

Japanese Bar Association Publishes New Guidance on Foreign Bribery Prevention



Introduction

In July 2016, the Japanese Federation of Bar Associations ("**JFBA**") published new guidelines on foreign bribery prevention (the "**JFBA Guidelines**"), which sets out a menu of best-practice recommendations to ensure compliance not only with Japan's Unfair Competition Prevention Act ("**UCPA**"), but more importantly with the United States' Foreign Corrupt Practices Act ("**FCPA**") and United Kingdom's Bribery Act 2010 ("**UKBA**"). These guidelines represent yet another step in Japan's ongoing and increasing efforts to combat bribery and corruption and to protect its companies doing business abroad.

Japan has faced ongoing criticism within the international community for its perceived lack of anti-bribery enforcement.¹ Notably, in July 2015, the Ministry of Economy, Trade and Industry ("**METI**") revised its "Guidelines for the Prevention of Bribery of Foreign Public Officials" (the "**METI Guidelines**"); however, local enforcement remains minimal, and Japanese companies have continued to face investigations abroad, including several high-profile FCPA enforcement actions.² The JFBA Guidelines provide practical advice to help companies operating in Japan to avoid violating laws locally and abroad.

What the new guidance says

The JFBA Guidelines – which are broken down into four broad sections – aim to help companies:

- a. Better detect or prevent bribery and corruption through the establishment of adequate internal controls;
- b. As a result of the above, be better able to subsequently reduce or mitigate any potential regulatory censure they may face in the event of a violation; and
- c. Deal appropriately, on a practical level, with bribery and corruptions risk they face overseas.

While much of the content has been previously covered in the METI Guidelines, the JFBA Guidelines go further in suggesting practical ways to establish and maintain robust internal controls which are more readily compliant with the FCPA and UKBA. This is a shift away from the METI Guidelines, which focuses on compliance with the UCPA. For example, the JFBA Guidelines specifically reference UKBA section 7(2), which allows companies with "adequate procedures" in place to have a defence against the UKBA strict corporate liability offence of failing to prevent bribery. The emphasis on establishing and maintaining robust internal controls is most evident in the first section, titled "Establishing and Operating a Foreign Bribery Prevention System," which details:

- a. How to manage risks emanating from third parties – for example by requesting specific anti-bribery representations or including specific contractual provisions when dealing with third parties;
- b. How to reduce the need for facilitation payments – for example by declaring a basic prohibition of facilitation payments, investigating current facilitation payments, and recording facilitation payments;
- c. The need to educate and train Japanese executives and employees in relation to extraterritorial anti-bribery laws such as the FCPA and UKBA; and
- d. The need to accurately record relevant commercial activity and transactions – for example records relating to the company's accounts and internal control processes.

Further practical guidance is set out in the following three sections of the JFBA Guidance covering emergency/crisis management, managing subsidiaries and corporate acquisitions, and other considerations. The practical guidance of most interest (and not covered in detail in the METI Guidelines) include:

- a. Formulating a crisis management response mechanism when company executives offer, promise or receive a bribe.
- b. Recommending the accurate recording of all emergency / crisis situations relating to bribes and, as much as possible, recording such information in a manner to protect legal privileges.
- c. In relation to foreign corporate acquisitions – emphasising the need to undertake anti-bribery due diligence on a target company, to include anti-bribery representations in acquisition documentation and to monitor and remedy any adverse bribery issues at the target company post-acquisition.
- d. Recommending sample company policy language stating that the company shall seek to implement anti-bribery and corruption measures based on guidelines issued by the METI and JFBA.

In context

The Abe administration has continued to push Japanese companies to improve exports and outbound investment activity which has inevitably led Japanese companies to invest heavily in high-risk, emerging markets such as China, South-East Asia, Africa and Latin America. Both the FCPA and UKBA have broad extraterritorial applications, often subjecting foreign companies to liability for conduct occurring in any of these high-risk jurisdictions. Without adequate internal controls and anti-bribery programs, Japanese companies expose themselves to significant bribery and corruption risks inherent in doing business in those markets.

The JFBA Guidelines are a further sign that the Japanese authorities are considering bribery and corruption issues more seriously than before. There is also a tacit acknowledgment in the JFBA Guidelines that the UCPA has prosecuted very few foreign bribery cases in the past and such cases have led to relatively small fines, but that the extraterritorial reach of the FCPA and UKBA is capable of inflicting significant reputational and financial loss on Japanese companies. Whether Japan responds to calls from the international community to increase domestic enforcement remains to be seen, but the JFBA Guidelines' emphasis on internal controls and practical measures Japanese companies should implement may serve to help reduce the extent of any future US/UK regulatory censure of Japanese companies operating overseas.

[1] See OECD Working Group on Bribery's "Japan: Follow-Up to the Phase 3 Report & Recommendations," February 2014 ("The Working Group on

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Bribery (WGB) continues to have significant concerns about the low level of foreign bribery enforcement in Japan")

[2] Available in Japanese at http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GaikokukoumuinzouwaiBoushiShishin.pdf and in English at http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GuidelinesforthePreventionofBriberyofForeignPublicOfficials.pdf.

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