

# Client Alert

May 14, 2014

## Japan Discloses New Efforts to Combat Foreign Bribery, as OECD Steps Up Pressure on Japan to Increase Enforcement

By Charles E. Duross and James E. Hough

While many people don't know it, a bribery scandal in Japan in 1976 was part of the motivation for the Foreign Corrupt Practices Act (FCPA), which was signed into law on December 19, 1977.<sup>1</sup> Almost exactly two decades later, Japan joined the fight against foreign corruption by signing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) on December 17, 1997, and by joining the Working Group on Bribery (Working Group) of the Organisation for Economic Co-operation and Development (OECD). After signing the Anti-Bribery Convention, Japan enacted implementing legislation outlawing foreign bribery, which came into force on February 15, 1999. But this was just the beginning, not the end.

One of the hallmarks of the OECD Working Group on Bribery is its ongoing monitoring function, which Transparency International has described as the "gold standard."<sup>2</sup> This oversight function is rigorous, and many countries—including Japan recently—have felt the sting of pointed criticism in the Working Group's monitoring reports. A recent Working Group report (released in February 2014) suggests Japan is undertaking new measures—and committing additional resources—to combat foreign corruption.<sup>3</sup> As one of the world's largest economies and as a response to such criticism, Japan may well be poised for a new phase of foreign bribery enforcement.

Japanese companies should begin preparing now for increased scrutiny by Japanese authorities as well as continuing close oversight by U.S. authorities. Such proactive measures should include (1) appropriate and rigorous risk assessments, (2) compliance program benchmarking, (3) enhanced foreign bribery training for board members, executives, and employees, (4) thorough third-party and transactional due diligence, and (5) a review of internal accounting controls. Besides preventing and detecting foreign corruption in the first instance, such measures may also enable a Japanese company to avoid criminal liability in Japan by demonstrating that the

<sup>1</sup> See A. Carl Kotchian, *The Payoff: Lockheed's 70-Day Mission to Tokyo*, Saturday Review, Jul. 9, 1977, at 7; H.R. Rep. No. 95-640, at 5 (1977) ("Corporate bribery also creates severe foreign policy problems for the United States. . . . For example, in 1976, the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations.").

<sup>2</sup> F. Heiman et al., Transparency Int'l, *Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, at 2 (Oct. 7, 2013), available at [http://www.transparency.de/fileadmin/pdfs/Themen/Internationales/2013\\_ExportingCorruption\\_OECDProgressReport\\_EN.pdf](http://www.transparency.de/fileadmin/pdfs/Themen/Internationales/2013_ExportingCorruption_OECDProgressReport_EN.pdf).

<sup>3</sup> OECD Working Group on Bribery, *Japan: Follow-Up to the Phase 3 Report & Recommendations*, at 4 (Feb. 2014) ("Report"), available at <http://www.oecd.org/daf/anti-bribery/JapanP3WrittenFollowUpReportEN.pdf>.

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company acted with due care designed to prevent such violations. These measures will also pay dividends, because, regardless of any enhanced Japanese enforcement, many Japanese companies remain subject to the FCPA, and thus the long reach and rigorous foreign bribery enforcement of U.S. authorities. These measures may prevent an FCPA violation, or at a minimum, put Japanese companies in a position to seek a more favorable resolution, including a declination to prosecute by U.S. authorities.

## OECD WORKING GROUP ON BRIBERY MONITORING PROCESS

Once a country accedes to the Anti-Bribery Convention, it becomes subject to a rigorous review process. This is because, pursuant to Article 12 of the Anti-Bribery Convention, there is a program to “monitor and promote the full implementation of [the] Convention.” The idea behind this monitoring process is to ensure that countries that have signed the Anti-Bribery Convention actively enforce their foreign bribery laws to ensure that companies from all countries are playing by the same rules. To accomplish this goal, the Working Group, which is comprised of the countries that have signed the Anti-Bribery Convention (currently 40 countries), meets quarterly at the OECD in Paris. The Working Group oversees implementation of the Anti-Bribery Convention through a “peer review” system based on a set of agreed-upon principles and standards.<sup>4</sup> This monitoring has occurred in three phases in which two countries review a third country after which the reviewing countries submit a report to the entire Working Group for its review and approval.<sup>5</sup>

- **Phase 1** evaluates whether the legal texts through which state parties implement the Anti-Bribery Convention meet the standard set by the convention.
- **Phase 2** studies the structures put in place to enforce the laws and rules implementing the Anti-Bribery Convention and to assess their application in practice. Phase 2 broadens the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation (and now 2009 Recommendation). Phase 2 also serves an educational function as participants discuss problems and different approaches.<sup>6</sup>
- **Phase 3**, which for most state parties is the current phase of review, concentrates on the following pillars: (a) progress made by state parties on weaknesses identified in Phase 2; (b) enforcement efforts and results; (c) implementation of the 2009 Recommendation for further Combating Foreign Bribery; and (d) cross-cutting issues faced by all countries, such as corporate liability and mutual legal assistance.

Each report issued during each phase of the review contains various recommendations for improvements to be made by the country being reviewed. One year after the report, the reviewed country is expected to provide the Working Group with an oral follow-up report on the progress it has made in implementing the recommendations contained in the report. Two years after issuance of the report, the reviewed country is expected to provide a

<sup>4</sup> See OECD, *Country Monitoring Principles for the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/countrymonitoringprinciplesfortheoecdanti-briberyconvention.htm> (last visited Mar. 31, 2014).

<sup>5</sup> See OECD, *Country Monitoring of the OECD Anti-Bribery Convention*, <http://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Mar. 31, 2014).

<sup>6</sup> OECD, *Phase 2 Country Monitoring of the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase2countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Mar. 31, 2014).

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written follow-up report delineating the progress it has made responding to the recommendations contained in the report, and the Working Group assesses that progress indicating whether a recommendation has been fully implemented, partially implemented, or not implemented.

In many instances, after a critical report by the Working Group, countries have responded to Working Group recommendations by dedicating more resources to combat foreign bribery, increasing investigations and prosecutions, and even amending their foreign bribery laws. For example, following severe criticism by the Working Group, the United Kingdom passed the landmark U.K. Bribery Act and brought a series of high-profile foreign bribery cases.<sup>7</sup> Canada is another example where, after a highly critical Working Group report, it began investigating and prosecuting more foreign corruption cases, and just last year, Canada amended its law to eliminate an exception for facilitating payments and to increase possible prison sentences, among other things.<sup>8</sup>

## JAPAN'S FOREIGN BRIBERY LAW

Since February 1999, Japan has outlawed the bribery of foreign public officials.<sup>9</sup> Article 18 of the Unfair Competition Prevention Law (UCPL) makes it illegal to give (*kyoyo*), offer (*moshikomî*), or promise (*yakusoku*) a bribe to a foreign public official (i.e., non-Japanese official):

No person shall give, offer, or promise any pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert upon another foreign official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain [an] improper business advantage in the conduct of international business.<sup>10</sup>

The UCPL defines a “foreign public official” broadly as:

- Any person who engages in public services for national or local foreign governments;
- Any person who engages in services for an entity constituted under foreign special laws to carry out specific tasks concerning public interest;

<sup>7</sup> For additional information regarding increased enforcement of the UK Bribery Act, please see our related Client Alert available at <http://www.mofo.com/files/Uploads/Images/130815-UK-Bribery-Act.pdf>.

<sup>8</sup> Theresa Tedesco, “OECD Praises Canada’s Anti-Corruption Efforts,” *National Post*, May 27, 2013, available at <http://business.financialpost.com/2013/05/27/oecd-praises-canadas-anti-corruption-efforts/> (last visited April 23, 2014).

<sup>9</sup> Penal Code (Act No. 45 of Apr. 24, 1907) art. 198; Unfair Competition Prevention Law (Act No. 47 of May 19, 1993) art. 18-(1); Companies Act (Act No. 86 of July 26, 2005) arts. 967-968.

<sup>10</sup> Unfair Competition Prevention Law, art. 18-(1); see Japan Min. of Econ., Trade and Indus., *Guidelines to Prevent Bribery of Foreign Public Officials*, at 14 (Sept. 21, 2010) (hereinafter “METI Guidelines”), available at [http://www.meti.go.jp/policy/external\\_economy/zouwai/pdf/Guidelines%20to%20Prevent%20Bribery%20of%20Foreign%20Public%20Officials.pdf](http://www.meti.go.jp/policy/external_economy/zouwai/pdf/Guidelines%20to%20Prevent%20Bribery%20of%20Foreign%20Public%20Officials.pdf). Since the law came into force, it has been amended three times. Japanese Delegation to OECD Working Group on Bribery, *Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 1 (June 9, 2011), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/42102365.pdf>. In 2001, in response to criticism by the Working Group, Japan amended the UCPL to (1) remove the so-called “Main office” exception and (2) broaden the definition of foreign public officials to cover those working for public enterprises. *Id.* In January 2005, another amendment to the UCPL came into force to extend nationality jurisdiction under Article 3 of the Penal Code to the foreign bribery offense. *Id.* In June 2005, Japan extended the statute of limitations for natural and legal persons to five years and increased the maximum fine to 5 million yen and the maximum term of imprisonment to five years. *Id.*

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- 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 is defined in the government ordinances as "foreign public officials";
- Any person who engages in public services for an international organization, which means an international organization that is formed either by governments or by an international organization itself formed by governments; or
- Any person who exercises a public function that falls under the authorized competence of national or local foreign governments or an international organization and is delegated by them.<sup>11</sup>

By comparison, while the FCPA does not contain such a detailed definition of "foreign official," a number of district courts in the United States have found that many co-extensive factors like those contained in Japan's foreign bribery law can be used by jurors to determine whether a particular entity qualifies as an "agency" or "instrumentality" of a foreign government.<sup>12</sup>

The UCPL applies to natural and legal persons alike.<sup>13</sup> Unlike the United States, under Japanese law, criminal liability of a legal person is based on the principle that the company did not exercise due care in its supervision and selection, among other things, of an officer or employee to prevent the criminal act.<sup>14</sup> The burden rests on the company to establish that it acted with due care by showing it took proactive and specific steps to prevent violations.<sup>15</sup> While in the United States there is no "due care" defense, such proactive steps, like establishing an effective compliance program, are weighed heavily in favor of companies by the DOJ<sup>16</sup> and SEC,<sup>17</sup> as well as the

<sup>11</sup> Unfair Competition Prevention Law, art. 18-(2); see also METI Guidelines at 19.

<sup>12</sup> U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 20 (Nov. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

<sup>13</sup> Unfair Competition Prevention Law, art. 22; see also METI Guidelines at 24 ("Article 22 of the Unfair Competition Prevention Law provides that where a representative, agent, employee or any other staff etc. of a legal person has committed a violation in connection with an operation of the said legal person, a fine not exceeding 300,000,000 yen will be imposed on that legal person, which is in addition to punishment for the offender himself.")

<sup>14</sup> Supreme Court Judgment 1965.3.26. Keishu 19.2.83; METI Guidelines at 25 (opining that under UCPL "general and abstract advice" will not establish due care, but rather company would need to establish that "proactive and specific instruction etc. for violation prevention purposes" would be necessary "in order for the exemption from criminal responsibility of legal persons to be admitted due to non-existence of negligence"); OECD Working Group on Bribery, *Japan: Review of Implementation of the Convention and 1997 Recommendation*, at 7 (May 21, 2002) ("Where a legal person raises the defence a person must be identified as having exercised due care, etc., and the court must determine whether it was exercised properly having regard to the nature of the legal person and circumstances of the case."), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2387870.pdf>.

<sup>15</sup> *Japan: Review of Implementation of the Convention and 1997 Recommendation*, at 7.

<sup>16</sup> U.S. Dep't of Justice, *Principles of Federal Prosecution of Business Organizations*, tit. 9, ch. 28.800, available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

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courts.<sup>18</sup> As such, under either the Japanese or the U.S. system, establishing an effective compliance program and robust internal accounting controls will help insulate companies from liability or enforcement.

In terms of jurisdictional reach, the UCPL applies to Japanese citizens and Japanese legal persons anywhere in the world under the “principle of nationality jurisdiction” and applies to non-Japanese nationals and non-Japanese legal persons (for example, a foreign company or *gaikoku gaisha*) where an act of the offense, or a result of the offense, occurs in the territory of Japan under the “principle of territorial jurisdiction.”<sup>19</sup>

With respect to facilitation payments, Japan's foreign bribery law contains no exception for such payments. However, Japanese authorities have indicated that “[w]here a small facilitation payment is made in order to expedite a routine administrative service, this would be considered not to fall under ‘improper business advantage.’”<sup>20</sup> Other countries, like Germany, have used a similar interpretation to permit a *de facto* exception for facilitation payments even though the law makes no explicit exception for them.<sup>21</sup> Even though the Japanese authorities may not regard facilitation payments as prohibited, the law does not contain an explicit exception for them, and therefore the safest course for a company is simply not to permit them.

Under the UCPL, the punishment for bribery of a foreign public official is a maximum of five years in prison or a five million yen fine (approximately US\$50,000) for natural persons, or both, and a maximum 300 million yen (approximately US\$3 million) fine for legal persons.<sup>22</sup>

While the principal regulatory authority overseeing Article 18 of the UCPL is the Ministry of Economy, Trade and Industry (METI), the National Police Agency, Ministry of Justice, and public prosecutors' offices are substantially involved in the investigation and prosecution of violations under the UCPL. To date, Japan has brought three prosecutions under its foreign bribery law, with its most recent prosecution occurring in September 2013.<sup>23</sup>

## JAPAN RESPONDS TO OECD CRITICISM WITH INCREASED RESOURCES AND NEW RESOLVE

The Phase 1 report for Japan was issued in May 2002<sup>24</sup> and an initial Phase 2 report followed thereafter in March 2005.<sup>25</sup> The Phase 2 report was highly critical of Japan for its lack of effort to enforce its foreign bribery. In fact, it

<sup>17</sup> See U.S. Sec. & Exch. Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 and Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001) (the “Seaboard Report”), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

<sup>18</sup> U.S. Sentencing Guidelines Manual, § 8B2.1 (2013), available at [http://www.ussc.gov/Guidelines/2013\\_Guidelines/Manual\\_PDF/Chapter\\_8.pdf](http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/Chapter_8.pdf).

<sup>19</sup> METI Guidelines at 25-26.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Germany*, at 21 (Mar. 2011), available at <http://www.oecd.org/germany/Germanyphase3reportEN.pdf>.

<sup>22</sup> METI Guidelines at 23-24.

<sup>23</sup> Report at 7.

<sup>24</sup> *Japan: Review of Implementation of the Convention and 1997 Recommendation*, *supra*.

<sup>25</sup> OECD Working Group on Bribery, *Japan: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Mar. 7, 2005), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34554382.pdf>.

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was so critical of Japan that the Working Group ordered that Japan undergo a second review, also known as a *bis*, to subject Japan to even more detailed scrutiny.<sup>26</sup> As a result, an additional on-site visit took place in February 2006 and a subsequent Phase 2 *bis* report was then issued in June 2006 finding that “Japanese law enforcement authorities have still not made adequate efforts to investigate and prosecute foreign bribery cases.”<sup>27</sup>

As with other member states, Japan underwent a Phase 3 review, and a report was issued in December 2011.<sup>28</sup> This report contained strongly worded criticism of Japan’s lack of enforcement effort and provided a lengthy list of recommendations for Japan to address in future follow-up reports.

In response to the pointed criticism contained in its December 2011 Phase 3 report, Japan submitted a written follow-up report in advance of the December 2013 plenary of the Working Group. This written follow-up report was required by the Working Group’s procedures. Japan’s two-year written follow-up report (and the Working Group’s assessment of that report) was released publicly by the Working Group in February 2014.<sup>29</sup> That report provides an important and rare insight into the inner workings of Japanese enforcement authorities, and it also provides a glimpse into the mounting pressure on Japan to increase its foreign bribery enforcement.

In the lengthy report, Japan disclosed certain enhancements, increased resources, and additional steps it was taking to investigate and prosecute foreign bribery more effectively. What follows are some of the highlights of that report:

- **Stressing the Importance of Foreign Bribery Enforcement.** Japan reported that it took several measures to raise the profile of its foreign bribery law, including “announcing the importance of enforcement of the foreign bribery offence in the UCPL in the assembly of law enforcement authorities.”<sup>30</sup> Moreover, Japan sent prosecutors and police to a foreign bribery training in Washington, D.C.<sup>31</sup> Japan indicated that it was optimistic that its enforcement authorities, armed with this additional international training, would “more actively detect leads of foreign bribery cases.”<sup>32</sup> Indeed, Japan highlighted that following that international training, the Aichi Prefectural Police in September 2013 arrested a former senior executive of a major car parts manufacturer, who was convicted of foreign bribery in China.<sup>33</sup>

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<sup>26</sup> *Id.* at 56.

<sup>27</sup> OECD Working Group on Bribery, *Japan: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, at 3 (June 15, 2006), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37018673.pdf>.

<sup>28</sup> OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan* (Dec. 2011), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>.

<sup>29</sup> See generally the Report.

<sup>30</sup> Report at 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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- **Strengthening Coordination Among Japanese Law Enforcement Authorities.** Japan reported that METI “has strengthened the coordination with law enforcement authorities.”<sup>34</sup> Japan noted METI’s establishment of “clear guidelines” for processing allegations of bribery and METI’s efforts to provide “quick responses” to questions from law enforcement about how the UCPL should be interpreted.<sup>35</sup> In particular, Japan highlighted a “framework” for coordination among the “special investigative divisions in district prosecutors[’] offices and relevant agencies, including Police, the National Tax Agency (NTA) and the Securities and Exchange Surveillance Commission (SESC).”<sup>36</sup> Japan stated that it has strengthened this “framework” by “stressing the importance of close cooperation” and sending law enforcement to the foreign bribery conference in Washington, D.C., where inter-agency coordination was “one of the main themes.”<sup>37</sup> As an example of its success in strengthening coordination among law enforcement agencies, Japan cited the Futaba case, in which police officers “coordinated closely with relevant authorities to overcome the legal and fact finding issues.”<sup>38</sup>
- **Enhancing Use of Mutual Legal Assistance Requests.** Japan stressed that it has used Mutual Legal Assistance requests when law enforcement “became aware of allegations” of foreign bribery.<sup>39</sup> Further, Japan highlighted that in 2011, the Ministry of Justice established a “Special Subcommittee on a Criminal Justice System for a New Era,” which consisted of legal scholars, legal professionals, and others. After meeting regularly for two years, the Special Subcommittee announced its findings in January 2013.<sup>40</sup> Among its findings, the Special Subcommittee recommended using “new investigative techniques,” including “mitigation/remission, [and] prosecutorial agreement and immunity for cooperative witness[es].”<sup>41</sup> But Japan cautioned that the Subcommittee’s work is ongoing and that its work is a part of “greater and ongoing discussions on a new criminal justice system.”<sup>42</sup>
- **Including Foreign Bribery Enforcement Explicitly Within the Duties of Economic and Financial Crimes Prosecutors.** Japan emphasized that the Ministry of Justice amended regulations “so as to expressly include the detection, investigation and prosecution of foreign bribery cases within the scope of [prosecutors’] duties.”<sup>43</sup> These regulations took effect on June 1, 2012.<sup>44</sup>

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<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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- **Focusing on Suspicious Transactions Reports to Detect Foreign Bribery Cases.** Japan described how its financial intelligence unit, the Japan Financial Intelligence Center (JAFIC), hosted semi-annual assemblies for law enforcement agencies and the Ministry of Justice to “follow-up on how law enforcement officials are utilizing suspicious transaction reports from JAFIC.”<sup>45</sup> Japan stated that, while it has not yet prosecuted a foreign bribery case using a suspicious transaction report, “relevant ministries and agencies have been fully aware of the importance of suspicious transaction reports from JAFIC in detecting foreign bribery cases.”<sup>46</sup>
- **Increasing Awareness of Foreign Bribery Law Among Japanese Companies.** Japan highlighted improvements to METI’s website as a key effort to increase awareness of foreign bribery law at Japanese companies.<sup>47</sup> Further, Japan stated that it produced and distributed “educational leaflets” and an e-mail newsletter to small- and medium-sized enterprises in order to describe METI’s guidelines and the UCPL.<sup>48</sup> Japan emphasized that it “actively provides advice based on the Guidelines” to corporate legal departments.<sup>49</sup>
- **Utilizing Japanese Overseas Missions to Detect Foreign Bribery by Japanese Companies.** Japan disclosed that the Ministry of Foreign Affairs (MOFA) created training materials for mission officials “in order to enhance their capacity to gather information” about Japanese citizens and companies in foreign countries.<sup>50</sup> The training materials cover the OECD Anti-Bribery Convention, the UCPL, foreign bribery cases of Japanese companies, and the Phase 3 review.<sup>51</sup> This strategy of having foreign missions gather possible leads for foreign bribery investigations has long been used by the United States and other countries to initiate foreign bribery cases.

In the end, the substantial efforts outlined above by Japan appear to announce a new phase of Japanese enforcement, which is best captured by one of the telling statements by Japan itself:

To conclude, we believe Japan has been taking [the] necessary steps to further strengthen the framework of effective coordination between special investigative divisions in district prosecutors['] offices and relevant agencies, and hope such framework will bring more investigation and prosecution of foreign bribery cases *in [the] near future*.<sup>52</sup>

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<sup>45</sup> *Id.* at 12.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 15-16.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 11 (emphasis added).



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## OECD CONTINUES TO INCREASE THE PRESSURE ON JAPAN FOR MORE ACTIVE ENFORCEMENT

In spite of all of the steps taken by Japan in the past two years, it is clear that the Working Group is not yet satisfied. To the contrary, it appears that the Working Group is increasing the pressure brought to bear on Japan to increase its efforts at enforcement.

Japan is scheduled to report to the OECD this year regarding its “action-plan” to address these concerns and the “continuing lack of clarity in METI materials about the legality of facilitation payments and what comprises a facilitation payment versus a bribe.”<sup>53</sup> This level of ongoing, relentless pressure on Japan to demonstrate its commitment to enforcement is both virtually unprecedented and almost certain to increase, at least incrementally, Japan’s foreign bribery enforcement.

## CONTINUED LONG-ARM REACH OF FCPA ENFORCEMENT BY DOJ AND SEC

Regardless of the potential increased scrutiny by Japanese authorities, Japanese companies have long faced enforcement by DOJ and SEC in the United States. As an initial matter, any Japanese companies that qualify as “issuers” in the United States can be subject to U.S. jurisdiction.<sup>54</sup> Moreover, even Japanese companies that are not “issuers” may be subject to U.S. jurisdiction based on conspiracy jurisdiction, aiding and abetting jurisdiction, as well as under the territorial jurisdiction of the FCPA if acts occur while in the territory of the United States. Indeed, all of the FCPA cases brought against Japanese companies to date have been Japanese companies that were *not* issuers.<sup>55</sup>

Those prior enforcement actions against Japanese companies have resulted in penalties of nearly US\$400 million in just the last three years, and there are media indications of ongoing U.S. investigations into other Japanese companies arising from allegations of foreign bribery.

## WHAT CAN COMPANIES DO NOW?

Given the continued aggressive enforcement by U.S. law enforcement and the potential new era of enforcement by Japanese law enforcement, companies should begin addressing foreign bribery risk, if they have not already. Those steps should include:

- Conducting an Appropriate Risk Assessment
- Reviewing and Improving Its Existing Compliance Program

<sup>53</sup> *Id.* at 5. These scheduled reports are not publicly available.

<sup>54</sup> A company is an “issuer” under the FCPA if it has a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 or is required to file periodic or other reports with the SEC under Section 15(d) of the Exchange Act.

<sup>55</sup> See, e.g., U.S. Dep’t of Justice, *Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty*, Jan. 17, 2012, available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html> (last visited April 23, 2014); U.S. Dep’t of Justice, *Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine*, March 19, 2014, available at <http://www.justice.gov/opa/pr/2014/March/14-crm-290.html> (last visited April 23, 2014); U.S. Dep’t of Justice, *Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials*, Sept. 15, 2011, available at <http://www.justice.gov/opa/pr/2011/September/11-crm-1193.html> (last visited April 23, 2014); U.S. Dep’t of Justice, *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty*, April 6, 2011, available at <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html> (last visited April 23, 2014).

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- Ensuring the Proper Tone at the Top
- Performing Compliance Training and Requiring Certifications
- Conducting Appropriate Third-Party Due Diligence and Ongoing Monitoring
- Performing Necessary Transactional Due Diligence and Ensuring Post-Acquisition Compliance Integration
- Reviewing and Improving Internal Controls
- Establishing Proper Systems to Investigate Potential Issues Internally
- Testing Compliance Programs and Internal Controls

In the end, the need for compliance with foreign bribery laws, both in Japan and elsewhere, is now a reality with serious consequences for failure. Companies should act now to avoid problems later.

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