

**NOTE FOR THE BOARD ON ANTI-CORRUPTION: CROSS-BORDER: JAPAN**by *Wataru Kamoto, Jacky Scanlan-Dyas, Andrew Lassman, Wataru Nakajima and Paul Henesy, Hogan Lovells*

This note is for in-house or local counsel to provide to the board of directors (or equivalent body) of a legal entity on the key points in relation to the applicable anti-corruption regime in Japan.

**OFFENCES UNDER APPLICABLE LAW**

The applicable anti-bribery and anti-corruption regime (Applicable Law) in Japan consists of the following:

- Criminal Code (Act No.45 of 1907, as amended).
- Act on Punishment of Public Officials Profiting by Exerting Influence (Act No.130 of 2009, as amended) (APPOPEI).
- Unfair Competition Prevention Act (Act No.54 of 1993, as amended) (UCPA).

The main offences under the Applicable Law are as follows:

**Criminal Code.** Article 198 of the Criminal Code prohibits giving and receiving bribes. Under the Criminal Code, a person must not do all of the following:

- Give, offer or promise to give a bribe.
- To a public official.
- Regarding their public office.

A bribe includes any tangible or intangible benefit. The bribe needs to have some connection with the office or duties of the public official.

**APPOPEI.** Article 4 of APPOPEI prohibits a bribe (something of value) being given (offering or promising to give a bribe is not prohibited under APPOPEI) to a member of parliament, a senator, a member of a local assembly, or the governor of a local public entity, for the purpose of that public figure exerting pressure over other officials to act under the public figure's influence, irrespective of any violation of laws. Receiving a bribe is also prohibited.

**UCPA.** Article 18 of the UCPA prohibits bribery of foreign public officials. Under the UCPA, a person must not do all of the following:

- Give, offer, or promise to give any money or other benefit.
- To a foreign public officer (including employees of state-owned entities or those controlled by the government).
- For the purpose of influencing the foreign public officer to act or refrain from acting in a particular way, in connection with their duties.
- To obtain a wrongful gain.
- In business with regard to international commercial transactions.

The applicable sanctions under the Applicable Law are as follows.

**Criminal Code.** Under Article 198 of the Criminal Code, individuals found guilty of bribery under Article 198 of the Criminal Code can face imprisonment up to three years, or a fine up to JPY2.5 million.

**APPOPEI.** Under Article 4 of the APPOPEI, individuals found guilty of an offence under Article 4 of the APPOPEI can face imprisonment up to one year, or a fine up to JPY2.5 million.

**UCPA.** Under Article 21.2.7 of the UCPA:

- Individuals found guilty under Article 18 can face imprisonment up to five years and/or a fine of up to JPY5 million.
- A company found guilty under Article 18 can face a fine up to JPY300 million.

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### IMPLICATIONS FOR COMPANIES, BOARDS AND MANAGEMENT

The Criminal Code and APPOPEI only target individuals, while the UCPA applies to both individuals and incorporated entities. An unincorporated entity is not subject to these regulations in its capacity as an entity, but individual members can be collectively liable as accomplices.

Under the Criminal Code and APPOPEI, there is no specific defence, safe harbour or exemption.

Under the UCPA, any conduct that is lawful under the local regulations where the conduct occurs will not give rise to liability. Therefore, for example, a facilitation payment permitted under statute or judicial precedent in the jurisdiction of the receiving public official is not punishable under the UCPA.

In addition, the Guidelines for the Prevention of Bribery of Foreign Public Officials (Guidelines) based on Article 18 of the UCPA issued by the Ministry of Economy, Trade and Industry, state that threatened or actual danger against the body or property of an individual or company may exempt the individual or company from liability.

The Guidelines also provide commentary on the scope of permissible gifts and services, in the context of greetings or social relationships exempted from Article 18 of the UCPA, using examples of small seasonal greetings based on local custom, tea and snacks at a meeting and reasonable dining expenses. Frequent gifts, gifts easily convertible to money and payments just before bidding are likely to be regarded as bribes. No particular threshold amount is specified. While technically the Guidelines are not legally binding and operate as a de facto standard, it is unlikely that any company acting in accordance with the Guidelines would be liable.

### JURISDICTIONAL REACH OF JAPANESE LAW

The Applicable Law can have extraterritorial reach, for both companies incorporated in Japan doing business overseas and foreign companies with operations in Japan.

Companies incorporated in Japan doing business overseas

Regarding the bribery of Japanese public officials, the Criminal Code and APPOPEI apply to:

- Any Japanese public official, regardless of where the alleged crime takes place.

- Any individual (Japanese or non-Japanese), including employees of foreign companies doing business in Japan, where at least part of the crime (that is, offering, dispatching or receiving the benefit) takes place in Japan.

Bribery of foreign public officials is outside the scope of the Criminal Code and APPOPEI.

The UCPA prohibits offering a bribe to foreign public officials, therefore extraterritorial application is possible.

The UCPA applies to:

- Any Japanese national and Japanese incorporated companies.
- Any non-Japanese individual or company incorporated outside Japan, if a bribe has been granted, offered, promised or received in Japan.

For example, the UCPA:

- Applies where a non-Japanese individual working for a non-Japanese company has dispatched a bribe to a foreign public official from Japan.
- Does not apply where a non-Japanese individual working for a Japanese company commits an act of bribery in relation to a foreign public official during a business trip outside Japan, unless the conspiracy to commit bribery takes place in Japan.

In either case, the Japanese company employing the relevant non-Japanese individual can be liable.

Although the UCPA technically has extraterritorial reach, extraterritorial enforcement has not been actively pursued. Since enactment of the UCPA in 1998, as of January 2017 there have only been four cases of enforcement under Article 18 of the UCPA.

### FOREIGN COMPANIES WITH OPERATIONS IN JAPAN

The Criminal Code and APPOPEI apply to any foreign individuals, provided that part of the bribery takes place in Japan. It does not apply to corporations.

The UCPA does not apply to a foreign parent company of a Japanese incorporated entity, or the foreign parent company of a foreign entity doing business in Japan, simply because the foreign parent company holds shares in a Japanese incorporated company that commits an act of bribery. However, if the foreign parent company directs its Japanese subsidiary to commit an act of bribery, the parent company may be exposed to criminal liability under the UCPA.

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## THE US FOREIGN CORRUPT PRACTICES ACT

Companies must recognise that although their anti-bribery programme may be compliant with the US Foreign Corrupt Practices Act 1977, this does not ensure that it constitutes adequate procedures under Japanese law.

## COMMON RED FLAGS FOR BRIBERY

There are no specific bribery red flags specified under Japanese law or the Guidelines.

However, the following are examples indicating a risk of bribery.

## AGENTS AND CONSULTANTS

Agent's fees are paid in cash.

- Fee payments are made in a different country to where the activity takes place, in particular an offshore financial centre known to be used to launder money.
- No apparent business case for use of an agent. There is extensive use of consultancy services without apparent value received.
- Pressure exerted for payments to be made urgently or ahead of schedule.
- Payments made through a third party country, for example, goods or services supplied to country A but payment being made to a shell company in country B.
- Fees split into multiple accounts for the same agent, often in different jurisdictions.

## MARKETING

- Exceptional sales achievements in a market in which competitors are known to bribe.
- Tender documents using specifications favourable to the company's products.
- Frequent hospitality and travel for public procurement officials.
- Requests for special favours, such as donations or sponsorship related to the favourite causes of the procurement officer.

## PURCHASING AND CONTRACTING

- Governmental bidding, customs, businesses relating to a regulated industry, and manufacturing at a local factory are usually regarded as high risk.
- Trading houses, defence, pharmaceuticals, healthcare, natural resources, construction, real estate, transport, and finance industries are indicated as being exposed to higher risk in the Guidelines.
- Private meetings with public contractors or companies hoping to tender for contracts.
- Lavish hospitality and gifts being received.
- Proximity of employees to suppliers, such as:
  - taking holidays with suppliers or their families;
  - individual never takes time off, even if ill, or holidays;
  - insists on dealing with specific contractors himself; and
  - unexpected or illogical decisions on accepting projects or contracts.
- Breaching the decision process, controls or delegated powers in awarding a contract.
- Awarding contracts unfavourable to the organisation, due to the terms or time period.
- Unexplained preference for certain contractors, and avoidance of independent checks on tendering or contracting processes.
- Raising barriers around specific roles or departments that are key in the tendering or contracting process, and an excessive number of rush orders or contract variations.
- Lack of documentation regarding key meetings and decisions.

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