value. Those reports must be submitted to the head of the relevant ministry and include the amount of the gift and the name of the provider of the gift.

The Ethics Code provides more practical regulations and guidelines for public officials. It generally prohibits national public officials from accepting gifts from specific stakeholders; for example, those who conduct businesses subject to licences or permissions or those who obtain subsidies, if granting such licences, permissions or subsidies is within the scope of the public officials' duties. The government has published various guidelines and Q&As on case studies in relation to the NPSEA and the Ethics Code, which are useful for companies as practical guides analysing the risks of communications or relations with public officials.

iii Private commercial bribery

Private commercial bribery is not generally regulated. However, there are laws that regulate private commercial bribery in specific circumstances. For example, under Article 967(2) of the Companies Act (CA), providing certain benefits to persons such as company board members in connection with their duties is prohibited. Private commercial bribery could also constitute other categories of crime, such as breach of trust under Article 247 of the CC, depending on the facts and circumstances.

iv Political contributions by foreign citizens or foreign companies

The PFCA prohibits certain political contributions from foreigners.

Article 22-5 of the PFCA prohibits political contributions from:

a foreign persons;

b foreign entities; or

c associations or any other organisations of which the majority of the members are foreign persons or entities, with the exception of Japanese entities that have been listed on a Japanese stock exchange consecutively for five years or more.

The above rule prohibits the receipt of foreign-sourced political contributions and penalises the recipient, but it does not penalise the foreigners who make the political contributions.

III ENFORCEMENT: DOMESTIC BRIBERY

i Enforcement of domestic anti-bribery laws

There have been a number of domestic bribery cases at both the national and local government level. Most recently, in 2019, a House of Representatives member was arrested and indicted on a charge of accepting bribes from a Chinese company in relation to integrated resort projects including a casino when he was serving as a State Minister in charge thereof. Also, in 2021, a number of public officials of the Ministry of Internal Affairs and Communications were punished for violation of the Ethics Code due to lavish meals or entertainment treated by Nippon Telegraph and Telephone Corporation or its group companies.

ii Extraterritorial application of the CC

The CC applies to anyone who commits bribery (including foreigners) within the territory of Japan. It is also applicable to Japanese public officials who receive bribes outside the territory of Japan. Prior to 2017, the CC was not applicable to those who gave bribes outside the territory of Japan, but it has since been amended in relation to this applicability and now includes Japanese nationals who give bribes to Japanese public officials outside the territory of Japan.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements

Foreign bribery is prohibited by Article 18(1) of the UCPL. Japan amended the UCPL in 1998 to criminalise bribery of foreign public officials and to implement the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).

Article 18(1) of the UCPL provides:

> *No person shall give, or offer or promise to give, any money or other benefit, to a foreign public official, in order to have the foreign public official act or refrain from acting in relation to the performance of official duties, or in order to have the foreign public official use his/her position to influence another foreign public official to act or refrain from acting in relation to the performance of official duties, in order to obtain wrongful gains in business with regard to international commercial transactions.*

'International commercial transaction' means the act of economic activity beyond national borders such as trade and foreign investment, and 'international' means either an international relationship exists between the parties to the commercial transaction, or an international relationship exists for the business activity in question. 'Acting in relation to the performance of official duties' includes not only any acts within the scope of official authority of the foreign public official, but also any acts closely connected to his or her official duties.

ii Definition of foreign public official

Article 18(2) of the UCPL provides that the following five categories of persons fall under the definition of 'foreign public official':

a a person who engages in public services for a national or local foreign government;

b a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;

c a person who engages in the affairs of an enterprise of which the majority of voting shares or capital subscription that exceeds 50 per cent of that enterprise's total issued voting shares or total amount of capital subscription is directly owned by a national or local government of a foreign state, or of which the majority of officers (meaning directors, auditors, council members, inspectors, liquidators and other persons engaged in the management of the business) are appointed or designated by a national or local foreign government, and to which special rights and interests are granted by the national or local foreign government for performance of its business, or a person specified by a cabinet order as an equivalent person;

d a person who engages in public services for an international organisation (which means an international organisation constituted by governments or intergovernmental international organisations); or

e a person who, under the authority of a foreign state or local government of a foreign state or an international organisation, engages in affairs that have been delegated by that state or organisation.

iii Gifts and gratuities, travel, meals and entertainment restrictions

It is prohibited to offer or promise to give any money or other benefits to a foreign public official to obtain wrongful gain in business. 'Gain in business' is interpreted to include any tangible or intangible economic value or any other advantage in a general sense that a business operator can gain from the business. Therefore, offering gifts and gratuities, travel, meals and entertainment (collectively, gifts) to a foreign public official can be prohibited if it is considered to have the purpose of obtaining wrongful gain in business. The Guidelines issued by the Ministry of Economy, Trade and Industry (the METI) and revised in May 2021 (the METI Guidelines) provide useful guidance on what kind of gifts are allowed under the UCPL. They provide that some gifts in a small amount can be regarded as being purely for the purpose of socialising or for fostering understanding of the company's products or services and are therefore allowed depending on the timing, type of item, amount of money, frequency or other factors. Specific examples that may be considered as not obtaining wrongful gain in business include: providing appropriate refreshments or basic food and drink at a business meeting; riding with a foreign public official in a company car when it is necessary to visit the company's office because of transportation conditions; or providing an appropriate seasonal gift of low cost in accordance with social customs.[2]

iv Facilitation payments

There is no provision in the UCPL that clearly allows small facilitation payments. Therefore, bribery of foreign public officials will not be exempted from punishment just because the bribe is a small facilitation payment. The METI Guidelines recognise that there are cases, for

2 METI Guidelines 3.1(4), p. 26.

instance in customs procedures, where, despite the fact that all the necessary procedures under local laws have been observed, there will still be delays or other unreasonably disadvantageous discriminatory treatment by the local government until money or goods are provided to the local government officials. However, the METI Guidelines state that providing money or goods in such cases, even for the purpose of avoiding discriminatory disadvantageous treatment, is likely to be considered as giving money or other benefits to obtain a wrongful gain in business.[3]

v Penalties and other matters

Penalties

Under Article 21(2) of the UCPL, a natural person who bribes a foreign public official shall be subject to imprisonment for a period not exceeding five years or a fine not exceeding ¥5 million. In addition, the UCPL provides for 'dual criminal liabilities', such that if a representative, agent, employee or any other staff member of an entity has committed a violation in connection with the operation of the said entity, a fine not exceeding ¥300 million will be imposed on that entity.

Territorial jurisdiction and prosecution of foreign companies

The UCPL adopts the principle of territorial jurisdiction. Therefore, if any elements constituting the offence have been committed in Japan, or the result of the offence has occurred in Japan, regardless of the nationality of the offender, the act will be subject to punishment as bribery of a foreign public official. In addition, the principle of nationality is also adopted. Therefore, a Japanese person who commits offences outside Japan could still be subject to punishment.

Plea-bargaining and leniency

With effect from 1 June 2018, Japan has introduced a plea-bargaining system. Suspects and criminal defendants can avoid indictment or obtain lighter sentences if they cooperate to provide evidence for the crimes committed by others (not crimes committed by themselves). On 20 July 2018, Mitsubishi Hitachi Power Systems, Ltd released a press release stating that the company itself had applied to use this system in relation to a violation of the UCPL by their former officers regarding the construction of a thermal power plant in Thailand. This is the first reported case of the use of the plea bargaining system.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Basic regulations on financial record-keeping

General rules on financial record-keeping are provided in the CA. Article 432 provides that a joint-stock company (KK)[4] is obliged to prepare accurate account books in a timely manner pursuant to the applicable ordinance of the Ministry of Justice, which stipulates detailed regulations on the preparation of account books, and must also retain the account books and important materials regarding its business for 10 years from the time of the closing of the

3 METI Guidelines 3.1(3), p. 25.

4 *Kabushiki kaisha*.

account books. A KK is required to prepare financial statements and business reports at the end of every fiscal year. The financial statements must be approved at the annual shareholders' meeting and the contents of the business reports must be reported at the annual shareholders' meeting by the directors in accordance with Article 438 of the CA. Article 440 of the CA also provides that a KK must issue a public notice of its balance sheet (or, for a large company, its balance sheet and profit and loss statement), without delay after the conclusion of the annual shareholders' meeting pursuant to the provisions of the applicable ordinance of the Ministry of Justice, unless it has an obligation to file a securities report with the relevant local finance bureau under the Financial Instruments and Exchange Act (FIEA). A foreign company that is registered in Japan (that is the same type of company as a KK or is closest to it in kind) is also obliged, under Article 819 of the CA, to issue a public notice of its balance sheet or equivalent without delay after the conclusion of the annual shareholders' meeting, or other similar procedures, unless it has an obligation to file a securities report under the FIEA.

ii Act on Prevention of Transfer of Criminal Proceeds

Article 4 of the Act on Prevention of Transfer of Criminal Proceeds (APTCP) provides that specified business operators (SBOs) such as financial institutions (including banks, insurance companies, securities companies, money lenders and money exchange operators) and real estate agents and other business operators listed in Article 2 of the APTCP must verify customer identification for certain types of transactions listed in Article 7 of the ordinance of the APTCP, and certain types of suspicious transactions. Information required to be confirmed by SBOs includes:

a customer identification data;
b purpose of conducting the transaction;
c occupation and nature of business; and
d when the customer is a juridical person, if there is a person specified by an ordinance of the competent ministries as a person in a relationship that may allow that person to have substantial control of the business of the juridical person (the substantial controller), the customer identification data of that person.

If the transaction is made with an entity, SBOs are obliged to verify identification of both the entity itself and the natural person who is in charge of the transaction. In such cases, the SBO must also verify that the personnel in charge are duly authorised by the entity to conduct the transaction. Furthermore, should the SBO find that the transactions are suspicious and involve possible identity theft, transactions with residents in specific countries or transactions with foreign 'politically exposed persons', it must separately obtain additional documents to identify the customer or to confirm the substantial controller through documents such as the shareholders' list or annual securities reports. If it is a suspicious transaction through which more than ¥2 million is transferred, the asset and income status of the customer must be confirmed by the SBO.

The SBO must also prepare and retain certain records of confirmation and of the transaction (Articles 6 and 7 of the APTCP). The SBO is also obliged to submit a report to the relevant administrative agency on suspicious transactions that may involve money laundering or criminal proceeds under Article 8 of the APTCP.

To strengthen anti-money laundering regulations, the APTCP was amended in 2014 and most parts of this amendment became effective on 1 October 2016. The amended APTCP and the relevant ordinance require SBOs to examine and judge, in accordance

with the specific criteria, whether each individual transaction triggers the submission of a suspicious-transaction report. In addition, the amended APTCP and the relevant ordinance provide that SBOs are required to make efforts to:

a provide their employees with educational training regarding the verification of customer identification;
b establish and maintain internal rules for these verification procedures; and
c appoint an administrator of the verification procedures.

iii Foreign Exchange and Foreign Trade Act

Under Article 18 of the Foreign Exchange and Foreign Trade Act (FEFTA), banks are required to confirm customer identification data by means of a driver's licence or other means specified by the ordinance of the Ministry of Finance when conducting a foreign exchange transaction (excluding those pertaining to small payments or payments specified by the Cabinet Order) and to prepare a record of the identification data immediately and retain the record for seven years. Customer identification data to be confirmed by banks include name, domicile or residence and date of birth for a natural person, and corporate name and location of the principal office for an entity. Confirmation of identification data of the natural person who is in charge of the transaction is also required for an entity.

iv Tax deductibility

It is prohibited to claim expenditure for bribes to public officials or foreign public officials as a deductible expense under the relevant regulations regarding corporation and income taxes.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There have been a small number of cases involving foreign bribery since Japan first incorporated the crime of foreign bribery into the UCPL in 1998.

i Bribery of public officials of the Philippines

The first case, which occurred in March 2007, involved the giving of improper benefits to Philippine public officials. Two Japanese employees who had been seconded to a local subsidiary of a Japanese company in the Philippines gave a set of golf clubs and other gifts (worth about ¥800,000) to certain executive officers of the National Bureau of Investigation of the Philippines (NBI) upon their visit to Japan, to promptly conclude a service contract on a project that the NBI was planning. Both employees were punished, by fines of ¥500,000 and ¥200,000 respectively.

ii Bribery of a public official of Vietnam

The second case, for which the Tokyo District Court rendered decisions in January and March 2009, concerned the giving of improper benefits to a Vietnamese public official. Four employees of Pacific Consultants International (PCI), a construction consultancy company, gave money on two occasions, about US$600,000 and US$220,000 each, to an executive officer mainly to express their gratitude for receipt of an order for the consultancy business related to a major road construction project in Ho Chi Minh City in Vietnam. The four employees were each punished by imprisonment of between one-and-a-half and

two-and-a-half years, and PCI was punished with a fine of ¥70 million. This is the first case where an entity was punished pursuant to the dual criminal liabilities provision under the UCPL.

iii Bribery of a public official of China

The third case concerned the giving of improper benefits to a public official of China. A former senior executive of Futaba Industrial Co, Ltd (Futaba), a car parts maker, committed foreign bribery under the UCPL by paying a local government official of Guangdong province in China around HK$30,000 and giving a gift of a women's handbag in mid December 2007 to persuade authorities to overlook an irregularity at the plant of a subsidiary of Futaba and not report it to the relevant state agency. The former senior executive was punished with a fine of ¥500,000.

iv Bribery of public officials of Indonesia, Vietnam and Uzbekistan

The fourth case is the largest and has been widely reported in Japan. This is a case for which the Tokyo District Court issued a decision on 2 February 2015, concerning the railway consulting firm Japan Transportation Consultants Inc (JTC) and three former executives who paid bribes to foreign public officials in several countries.

The former executives paid a total of around ¥70 million from December 2009 to February 2014 to several officials of Vietnam Railways, a Vietnamese public corporation in Vietnam, to win consulting contracts with favourable conditions related to the Hanoi City Urban Railway Construction Project (Line 1), which was funded by the Japan International Cooperation Agency (JICA) through Japan's Official Development Assistance (ODA). For a similar purpose, they paid a total of around ¥20 million (in Japanese yen and Indonesian rupiah) from October 2010 to December 2013 to several Indonesian governmental officials in connection with railway projects in Indonesia, and also paid a total of around US$720,000 from August 2012 to July 2013 to several officials of Uzbekistan's public railway corporation in connection with a railway project in Uzbekistan, all of which were funded by the JICA through the ODA. The former executives were each punished by imprisonment of two to three years with probation of three to four years, and JTC was fined ¥90 million.

v Bribery of public officials in Thailand

The fifth case was also widely reported in Japan, mainly because this is the first case where the plea-bargaining system was used. Three former executives of Mitsubishi Hitachi Power Systems, Ltd were indicted for paying 1.1 million baht to the public officials at the Ministry of Transportation in order to avoid delay in the import of the materials necessary for the construction of a thermal power plant. Two were punished by imprisonment of one year and six months and one year and four months with probation period of three years. The case seems to be still pending at the Supreme Court for one executive as at August 2021 (in July 2020, the appellate court reversed the judgment of the court of first instance, and imposed a fine of ¥2.5 million).

vi Other recent cases

There have been several recent cases in 2019 and 2020 where the defendants were fined. Details of those cases are not clear since the judgments in those cases have not been published. According to a report by the news media, one of the cases involved a Vietnamese national living in Japan who promised to pay cash to a Vietnamese consul in Japan in exchange for issuing a certificate falsely, which resulted in a fine of ¥500,000.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

i OECD Anti-Bribery Convention

Japan ratified the OECD Anti-Bribery Convention in 1998 and enacted implementing legislation criminalising acts of bribery of foreign public officials by amending the UCPL, which came into force on 15 February 1999.

ii The United Nations Convention against Corruption

The United Nations Convention against Corruption was adopted by the General Assembly of the United Nations on 31 October 2003. The National Diet of Japan approved adoption of this convention in June 2006 and approved the relevant domestic legislation on 15 June 2017. The convention entered into force on 10 August 2017.

iii The United Nations Convention against Transnational Organized Crime

The National Diet of Japan approved adoption of the United Nations Convention against Transnational Organized Crime in May 2003 and approved the relevant domestic legislation on 15 June 2017. The convention entered into force on 10 August 2017.

VIII LEGISLATIVE DEVELOPMENTS

i OECD recommendations

The OECD Working Group on Bribery in International Transactions has continuously requested that Japan strengthen its efforts to fight bribery by Japanese companies in their foreign business activities, and to implement the Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions. In its press release dated 3 July 2019 and its new report (Japan's Phase 4 report), the OECD Working Group on Bribery criticised Japan for only having prosecuted five cases of foreign bribery and sanctioned 12 individuals and two companies since 1999. The Working Group recommended that Japan take certain measures, including that it should:

a improve key elements of its legislative framework, in particular to increase the level of sanctions and the limitation period for foreign bribery;

b broaden its framework for establishing nationality jurisdiction over legal persons;

c encourage its agencies with the potential to detect foreign bribery to become more proactive in this respect;

d ensure that the Ministry of Justice's role in transmitting and clarifying certain allegations does not create unnecessary delays in opening investigations;

e ensure that the prosecution's role in conducting investigations and prosecutions is exercised independently of the executive, and in particular of the Ministry of Justice and the METI; and

f ensure that both the police and the prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing the reliance on voluntary measures and confession.

ii METI Guidelines

The METI established the Study Group on Prevention of Bribery of Foreign Public Officials, and the Study Group has held meetings since January 2020. Based on the recommendations by the OECD Working Group and the results of the Study Group's discussions, the METI revised its guidelines regarding bribery of foreign public officials in international business transactions under the UCPL and released a new handbook in May 2021 that elaborates on the guidelines in ways easy to understand. This is not new legislation, but the revision clarifies legal interpretations as follows:

a It is advisable for companies to clearly state in their internal rules that 'small facilitation payments' are prohibited in principle, because such payments themselves may fall under the category of provision of benefits 'for the purpose of obtaining wrongful gains in business'.

b The UCPL does not explicitly provide an exemption for 'small facilitation payments'. Therefore, the provision of money or other benefits to foreign public officials, even in small amounts, is a violation of the UCPL if the purpose is to obtain wrongful gains in business. The mere fact that a payment is a small facilitation payment does not exempt the payer from punishment.

Furthermore, in light of the increased risk of bribery in transactions conducted through agents and M&A transactions, the revised guidelines have also added points that should be kept in mind when retaining agents and conducting M&A transactions.

iii Japanese Federation of Bar Associations Guidelines

On 15 July 2016, the Japanese Federation of Bar Associations (JFBA) issued new guidelines on compliance with foreign bribery regulations. These guidelines provide best practice recommendations to ensure compliance with Japan's foreign anti-bribery rules and to manage risks related to potential bribery.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Confidentiality obligation and privilege

In 2019, the National Diet of Japan approved a bill that came into force on 25 December 2020, to introduce an attorney–client privilege system under which companies can keep their communications with lawyers confidential under certain conditions but the introduction of this system is limited only to the area of the Antimonopoly Act. In other areas, including the CC and the UCPL, there are no concepts of attorney–client privilege or 'work product doctrine' in Japan. The Attorneys Act provides that attorneys admitted in Japan and foreign-law attorneys registered in Japan have the right and obligation to maintain confidentiality of any facts that they may have learned in the course of performing their professional duties. Under the Code of Attorney Ethics created by the JFBA, if an attorney violates the confidentiality obligation, he or she may be disciplined by the JFBA. Attorneys can refuse to testify or produce documents in civil and criminal court procedures regarding facts relating to the confidential information of others obtained in the course of their duties, but if confidentiality

is waived by the client or the person who has the right to keep the information confidential, the lawyer may no longer assert the right. These protections in the court proceedings are available not only to attorneys, but also to other professionals, such as doctors, dentists, birthing assistants, patent attorneys, notaries and persons engaged in a religious occupation who have a statutory duty of confidentiality.

ii Whistle-blower protection

The Whistle-Blower Protection Act (WPA), which was enacted in 2004 and came into effect in April 2006, provides civil rules on voidance or prohibition of dismissal or other disadvantageous treatment, to protect employees who engage in whistle-blowing. More than 400 laws are covered by the WPA, including the CC, CA, FIEA, UCPL, FEFTA and the Act on the Protection of Personal Information.

X COMPLIANCE

The METI Guidelines describe 'good practices' as to how Japanese companies as enterprise groups, including their subsidiaries, should strengthen their internal control systems for preparing, recording and auditing internal company regulations against risky actions to prevent and combat foreign bribery. These good practices include the following:

a Japanese companies that conduct overseas business operations under the CA, the UCPL and overseas laws and regulations should organise and operate an internal control system focused on ethics and compliance (internal control system) for the prevention of bribery of foreign public officials.

b As for the establishment and operation of internal control systems, it is recommended that Japanese companies should organise and operate a focused internal control system taking a 'risk-based approach', or considering the risks associated with the relevant target countries, business fields and types of activity, while the corporate directors have considerable discretion regarding their own internal control systems.

c In particular, the guidelines emphasise the importance of subsidiaries and sub-subsidiaries, many of which have not completely managed their risks, and the necessity of support from parent companies.

d It is recommended that Japanese companies prepare an internal review system to organise, record and audit appropriate approval processes for risky operations such as hiring local agents, acquiring local companies and conducting business entertainment.

XI OUTLOOK AND CONCLUSIONS

Anti-bribery compliance has become one of the most important and challenging issues for the Japanese legal community. We have seen rapid developments in legislation and practice in this area over the past several years (including the recent amendment to the METI Guidelines in 2021, described above), and we expect to see more corruption prosecutions in the near future, especially because of Japan's Phase 4 report issued by the OECD and pressure from other countries. As a result, we expect rapid development of the practices in this area, including those in relation to anti-corruption compliance programmes, whistle-blowing practices and risk and crisis management in the event of actual corruption incidents.

Appendix 1

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