

Japanese Ministry of Economy, Trade and Industry Updates Guidance to Prevent Foreign Bribery

Companies with business operations in Japan should review due diligence procedures and internal policy regarding small facilitation payments to ensure they are consistent with new guidance from METI.

In May 2021, the Ministry of Economy, Trade and Industry (METI) revised the Guidelines for the Prevention of Bribery of Foreign Public Officials (Guidelines).¹ Although the Guidelines do not impose legal obligations on companies, METI expects each company to create and implement an appropriate compliance system with reference to the Guidelines. The revised Guidelines include detailed guidance on due diligence prior to executing an acquisition or retaining a third-party agent — largely consistent with US government expectations under the US Foreign Corrupt Practices Act (FCPA) — and urge Japanese companies and global companies with business operations in Japan to prohibit small facilitation payments. Companies that have business operations in Japan should understand and incorporate the most recent changes to the Guidelines into their local company compliance system to the extent appropriate.

Background

Japan implemented the 1997 OECD Anti-Bribery Convention in 1998, by amending the Unfair Competition Prevention Act (UCPA) to add Article 18, which criminalizes bribery of foreign public officials.

Article 18 was intended to track the language of the Anti-Bribery Convention, and provides as follows:

No person shall give, offer or promise any pecuniary or any 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 improper business advantage in the conduct of international business.

METI administers the UCPA, including Article 18, while prosecutions under Article 18 are handled by the Public Prosecutors Office. In 2004, METI issued the Guidelines for the first time to explain the UCPA and to guide companies on how to prevent bribery. The Guidelines have been revised several times over the years, most recently in September 2017 and now May 2021.

M&A and Bribery Risk

The revised Guidelines add a subsection on M&A, which offers guidance on assessment/handling bribery risk in contemplated acquisitions. This subsection emphasizes the importance of detailed due diligence on the bribery risk of the target company, and recommends a post-closing risk assessment if the target company does not fully cooperate with pre-acquisition due diligence and the deal faces pre-closing time constraints. Pursuant to the revised Guidelines, pre-acquisition due diligence and risk assessment should include:

- The target company's business: if the business has a high bribery risk (e.g., frequent transactions with government agencies, business in high bribery-risk regions, or business for which regulatory permits and approvals are important)
- Internal anti-bribery policies and implementations thereof (such as compliance manuals, trainings, risk assessment and audit, evaluation of agents and updates thereof, training and management of agents, disciplinary and corrective actions in case of compliance violations)
- Past and current bribery reports, audits, and investigations (including reports made to the company compliance hotline and any bribery-related issues flagged by an audit)
- Any "unnatural" payments in relation to transactions with government agencies (e.g., a large number of payments made to agents in relation to a contract with a government agency, a discrepancy between what is written in the company books and records and the actual nature of the expenses paid)

If sufficient information is not obtained by due diligence, the revised Guidelines suggest anti-bribery compliance representations and warranties in the M&A agreement may become particularly important, noting that such contractual clauses do not eliminate bribery risk or the need for adequate pre-acquisition due diligence or a post-acquisition risk assessment.

If a bribery risk is flagged as a result of due diligence, the revised Guidelines recommend companies consider a number of actions, including the possibility to hold off the acquisition or change the post-merger integration schedule. If post-closing verification identifies an issue or risk previously unknown, a corrective measure should be taken, including possibly reporting to government authorities. The revised Guidelines also recommend support from the parent company to set up and implement the compliance system at the newly acquired subsidiary.

Third Party Due Diligence and Monitoring

The prior Guidelines urged companies to include anti-bribery representations, warranties, and covenants in agreements engaging agents or other third parties and to conduct anti-bribery due diligence prior to engagement. The revised Guidelines also emphasize the importance of ongoing monitoring of third parties by exercising audit rights and rights to request documents, and suggest terminating the third-party relationship or suspending payments if third parties do not cooperate with monitoring. The revised Guidelines provide further details on these points, specifically on recommended due diligence, including:

- Third parties' contact points and relationships with foreign public officials in the countries where third parties are based and where the transactions take place
- Third parties' internal anti-bribery rules and compliance

- Past and current bribery risks of third parties
- The volume of transactions that third parties have with government agencies

Prior to entering into an agreement with third parties, the revised Guidelines recommend incorporating anti-bribery compliance representations and warranties, rights to audit and investigate third parties, third parties' obligations to provide information on invoices and other documents, obligations to keep records of transactions, and a right to terminate and seek damages if representations and warranties are violated. In addition, the revised Guidelines recommend to confirm whether payments to third parties are reasonable, considering the services these third parties provided.

In this regard, the revised Guidelines are consistent with expectations from authorities in other countries such as the US and the UK. Indeed, a footnote in the revised Guidelines emphasizes the importance of continuously improving compliance systems with reference to overseas authorities' guidelines such as the FCPA Resource Guide and the Bribery Act 2010 Guidance.

Recommendation of Prohibition of Small Facilitation Payments

The revised Guidelines recommend that companies prohibit small facilitation payments in their internal policies, because even small facilitation payments may be made "in order to obtain a wrongful gain in business," under Article 18 of the UCPA. In making this recommendation, the revised Guidelines note a narrow exception for "facilitating or expediting payments" to bribery prohibition under the FCPA — namely, that the FCPA's prohibition of bribery does not apply when a payment is made to further "routine governmental action" that involves non-discretionary acts, such as processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water.

The revised Guidelines' recommendation to prohibit small facilitation payments is most likely a response to the Phase 4 report adopted by the OECD Working Group on Bribery in June 2019. The original Guidelines issued in 2004 indicated that the UCPA does not explicitly exempt small facilitation payments, but that such payments would not be a criminal offense under the OECD Anti-Bribery Convention. The OECD criticized this interpretation as confusing, and METI updated the Guidelines in September 2010 to clarify that facilitation payments would be illegal under Japanese law if the payments were intended to obtain or retain improper business advantage in the conduct of international business. The OECD subsequently criticized this clarification for not actively encouraging Japanese companies to prohibit even small facilitation payments, and METI removed the paragraph related to facilitation payments in its July 2015 revision of the Guidelines. The June 2019 Phase 4 report again criticized this removal, stating that "the total lack of information on what is a small facilitation payment in fact creates a grey area that is at least equally problematic as the former ambiguous example."

A footnote in the Revised Guidelines clarifies that the UCPA is more closely aligned to the UK Bribery Act, which does not include an exception for facilitation payments and criminalizes all bribery.

Payment to Avoid Unreasonably Discriminatory Treatment

The previous Guidelines stated that if a payment was unavoidable in order to avert foreseeable damage to the company or its employees, such payment may not be treated as payment "to obtain a wrongful gain in business" as prohibited by Article 18 of the UCPA. The Phase 4 report criticized this interpretation as incompatible with the OECD Convention and noted that it would constitute a major loophole. The revised Guidelines do not include this caveat.

Introduction of “Agreement System” Under the Criminal Procedure Code

The revised Guidelines note that pursuant to an amendment to the Criminal Procedure Code in May 2016, a prosecutor may enter into an agreement with a suspect or defendant to drop or reduce criminal charges or agree to a pre-determined punishment if such suspect or defendant provides evidence or testimony in relation to certain types of crimes, including violations of the UCPA. Furthermore, the revised Guidelines recommend considering using the new agreement system if a foreign public official demands bribes, or if an internal audit or a whistleblower report finds that local staff may have paid bribes to a foreign public official.

Conclusion

The Guidelines were issued “to support companies involved in international commercial transactions to voluntarily take a preventative approach to the prevention of bribery of foreign public officials,” but the Guidelines also provide general guidance about setting up and implementing anti-bribery and anti-corruption compliance programs. In light of the recent changes to the Guidelines, companies that have business operations in Japan should review due diligence procedures relating to third parties and contemplated acquisitions, and consider adopting an internal policy prohibiting small facilitation payments if existing policies do not prohibit such payments.

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Endnotes

- ¹ Ministry of Economy, Trade and Industry, Regarding the Guidelines for the Prevention of Bribery of Foreign Public Officials (https://www.meti.go.jp/policy/external_economy/zouwai/overviewofguidelines.html) (official English translation not yet available, as of early July 2021). Under the UCPA, foreign public officials mean: any person who engages in public services for a national or local foreign (non-Japanese) government; any person who engages in services for an agency affiliated with a foreign (non-Japanese) national government; any person who engages in services for a foreign (non-Japanese) public enterprise; any person who engages in public services for an international organization; and any person who exercises a public function on behalf of a foreign (non-Japanese) national government as delegated.