

# **Guidelines to Prevent Bribery of Foreign Public Officials**

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**Ministry of Economy, Trade and Industry**

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## INTRODUCTION

With the progress of further globalization and growth beyond national borders of corporate activities, the volume of international business transactions that Japanese companies engage in is increasing steadily.

In response to the awareness that unfair competition through bribery of foreign public officials etc. should be prevented to ensure the acquisition and maintenance of opportunities in the conduct of business in overseas markets, the Convention on combating bribery of foreign public officials in international business transactions was developed and subsequently approved by the OECD in 1997. Japan also takes part in this movement and has been taking actions including a revision to the Unfair Competition Prevention Law in 1998 (which came into force in February 1999), under which the bribery of foreign public officials was defined as a chargeable offense.

In the meantime, worldwide concern for the problem of fraud and corruption including the bribery of foreign public officials has been showing a rapid increase in recent years, as is evidenced by, for instance, suggestions made during the Evian Summit in June 2003 calling for enhanced actions to combat the problem of fraud and corruption and the approval of the UN Convention Against Corruption, which Japan also signed in December of the same year.

In consideration of these circumstances, the Subcommittee on Corporate Activities Related to International Business Transactions, of the Trade and Economic Cooperation Committee, of the Industrial Structure Council, was mandated since January 2003 to study what kinds of measures should be set in place for the further effective prevention of bribery of foreign public officials.

Following its discussion that continued for approximately one year, the Subcommittee presented its recommendations in February of this year in the form of a report titled "Report on Measures for Effective Prevention of Bribery of Foreign Public Officials" as well as the "Guidelines for Prevention of Bribery of Foreign Public Officials."

After the Japanese government subsequently examined necessary legislative measures in consideration of the Report, the "Bill for amendment of the Unfair Competition Prevention Law" was passed on May 19, 2004 and was promulgated on May 26, which provides that a Japanese national who commits an offense of bribery of a foreign public official outside of Japan may be charged in Japan.

Taking this opportunity to achieve its objective of supporting voluntary and preventative approaches by companies involved in international business transactions with respect to the offense of bribery of foreign public officials, the Ministry of Economy, Trade and Industry hereby releases the "Guidelines to Prevent Bribery of Foreign Public Officials," which is based on the guidelines recommended by the Subcommittee.

It would be our wish to see these Guidelines help promote the public's understanding of the offense of bribery of foreign public officials.

# CHAPTER 1: BACKGROUND AND OBJECTIVES OF THE GUIDELINES

## 1. Background of the Guidelines

With the progress of further globalization and growth beyond national borders of corporate activities, the volume of international business transactions that Japanese companies engage in is increasing steadily. In order to ensure the acquisition and maintenance of opportunities in the conduct of business in overseas markets, fair competition based on prices and quality of products and services should be the norm and unfair competition through bribery of foreign public officials etc. should be prevented.

Also being shared worldwide, such awareness led to the development of the Anti-Bribery Convention ("Convention on Combating Bribery of Foreign Public Officials in International Business Transactions"<sup>1</sup>), which had been approved by the OECD in 1997. In accordance with this Convention, the respective countries proceeded to take mutually equivalent measures to prevent bribery of foreign public officials by concerted actions mainly under the initiative of developed nations<sup>2</sup>.

### Main Points of the Convention

#### (1) Elements of the Offense

The offense of bribery of foreign public officials is committed when:

- any person intentionally
- to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries,
- to a foreign public official,
- for that official or for a third party,
- in order that the public official act or refrain from acting in relation to the performance of official duties,
- in order to obtain or retain business or other improper advantage in the conduct of international business.

#### (2) Definition of Foreign Public Official

"Foreign public official" means:

- any person holding a legislative, administrative or judicial office of a foreign country (including a local public entity in a foreign country),
- any person exercising a public function for a foreign country, including an official for a public agency (an entity constituted under public laws to carry out specific tasks in the public interest) of a foreign country,

<sup>1</sup> This Convention may hereinafter be abbreviated as the "OECD Convention" or, more simply, the "Convention." For information regarding the Convention and the Commentaries adopted together with the Convention in November 1997, refer to: [http://www.oecd.org/document/21/0,2340,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html) (text of the Convention) and [http://www.oecd.org/document/1/0,2340,en\\_2649\\_34859\\_2048129\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/0,2340,en_2649_34859_2048129_1_1_1_1,00.html) (text of the Commentaries). For the Japanese translation of the text of the Convention, refer to: [http://www.mofa.go.jp/mofaj/gaiko/oecd/jo\\_shotori.html](http://www.mofa.go.jp/mofaj/gaiko/oecd/jo_shotori.html).

<sup>2</sup> The Convention is open for signature by non-OECD member countries as well, and the signatories as of May 2004 are 30 OECD member countries (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States) and five other countries, namely, Argentina, Brazil, Bulgaria, Chile and Slovakia (35 signatories in total).

- any person exercising a public function for a foreign country, including an official for a public enterprise, and
  - any official or agent of a public international organization.
- (3) Sanctions**
- Effective, proportionate and dissuasive criminal penalties;
  - The range of penalties shall be comparable to that applicable to the bribery of the bribery of the Party's own public officials;
  - To establish the liability of legal persons;
  - Seizure and confiscation of the bribe and the proceeds of the bribery, or monetary sanctions of comparable effect; and
  - The imposition of additional civil or administrative sanctions shall also be considered.
- (4) Jurisdiction**
- Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory; and
  - Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles..
- (5) Money Laundering**
- Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.
- (6) Miscellaneous**
- In addition to the above, measures in such areas as accounting, mutual legal assistance, extradition, and follow-up on the implementation of the Convention by the signatory countries shall also be taken in conjunction in order to ensure the effect of the Convention.

In conformity with the said Convention, Japan has been taking actions including a revision to the Unfair Competition Prevention Law in 1998 (which came into force in February 1999)<sup>3</sup> and each signatory country is also working on measures including the creation of criminal penalties for the bribery of foreign public officials<sup>4</sup>. (For the details of the measures taken in Japan, refer to Chapters 3 and 4.)

In recent years, worldwide concern for the problem of fraud and corruption including bribery of foreign public officials has been showing a rapid increase. Over the past one year alone, suggestions were made to call for enhanced actions to combat the problem of fraud and corruption, some of which took the form of specific mentions of the issue in summit-level consensus documents, namely, those issued at the Evian Summit in June 2003 ("Fighting Corruption and Improving Transparency: A G8 Declaration") and the APEC Leaders' Declaration in October 2003 ("Bangkok Declaration on Partnership for the Future"). As another initiative, the United Nations hosted, with extensive participation of not only developed countries but also developing countries, the signing ceremony for the "UN Convention Against Corruption" in December of the same year, which stipulates, among others, the control against bribery and acceptance of a bribe involving domestic public officials and bribery of foreign

<sup>3</sup> For the development etc. of the discussion on the bribery of foreign public officials, also refer to "Implementation of Measures for Effective Prevention of Bribery of Foreign Public Officials" (by the Subcommittee on Corporate Activities Related to International Commercial Transactions, of the Trade and Economic Cooperation Committee, of the Industrial Structure Council).

<sup>4</sup> Another partial revision was made to the Unfair Competition Prevention Law in June 2001 in order to clarify the definition of foreign public official, etc.

public officials and to which Japan also became a signatory.

In consideration of these changes in the surroundings, yet another round of efforts is required to raise the awareness of a wide array of stakeholders in Japan regarding the issue of bribery of foreign public officials etc.

## **2. Objectives Behind the Development of the Guidelines**

Bribing a foreign public official may constitute a bribery offense in the country of that public official and may also violate the Unfair Competition Prevention Law of Japan. Whether subject to criminal penalties or not, however, it is believed that companies engaging in international business transactions are, from the standpoint of corporate governance, required to behave so as not to be mistaken for fostering fraud or corruption.

Taking a preventative approach is extremely important to address the issue of fraud and corruption. Otherwise, a company might suffer a negative image that is unrecoverable after having its scandal brought to light.

Based on such concern, the objective behind the development of these Guidelines was to support voluntary and precautionary approaches by companies involved in international business transactions. Specifically, these Guidelines provide information etc. to be referred to in taking measures for the prevention of bribery of foreign public officials. Provision of such information should likely help companies further understand and raising the ability to predict the offense of bribery of foreign public officials.

By referring to these Guidelines, each company is strongly expected to review its existing measures and apply new measures, as well as to take specific actions such as dissemination of and education on the issue targeting its departments pertaining to international business transactions.

## **3. Structure of the Guidelines and Points to Note**

In Chapter 2 of these Guidelines, measures for the prevention of bribery of foreign public officials that each company should aim for will be presented. In order for the company to smoothly develop specific prevention measures as thus presented, the scope of punishable acts under the Unfair Competition Prevention Law will subsequently be discussed in Chapter 3, followed by the provision of the basic information on relevant issues in and outside of Japan in Chapter 4.

Note that the internal control methodologies referred to in these Guidelines are based on the results of analysis of the current situation as it stood when these Guidelines were developed. The level of internal control required of a company necessarily keeps shifting and evolving according to changes in the economic and social surroundings. Each company needs to heed this fact and conduct continual reviews of its measures.

As there is also still no court case at this point in time that has ruled on the offense of bribery of foreign public officials under the Unfair Competition Prevention Law, details would have to wait until cases are accumulated. For that reason, readers are asked to note that the contents of interpretations etc. of the Law described in these Guidelines are based on judgments available when they were developed.

## **CHAPTER 2: IMPROVING EFFECTIVENESS OF INTERNAL CONTROL EXERCISED BY BUSINESS**

This Chapter illustrates examples of measures etc. that might be referred to for the purposes of augmenting the effect of preventative measures against the bribery of foreign public officials and improving the effectiveness of internal control (which means a "program developed and applied within a company for the company to perform its operations appropriately and efficiently")<sup>5</sup> at the level of individual companies.

### **1. Basic Views**

#### **(1) Background**

In keeping with higher consumer awareness and further internationalization in business operations etc., social responsibility of business is becoming increasingly weighty as well, which has led to active efforts being made by companies in the area of internal control including compliance programs, in their attempt to ensure statutory compliance and to add more efficiency to their operations etc.<sup>6</sup>

Such efforts in the area of internal control are also extremely effective in the prevention of bribery of foreign public officials. This point has been proven by a consensus reached during the Evian Summit in June 2003 that governments should encourage the private sector to develop compliance programs in respect of bribery of foreign public officials<sup>7</sup>.

On top of that, the question of whether or not a given company exercises effective internal control now influences civil trials in Japan. It has been made clear in a court decision that the failure to develop adequate internal control might result in the corporate manager being held accountable for the violation of the obligation to use the care of a good manager under civil law.

Companies also need to set in place proactive and specific violation preventative measures on a corporate-wide basis, paying attention to the fact that, in Japan, criminal penalties are impossible upon legal persons (criminal responsibility of legal persons) upon the general presumption of negligence of an employer in the case of the commission of a statutory violation by its employee.

#### **(2) Internal Control Concept Applied in these Guidelines**

<sup>5</sup> The commonly-cited objectives for the development of internal control are (i) effectiveness and efficiency of operations, (ii) reliability of accounting information and (iii) compliance with applicable laws and regulations.

In addition, appropriate management of various internal and external risks associated with business operations is also weighed heavily in order for companies to maintain and augment their corporate values in their business administration. This idea is called "risk management" and is also reflected in, among others, the Law concerning the Law for Special provisions for the Commercial Code (Item 2 of Article 21-7, also Article 193 of the Enforcement Regulations of the Commercial Code) and a draft report issued by the Committee of Sponsoring Organizations of the Treadway Commission of the United States (Enterprise Risk Management Framework (COSO-ERM)). The effectiveness of internal control will augment when it functions in conjunction with risk management.

<sup>6</sup> Specific examples include a revision to the "Charter of Corporate Behavior" by Nippon Keidanren (May 2004), the development of the "Corporate Code of Conduct" by the Tokyo Chamber of Commerce and Industry (December 2002) and the development of the "Model Compliance Program" by the Japan Foreign Trade Council, Inc. (December 2002).

<sup>7</sup> "Fighting Corruption and Improving Transparency: A G8 Declaration" sets out, "2. We will strengthen the enforcement of our Anti-Bribery Laws and will encourage the private sector to develop related compliance programs. We will . . . 2.2. encourage the private sector to develop, implement and enforce corporate compliance programs relating to our domestic laws criminalizing foreign bribery."

A variety of developments can also be found in methodologies of internal control by business in Japan, at different levels including private organizations and the government sector. One example is the "Study Forum on Risk Management and Internal Controls" initiated by the Ministry of Economy, Trade and Industry. This Study Forum developed and released "Internal Control in the Era of Risks ~ Guidelines for Internal Control That Functions Together with Risk Management"<sup>8</sup> in June 2003 in an attempt to support efforts on the part of business and industry. The bribery of foreign public officials is an act that can be positioned as one of the legal risks discussed there as well. The contents of this report are therefore very useful in developing internal control from a wider perspective.

The internal control methodologies discussed in this Chapter provide an illustration of the target approach of internal control focusing on the prevention of the preventing bribery of foreign public officials, by referring to and respecting existing outcomes from activities performed in various areas. This embodies some particular features of these Guidelines in comparison with other existing outcomes regarding other types of internal control, such as the strong prospect of linkage with efforts made overseas and the need for judgment formation commensurate with overseas legislative structures and business practice etc.

### **(3) Points to Note in Developing Internal Control Contributing to the Prevention of Bribery of Foreign Public Officials**

The examples shown in Section 2 that follows are mostly intended to promote the structuring and development of internal control. It should also not be forgotten, however, that the state of internal control application and its evaluation are critical for judging whether or not the internal control is functioning effectively.

Another point is that the state of structuring and application of internal control required of a company may be evaluated differently depending on the company size, business category, economic and social surroundings and sign of the times etc. and it is accordingly difficult to define uniform criteria. Therefore, companies are required to make incessant efforts to regularly examine whether the level of internal control that they have developed and applied is sufficient at each given point in time, and work to improve it.

## **2. Desirable Internal Control Methodologies for Business**

**To prevent the bribery of foreign public officials, companies engaged in international business transactions must improve the effectiveness of internal control, including the development of a compliance program.**

**Items (1) to (6) below illustrate desirable methodologies for internal control<sup>9</sup>. Each company is expected to refer to these illustrations and promptly start the process of examining and taking measures to put them into practice.**

<sup>8</sup> For the full text and summary of the report, refer to: <http://www.meti.go.jp/report/data/g30627aj.html>.

<sup>9</sup> The internal control methodologies illustrated here follow the sequence of "development of a policy etc. (= plan)," "implementation of specific measures (= do)," "audit of the state of implementation and management of the measures (= check)" and "review of the policy etc. based on audit results (= act)." As a management method of this type is beneficial for continual improvements of internal control management, it is also used as a standard method by the International Organization for Standardization (ISO) and has already been applied by a large number of companies as well.

## **(1) Defining Basic Policies and Establishing a Compliance Program**

**In addition to preventing an act of bribery of foreign public officials that would constitute a statutory violation in and outside of Japan, companies also need to take extensive actions so as not to appear dubious from the viewpoint of ethics, including social norm. For that purpose, they should take the following measures.**

**It should be noted that a basic policy and a compliance program are also critical for sharing and thoroughly enforcing the determination within the company towards the prevention of bribery of foreign public officials.**

### **(i) Definition of Basic Policies**

**To prevent the bribery of foreign public officials, a basic policy that contains the following measures should be developed and announced:**

- Any act of bribing a foreign public official, such as an official of a foreign national government, that would constitute a bribery offense in that country or would violate the Unfair Competition Prevention Law should not be committed;
- Sanctionary measures should be clarified in advance, under which a severe sanction including disciplinary actions will be imposed on an employee who committed an illegal act, commensurate with the nature of the act<sup>10</sup>;
- By clearly presenting the developed basic policy in and outside of the company, the strong determination that the company has towards bribery prevention should be made clear and the transparency of the details of its activities should be ensured as well;
- It is also useful to translate a basic policy and a compliance program as required, so that they can be utilized for dissemination among non-Japanese staff etc. employed in overseas branches as well as when, for instance, the company wants to gain the understanding of foreign investors and business transaction partners.

### **(ii) Establishment of a Compliance Program<sup>11</sup>**

**Each company should establish a compliance program that can lead to the appropriate prevention of the act of bribing foreign public officials.**

**If the company already has a comprehensive compliance program, there should be a clear mention in that program, to the extent possible, that it is applied to the act of bribing foreign public officials.**

- The points described in (2) to (6) below (including the development of an organizational structure) should be clarified in the compliance program.
- A basic stance on "facilitation payments" should be clarified, as well as internal procedures and a consultation desk to deal with practical matters regarding such payments<sup>12</sup>. In the case of having an employee make a facilitation payment under some compelling circumstances to do so, financial accounting for that payment should be done in a clear

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<sup>10</sup> When a violation actually occurs, strict actions need to be taken in accordance with the rules prescribed in advance.

<sup>11</sup> A compliance program means a corporate code of ethics or statutory compliance guidelines etc. prepared for company employees etc. so that they can take specific actions to practice statutory compliance etc. in line with the basic policy.

<sup>12</sup> More specifically, this subject needs to be examined by taking the context in the respective countries into consideration, supported by the reference to Chapters 3 and 4. Possible ways to deal with facilitation payments might be, for example, to firmly administer a system in which the consultation desk should be notified in advance of such payment, to ban any such payment as a general rule, or to limit them only to compelling circumstances.

fashion and the transparency should also be ensured by, for instance, retaining a record of the payment details etc.

- Taking into consideration the fact that contacts with foreign public officials<sup>13</sup> might occur in Japan as well as abroad, the company should set out measures for the respective occasions in an orderly fashion; it would also be effective to develop manuals on specific internal procedures and judgment criteria etc.<sup>14</sup>

## **(2) Establishing Organizational Structure**

**An organizational structure for internal control purposes that is commensurate with the company size etc. should be established, so that the segregation of duties within the company and the authority and responsibility of relevant personnel are clarified. In this attempt, the following points should be noted in particular:**

### **(i) Involvement of the Highest Corporate Officer**

- When an illegal act is brought to light, minding that the company and its highest officer may be held accountable, the highest officer himself should be actively involved in the process of dealing with it. The highest officer should at least be personally involved in the development and reviews of a compliance program, damage control in the face of trouble, feedback reports to audit results and review procedures based on them.

### **(ii) Appointment of A Compliance Supervisor**

- A compliance supervisor to oversee the whole company should be appointed<sup>15</sup>. The supervisor should, in addition to properly comprehending and understanding applicable laws and regulations as well as various information from the government such as these Guidelines, sort out as is found appropriate the issues arising in the conduct of business.
- The compliance supervisor should regularly report to the Board of Directors including the highest corporate officer.
- The company should work to have a compliance supervisor appointed in its overseas subsidiaries as well.

### **(iii) Establishment of An Internal Consultation Desk and A Reporting Desk, etc.**

- A consultation desk (help line) should be set up to deal with cases where a judgment needs to be made on a particular case-by-case basis, such as in the face of a request for a bribe from a foreign public official.
- In addition to a consultation desk, a reporting desk should also be set up to receive whistle-blowing reports etc. In such cases, a website for whistle-blowing purposes etc. might be utilized as well<sup>16</sup>.

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<sup>13</sup> Contacts with foreign public officials include transportation of arriving or departing officials, dining occasions, study trips, golfing and other recreations, gift exchanges, hiring of connected persons such as children of officials, and speech occasions, etc.

<sup>14</sup> Internal procedures include prior inquiries with authorized personnel such as a compliance supervisor, and notification from overseas subsidiaries to the consultation desk or reporting desk in the main office. Possible judgment criteria might take the form of, for example, a prior decision on the amount and frequency of gift offering (for ceremonial occasions etc.) to and entertainment for foreign public officials etc. within the scope of law and custom, or common sense of the respective countries, the establishment of limits to entertainment according to the stage of negotiation in respect of international business transactions, and clarification of a stance towards foreign public officials as well as their family members and family-run companies.

<sup>15</sup> Some companies have a system of coordination between compliance staff in operational, management and financial divisions etc., or set up a "compliance committee."

<sup>16</sup> On the subject of whistle-blowing, the Japanese government (Cabinet Office) has recently submitted a bill to legislate the "Public Interest Disclosing Employee Protection Law" following its approval in a Cabinet meeting on

- Confidentiality should be ensured for the consultation and reporting desks and that advice from external specialists including lawyers etc. be actively exploited.
- One single channel might be charged with the functions of both consultation and reporting desks. Another idea is to have a compliance supervisor involved in an effective fashion.
- The company should work to apply similar measures to consultation and reporting desks in its overseas subsidiaries as well, such as arranging to have the main office deal with all cases across the board<sup>17</sup>.
- It is important to ensure opportunities for relevant persons to keep adequate mutual communication; face-to-face consultation on reports and investigation by hearing etc. should also be available as required.

**(iv) Development of A Follow-Up Structure After Suspicion etc. Is Brought to Light**

- A structure should be developed in which, when a suspicion of a bribery of a foreign public official is brought to light, the fact situation can be confirmed promptly and the information will be reported to the compliance supervisor and the highest corporate officer.
- A structure in which to examine and develop recurrence prevention measures should also be set up for when the fact of bribery is discovered. In such occasions, the company should try to report the case to applicable governmental agencies etc. in a prompt fashion.
- An information collection structure should be developed in advance so that issues arising in connection with overseas subsidiaries etc. can be dealt with.

**(3) Conducting the Promotional and Educational Activities in the Company**

**Appropriate dissemination activities and education activities should be conducted within the company to promote the improvement of executives' and employees' awareness and the effect of internal control application.**

**(i) Implementation of Promotional Activities**

- The purpose and contents of the basic policy and compliance program should be disseminated among officers and employees involved in international business transactions.
- The company should examine an approach in which, when new information regarding bribery of a foreign public official is obtained, the details will be properly disseminated to relevant personnel.

**(ii) Implementation of Educational Activities**

- Education and training should be offered to employees etc. involved in international business transactions. It is important to offer such education and training at the time of hiring or transfer to a relevant department.
- In offering education and training, the company should take into consideration the possibility of future contacts with foreign public officials and examine suitable training methods (such as lecture-based training and education using written information and e-mail) to try to make them effective.
- It is also useful to educate employees by focusing on what they should pay attention to, upon sorting out cases of contacts with foreign public officials that might occur in the specific circumstances applicable to the company, and previous cases of gift exchanges and entertainment etc.

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March 9, 2004.

<sup>17</sup> In the case of overseas subsidiaries, another idea is to set up a local desk and have it provide feedback to the main office regarding the current state of affairs.

- As another awareness-raising effort, employees involved in international business transactions who have received the education or training discussed above might be required to submit a written oath not to engage in bribery of foreign public officials.

#### **(4) Regular Audits**

**In addition to every-day management, it is also important to conduct adequate follow-up management (including checkup and corrective measures) on a regular basis. For this purpose, regular audits should be conducted.**

- The company should regularly audit whether or not its internal control including a compliance program is functioning effectively and evaluate the state of internal control implementation.
- When an employee tries to purposefully hide an act of bribery, the company should make sure to have the matter audited in a strict fashion in consideration of the high likelihood of wrongdoings in transaction document preparation and accounting procedures.
- The company should try to have the information on audit results etc. shared broadly among the highest corporate officer, compliance supervisor and relevant employees.

#### **(5) Review by the Chief executives**

**In order to facilitate continual and effective measures for and application of internal control, chief executives should be involved in evaluation of the effectiveness of internal control and review procedures based on results of regular audits.**

- If some problem is found as a result of audits and evaluation, the basic policy and compliance program etc. should be reviewed as necessary, with the involvement of the chief executives.
- The company should confirm on a regular basis whether or not an effective internal control environment has been developed over the whole corporate group including overseas entities.

#### **(6) Other Points to Note: Particularly with Respect to Business Activities Overseas**

**Upon taking notice of business activities etc. overseas that have high relevance to bribery of foreign public officials, the company should take the following measures<sup>18</sup>.**

- In using an agency etc. for an international business transaction, the company should request the agency not to engage in bribery of a foreign public official. Also, caution should be taken when paying agency fees so as not to allow the agency to include bribery expenses in the payment amount.  
In entering into a contract with an agency etc., the company should also include in it provisions etc. specifying a policy of no bribery.
- The company should exchange views with corporate managers and employees of other entities including overseas subsidiaries, so that they will share the common awareness with the main office. Desirably, a basic policy and an organizational structure similar to those of the main office in Japan will be developed by them with local laws etc. taken into

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<sup>18</sup> An act committed by an overseas subsidiary or agent may also be chargeable for the offense of bribery of foreign public officials under the Unfair Competition Prevention Law. For the details of this possibility, refer to (4) of Section 3 in Chapter 3.

account. In the case of, in particular, an overseas subsidiary or joint company etc. that the company has control over, the company should try at least to facilitate coordination between the subsidiary etc. and the compliance supervisor of the main office.

- The company should make the purpose of the compliance program well-known to non-Japanese employees etc. of overseas subsidiaries who are not subject to punishment under the OECD Convention or the Unfair Competition Prevention Law, in order to have the program enforced thoroughly.
- No illegal donation should be made to public office candidates and political parties etc. that do not fall under foreign public officials according to the definition in the OECD Convention and the Unfair Competition Prevention Law.
- Even in the case of a joint company that is not under control of the company, the company should exchange views and make suitable arrangements with the joint venture partner regarding a compliance structure and the treatment of Japanese staff loaned to that joint company, etc.
- The company should try to adequately collect information on foreign laws etc. (including laws and regulations and enforcements regarding bribery offenses) and take appropriate measures<sup>19</sup>. When making an international business transaction in a country the company has no previous experience in, as much information as possible should be collected in advance.

**When each company examines a first-time application of an internal control system or a major review of the existing one by referring to the suggestions above, it may possibly face difficulties implementing it on a full scale. In such a case, the company should, on its own responsibility and as a provisional emergency measure, give preference to items that it finds particularly necessary upon considering its company size and business category, existing systems, relevance to international business transactions, and anticipated effect etc.**

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<sup>19</sup> Such collection and sorting-out of information on foreign laws and customs does not necessarily have to be conducted at an individual company level. One way might be for companies operating in the same foreign country to group together to conduct research and sort out information through, for instance, the use of the local chamber of commerce and industry that is versed with affairs specific to that region.

## CHAPTER 3: SCOPE OF PUNISHMENT UNDER THE UNFAIR COMPETITION PREVENTION LAW

Following its signature to the OECD Convention, one of the actions that Japan has taken is making an act of bribery of foreign public officials criminally punishable through a revision to the Unfair Competition Prevention Law in 1998<sup>20</sup>.

This Chapter provides article-by-article explanations of the relevant portion of the Law from the perspective of further understanding and better predictability regarding the bribery of foreign public officials.

As an additional note, readers are reminded that it is the law enforcement authorities that are in charge of the actual application of the Law with respect to each individual and specific case and that the final interpretation of the Law in terms of its application is left to the courts.

### 1. The Elements of the Offense of Bribery of a Foreign Public Official (Paragraph 1 of Article 11)

Article 11-(1) of the Unfair Competition Prevention Law

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 improper business advantage in the conduct of international business.

**(1) Overview**(the subscript numbers in brackets each refer to the Item in this Section in which the terms are explained)

Article 11-(1) of the Unfair Competition Prevention Law provides, "<sup>(3)</sup>No person shall <sup>(9)</sup>give, offer or promise any <sup>(8)</sup>pecuniary or other advantage , to a <sup>(refer to "2. Definition of Foreign Public Official etc.")</sup>foreign public official, in order that the official <sup>(7)</sup>act or refrain from <sup>(6)</sup>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, <sup>(5)</sup>in order to obtain or retain improper business advantage in the <sup>(4)</sup>conduct of international business."

This Article is intended to warrant the provisions of paragraph 1 of Article 1 of the Anti-Bribery Convention. In other words, it prohibits the giving, offering or promising of any advantage in order to cause an act of commission or omission etc. in relation to the performance of official duties of a foreign public official etc., committed in order to obtain or retain improper business advantage in the conduct of international business.

**(2) Treatment of Facilitation Payments etc.**

While the Convention requires that certain acts committed "in order to obtain or retain business

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<sup>20</sup> The Preamble of the Convention sets out, "achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention," and, in line with this view, requires that measures be taken including the criminalization of the bribery of foreign public officials.

or other improper advantage" in the conduct of international business (paragraph 1 of Article 1 of the Convention) should be established as a criminal offense, it sets out that **small "facilitation" payments** do not fall under such an act and are also not an offense (Commentary 9<sup>21</sup>). In addition, it also sets out, "It is not an offence. . . if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law" (Commentary 8).

With the said intentions of the Convention taken into consideration, such payments can be interpreted as not falling under payments made "in order to obtain or retain improper business advantage" under the Unfair Competition Prevention Law, either.

It should, however, be noted that the Convention does not encourage facilitation payments, because it sets out that countries in which such payments (small<sup>22</sup> facilitation payments) are illegal "can and should address this corrosive phenomenon by such means as support for programs of good governance" (Commentary 9).

**For the treatments of payments such as facilitation payments in other countries, refer to "Section 3. Trends of Systems and Applications in Foreign Countries etc." in Chapter 4.**

### **(3) About "No Person"**

If someone commits the whole or part of an act regulated by this provision in Japan, the Law will apply to that person whether he is Japanese or non-Japanese, irrespective of the nationality. If a Japanese national commits a prohibited act outside of Japan, the Law will also apply to that person (effective as of January 1, 2005).

**Refer to "(3) Geographical Scope of Application" in "Section 3: Penalties".**

### **(4) About " International Business"**

"International business" means the act concerning the economic activity beyond national borders, such as trade and international investment. Concretely, this means (i) "international relations"<sup>23</sup> among the parties concerned with business, or (ii) "international relations" about activities, and refers to acts concerning business repeatedly and continuously conducted for the purpose of profit.

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<sup>21</sup> In conjunction with the text of the Convention on Combating Bribery of Officials in International Business Transactions, the Commentaries on the Convention consisting of 37 commentaries were also adopted. The Commentaries embody international common understanding of the interpretation of the Convention.

<sup>22</sup> In determining if a payment is in a "small" amount, the economic standard of the country in which a prohibited advantage is given would presumably be taken into consideration.

<sup>23</sup> "International relations" means relations beyond national borders.

### **Specific Examples Regarding "Conduct of International Business"**

1. Where a trading company of Japan bribes a public official of Country A in Japan in order to win an order for bridge construction under an ODA project in Country A:

**As international relations exists between trading parties, this would be considered to be the "conduct of international business."**

2. Where a Japanese-run construction company located in Country B bribes a public official of Country B in Japan with the intention of winning an order for repair work for the embassy of Country B in Tokyo:

**As international relations exists in the business activity, this would be considered to be the "conduct of international business."**

3. Where an employee of a company of Country C bribes a public official of Country C in Japan with the intention of obtaining permission to sell food products in Country C:

**As this case concerns a "conduct of business in the home country," this would not be considered to be the "conduct of international business."**

### **(5) About "Improper Business Advantage"**

#### **(i) Concept of "Business Advantage"**

As defined by case laws, the term "business (*eigyō*)" is not limited to operations conducted simply for direct purposes of commercial profit but also includes operations in a general sense (such as hospital management etc.) that are, in light of a legislative intention of securing fair competition of business operators, conducted on the basis of comprehensive calculation of economic balance.

Therefore, "business advantage" refers to a tangible or intangible economic value or any other advantage in a general sense that a business operator can gain in carrying out such "business."

#### **(ii) Concept of "Improper Advantage"**

"Improper advantage" means any advantage obtained in a manner running counter to public order and decency or the duty of good faith for the purpose of the Unfair Competition Prevention Law. More specifically, it is interpreted as referring to:

- any advantage obtained by, through the giving of an advantage to a foreign public official etc., having the said foreign public official etc. exert his discretion in a manner favorable to the advantage giver, or
- any advantage obtained by, through the giving of an advantage to a foreign public official etc., having the said foreign public official etc. commit an illegal act.

### **Specific Examples Regarding "Improper Business Advantage"**

1. Case of giving an advantage to an official of the Ministry of Health of Country A with the intention of finding out the minimum bid price that is not supposed to be released in advance, in order to win a bid for a national hospital construction project in Country A:

**This would be considered to be the giving of an advantage in order to obtain or retain "improper business advantage."**

2. Case of giving an advantage to an official of an inspection agency of Country B in order to obtain permission for equipment installation for a chemical plant built in Country B that does not actually meet environmental criteria:

**This would be considered to be the giving of an advantage in order to obtain or retain "improper business advantage."**

3. Case of giving an advantage to a customs official of Country C in order to have customs duties on the import of construction materials improperly reduced in Country C:

**This would be considered to be the giving of an advantage in order to obtain or retain "improper business advantage."**

**Where, on the other hand, a small facilitation payment is made in order to have the procedure for tax reimbursement duly performed, considering that there is no sign of the procedure being commenced although entitlement to the said reimbursement is clearly expected under a law of Country C, this would be considered not to fall under "improper advantage" according to the intention of the Convention.**

4. Case of giving an advantage to a public official of Country D with the intention of facilitating preferential treatment regarding permission for product importation in order to gain predominance over competitors in Country D:

**This would be considered to be the giving of an advantage in order to obtain or retain "improper business advantage."**

**Where, on the other hand, a small facilitation payment is made in order to have the procedure for permission duly performed when the permission is unduly delayed, this would be considered not to fall under "improper advantage" according to the intention of the Convention.**

5. Case of giving an advantage to a village mayor in order to facilitate food procurement in Country E:

**Facilitation for the purpose of food procurement would be considered not to fall under "business advantage."**

6. Case of giving an advantage to an immigration official of Country F in order to have the issue of an entry or visitor visa processed promptly in an airport of Country F:

**Where a small facilitation payment is made in order to expedite a routine administrative service, this would be considered not to fall under "improper advantage" according to the intention of the Convention.**

**\* For the details of facilitation payments, refer to "(2) Treatment of Facilitation Payments etc."**

**\* Whether or not gift exchanges, entertainment and political donation etc. fall under an improper business advantage would have to be judged on a case-by-case basis depending on the particular circumstances including the intention, amount and background.**

## **(6) About "Acting in Relation to the Performance of Official Duties"**

"Act in relation to the performance of official duties" naturally includes an act within the scope of official authority of the said foreign public official etc., but also includes an act closely connected to his official duties.

Note that the definition of "official's duty (*shokumu*)" here is the same as that for "official's duty (*shokumu*)" in the provision of Article 197 (Acceptance of Bribe) of the Criminal Code.

Case laws concerning an act closely connected to official duties in the context of the offense of giving or taking bribes under the Criminal Code include the one that admitted that an action conventionally processed by a public official or an act preliminary to legitimate official's duty was an act closely connected to official duties.

## **(7) About "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)"**

The requirement is that the purpose of the giving of an advantage should be the commission or omission of a certain act by a foreign public official etc., or causing the commission or omission of a certain act by another foreign public official etc.

As discussed in (6) above, an act by a public official himself using his position refers to an act within the scope of official authority of the said foreign public official and an act closely connected to his official duties.

Also, to "exert ~ to cause (*assen*)" includes having the said public official exert, using his position, upon another foreign public official so as to cause him to act in relation to the performance of official's duty, even if that action is beyond the scope of official authority of the former official.

## **(8) About "Pecuniary or Other Advantage"**

"Pecuniary or other advantage" is not limited to an economic advantage, but any advantage that serves to satisfy a demand or desire of a person may also be considered to be one. Accordingly, it would be considered to cover, naturally, money and goods of value, as well as any economic advantage such as financial advantage, free renting of a house or building, entertainment and paid dining, offering of a collateral or guarantee, but also cover any and all other tangible and intangible advantages including non-economic advantages such as a sexual relationship and occupational position.

## **(9) About "Give, Offer or Promise (to A Foreign Public Official)"**

To "give (*kyoyo*)" does not only mean simply providing any pecuniary or other advantage as a bribe, but must be accompanied by the acceptance of such advantage by a foreign public official etc. on the other end.

To "offer (*moshikomi*)" is an act of prompting a foreign public official etc. to accept a pecuniary or other advantage in a situation where it can be recognized as a bribe, and does not need to be accompanied by any reaction on the part of that official etc.

To "promise (*yakusoku*)" refers to an agreement on the giving/acceptance of a pecuniary or other advantage between parties to bribery.

In the case of giving, offering or promising a bribe to a third party other than a

foreign public official etc., it would highly likely be considered to constitute an offense of bribery of foreign public officials as well, if:

- there is a conspiracy between the foreign public official etc. and the third party;
- it is obvious that a bribe has been given to the said foreign public official etc., such as where it is directed to a relative of that official; or
- the foreign public official etc. has used the third party as a tool and had him receive the advantage.

## **2. Definition of Foreign Public Official etc. (In Respect of Article 11-(2) of the Law and the Government Ordinance)**

Article 11-(2) of the Unfair Competition Prevention Law

2. The term “foreign public official” used in paragraph (1) shall mean any of the following persons:

- (i) Any person who engages in public services for national or local foreign governments;
- (ii) Any person who engages in services for an entity constituted under foreign special laws to carry out specific tasks concerning public interest;
- (iii) Any person who engages in services for an enterprise of which the number of stocks with the right to vote or the amount of capital subscription directly owned by one or more of national or local foreign government exceeds one-half of that enterprise’s total issued stocks with the right to vote or total subscribed capital, or of which the number of executives (including directors, statutory auditors, trustees, inspectors, liquidators or other persons who engage in management of its business) appointed or named by one or more national or local foreign government exceeds one-half of that enterprise’s executives, and to which special privileges are given by national or local foreign governments to do its business; and such person as defined in the government ordinances as “foreign public official”;
- (iv) Any person who engages in public services for an international organization (here in after, an “international organization” means an international organization which is formed either by governments or by an international organization formed by governments)
- (v) Any person who exercises a public function which falls under the authorized competence of national or local foreign governments or an international organization and is delegated by them.

### **(1) Purposes**

Article 11-(2) of the Unfair Competition Prevention Law and **the government ordinance to define “such person as defined in the government ordinance as Foreign public official” provided for in Article 11.2(iii) of the Unfair Competition Prevention Law** provide for the definition of "foreign public official" who could be a party to the bribery.

Foreign public officials subject to the application of this Law can be divided into the following five categories:

- (i) Any person who engages in public services for national or local foreign governments (Item 1)**
- (ii) Any person who engages in services for an agency affiliated with a foreign national government (Item 2)**

(iii) Any person who engages in services for a public enterprise which is given special privileges by a foreign national government etc (Item 3)

(iv) Any person who engages in public services for an international organization (Item 4)

(v) Any person who exercises a public function which falls under the authorized competence of a foreign national government etc. and is delegated by them. (Item 5).

Note that those countries which Japan has not recognized as countries are also covered by the concept "foreign."

## **(2) Item 1: Person who engages in public services for national or local foreign governments (Foreign Public Official)**

A person who engages in public services for national or local foreign governments refers to a person who occupies a position in an administrative or legislative body, or a judicial agency.

\* Note that political party officials and civil service candidates are not subject to the application of this Law because they are not included in the definition of foreign public official under the Convention.

## **(3) Item 2: Person who engages in services for an agency affiliated with a foreign national government**

An agency affiliated with a foreign national government refers to an organization constituted under special laws to carry out specific tasks concerning public interest, which is an equivalent of a public corporation (*tokushu hojin*) or special company (*tokushu gaisha*) in Japan.

Note that an organization constituted under special laws does not include any corporation organized under civil law, such as a non-profit corporation and commercial company, that can, under the rule-based (as opposed to permission-based) principle, be constituted if certain requirements are met.

A "person who engages in services" refers to a person who is judged, in terms of the function fulfilled by him, to perform services for the said agency.

### **Examples of agency affiliated with a foreign national government**

#### Government corporations in the United States:

Specific examples include the Tennessee Valley Authority and the National Railroad Passenger Corporation (a.k.a. Amtrak).

#### Etablissements publics in France:

Specific examples include France Télécom, Bibliothèques Nationales, and *universités*.

## **(4) Item 3: Person who engages in services for a public enterprise which is given special privileges by a foreign national government etc**

A "public enterprise" in this Item covers an enterprise whose

(i) majority of stocks with the right to vote are or

(ii) majority of the amount of capital subscription is owned by; or

(iii) majority of executives are appointed or named by

one or more national or local foreign government (including a non-profit corporation), and such enterprise equivalent thereto as defined in the government ordinances.

Under the Ordinance, such enterprise is defined as an enterprise which is either a subsidiary or sub-subsidiary etc.

(i) whose majority of stocks with the right to vote of all stockholders are owned by,

(ii) which is under control, through the holding of golden shares without permission, license, approval or consent etc. under which the whole or part of resolutions at general stockholders' meetings do not take effect, of, or

(iii) which is under control, such as through the indirect ownership of majority of stocks, of one or more national or local foreign government.

Of the persons who engage in services for such "public enterprises," those who are specially given rights and accompanying advantages to the said rights by national or local foreign governments in the conduct of operation of the enterprises fall under foreign public officials under the Unfair Competition Prevention Law.

#### **Example of "Public Enterprise" 1: Control through Golden Shares<sup>24</sup>**

The articles of incorporation of Company B in Country A, a private company that was formerly state-owned, had provisions requiring the consent of the government, *i.e.*, the golden share owner, for a resolution of a general stockholders' meeting to amend certain articles to take effect, articles such as:

(i) No one may own 15% or more shares or exercise 15% or more voting rights, either singly or jointly; and

(ii) Non-Country A citizen may serve as the chairman of the Company or the chief executive of the Company.

In this case, Company B would be considered to fall under a "public enterprise" under this Item.

#### **Example of "Public Enterprise" 2: Indirect Control**

Companies D<sub>1</sub> and D<sub>2</sub> are both 70%-owned subsidiaries of Company D in Country C, a state-owned electricity power company (the government owns 80% of its stocks). Company D<sub>1</sub> generates power mostly in the northern part of Country C while Company D<sub>2</sub> conducts the same operation mostly in the southern part of Country C.

In this case, Companies D<sub>1</sub> and D<sub>2</sub> would each be considered to fall under a "public enterprise" under this Item.

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<sup>24</sup> The golden share system is applied in the United Kingdom etc. but, being under criticism by the E.U., etc., is in the process of being abolished.

**The government ordinance to define “such person as defined in the government ordinance as Foreign public official” provided for in Article 11.2(iii) of the Unfair Competition Prevention Law**

1. Such person as defined in the government ordinance as foreign public official provided for in Article 11.2(iii) of the unfair Competition Prevention Law (hereinafter, referred to as the “law”) means any person engaging in services for any of the following enterprises (excluding the enterprises stipulated in Article 11.2(ii) of the Law) which are given special privileges by national or local foreign governments to do its business:

- i) Any enterprise of which one or more of national or local foreign government(s) directly own more than half of all the stock holders’ rights to vote,
- ii) Any enterprise which requires permission, approval, consent of, or other similar acts by national or local foreign government(s) for all or part of the resolutions of general meetings of stock holders to become effective, or whose such resolutions may be invalidated by national or local foreign governments,
- iii) Any enterprise (excluding any enterprise described in 1(i) of this government ordinance), of which one or more foreign government(s), whether national or local, or public enterprises directly own more than half of (a) the total issued stocks with the right to vote, (b) the total subscribed capital, or (c) all the stock holders’ lights to vote, or the majority of whose executives (including directors, statutory auditors, trustees, inspectors liquidators or other persons who engage in management of its business. “Executives” stated in the next paragraph shall mean the same) are appointed or named by one or more foreign governments, whether national or local or public enterprises.

2. “Public enterprise” stipulated in 1(iii) of this government ordinance shall mean any enterprise stipulated in Article 11.2(iii) of the Law and those described in 1(i) and (ii) of this government ordinance. In this case, any enterprise of which one or more foreign government(s), whether national or local, or public enterprises directly own more than half of (a) the total issued stocks with the right to vote, (b) total subscribed capital, or (c) all the stock holders’ rights to vote, or the majority of whose executives are appointed or named by one or more foreign government(s), whether national or local, or public enterprises, shall be deemed as public enterprise.

**(5) Item 4: Person who engages in public services for an international organization**

An "international organization" in this Item refers to an international organization organized by a nation state, government or any other public body, irrespective of the organizational form or the scope of authority.

However, it does not include international organizations constituted by a private body, such as the IOC (International Olympic Committee).

**Examples of International Organizations**

United Nations, UNICEF (United Nations International Children's Emergency Fund), ILO (International Labour Organization), WTO (World Trade Organization) etc.

**(6) Item 5: Person who exercises a public function which falls under the authorized competence of a foreign national government etc. and is delegated by them**

This refers to a person to whom privileges are delegated by national or local foreign governments or an international organization and who engages in services as delegated. In other words, it is intended to mean a person to whom privileges are delegated by a foreign national government or an international organization over services that fall under the competence of the said foreign national government etc., such as inspection and testing services etc., and who engages in the said services.

It does not include those persons who process some work ordered by a foreign national government etc. without any delegation of authorities, such as staff etc. of construction companies contracted for public works projects.

**Example of person who exercises a public function which falls under the authorized competence of a foreign national government etc. and is delegated by them**

"Foreign public officials " include staff of a designated inspection agency or designated testing agency delegated to conduct inspections and testing operations etc. for a chemical plant project to check in advance if it meets environmental criteria for permission etc. for equipment installation etc. pursuant to the laws of the country of the project.

**3. Penalties (In Respect of Articles 14(1) (vii), 14(3) and 15)**

Articles 14 and 15 (partially omitted) of the Unfair Competition Prevention Law

Article 14-(1)

Any person who falls under any of the following items shall be liable for an imprisonment for a period not exceeding three years or for a fine not exceeding ¥3,000,000

*(i) to (vi) (Omission)*

(vii) A person who violated any provision of Article 9, Article 10 or Article 11-(1).

*Article 14-(2) (Omission)*

Article 14-(3)

The offences under Article 14(1) (vii) (limited to the part thereof which relates to Article 11-(1)) are subject to article 3 of the *Criminal Code (Kei ho Law No 45 of 1907.)*

*Article 14-(4) (Omission)*

Article 15-In the case where a representative, an agent or an employee of a legal person or a person has committed, in relation to the business of the legal person or the person, any of the violations described in the paragraph 1 of preceding article (except from (iii) to (vi)), in addition to the violator being punished, the legal person shall also be liable for a fine not exceeding ¥300,000,000 and the person shall be liable to the same fine described in the preceding article.

**(1) Penalties for Perpetrators**

(i) Article 14-(1) (vii) of the Unfair Competition Prevention Law provides that a person who gave an improper advantage in violation of the provision of Article 11-(1) shall be subject to **an imprisonment for a period not exceeding three years or for a fine not exceeding 3,000,000 yen.**

(ii) By imposing a penalty at least equal to "imprisonment for not more than three years or for a fine of not more than 2,500,000 yen" provided as imposable in the case of a bribery offense

committed with respect to a public official of Japan (Article 198 of the Criminal Code), this provision fulfills a requirement under the Convention regarding the severity of penalty, which sets out that "the range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials" (paragraph 1 of Article 3).

(iii) Also, the provision of Article 14-(3) sets out that the offences of bribery of foreign public officials are subject to Article 3 of the Criminal Code.

As Article 3 of the Criminal Code provides that Japanese nationals who have committed certain offenses outside of Japan shall be punishable under the Code, punishment of a Japanese national for an offense committed outside of Japan will be established with regard to the offense of bribery of foreign public officials as well (*i.e.*, a Japanese national who has given a prohibited advantage to a foreign public official outside of Japan will also be punishable). (effective as of January 1, 2005)<sup>25</sup> [**Refer to "(3) Geographical Scope of Application" in this Section**]

(iv) Note that a person who has been convicted of a bribery offense in the country of offense may still be punishable under the Law, as provided for in Article 5 of the Criminal Code<sup>26</sup>.

If, however, the person has actually served a sentence in that foreign country, execution of a sentence in Japan will be mitigated or discharged pursuant to the provision of the said Article.

\* The statute of limitation for the offense of bribery of foreign public officials is three years<sup>27</sup>. Under Paragraph 1 of Article 255 of the Criminal Procedure Law, however, the statute of limitation does not run during the period for which the offender is outside of Japan.

## **(2) Penalties for Legal Persons etc.**

### **(i) Criminal Responsibility of Legal Persons**

Article 15 of the Unfair Competition Prevention Law provides that where a representative, agent, employee or any other staff etc. of a legal person<sup>28</sup> has committed a violation in connection with an operation of the said legal person, a fine not exceeding 300,000,000 yen may be imposed on that legal person, which is in addition to punishment for the offender himself.

This clause was created because the Convention requires that legal persons that engage in international business transactions should also be held criminally liable.

### **(ii) Presumption of Negligence on the Part of a Legal Person**

The Supreme Court has previously ruled with respect to a provision of penalties for legal persons that the legislative intention of such a provision is that negligence of a legal person in the appointment and oversight of the perpetrating employee etc. and in the failure to exercise

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<sup>25</sup> The "Bill for Partial Revision of the Unfair Competition Prevention Law," by which punishment of a Japanese national for an offense committed outside of Japan is established with regard to the offense of bribery of foreign public officials, was passed by the Diet on May 19, 2004 and will come into force as of January 1, 2005.

<sup>26</sup> Article 5 of the Criminal Code: Even when a decision has been rendered final by a foreign judiciary against a person's criminal act, it shall not preclude a further punishment in Japan in regard to the same act; provided that when the person has already served either in whole or in part the punishment abroad, execution of punishment shall be mitigated or remitted.

<sup>27</sup> As provided for in Article 250 of the Criminal Procedure Law.

<sup>28</sup> The criminal responsibility of legal persons may also be applied to sole proprietor businesses. However, the fine is limited to 3,000,000 yen.

other caution necessary to prevent violation would be presumed and, in the absence of proof of such caution having been exercised, the business proprietor may also not be discharged from criminal liability<sup>29</sup>.

While this ruling is not about the provision of the Unfair Competition Prevention Law, it is also likely required under the Law that such caution should be exercised as necessary to prevent violation, which is not sufficient if in the form of general and abstract advice but has to take the form of proactive and specific instruction etc. for violation prevention purposes, in order for the exemption from the criminal responsibility of legal persons to be admitted due to non-existence of negligence.

Again from this perspective, it is necessary to augment the effect of measures for preventing bribery of foreign public officials and to improve the effectiveness of internal control by, for instance, establishing a compliance program capable of appropriate prevention of bribery of foreign public officials and conducting dissemination and education activities, using these Guidelines etc., regarding the offense of bribery of foreign public officials, as illustrated in Chapter 2.

Whether or not the main office of a Japanese company is subject to punishment where a Japanese employee of its overseas subsidiary has committed bribery on his own judgment would be judged in light of the individual and specific circumstances, including the degree of involvement of the main office in the operation that the bribe-giver usually engages in, and the state of appointment and oversight of that Japanese employee by the main office. If the bribe-giver can be considered to be virtually an employee etc. of the main office in Japan, the criminal responsibility of legal persons may be applicable to the main office in Japan.

### **(3) Geographical Scope of Application of Penalties**

(i) The geographical scope of application means a scope in terms of exercise of jurisdiction within which cases that have occurred in a given geographical area can be governed by criminal laws of that country and be treated pursuant to those laws.

(ii) In principle, the Criminal Code of Japan applies the "principle of territorial jurisdiction" in Article 1 under which the criminal legislations of Japan apply to offenses committed within the territory of Japan, irrespective of the nationality of the offender; however, it applies the "principle of nationality jurisdiction" to certain offenses, including murder, assault and fraud, in Article 3 under which the criminal legislations of Japan also apply to, in addition to offenses committed within the territory of Japan, offenses committed by Japanese nationals, irrespective of the venue of the offense.

As the principle of nationality jurisdiction is applied to the offense of bribery of foreign public officials pursuant to Article 3 of the Criminal Code, Japanese nationals who have committed bribery outside of Japan will be punishable in addition to those who have committed bribery in Japan. (effective as of January 1, 2005)

(iii) Under the principle of territorial jurisdiction, penal law provisions of Japan should be applicable to an offense if the act of the offense, a necessary element of the offense, has been committed in Japan or the result of the offense, another necessary element of the offense, has occurred in Japan.

In respect of bribery of foreign public officials, this can possibly lead to a conclusion that if the giving of an advantage has been offered or promised to a foreign public official via e-mail or fax etc. from a location in Japan and the advantage has subsequently been given in a

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<sup>29</sup> Supreme Court Ruling on March 26, 1965. Supreme Court Criminal Case Reports, Volume 19, Issue 2, page 83 (for a case of violation of the Law Concerning Foreign Capital).

location overseas, the offense as a whole is considered to have been committed in Japan.

(iv) In cases of non-Japanese corporations, the criminal responsibility of legal persons in Article 15 of the Unfair Competition Prevention Law would be applicable to, for instance, a foreign company (*gaikoku gaisha*) as defined under the Commercial Code<sup>30</sup>.

#### **(4) Giving of Advantage Using An Overseas Subsidiary (Branch) or Agent**

It is quite a common practice to use an overseas subsidiary (branch) or agent in the conduct of international business such as foreign trade and overseas investment.

As an accomplice to an offense of bribery of foreign public officials is also subject to punishment according to the Convention and the criminal law principle applied in Japan, attention must be paid to the existence of complicity with a company's main office<sup>31</sup>.

The applicability of the Unfair Competition Prevention Law will be clarified below with respect to typical examples of an employee of an overseas subsidiary (branch) or agent bribing a foreign public official jointly with an employee of the company's main office in Japan. (Note that the description given here is intended to apply after Japanese nationals become punishable for the offense committed abroad, as of January 1, 2005.)

##### **(i) Case of co-principals in conspiracy,<sup>32</sup> based on the existence of conspiracy between an overseas subsidiary (branch) employee and a main office employee**

If, for example, conspiracy between an overseas subsidiary (branch) employee and a main office employee took place in Japan, one necessary element of an offense by co-principals in conspiracy would be considered to have occurred in Japan; therefore, the offense could be considered to have been committed in Japan even if an advantage was actually given in an overseas location.

In this case, both the overseas subsidiary (branch) employee and the main office employee would be chargeable for the offense of bribery of foreign public officials. (In such cases, that chargeability against the overseas subsidiaries (branches) employee would not be limited only to Japanese nationals.)

##### **(ii) Case of a main office employee inciting<sup>33</sup> or abetting<sup>34</sup> the offense and an overseas subsidiary (branch) employee perpetrating the act**

If incitement or abetting of the giving of a prohibited advantage took place in Japan and the principal offender perpetrated the act (such as the giving of the advantage) outside of Japan, the

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<sup>30</sup> Article 485-2 of the Commercial Code provides, "In respect of application of other laws, a foreign company (*gaikoku gaisha*) will be considered to be a company organized in Japan that is equivalent or most similar thereto."

<sup>31</sup> Paragraph 2 of Article 1 of the Convention sets out, "Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence."

The respective provisions for co-principals, incitement and abetting etc. in Articles 60 through to 65 of the Criminal Code are applied to these matters.

<sup>32</sup> Co-principals (Article 60 of the Criminal Code) are "two or more persons who have jointly committed an offense." A "person who had no role in the act of actual perpetration of an offense where several persons had conspired to commit the offense and some of them actually perpetrated it" may also be punished as a principal offender, which constitutes a case of co-principals in conspiracy.

<sup>33</sup> Incitement (Article 61 of the Criminal Code) is an "act of inducing another person to decide to perpetrate an offense."

<sup>34</sup> Abetting (Article 62 of the Criminal Code) is an "act of assisting a principal offender in a manner other than perpetration of an offense."

Japanese employee of the overseas subsidiary (branch) should, as with the main office employee who incited or abetted the act, also be chargeable for the offense of bribery of foreign public officials.

**(iii) Case of an overseas subsidiary (branch) employee giving a prohibited advantage on his own decision or upon instruction by that overseas subsidiary (branch)**

The perpetrating Japanese employee of the overseas subsidiary (branch) and the Japanese employee of the overseas subsidiary (branch) who gave the instruction would be chargeable for the offense of bribery of foreign public officials. On the other hand, any employee of the main office in Japan who has no involvement in the giving of the advantage would not be chargeable for the bribery of foreign public officials.

**(iv) Case of giving a prohibited advantage through the use of an overseas agent**

If an employee of an overseas agent gave a prohibited advantage upon instruction etc. by an employee of a Japanese company, the employee etc. of the Japanese company who made that request might, under the current Law, be chargeable for the offense of bribery of foreign public officials (as with the cases under (i) and (ii) that involve an overseas subsidiary (branch) employee).

The overseas agent employee who perpetrated the act should also be chargeable for the bribery of foreign public officials if he is considered to be a co-principal in conspiracy with the Japanese company employee or if he is a Japanese national.

At any rate, whether or not complicity, such as instruction from the main office in Japan, exists in a particular case, etc. is left to judicial decision on a particular case-by-case basis.

Even when an employee of an overseas subsidiary (branch) or an overseas agent is not chargeable for the offense of bribery of foreign public officials, he may not be exempt from being charged for a bribery offense under the criminal law of the country of his location, which is a matter left to judicial decision of that country on a particular case-by-case basis.

## CHAPTER 4: OTHER MATTERS OF RELEVANCE

This Chapter provides information on measures taken in Japan with regard to the bribery of foreign public officials other than the Unfair Competition Prevention Law, and relevant information from other countries. The information provided here is also expected to be utilized as basic information etc. for each company to refer to in examining its actions.

### 1. Relevant Measures Taken to Implement Obligations under the OECD Convention

In implementing the obligations under the OECD Anti-Bribery Convention, statutory measures have been taken through other laws and regulations etc. in addition to those under the Unfair Competition Prevention Law. The overview of the measures taken in accordance with articles of the OECD Convention is as follows:

#### (1) Confiscation of Proceeds (in Respect of Article 3 of the Convention) - Money Laundering (in Respect of Article 7 of the Convention)

Paragraph 3 of Article 3 of the Convention sets out, "Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."

In accordance with this Article, Paragraph 2 of Article 2 of the "Law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters" (hereinafter referred to as the "Organized Crime Punishment Law") defines the "property given" to a foreign public official etc. (which is a property given to the bribe-taker's side) as "proceeds of crime" that are subject to confiscation under the said Law<sup>35</sup>, in addition to monetary sanctions under the clause for penalties for legal persons etc. in the Unfair Competition Prevention Law that were previously discussed.

The Organized Crime Punishment Law likewise fulfills the obligation in Article 7 of the Convention that sets out, "Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred."

#### (2) Accounting (in Respect of Article 8 of the Convention)

Article 8 of the Convention requires signatories to take such measures as may be necessary regarding inadequate and false entries in books and records, and financial statements etc. for the purpose of, for example, hiding a giving of improper advantage to a foreign public official.

In Japan, false entries etc. are prohibited under the General Principles of the "Accounting Principles for Business Enterprises" and Article 5 of the "Regulation Concerning Terms in, and

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<sup>35</sup> If the "Bill for Partial Revision of the Criminal Code etc. to Address Internationalization and Organization of Crimes and Advancement of Information Processing," which is currently, as of May 26, 2004, tabled in the Diet by the government (Ministry of Justice), is passed, the Organized Crime Punishment Law will be revised so that the property acquired through bribery of foreign public officials and the rewards etc. for bribery of foreign public officials will also be subject to confiscation.

Forms and Preparation Methods of Financial Statements etc." In addition to those, violations may be subject to civil damages under Articles 18, 22 and 24-4 of the Securities and Exchange Law, or administrative or criminal sanctions under Article 498 of the Commercial Code, Articles 197 and 207 of the Securities and Exchange Law, and Articles 30 and 34-21 of the Certified Public Accountant Law.

### **(3) Mutual Legal Assistance (in Respect of Article 9 of the Convention) - Extradition (in Respect of Article 10 of the Convention)**

Article 9 of the Convention lays down a requirement for mutual legal assistance such as the provision of prompt and effective legal assistance to other signatory countries.

This requirement can adequately be met through the relevant procedures provided in the "Law for International Assistance in Investigation" and the "Law Relating To Reciprocal Judicial Aid To Be Given At The Request Of Foreign Courts."

Meanwhile, Article 10 of the Convention requires that bribery of a foreign public official should be included as an extraditable offence under the laws etc. of the signatory country<sup>36</sup>, the country's own nationals should be extraditable or, when the country declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, the case should be submitted to its competent authorities.

As the offense of bribery of foreign public officials under the Unfair Competition Prevention Law falls under an offense punishable by imprisonment for three years or longer, it is designated as an extraditable offense under the "Law on Extradition."

### **(4) Monitoring and Follow-Up (in Respect of Article 12 of the Convention)**

Under the awareness of the necessity to achieve equivalence among the measures to be taken by signatory countries, Article 12 of the Convention requires cooperation between signatory countries for the purpose of monitoring and promoting the full implementation of the Convention.

In response to this requirement, the OECD Working Group on Bribery in International Business Transactions has been conducting a sequenced series of evaluations after the Convention came into force in February 1999, *i.e.*, the evaluation of signatory countries' implementation of the Convention by reference to their relevant legal texts (Procedure of Self- and Mutual Evaluation - Phase 1), the follow-up evaluation on the issues pointed out in the Phase 1 evaluation (Phase 1 bis), and the evaluation of the state of Phase-1-evaluated countries' application of the relevant laws (Procedure of Self- and Mutual Evaluation - Phase 2), and thereby continually monitors the systems and applications of all signatory countries.

For Japan, the Phase 1 evaluation was conducted in October 1999 and the Phase 1 bis evaluation in April 2002<sup>37</sup>.

## **2. Other Relevant Actions in Japan**

**In addition to the measures in accordance with the OECD Convention, the Japanese government and governmental agencies have taken actions that contribute to preventing corruption, including prevention of bribery of foreign public officials. Among these**

<sup>36</sup> A signatory country which makes extradition conditional on the existence of an extradition treaty may consider the OECD Anti-Bribery Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official (paragraph 2 of Article 10 of the Convention).

<sup>37</sup> The Phase 2 evaluation for Japan is scheduled for 2004.

actions, the following two are of particular relevance.

### **(1) Actions in Respect of Export Credits**

The OECD Export Credit Group adopted "Action Statement on Bribery and Officially Supported Export" (December 2000 OECD Working Party on Export Credits and Credit Guarantees (OECD-ECG)), which stipulates, among others, that appropriate steps be taken to deter bribery in officially supported export credits and, in the case that bribery was involved in the award of the export contract, appropriate measures be taken. As a result, agencies of the OECD member countries that pertain to export credits are required to take mutually-equivalent actions.

In Japan, Nippon Export and Investment Insurance and Japan Bank for International Cooperation are in the process of taking relevant actions in compliance with the said Statement.

Nippon Export and Investment Insurance has been making efforts in the following matters since November 2001<sup>38</sup>:

- Companies applying for an insurance agreement are required to submit a written oath confirming that they are not and will not be involved in bribery of foreign public officials;
- If an insured is convicted for a bribery after informal approval was given upon entering into the insurance agreement or after entering into the insurance agreement, appropriate measures should be taken including cancellation of the informal approval, non-payment or reimbursement of insurance claims, and dissolution of the insurance agreement; and
- In the case of an indictment on suspicion of a bribery in violation of the Unfair Competition Prevention Law, no insurance should be offered.

Japan Bank for International Cooperation has likewise taken the following measures regarding export credits:

- In registering a loan project, confirmation should be obtained in writing that the registrant is not involved in bribery in respect of the Unfair Competition Prevention Law. In the case of an indictment on suspicion of a bribery, the loan can be refused; and
- If indicted on suspicion of committing a bribery after entering into the loan agreement, a borrower may be subject to acceleration of obligations.

### **(2) Actions in Respect of ODA (Official Development Assistance)**

The "Charter of Official Development Assistance of the Government of Japan," which was approved by the Cabinet on August 29, 2003, also refers to the importance of "Prevention of fraud and corruption" in respect of ODA implementation, as shown below. Bribery of foreign public officials is one of the key items in that policy.

#### 3. Matters Essential to Effective Implementation

##### (3) Prevention of fraud and corruption

The government will implement appropriate measures to ensure the transparency of the activity-selection and implementation process, and to prevent fraud, corruption, and improper diversion of aid. In addition, the government will make efforts to assure the appropriate use of funds by enhancing auditing, including through the introduction of external audits.

In line with the said policy etc., the government and relevant governmental agencies, including

<sup>38</sup> For details, refer to: [http://www.nexi.go.jp/insurance/ins\\_oecd/ins\\_oecd\\_torikumi.html](http://www.nexi.go.jp/insurance/ins_oecd/ins_oecd_torikumi.html).

the Ministry of Foreign Affairs, Japan International Cooperation Agency and Japan Bank for International Cooperation, are committed to taking disciplinary actions against persons involved in bribery of foreign public officials, on a case-by-case basis within a predetermined scope.

With the implementation of these measures, attention is paid so that no bribery of foreign public officials should take place in connection with official development assistance by the Japanese government.

### **3. Trends of Systems and Applications in Foreign Countries**

#### **(1) Overview of Legal Systems and Applications in Foreign Countries**

As legal systems of and the state of applications in signatory countries to the Convention are followed up on by the OECD as required, information on countries of interest can be obtained through the results of that work<sup>39</sup>.

Additionally, the Ministry of Foreign Affairs conducted a study on the relevant legal systems of several countries in June 2003. As a result, it was found out that cases of indictment had been reported in five countries, namely, the United States, Korea, Poland, Canada and Sweden<sup>40</sup>.

#### **(2) Treatments of Facilitation Payments etc.**

According to the results of the said study by the Ministry of Foreign Affairs, eight countries are confirmed to have legally provided for the exemption of facilitation payments from penalties.

In providing for the exemption of such payments in statutes, these countries refer to the "purpose of the act" and "pettiness of the amount of advantage" or, in most cases, the combination of the two.

Shown below is the overview of their provisions:

##### **(i) United States (Section 78dd-1 etc. of the Foreign Corrupt Practices Act)**

Subsections (a) and (g) of this section (which provides for the prohibition of bribery of foreign public officials) shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

\* The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

##### **(ii) Canada (Section 3 of the Corruption of Foreign Public Officials Act)**

(Subsection 4)

<sup>39</sup> For information on the examinations by the OECD, refer to:

[http://www.oecd.org/document/21/0,2340,en\\_2649\\_34855\\_2022613\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_34855_2022613_1_1_1_1,00.html).

<sup>40</sup> According to this study, they include 45 indictments in the United States, two in Korea, one in Sweden and one in Canada (as of March 2003 for Korea and January 2002 for the rest).

For the purpose of subsection (1) (which provides for the prohibition of bribery of foreign public officials), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including

- (a) the issuance of a permit, license or other document to qualify a person to do business;
- (b) the processing of official documents, such as visas and work permits;
- (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

**(iii) Korea (Article 3.2.b of the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions)**

It shall constitute an exception when small pecuniary or other advantage is promised or given, or an intention to give such advantage is expressed to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official's business.

**(iv) Australia (Section 70.4 of the Criminal Code)**

(1) A person is not guilty of an offence against section 70.2 (which provides for the prohibition of bribery of foreign public officials) if:

- (a) the value of the benefit was of a minor nature; and
- (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3) (which sets out the matters to be indicated in such a record); and
- (d) any of the following subparagraphs applies:
  - (i) the person has retained that record at all relevant times;
  - (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
  - (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

**(v) New Zealand (Section 105 C paragraph 3 of the Crimes Amendment Act 2001)**

This section does not apply if --

- (a) if the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring of expediting the performance of a foreign public official of a routine government action; and
- (b) the value of the benefit is small.

**(vi) Switzerland (Article 322<sup>octies</sup> of the Criminal Code)**

(1) When the significance and the level of liability for the act is so minor that punishment would be inappropriate, the applicable authorities may abandon criminal accusation, court indictment, or punishment.

(2) Advantages authorized by department regulations and advantages of minor value in conformity with social custom shall not be considered as undue advantages.

**(vii) Belgium (Article 58 of the 1992 Income Tax Code)**

When the payment of secret commissions is recognized as a common business practice, the Minister of Finance may allow the deductibility of these commissions providing that the taxpayer should file a request with the Minister of Finance, the said commissions do not exceed the usual amounts, and the company should pay taxes regarding the said commissions. This authorization of deductibility of secret commissions may not be granted in respect of obtainment or retention of public procurement contracts or administrative authorizations.

(Note) Under this provision, criminal liability for facilitation payments is also discharged.

**(viii) Greece (Article 7 of Act 2656)**

Small "facilitation" payments do not constitute payments made to obtain or retain business or "other improper advantage" within the meaning of paragraph 1 (paragraph 1 of Article 1 of the Anti-Bribery Convention) and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in other countries.

(Note) This provision is a quote from Commentary 9 of the Convention that sets out facilitation payments.

**(3) OECD Guidelines for Multinational Enterprises<sup>41</sup>**

The OECD Committee on International Investment and Multinational Enterprises (CIME) approved the revised version of the "OECD Guidelines for Multinational Enterprises" in June 2000. These OECD Guidelines also refer to six areas of action that multinational enterprises should take to prevent bribery.

For example, the Guidelines set out the following matters as recommendations which can serve as reference for enterprises in their attempt to combat bribery:

- Not offer, nor given in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channeling payments to public officials, to employees of business partners or to their relatives or business associates.
- Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.

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<sup>41</sup> The OECD Guidelines for Multinational Enterprises (Revision 2000) also provide suggestions for desirable corporate behavior of multinational enterprises (<http://www.mofa.go.jp/mofaj/gaiko/oecd/hoshin.html>).