



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012/13

CORPORATE CRIME, FRAUD AND INVESTIGATIONS

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Japan

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FRAUD

Regulatory provisions and authorities

1. What are the main regulatory provisions and authorities responsible for investigating corporate or business fraud?

The principal statutes that apply to corporate or business fraud and the principal investigative or regulatory authorities are:

- The Penal Code (Act No. 45 of April 24, 1907) (Penal Code). The regulatory authority is the Ministry of Justice (MOJ).
- The Companies Act (Act No. 86 of July 26, 2005) (Companies Act). The regulatory authority is the MOJ.
- The Financial Instruments and Exchange Act (Act No. 25 of April 13, 1948) (FIEA). The regulatory authority is the Financial Services Agency (FSA) and the Securities and Exchange Surveillance Commission (SESC).
- The Unfair Competition Prevention Act (Act No. 47 of May 19, 1993) (UCPA). The regulatory authority is the Ministry of Economy, Trade and Industry (METI).

Where an individual or corporation is suspected of violating these statutes, the police and/or the Public Prosecutor's Office have the power to conduct investigations into such suspected misconduct. The SESC can also conduct investigations into suspected violations of the FIEA.

The Penal Code, which includes core criminal offences, such as fraud and bribery, applies only to individuals. It applies to Japanese nationals for crimes committed anywhere in the world, as well as to non-Japanese nationals for crimes committed in Japan. Prohibitions against corporate criminal conduct are set forth in specific statutes, such as the UCPA. These statutes can also apply to criminal acts outside of Japan.

Generally, businesses in Japan are regulated through specific legislation (for example, the Pharmaceutical Affairs Law, the Law against Unjustifiable Premiums and Misleading Representations, the Food Sanitation Law, the Insurance Business Law, and so on). Various ministries and agencies within the Japanese government supervise businesses subject to these laws. These agencies also promulgate administrative guidelines.

See *Question 4, Civil/administrative proceedings or sanctions*.

For more information on the MOJ, the FSA, the SESC, METI and the Public Prosecutor's Office see box, *The regulatory authorities*.

Offences

2. What are the specific offences relevant to corporate or business fraud?

In order to convict a corporation or individual of a criminal offence, the public prosecutor must establish beyond reasonable doubt both that the criminal act occurred, as well as that there was sufficient criminal intent.

Fraud

Article 246 of the Penal Code prohibits individuals from defrauding another person and/or company of property. Where a person obtains a trade secret through an act of fraud, that person can be charged with violating Article 21 of the UCPA. However, the public prosecutor cannot press charges under Article 21 without a complaint from the victim.

Theft

Individuals are prohibited from stealing the property of another person and/or company under Article 235 of the Penal Code. Theft of a trade secret is also punishable under Article 21 of the UCPA. However, as discussed above, the victim of trade secret theft must submit a complaint in order for the prosecutor to bring a charge.

Misappropriation (embezzlement)

Individuals are prohibited from embezzling the property of another person and/or a company in the course of the management or operation of a company (*Article 253, Penal Code*).

General breach of trust

An individual who breaches his duties to another person and/or company, with whose affairs he is charged, for the purpose of promoting his own interest or a third party's interest, or inflicting damage on another person and/or company can be prosecuted under Article 247 of the Penal Code.

Aggravated breach of trust by an officer or director

An officer or director who breaches his or her duties to a joint stock company (*kabushiki kaisha*) for the purpose of promoting his own interest or the interest of a third party, or inflicting damage on the joint stock company (for example, where a director of a bank approves a loan to a third party without adequate repayment capacity and causes financial damage to the bank) can be prosecuted under Article 960 of the Companies Act.



Misrepresentation

Individuals who file an offering disclosure document containing a false statement, or who, in the course of a securities transaction, conduct an illegal act (such as threatening investors or misrepresentation) can be prosecuted under Articles 157 and 158 of the FIEA. An officer or director who makes false statements at the time of the sale of shares, stock options, bonds, or bonds with stock options can be prosecuted under Article 964 of the Companies Act.

A person who has misrepresented information about goods or service can be prosecuted under Article 21 of the UCPA.

Enforcement

3. What are the regulator's powers of investigation, enforcement and prosecution in cases of corporate or business fraud?

The relevant authorities (see *Question 1*) can use a number of methods for conducting investigations, including voluntary and compulsory requests for information. They can also apply to a court for a search warrant in serious cases. Where an investigative authority concludes that a crime has been committed, it can refer the matter to the police and/or the public prosecutor.

Search and seizure

Where there is a suspicion of a violation of the relevant statute, the police and/or the public prosecutor can apply to a court for a search warrant permitting the search and seizure of relevant evidence at the premises of a company or individual suspected of committing the violation. The application is made *ex parte* (that is, without notice to the subject of the search warrant) and the warrant is usually issued several days after application. Relevant documents and/or materials that establish *prima facie* proof of a violation must be submitted. (Some searches can be conducted by administrative agencies (that is, authorities other than the police and the Public Prosecutor's Office), where authorised by statute, for example, the tax laws and the FIEA.)

Where a search warrant is issued, the police and/or the public prosecutor can search premises and seize any material within the scope of the warrant. There is no exception made for materials that would be covered by legal advice privilege or litigation privilege under the common law system. The police and/or the public prosecutor must provide an inventory of the seized documents and/or materials to the subject of the warrant.

While the subject of a warrant can request that a lawyer be present at the investigation, the Code of Criminal Procedure (CCP) does not guarantee this right and the request can be granted or refused at the discretion of the police officer and/or the public prosecutor.

Administrative investigations

Administrative agencies do not generally have the power to conduct searches or seizures even with a warrant, nor do they have the power to compel the businesses under their jurisdiction to respond to requests for information or documents. However, it is common for a regulatory government agency to request voluntary co-operation with a government investigation. In practical terms, a company that is the subject of a voluntary investigation has little

option but to co-operate, because if the company refuses, it can be subject to administrative action, which can range from a mere notice of non-compliance to a business improvement order, and in the worst case, to a business suspension order, which would prevent all or part of a company's business from operating for a certain period of time.

Extra-territorial jurisdiction

If a Japanese citizen or entity organised under Japanese law commits certain acts, such as business fraud, outside Japan, the Penal Code, UCPA and/or Companies Act may apply. Details regarding how Japanese enforcement agencies can conduct activities in a foreign country depend on the laws of that country and agreements that country may have entered into with Japan. Generally, a Japanese enforcement agency cannot conduct an investigation or arrest a suspect outside of Japan without the co-operation of local authorities.

With regard to searches and seizures abroad, a Japanese court would not have jurisdiction to issue a search warrant to be executed outside Japan.

Sanctions

4. What are the potential sanctions or liabilities for participating in corporate or business fraud?

Civil/administrative proceedings or sanctions

Depending on the gravity of the infraction, regulatory agencies can impose penalties including:

- Administrative penalties (surcharges).
- Rescission of business licences or registrations.
- Business suspension, improvement orders or recommendations.
- Warnings against future violations.
- Debarment from government contracts.

Before any penalty is imposed, the subject has the opportunity to be heard before the administrative agency under the Administrative Procedure Act (Act No. 88 of November 12, 1993) (APA) or the FIEA. Any decision made by the administrative agency can be appealed to a district court.

While the violation of administrative regulations and guidelines does not generally carry any criminal penalty, non-compliance can result in an administrative sanction as described above. However, non-compliance with the relevant government agency's orders can trigger criminal penalties under the relevant statute. For this reason, compliance with administrative guidelines is mandatory in practice.

Criminal proceedings

Penal Code. As discussed above, the Penal Code only applies to individuals. However, a fine can be imposed on legal persons where the relevant statute prescribes liability. Generally, imprisonment is with hard labour. Any proceeds of fraudulent conduct are subject to confiscation (or collection of a sum of equivalent value in lieu of confiscation) (*Articles 19 and 19-2, Penal Code*).



Fraud. Fraud is punishable by imprisonment of up to ten years (*Article 246, Penal Code*).

Theft. Theft is punishable by imprisonment of up to ten years or a fine of up to JPY500,000 (as at 1 August 2012, US\$1 was about JPY78) (*Article 235, Penal Code*).

Misappropriation (embezzlement). Embezzlement is punishable by imprisonment of up to ten years (*Article 253, Penal Code*).

General breach of trust. General breach of trust is punishable by imprisonment of up to five years or a fine up to JPY500,000 (*Article 247, Penal Code*).

Criminal proceedings under the Companies Act. There are various criminal proceedings which can be brought under the Companies Act, including:

- Aggravated breach of trust by an officer or director of a joint stock company is subject to imprisonment of up to ten years or a fine of up to JPY10 million, or both (*Article 960, Companies Act*).
- Misrepresentation by an officer or director of a company in connection with the issuance of shares or bonds is subject to imprisonment of up to five years or a fine of up to JPY5 million, or both (*Article 964, Companies Act*).

Criminal proceedings under the UCPA. Under Article 21 of the UCPA, a person who obtains a trade secret by an act of fraud or theft is subject to imprisonment of up to ten years or a fine of up to JPY10 million, or both.

Criminal proceedings under the FIEA. Under Article 197 of the FIEA, securities-related fraud can be punished by imprisonment of up to ten years, or a fine of up to JPY10 million, or both. Where a representative or employee of a company commits such an act, the company can be punished by a fine of up to JPY700 million (*Article 207, FIEA*).

Civil suits

An aggrieved party can file an action for damages or for restitution for unjust enrichment under the Civil Code.

Class actions

Class actions are not recognised in Japan. However, Japan has adopted a so-called “consumer organisation litigation system” whereby the Prime Minister can certify particular consumer organisations, such as the Consumers Organisation of Japan, as qualified to represent consumers generally. These organisations, acting on behalf of consumers, can file for injunctions against companies that commit fraudulent acts. Two major differences between this system and the US class action system are that:

- Classes cannot be formed under the guidance of attorneys (actions can only be filed by qualified consumer organisations).
- Qualified consumer organisations are only able to apply for injunctions, they are not permitted to file a claim for damages.

BRIBERY AND CORRUPTION

Regulatory provisions and authorities

5. What are the main regulatory provisions and authorities responsible for investigating bribery and corruption?

Criminal procedures

The bribery of domestic and foreign officials, as well as commercial bribery, is prohibited under the following legislation:

- Article 198 of the Penal Code prohibits the bribery of Japanese public officials.
- Article 18 of the UCPA prohibits the bribery of foreign public officials.
- Articles 967 and 968 of the Companies Act prohibit the bribery of a director to cause the director to violate his fiduciary duties to the company or to shareholders.
- The preparation of financial records and statements in order to conceal bribes is prohibited under the Companies Act and the FIEA (*see Question 23*).

Supervisory and other guidelines

METI has published best practice guidelines entitled “Guidelines to Prevent Bribery of Foreign Public Officials” (METI Guidelines). In addition, the FSA has issued supervisory guidelines on internal controls. The FSA’s inspection manuals also contain recommendations and guidance for best practice regarding compliance generally. While bribery is not explicitly covered in the FSA’s guidelines and inspection manuals, robust internal controls and compliance procedures are likely to help minimise the risk of corrupt conduct. See also *Question 4, Civil/administrative proceedings or sanctions*.

Specific cases

There has been little enforcement of Japan’s foreign anti-bribery laws. There are only two reported cases:

- The first case involved the bribery of two foreign government officials by a senior executive and a lower ranking employee of a foreign subsidiary of a Japanese company in order to obtain favourable treatment in a foreign public procurement contracting process. The bribes were in the form of gifts, worth approximately JPY800,000. The company did not win the contract, the value of which is not specified. The senior executive, a Japanese national, was convicted and fined JPY500,000. The employee, also a Japanese national, was convicted and fined JPY200,000. The facts that gave rise to the case took place in 2004, and the convictions were obtained in 2007. This case was detected through a whistleblower.
- The second case involved the bribery of a senior official of a foreign public procurement authority in relation to a substantial infrastructure project that was financed in part by official development assistance from Japan. Four Japanese defendants were convicted under the foreign bribery offence in the UCPA. A senior executive of a Japanese company was sentenced to imprisonment with



hard labour for two years and another executive of the company, a manager of the company, and a representative of a paper subsidiary in a third country, were sentenced to imprisonment for two and a half years, one and a half years, and 20 months, respectively (the execution of the custodial sentences was suspended for three years). The company was also convicted and fined JPY70 million.

For more information on METI and the FSA, see box, *The regulatory authorities*.

6. What international anti-corruption conventions apply in your jurisdiction?

Japan signed the OECD Convention on Combating Bribery of Foreign Public Officials 1997. On 18 September 1998 implementing legislation in the form of amendments to the UCPA (to become Article 18 of the UCPA) was enacted, which came into force on 15 February 1999.

Offences

7. What are the specific bribery and corruption offences in your jurisdiction?

Foreign public officials

Giving, offering, or promising to provide any gain to a foreign (that is, non-Japanese) public official for the purpose of causing that foreign public official to act or refrain from acting in relation to his duties to acquire an improper business advantage in an international commercial transaction is prohibited (*Article 18(1), UCPA*). This applies both where a Japanese citizen offers a bribe to a foreign public official (whether inside or outside Japan) and where a foreign national offers a bribe to a foreign public official in Japan.

In addition to individual liability, where a representative or employee of a company offers a bribe to a foreign public official, the company is also subject to prosecution.

Domestic public officials

Article 198 of the Penal Code prohibits any person from giving, offering or promising to give a bribe to a Japanese public official (or a person who is to be appointed as a public official or any former public official).

Private commercial bribery

Article 967 of the Companies Act prohibits officers or directors of Japanese companies from offering bribes in connection with the management of the company. Article 968 of the Companies Act prohibits officers or directors from offering bribes in response to unlawful requests relating to shareholders' meetings, for example:

- "Greenmail" (purchasing enough shares in a company to threaten a takeover, thereby forcing the target company to buy back the shares at a premium to prevent the takeover).
- *Sōkaiya* demands (a form of corporate blackmail unique to Japan where money is extorted by threatening to publicly humiliate companies and their management, usually in their annual meeting (often associated with organised crime)).

Articles 967 and 968 of the Companies Act also prohibit an individual from accepting payment.

These provisions apply even if a violation is committed outside Japan (*Article 971, Companies Act*). If a company accepts a bribe, these provisions apply to the directors involved (*Article 972, Companies Act*).

Defences

8. What defences, safe harbours or exemptions are available and who can qualify?

Indirect bribery

The Penal Code prohibits the payment of a bribe to a Japanese government official through third party agents. The METI Guidelines state that the same prohibition applies with respect to bribes to foreign government officials under the UCPA.

Gifts within the scope of social courtesies

Under case law there is a defence to the crime of domestic bribery (*see Question 7, Domestic public officials*) where a gift is given within the scope of social courtesies. If the gift was provided in consideration for certain conduct within the scope of the official's authority, the defence does not apply.

The METI Guidelines state that whether a gift to a foreign public official is considered an improper bribe depends on the specific facts and circumstances of each case.

Facilitation payments

The METI Guidelines state that in some cases a facilitation payment may not be considered a bribe, where such payment is made only to expedite the performance of a function that the government official is already bound to perform (for example, process a tax return, issue a licence) pursuant to the foreign country's laws. The METI Guidelines explain that a facilitation payment generally does not constitute a bribe where not all of the elements of the foreign bribery offence exist, in particular, the intent "to obtain unlawful business advantage in the conduct of international business". However, the UCPA's anti-bribery provision contains no exception or defence for facilitation payments and the METI Guidelines do not narrow the police or the public prosecutor's interpretation of the UCPA's anti-bribery provision. Therefore, although the METI Guidelines state that facilitation payments may not be considered bribes, in any particular case the police or the public prosecutor's interpretation may differ depending on the facts.

Japanese law does not provide for a de minimus exception for payments of minor amounts.

9. Can associated persons and agents be liable for these offences and in what circumstances?

Japanese law provides for accessory (for example, conspiracy and aiding/abetting) liability for both domestic and foreign bribery.

The METI Guidelines state that agents can be liable for violation of the UCPA's prohibitions against foreign bribery (*see Question 7*).



Enforcement

10. What are the regulator's powers of investigation, enforcement and prosecution in cases of bribery and corruption?

The police and the Public Prosecutor's Office have the same investigatory, enforcement and prosecutorial powers in cases of bribery and corruption as they do in general business fraud cases. See *Question 3*.

Sanctions

11. What are the potential sanctions for participating in bribery and corruption?

Civil/administrative proceedings or sanctions

If an officer or director of a company offers, promises or pays a bribe, the company can be subject to administrative sanctions (for example, the rescission of its business licence or registration, a business suspension or improvement order, or a notice of non-compliance with agency guidelines or orders) from the relevant regulatory government agency on the grounds that the company's internal controls were deficient or that its business operations are unsound. Corporations can be debarred from government contracts as part of an administrative sanction.

Criminal proceedings

Domestic bribery. A person who offers, promises or pays a bribe to a Japanese public official is subject to up to three years' imprisonment or a fine of up to JPY2.5 million (*Article 198, Penal Code*).

Foreign bribery. A person who violates the UCPA's foreign bribery provision is subject to imprisonment of up to five years or a fine of up to JPY5 million yen, or both (*Article 21, UCPA*). If an individual who violates the UCPA's foreign bribery provision is an employee, an agent, an officer or director of a company (and where the bribe is made in connection with the company's business), the company is subject to a fine of up to JPY300 million (*Article 22, UCPA*).

Commercial bribery. Sanctions depend on what form the bribery takes:

- **Bribery involving officers or directors.** If an officer or director of a Japanese company accepts a bribe, he can be punished by imprisonment of up to five years or a fine of up to JPY5 million (*Article 967(1), Companies Act*). A person who offers, promises or pays a bribe to an officer or director of a Japanese company in connection with his duties, can face up to three years' imprisonment or a fine of up to JPY3 million (*Article 967(2), Companies Act*).

In addition, if an officer or director offers a bribe in connection with his duties, it is possible that this conduct could be considered an aggravated breach of trust, which is punishable by imprisonment of up to ten years or a fine of up to JPY10 million, or both (*Article 960, Companies Act*).

A bribe can be confiscated (or a sum of equivalent value collected in lieu of confiscation) (*Article 969, Companies Act*).

- **Bribery in connection with an exercise of shareholder's rights.** Any officer or employee of a Japanese company who makes an unlawful request to a shareholder relating to shareholders' meetings (for example requesting a vote to be exercised in favour of a resolution submitted by the company) can be punished by imprisonment of up to five years or a fine of up to JPY5 million (*Article 968(2), Companies Act*). Any person who accepts this bribe is subject to the same penalty.

Tax treatment

12. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?

These payments are not tax deductible.

INSIDER DEALING AND MARKET ABUSE

Regulatory provisions and authorities

13. What are the main regulatory provisions and authorities responsible for investigating insider dealing and market abuse?

Criminal procedures

The FIEA prohibits market manipulation under Article 159 and insider trading by officers, employees, shareholders of 3% or more, or any third party with whom a listed company has a contractual relationship, or by persons who have statutory authority over a listed company (for example, government officials) (corporate insiders) under Article 166.

Supervisory and other guidelines

The FSA has published comprehensive supervisory and administrative guidelines relating to financial transactions. Other bodies such as securities exchanges (for example, the Tokyo Stock Exchange (TSE)) and industry groups (for example, the Japanese Bankers Association (JBA) and the Japan Securities Dealers Association (JSDA)) have also issued guidelines or rules for the prevention of insider trading.

For more information on the FSA, TSE, JBA and the JSDA see box, *The regulatory authorities*.

Offences

14. What are the specific insider dealing and market abuse offences?

Market manipulation (*Article 159, FIEA*)

Securities transactions intended to mislead others as to market conditions are prohibited. This offence is not a strict liability offence. The prosecutor must prove that the defendant had the intent to mislead.

Insider trading (*Articles 166 and 167, FIEA*)

The following are offences under the FIEA:



- A corporate insider who has come to know a material fact pertaining to the business of the company (for example, a board decision to increase the company's capital, acquire treasury shares, or enter into a business alliance with another company) in the course of his duties, or any person who has received material information from an officer of a company, is prohibited from engaging in the purchase or sale of the company's securities before those material facts are publicised.
- A corporate insider who comes to know facts concerning the launch of a tender offer cannot purchase shares pertaining to that tender offer before the facts of the tender offer are publicised.
- Any person who comes to know facts concerning the suspension of a tender offer cannot sell shares pertaining to that tender offer before the suspension of the tender offer is publicised.

Insider trading is not a strict liability offence. Wilful misconduct by the person who committed the relevant trading must be established.

Defences

15. What defences, safe harbours or exemptions are available and who can qualify?

Safe harbours

The acquisition of share certificates by the exercise of a right to receive an allotment of shares (for example, convertible bonds) and other transactions that do not undermine the fairness and credibility of a securities market prescribed in the FIEA, are safe harbours from insider trading (*Articles 166(6) and 167(5), FIEA*).

Reduction or exemption of surcharges

For insider trading relating to the acquisition of treasury shares by a company, if the company voluntarily reports a violation to the SESC before the SESC, the FSA, or any financial bureau commences a voluntary investigation, the amount of the surcharge on the most recent violation will be reduced by half (*Article 185-7(12), FIEA*).

Statute of limitations

No surcharge is imposed after a period of five years has passed from the date on which the insider trading took place (*Articles 178(26) and 178(27), FIEA*).

Enforcement

16. What are the regulator's powers of investigation, enforcement and prosecution?

Administrative investigations and search and seizure

The SESC primarily conducts voluntary investigations when considering the imposition of surcharges on those who are suspected of market manipulation or insider trading. The SESC also has authority to conduct compulsory investigations into criminal cases and, if necessary, to apply to the court for permission to conduct on-site inspections (conducted by an SESC officer) or for a search warrant, under Articles 210 and 211 of the FIEA. Following the compulsory investigation, the SESC can file a complaint with the

police or a public prosecutor, to which it must provide any seized articles or evidence (*Article 226, FIEA*).

Searches by investigative authorities

The police or a public prosecutor can, on receipt of a complaint of market manipulation or insider trading from the SESC, or at their own discretion, apply to the court for a search warrant.

See also *Question 3, Extra-territorial jurisdiction*.

Sanctions

17. What are the potential sanctions for participating in insider dealing and market abuse?

Civil/administrative proceedings or sanctions

For insider dealing or market manipulation, the FSA can impose a surcharge under Articles 174 and 175 of the FIEA. The company can also be subject to other administrative guidance or sanctions (for example notice of non-compliance with agency guidelines or orders, the rescission of its business licence or registration, or a business suspension or improvement order) on the grounds that it had a deficient compliance system.

If a person who is found liable for insider trading has already been sanctioned with a surcharge for a violation within the previous five years (counting from the day on which the trading was conducted), the surcharge amount can be increased by an additional 50% (*Article 185-7(13), FIEA*).

Criminal proceedings

Market manipulation. A person who commits market manipulation can be punished by up to ten years' imprisonment or a fine of up to JPY10 million, or both (*Article 197(1)(v), FIEA*). A person who commits market manipulation and sells or purchases securities at prices that are the result of market manipulation with the intent of gaining economic benefit can be punished by up to ten years' imprisonment and a fine of up to JPY30 million (*Article 197(2), FIEA*). The economic benefits gained can also be confiscated or a sum of equivalent value collected in lieu of confiscation under Article 198-2 of the FIEA. Where the violation is committed by a representative, agent, or employee, the company can be punished by a fine of up to JPY700 million (*Article 207(1)(i), FIEA*).

Insider trading. A person who commits insider trading can be punished by up to five years' imprisonment or by a fine of up to JPY5 million, or both (*Article 197-2(13), FIEA*). The economic benefit gained can also be confiscated, or a sum of equivalent value collected in lieu of confiscation. Where the violation is committed by a representative, agent or employee, the company can be punished by a fine of up to JPY500 million (*Article 207(1)(ii), FIEA*).

Civil suits

A person who commits market manipulation can be liable for damages to any person who has suffered damage in connection with the sale or purchase of the securities or other financial instruments in question, at prices that resulted from the market manipulation (*Article 160, FIEA*). However, in practical terms when bringing a claim, it is difficult to prove that the securities were sold and purchased at prices that were a result of the market manipulation.



Article 160 sets out a shorter statute of limitations for these types of civil claims (one year from becoming aware of the violation or three years from the time when the violation is committed) than for general tort claims (three years from the time one becomes aware of the violation or 20 years from the time when the violation is committed) under the Civil Code.

Private plaintiffs can also bring a claim in tort under Article 709 of the Civil Code or a claim for restitution of unjust enrichment under Articles 703 or 704 of the Civil Code. In practice, however, it is difficult to prove causation between the unlawful conduct and the damages incurred, or the amount of damages.

MONEY LAUNDERING AND TERRORIST FINANCING

Regulatory provisions and authorities

18. What are the main regulatory provisions and authorities responsible for investigating money laundering and/or terrorist financing?

Regulations

Money laundering and terrorist financing is prohibited by the:

- Act for Punishment of Organised Crime, Control of Crime Proceeds and Other Matters (Act No. 136 of August 18, 1999) (Organised Crime Act).
- Act on Prevention of Transfer of Criminal Proceeds (Act No. 22 of March 31, 2007) (Transfer of Proceeds Act).

The principal provisions are contained in Articles 9, 10 and 11 of the Organised Crime Act and Articles 27 and 28 of the Transfer of Proceeds Act (see *Question 19*).

The Japan Financial Intelligence Centre (JAFIC) is an authority within the National Police Agency that co-ordinates investigative activities relating to money laundering and terrorist financing.

Obligations of business operators

Financial institutions and businesses have an obligation to:

- Conduct identity checks on customers when conducting certain transactions, for example opening accounts, effecting cash settlements of over JPY2 million or cash remittances of over JPY100,000.
- Create and keep identification records for seven years.
- Notify the relevant administrative agencies of any suspicious transactions.

The FSA has issued comprehensive supervisory and administrative guidelines and inspection manuals, primarily targeting financial institutions with regard to notification of suspicious transactions. For foreign exchange transactions, financial institutions must conduct identity checks on customers similar to the identity checks described above pursuant to the Foreign Exchange and Foreign Trade Act (Act No. 228 of December 1, 1949). These obligations are monitored by the Ministry of Finance of Japan (MOF). See *Question 4, Civil/administrative proceedings or sanctions*.

For more information on the JAFIC, MOF and the FSA see *box, The regulatory authorities*.

Offences

19. What are the specific money laundering and terrorist financing offences?

The following acts are prohibited under the Organised Crime Act:

- Becoming a shareholder of a company using criminal proceeds and exercising authority as a shareholder for the purpose of controlling the management of the company (*Article 9*).
- Concealing or attempting to conceal facts relating to the acquisition and disposal of the proceeds of a crime, or concealing or attempting to conceal the source of proceeds of a crime (*Article 10*).
- Accepting the proceeds of a crime (*Article 11*).

The public prosecutor must establish in each case that there was intent to commit the offence.

Impersonating another in order to receive, transfer, or solicit a transfer of deposits or savings is punishable under Articles 27 and 28 of the Transfer of Proceeds Act. The public prosecutor must establish that there was intent to commit the offence.

A Japanese citizen who commits any of these acts outside Japan is also subject to the provisions of the Organised Crime Act.

Defences

20. What defences, safe harbours or exemptions are available and who can qualify?

There is a defence against the crime of accepting criminal proceeds if either (*Article 11, Organised Crime Act*):

- The proceeds are accepted in the performance of a statutory obligation.
- The proceeds are accepted under a contract and the recipient of the proceeds was unaware at the time of execution of the contract that the contractual obligation in question would be performed using the proceeds of crime.

Enforcement

21. What are the regulator's powers of investigation, enforcement and prosecution?

JAFIC collects and analyses information about suspicious transactions reported by businesses and provides the police and/or the public prosecutor with this information. The police and/or the public prosecutor can apply to the court for a search warrant to investigate money laundering or the financing of terrorist activities. In addition, the public prosecutor can apply to the court before trial to freeze property that might later be confiscated under Articles 22 and 23 of the Organised Crime Act.

See also *Question 3, Extra-territorial jurisdiction*.



Sanctions

22. What are the sanctions for participating in money laundering or terrorist financing offences?

Civil/administrative proceedings or sanctions

A company found guilty of involvement in money laundering or dealing in or accepting funds generated by terrorist activities can be sanctioned by the FSA or the MOF by:

- Rescission of a licence or registration.
- Warning.
- Notice for lack of adequate internal controls.

The FSA and the MOF can also:

- Request that a company submit a report or materials about its business operations.
- Conduct an on-site inspection of the company's offices and documents (for example, accounting records) and question company employees.

The FSA and the MOF can also provide companies with guidance and advice and can, where a company has failed to satisfy relevant regulatory requirements, issue an order to remedy that failure. A company subject to these sanctions must generally file background documents or an improvement report.

Criminal proceedings

Article 9 and following of the Organised Crime Act provides that:

- A person who becomes a shareholder of a company, or who conducts other acts using criminal proceeds, and who exercises his or her authority as a shareholder for the purpose of controlling the management of the company is subject to up to five years' imprisonment or a fine of up to JPY10 million, or both.
- A person who conceals facts relating to the acquisition and disposal of the proceeds of crime or conceals or attempts to conceal the source of proceeds of a crime is subject to up to five years' imprisonment or a fine of up to JPY3 million, or both.
- A person who conceals the proceeds of crime is subject to imprisonment of up to three years or a fine of up to JPY1 million, or both.

Additionally, any criminal proceeds are subject to confiscation or collection of a sum of equivalent value in lieu of confiscation. If a representative or employee of a company commits these acts in connection with the operation of the company's business, the company can be punished by a fine equivalent to that imposed on an individual defendant under Article 9 and following.

A person who impersonates another person in order to receive, transfer, or solicit the transfer of deposits or savings is subject to imprisonment of up to one year or a fine of up to JPY1 million, or both (*Article 27 and following, Transfer of Proceeds Act*). A person who conducts these acts by way of business can be subject to an aggravated sanction of imprisonment of up to three years or a fine of up to JPY5 million, or both.

FINANCIAL RECORD KEEPING

23. What are the general requirements for financial record keeping and disclosure?

Accounts must be prepared in a timely and accurate manner (*Article 432, Companies Act*). Financial statements attached to disclosure documents required by the FIEA must give a true and accurate account of the financial condition and business results of the company (*Article 5, Ordinance on Terminology, Forms, and Preparation Methods of Financial Statements*).

The Companies Act and the FIEA prohibit off-balance-sheet accounting, the preparation of fraudulent financial statements and securities registration statements containing fictitious expenditures.

24. What are the sanctions for failure to keep or disclose accurate financial records?

Criminal sanctions

A person who knowingly files a securities report which contains a false statement on any matter material to investors, is subject to imprisonment of up to ten years or a fine of up to JPY10 million, or both (*Article 197, FIEA*). Where a representative or employee of a company commits such an act, the company can also be subject to criminal fines of up to JPY700 million (*Article 207, FIEA*).

Administrative sanctions

Where accounting books are found to contain false statements, the officers, directors or auditors of the company can be subject to an administrative penalty of up to JPY1 million (*Article 976(vii), Companies Act*). A person or officer who is found by the FSA and/or the SESC to have made a false statement in a securities report can be ordered by the Commissioner of the FSA to pay a surcharge under Article 172-2 *et seq.* of the FIEA and liable to pay damages to compensate investors for losses suffered as a result of fraudulent financial statements.

25. Are the financial record keeping rules used to prosecute white-collar crimes?

The SESC has the authority to conduct compulsory investigations of violations of financial record keeping rules under the FIEA. The SESC can file a complaint with the police or a public prosecutor based on what it learns during an investigation. The MOJ has authority to conduct voluntary investigations with respect to violations of financial record keeping rules under the Companies Act.

DUE DILIGENCE

26. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?

There are no specific due diligence requirements under Japanese law. Companies are advised to use global best practice in



conducting necessary due diligence, which often includes:

- The completion of a due diligence questionnaire by the external party.
- Media searches.
- Verification of in-country presence, industry experience, and capacity to perform legitimate services.
- Gathering client lists and references, as necessary.

It is also common to check that the external party has not been subject to any criminal investigation or prosecution or prior administrative guidance or sanction. In certain cases, it is advisable to conduct interviews of the relevant management team to identify corruption, fraud, or money laundering risks. Contractual provisions

prohibiting the external party from engaging in corruption, fraud, and/or money laundering, granting audit rights to monitor compliance and permitting immediate termination of the contract for violation of these prohibitions should also be considered.

CORPORATE LIABILITY

27. Under what circumstances can a corporate body itself be subject to criminal liability?

The FIEA, the UCPA and the Organised Crime Act provide for criminal liability for both individuals and corporations, as described in *Questions 4, 11, 17, 22 and 24*.

THE REGULATORY AUTHORITIES

Public Prosecutor's Office

W www.kensatsu.go.jp

Status. The Public Prosecutor's Office is a governmental organisation.

Principal responsibilities. The police and the Public Prosecutor's Office have principal responsibility for investigating criminal matters in general.

Ministry of Justice (MOJ)

W www.moj.go.jp/ENGLISH/index.html

Status. The MOJ is part of the government.

Principal responsibilities. The MOJ has supervisory responsibility for matters regulated by the Companies Act.

Financial Services Agency (FSA)/Securities and Exchange Surveillance Commission (SESC)

W www.fsa.go.jp/en/index.html (FSA)
www.fsa.go.jp/sesc/english/index.htm (SESC)

Status. The FSA and the SESC are governmental organisations.

Principal responsibilities. The SESC is part of the FSA. The FSA and the SESC have principal responsibility for violations of the FIEA.

Ministry of Economy, Trade and Industry (METI)

W www.meti.go.jp/english/index.html

Status. METI is part of the government.

Principal responsibilities. METI has supervisory responsibility for matters regulated by the UCPA.

Tokyo Stock Exchange (TSE)

W www.tse.or.jp/english/index.html

Status. The TSE is a private organisation.

Principal responsibilities. The TSE has issued guidelines on the prevention of insider trading.

Japanese Bankers Association (JBA)

W www.zenginkyo.or.jp/en/

Status. The JBA is an industry body.

Principal responsibilities. The JBA has issued guidelines on the prevention of insider trading.

Japan Securities Dealers Association (JSDA)

W www.jsda.or.jp/en/index.html

Status. The JSDA is an industry body.

Principal responsibilities. The JSDA has issued guidelines on the prevention of insider trading.

Japan Financial Intelligence Centre (JAFIC)

W www.npa.go.jp/english/index.htm (National Police Agency)
www.npa.go.jp/sosikihanzai/jafic/index.htm (JAFIC)

Status. The JAFIC is a governmental organisation.

Principal responsibilities. The JAFIC is an authority within the National Police Agency that has principal responsibility for co-ordinating the investigation of money laundering and terrorism.

Ministry of Finance (MOF)

W www.mof.go.jp/english/

Status. The MOF is part of the government.

Principal responsibilities. The MOF has supervisory responsibility for matters regulated by the Foreign Exchange and Foreign Trade Act.



The extent to which a company can be held liable for the acts of individuals depends on the provisions of the specific statute regulating the company's business.

IMMUNITY AND LENIENCY

28. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?

If a company reports insider trading to the SESC before the commencement of an inspection or request for a report by the SESC or the FSA, the surcharge can be reduced or waived (see *Question 15, Reduction or exemption of surcharges*).

When a company involved in a cartel reports the cartel to the Fair Trade Commission (FTC), the surcharge can be reduced or waived under Article 7-2 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) and the Rules on Reporting and Submission of Materials Regarding Immunity From or Reduction of Administrative Fines.

Other than as mentioned above, a company can make submissions in court, or to a regulatory agency, that it has co-operated with any investigation in order to receive a lesser sanction. However, leniency is at the discretion of the court or relevant investigative authority and there are no specific public guidelines governing the procedure.

CROSS-BORDER CO-OPERATION

29. What international agreements and legal instruments are available for local authorities?

Obtaining evidence

Evidence in criminal cases can be obtained from countries that have entered into a treaty or agreement with Japan regarding mutual assistance in criminal cases (for example China, the EU, Hong Kong, Russia, South Korea, and the US).

Seizing assets

Where a final and binding decision is made in a criminal court of an overseas jurisdiction for the confiscation of property located in Japan (or the collection of a sum of money in lieu of confiscation), the public prosecutor can apply to the court for recognition of the decision and co-operation in the execution of the sanction. The public prosecutor can also apply for the recognition of freezing and interim orders for the preservation of property in Japan.

WHISTLEBLOWING

30. Are whistleblowers given statutory protection?

Employees who report suspected violations of certain laws such as the Penal Code, the Food Sanitation Law, the FIEA, the Protection of Personal Information Law and other laws that protect individual health, safety and property, consumer interests, fair competition, and the environment, as designated by cabinet order, are protected from retaliation under the Whistleblower Protection Act (Act No. 122 of June 18, 2004).

REFORM

31. Are there any impending developments or proposals for reform?

There are no regulatory developments planned as a result of the economic downturn.

MARKET PRACTICE

32. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

Leading foreign and local companies manage their risk by applying global best practices in compliance. These measures include:

- Setting an appropriate "tone from the top" that compliance is a company priority.
- Thoroughly investigating suspected wrongdoing.
- Conducting due diligence into external parties and other business partners.
- Training employees and external parties on relevant compliance policies and procedures.
- Maintaining a robust audit function.
- Conducting periodic risk assessments to determine if current policies and procedures are adequate and where gaps are found implementing appropriate remedial measures.

Companies should also review relevant administrative guidance to ensure that they meet the expectations of regulators in conducting their compliance activities.

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Qualified. New York, US; Pennsylvania, US; New Jersey, US; Japan, Registered Foreign Lawyer (*Gaikokuho-Jimu-Bengoshi*)

Areas of practice. Commercial litigation; compliance; investigations and anti-corruption; international arbitration.

Recent transactions

- Assisted a publicly traded company with an investigation into possible employee misconduct relating to investment practices, revenue recognition, and accounting issues in Japan.
- Represented the Japanese subsidiary of a multinational corporation in litigation involving allegations that the company's employees engaged in fraudulent transactions, revenue recognition and accounting practices.
- Conducted an internal investigation into the conduct of certain employees and directors of a Japanese subsidiary of a multinational media corporation relating to potentially improper revenue recognition practices.
- Represented a Japanese company with respect to sales of controlled products and services to restricted countries. The investigation and compliance review successfully concluded with lifting of sanctions that had been imposed.

Qualified. Japan; New York, US; Japan Patent Attorneys Association

Areas of practice. Commercial litigation; compliance; investigations and anti-corruption; intellectual property litigation.

Recent transactions

- Representing the Japanese subsidiary of a multinational corporation in litigation involving allegations that the company's employees engaged in fraudulent transactions.
- Advised a multinational corporation regarding investigation into government contracts irregularities involving a distributor.
- Advised a Japanese corporation regarding government investigation into allegations of consumer fraud.
- Assisted Japanese subsidiaries of multinational companies with investigations into data protection and internal controls issues.