Client Alert

August 29, 2016

Japan Bar Association Issues New Anticorruption Compliance Guidelines

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On July 15, 2016, the Japan Federation of Bar Associations (JFBA) issued new guidance for companies on complying with Japanese and other foreign anti-bribery laws (the "Guidance").[2] The Guidance comes on the heels of and supplements prior guidelines issued by the Japanese Ministry of Economy, Trade and Industry (METI) in July 2015,[3] clarifying certain aspects of Japan's foreign anti-bribery laws, as well as guidance on foreign risk management issued by the Small and Medium Enterprise Agency (geared towards facilitating compliance by Japanese small and medium businesses).[4]

While earlier METI Guidelines contained suggestions regarding corporate compliance systems and interpretations of Japan's foreign anti-bribery law (for example, what constitutes a "foreign public official"), the Guidance is distinct in both the practicality and level of detail it provides to assist companies in crafting and implementing anticorruption compliance policies, responding to potentially corrupt practices, and coping with anticorruption risks in M&A transactions.

Interestingly, both the METI Guidelines and the Guidance appear designed to address prior criticism from the OECD Working Group on Bribery in International Business Transactions (the "Working Group") of Japan's relatively lax anticorruption enforcement and gaps in Japan's foreign anti-bribery laws.[5] The Guidance was issued shortly after a visit to Japan by high-level members of the Working Group to discuss Japan's anticorruption enforcement efforts and the upcoming evaluation of Japan as part of the Working Group's peer-review process.[6]

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[1] The authors thank Washington, D.C. associate Andrew Meyer and Tokyo associate Naoko Ishihara for their assistance in preparing this client alert.

[2] *Available at* http://www.nichibenren.or.jp/library/ja/opinion/report/data/2016/opinion_160715.pdf (available in Japanese only).

[3] The Guidelines for the Prevention of Bribery of Foreign Public Officials (the "METI Guidelines"): (1) clarified the meaning of "improper business advantage" under the UCPL; (2) provided best practices for addressing foreign bribery risks; and (3) addressed measures taken by Japan to implement the OECD Convention on the Prevention of Bribery of Foreign Public Officials in International Business Transactions. A Japanese version of this guidance is *available at*: http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GaikokukoumuinzouwaiBoushiShishin.pdf; an English translation is *available at*: http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GuidelinesforthePreventionofBriberyofForeignPublicOfficials.pdf.

[4] *Available at* http://www.smrj.go.jp/keiei/dbps_data/_material_/b_0_keiei/kokusai/pdf/82284RM_guide.pdf (available in Japanese only).

[5] *See* our prior alert regarding the OECD Working Group evaluation process *available at*: http://www.mofo.com/~/media/Files/ClientAlert/140501JapanDisclosesNewEffortstoCombatForeignBribery.pdf.

[6] *See* http://www.oecd.org/daf/anti-bribery/japan-must-make-fighting-international-bribery-a-priority.htm.

Although Japan's enforcement of its foreign anti-bribery laws has previously been criticized as overly lax, with only four prosecutions to date,[7] continuing international pressure and the increasing pace of anticorruption guidance issued by Japanese government agencies and organizations may signal a step-up in enforcement activity going forward.[8] Given the potential for significant liability in such enforcement actions, the Guidance's focus on practical steps to limit anticorruption risk is particularly helpful.

JAPAN'S FOREIGN ANTICORRUPTION LAW

Japan criminalizes the bribery of foreign government officials under Article 18 of the Unfair Competition Prevention Law (UCPL), which reads:

> *No person shall give, offer, or promise any pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert upon another foreign official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain [an] improper business advantage in the conduct of international business.*[9]

This prohibition applies to both natural and legal persons (e.g., corporations)[10] under the theory that a company is liable for not exercising due care in the supervision and selection of its officers and employees.[11] Jurisdictionally, the UCPL applies to Japanese citizens and entities anywhere in the world, while foreign (i.e., non-Japanese) individuals and entities are covered where the act or offense, or the result of the offense, occurs in Japan.[12]

Penalties for violating the foreign bribery provisions of the UCPL range from a maximum of five years in prison or a five million yen fine (approximately US$50,000) for natural persons,[13] or both, and a maximum 300 million yen (approximately US$3 million) fine for legal persons.[14]

Because Japan's foreign anti-bribery laws are contained within the UCPL, as opposed to the Penal Code, METI is the agency in charge of their administration (for comparison, the Ministry of Justice administers the Penal Code). Accordingly, the METI Guidelines carry more official force—particularly in their interpretations of various aspects of the UCPL—than the Guidance. However, while not a binding interpretation of Japan's anticorruption laws, the

[7] *See* METI Guidelines at 41-42.

[8] *See, e.g.*, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan, at 15 (December 2011), *available at* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf.

[9] *See* Unfair Competition Prevention Law (Act No. 47 of May 19, 1993) art. 18-(1).

[10] *See* Unfair Competition Prevention Law, art. 22I(3).

[11] *See* OECD Working Group on Bribery, Japan: Review of Implementation of the Convention and 1997 Recommendation, at 7 (May 21, 2002), *available at* http://www.oecd.org/japan/2387870.pdf.

[12] *See* METI Guidelines at 25-26.

[13] *See* Unfair Competition Prevention Law, art. 21II(7) and METI Guidelines at 35.

[14] *See* Unfair Competition Prevention Law, art. 22I(3) and METI Guidelines at 23-24.

Guidance represents the consensus view of the Japanese bar and provides an excellent starting place for companies seeking to implement or improve their anticorruption compliance programs.

THE JFBA'S GUIDANCE

The Guidance suggests steps for companies seeking to establish and strengthen anticorruption compliance programs, respond to allegations of potential bribery, and manage risk in M&A transactions. In addition to taking these steps, the Guidance suggests that companies actively publicize (for example, in investor communications) their efforts to comply with the Guidance both to enhance shareholder value and promote greater transparency.[15]

It is also worth noting that the Guidance is not necessarily unique. A Resource Guide to the U.S. Foreign Corrupt Practices Act[16] published by the U.S. Department of Justice and Securities and Exchange Commission (the "Resource Guide"), as well as the Bribery Act 2010 Guidance published by the UK Ministry of Justice,[17] contain similar suggestions—particularly regarding the importance and content of corporate compliance policies. In fact, the Guidance contains references to relevant provisions of the Resource Guide.[18] The Guidance's focus on the application of these principles to Japan's anticorruption laws, however, is a welcome confirmation of many established compliance best practices.

CREATING EFFECTIVE COMPLIANCE POLICIES

As the Guidance notes, the first step in designing an anticorruption compliance program is assessing an organization's anticorruption and compliance risks.[19] Such an assessment should focus on areas where an organization is most likely to encounter compliance risks—including high-risk countries and regions (e.g., by examining Transparency International's Corruption Perceptions Index)[20] and industries with a history and culture considered susceptible to compliance risks (e.g., trading companies, defense contracting, medical and pharmaceutical, finance, construction, and resource extraction)—and should take into account the nature and size of a company's operations (e.g., industries relying on government contracts, customs clearance, licensed operations, and foreign manufacturing).[21]

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[15] *See* Guidance arts. 17-18 at 17-18.

[16] *See* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 56 (Nov. 14, 2012), *available at* https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

[17] *See* UK Ministry of Justice, The Bribery Act 2010 Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated With Them From Bribing, at 22 *et seq.* (March 2011), *available at* https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[18] Guidance at 2 fn. 7. Similar references to the Resource Guide were also included in the METI Guidelines at 13 n.26.

[19] Guidance art. 2 at 6-7.

[20] *Available at* http://www.transparency.org/cpi2015 (showing results for 2015).

[21] Guidance art. 2 at 6-7.

Identifying a company's most serious risks facilitates the creation of policies that address those risks in a considered and efficient manner. The Guidance stresses that any policy should clearly state that no sale or profit is worth paying a bribe, either directly or indirectly.[22] Other items that the Guidance suggests companies specify in anticorruption policies include:

- The policy's scope (e.g., group companies and management as well as regular employees);
- An explicit prohibition on bribery as well as facilitation payments;
- A requirement to keep accurate books and records (i.e., a prohibition on the disguising of bribe payments under fake accounting records);
- Procedural rules for business entertainment, gifts, or donations (e.g., addressing appropriate occasions, maximum limits, and the process for obtaining approval) along with specific rules covering the retention of third party agents;
- A system for anonymous reporting of policy violations (i.e., "whistleblowers"); and
- A disciplinary system to address any violations.[23]

The Guidance advises that anticorruption policies be translated into the local language of countries where international organizations operate.[24] This will enable local employees, who may be more likely to receive bribe requests, to better understand and follow company policy.

Given the prevalence of enforcement activity involving third party agents or consultants, the Guidance provides fairly specific and detailed risk-based policies that companies can use to vet and approve third parties.[25] For example, the Guidance recommends that before entering into an agreement, and periodically thereafter, a company should:

- Ensure that any contract with a third party includes explicit prohibitions on the use of bribery or corrupt practices in the third party's business practices, for example, in the form of representations and warranties or similar covenants. The contract should also include clear statements of the assigned work and any deliverables, payments due, and termination rights for violation of the anticorruption provisions.
- Conduct appropriate diligence on the third party, including requiring the third party to provide basic information concerning itself, any past criminal or bribery-related allegations, any relationships between company officers and foreign officials, and business references. In addition, a company should conduct its own investigation of the third party, for example, by using publicly available information and databases. If necessary, in the case of particularly important or high-risk third parties, a company should also consider retaining an expert to perform a background check on and evaluate the third party.

[22] Guidance art. 1 at 6.

[23] Guidance art. 3 at 7-8; art. 8 at 11-12.

[24] Guidance art. 3 at 8.

[25] Guidance art. 5 at 9-10.

Once an anticorruption policy is established, the Guidance suggests that management, and staff who may be involved in international transactions, receive education and training regarding the UCPL and other prominent foreign anticorruption laws, like the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (UKBA).[26] That training should specifically address issues identified during the initial risk assessment.

To oversee and implement these policies, the Guidance suggests the creation of an independent and permanent compliance committee reporting to the company's board or audit Committee.[27] That committee should be responsible for supporting the company's compliance policies, overseeing the reporting/whistleblower system, and ensuring that relevant disciplinary policies are appropriately applied.

RESPONDING TO POTENTIAL BRIBERY ISSUES

Companies must also be ready to respond appropriately when they receive a request to pay a bribe or discover that a bribe may have been paid.

In the event that a company receives a bribe request, the Guidance proposes that a company should: (1) clearly refuse the request; (2) require local offices to report immediately to corporate HQ; (3) designate a task force to communicate with attorneys and local personnel as appropriate; and (4) report the request to outside managers or auditors at the corporate parent level, along with government agencies if necessary.[28] The Guidance also notes that it is important for companies to avoid placing the burden of compliance solely on the shoulders of local personnel and that a central department should take the lead in resolving such issues.[29]

When a company discovers that a bribe has been paid, the Guidance suggests that the company: (1) prevent any further bribe payments; (2) preserve all—even unfavorable—evidence; (3) appoint a task force to further investigate; (4) require local offices to promptly report to corporate HQ; (5) report to outside managers/directors and auditors as necessary; (6) evaluate whether to report to government authorities; and (7) take any necessary disciplinary action and review the results of the investigation for lessons learned.[30]

To the extent possible, the Guidance suggests that attorneys should be involved in any investigation to ensure that a complete analysis is facilitated by privileged attorney-client communication.[31] Determining whether, and to what extent, the attorney-client privilege or other protections apply in a particular jurisdiction involves issues of local law. Accordingly, companies should be sure that they or their attorneys consult with local counsel before beginning such an investigation.

[26] Guidance art. 6 at 10.

[27] Guidance art. 4 at 8-9.

[28] Guidance art. 11 at 13-14.

[29] Guidance art. 11 at 13.

[30] Guidance art. 12 at 14-15.

[31] Guidance art. 14 at 15.

ADDRESSING RISKS IN M&A TRANSACTIONS

The Guidance is particularly interesting in its inclusion of specific advice regarding anticorruption diligence and contract terms for M&A transactions. Companies should pay particular attention to ensure that they do not end up purchasing potentially significant and unexpected compliance-related liability.

The Guidance suggests that companies consider anticorruption issues in parallel with other financial and legal diligence, including:

- Whether the target has a sufficient internal compliance program;
- The attitude of the target's corporate management towards anticorruption issues;
- The degree to which the target is dependent on third party agents;
- Payments made to and by third party agents on the target's behalf;
- The amount and frequency of business entertainment, gifts, and donations;
- Petty and other cash management policies;
- Any payments linked to licensing or customs clearing;
- Whether any employees are, or are relatives of, government officials;
- The structure of the target's whistleblower system;
- The target's history of criminal and other administrative sanctions; and
- The ability of the target's accounting and compliance audit systems to detect corruption.[32]

If diligence exposes *non-material* compliance issues, the Guidance indicates that acquirers should consider including appropriate covenants, or representations and warranties, in transaction documents requiring the target to: take appropriate disciplinary action prior to closing; perform further investigation; take concrete steps to prevent the recurrence of compliance problems; and ensure that liability for compliance issues is not passed on as a result of the transaction.[33] In the event that diligence uncovers a *material* compliance issue, the Guidance advises that the transaction should not proceed or should be altered to exclude the affected business or asset.[34]

Post-closing, the Guidance advises the immediate investigation of any issues which could not be investigated during the diligence stage (for example, due to an uncooperative target or regulatory restrictions).[35] If bribery is discovered, the Guidance suggests that companies should consider appropriate disciplinary action, take steps to prevent recurrence, enforce applicable covenants or representations and warranties, and consider whether to report to government officials.[36] In any event, the Guidance notes that an acquired company should be promptly incorporated into the acquiring company's compliance program.

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[32] Guidance art. 16 at 15-16.

[33] Guidance art. 16 at 16.

[34] Guidance art. 16 at 17.

[35] *Id.*

[36] *Id.*

CONCLUSION

While Japan has not historically been a major enforcer of anti-bribery laws, there is significant potential for increased enforcement as a result of both sustained international pressure and the ever increasing number of Japanese companies engaging in overseas business and corporate transactions. Such companies already face well-known, and significant, risks of enforcement action in other jurisdictions such as the U.S. and UK. The addition of Japan as a realistic source of enforcement risk makes the creation and maintenance of effective corporate anticorruption policies all the more important. The practical nature of the Guidance's advice is particularly welcome in these circumstances and serves as an excellent starting point for companies seeking to create and support such policies.

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