Guidance on Prevention of Foreign Bribery (Proposal)

July 15, 2016
Revision: January 19, 2017
Japan Federation of Bar Associations

1) Background and developments

With the tightening in recent years of anti-bribery regulation throughout the world, the risk for Japanese companies being implicated in a bribery case in relation to their overseas business that is identified as having fallen foul of the law and sanctioned accordingly has increased dramatically. In Japan, Article 18 of the Unfair Competition Prevention Act lays down an offence of bribing a foreign public official, which prohibits the conferring of an improper advantage on a foreign public official and other similar persons,[i] and the relevant enforcement framework has been strengthened recently.[ii] Beyond that, the likelihood of Japanese companies finding themselves subject to the US Foreign Corrupt Practices Act (**FCPA**), the UK Bribery Act (**UK BA**) and other such foreign regulation also has increased. For instance, the US authorities are rigorous in their application of the FCPA even to non-US companies, and there already have been numerous cases where the FCPA has been applied to Japanese companies that were detected and charged for alleged involvements in bribery cases in emerging and developing markets.[iii]

Moreover, if an involvement by a Japanese company in bribery overseas comes to light, it is not simply a matter of massive fines being potentially imposed or management and employees potentially detained.[iv] There is a very real possibility that the situation will escalate to the point where a business partner suspends business transaction with the company, the company receives severe criticism from the public, and serious damage may be inflicted on its corporate value. Particularly in emerging and developing countries where the rule of law is yet to be established, engaging in bribery may not only distort the proper enforcement of regulation by the government in the relevant country or foster corruption in that society as a whole, but also aggravate environmental, labor and human rights issues. As a result, the company may be severely criticized by the public and significant damage may be inflicted on its corporate value. Accordingly, preventing foreign bribery is an essential component of their efforts to fulfil their corporate social responsibility (CSR) and responsibility to respect human rights.[v]

Given that the issue of foreign bribery has become a major risk that may directly lead to damage to corporate value for Japanese companies, the Ministry of Economy, Trade and

Industry revised in July 2015 its guidelines on the bribery of foreign public officials (the "**METI Guidelines**"). This put forward new perspectives such as the "*importance of the attitude of and message from top management*," a "*risk-based approach*," "*necessity of taking action at subsidiaries level*" and "*response in an emergency situation*" by way of measures designed to enhance the effectiveness of the compliance program for prevention of bribery for foreign public officials.

2) The aim of this Guidance

In light of the abovementioned background and developments, we have decided to issue this Guidance to provide practical guidelines for Japanese companies (and counsel who provide legal advice to them) in relation to implementation of anti-bribery measures. It is intended as a supplement to the METI Guidelines and should contribute to the promotion of corporate social responsibility and human rights advocacy, while aiding sustainable overseas expansion by Japanese companies. In particular, this Guidance is intended to be used from the following three perspectives:

(1) To clarify the elements of an anti-bribery compliance program necessary to fulfil the duty to implement an internal control system

According to case law, as an aspect of their fiduciary duties under the Companies Act, the directors of a Japanese company owe a duty to implement (i.e., devise and execute) an internal control system. As stated above, breaching anti-bribery regulation now involves a greater risk of damage to their corporate value, and it is no longer enough for companies to respond by maintaining the same measures they have previously taken. To fulfil the directors' duty to implement an internal control system, it is critical that the top management face the risks, clearly take a proactive stance to enhance the prevention of foreign bribery both internally and externally, and implement an internal control system to address the bribery risks, including compliance with foreign regulations throughout the corporate group.

This Guidance clarifies the elements of an anti-bribery compliance program that are generally required for directors to be deemed to have fulfilled their duty to implement an internal control system. Whereas Chapter 2 of the METI Guidelines also provides examples of what an anti-bribery compliance program should look like as a component of an internal control system, this Guidance sets out more explicitly the elements of an anti-bribery compliance program that are required to be incorporated in an internal control system, taking account of the case law concerning the duty to implement an internal control system, the regulations and

enforcement practices of various countries, the approaches currently being taken by companies in relation to anti-bribery compliance program, and so forth.

(2) To clarify the elements of internal control system that may help the company seek mitigation of or relief from penalties

Even in the event that a company's involvement in bribery comes to light, there are situations where penalties may be mitigated or avoided if an adequate internal control system has been put in place. The UK BA expressly provides that it is a complete defense for a company to demonstrate that it had in place appropriate procedures to prevent bribery.[vi] Also, although this does not constitute a statutory defense under the FCPA, its guidelines provide that whether or not a company had in place an appropriate compliance program is to be taken into account in the process enforcement of the FCPA.[vii] Likewise, in relation to the offence of bribing a foreign public official under Japanese law, the METI Guidelines provide that in order for a company to avail itself of the due diligence defense set out in the provisions relating to parallel corporate liability, " *it is necessary to augment the effect of measures for preventing bribery of foreign public officials and to improve the effectiveness of internal controls*."[viii]

What this guidance does is to set out more clearly the elements of the internal control systems that may prove helpful from the point of view of obtaining mitigation of or relief from penalties under overseas anti-bribery regulations, taking account of the guidelines issued by the US and UK authorities.[ix]

(3) To clarify a practical approach to foreign bribery issues for companies and lawyers

Although the METI Guidelines as revised in July 2015 deserve great credit for demonstrating how an anti-bribery compliance program should be structured, there is a need for more practical guidelines from the point of view of companies trying to implement it. In particular, in those developing and emerging counties where corruption is entrenched, it is not uncommon for Japanese companies' on-the-ground management and employees to be forced to provide bribes under explicit or tacit pressure by foreign public officials, even though they do not affirmatively offer them. Practical know-how is necessary for Japanese companies to entrust their local staff with the task of handling unreasonable demands and for the local staff to deal appropriately with contingencies, including unreasonable demands, without being left to their own devices and unsure as to how to proceed.

With the above considerations in mind, this guidance clarifies further how companies and lawyers should approach foreign bribery issues in practice.

Moreover, the explanation relating to facilitation payments (small payments to ensure the smooth progress of ordinary administrative services) have been removed in the revised edition of the METI Guidelines. Given, however, that dealing with these payments is an issue that often comes up both in business practices and in legal consultations, this Guidance sets forth practical guidelines in relation to it.

3) The nature and use of this Guidance

This Guidance summarizes contemporary best practice in relation to anti-bribery measures.

It is expected that Japanese companies will implement anti-bribery measures in reliance on this Guidance in order for their directors to fulfil their duty to implement an internal control system and develop their business abroad in a sustainable manner without being found to have fallen afoul of regulations in foreign countries and incurring penalties. We believe that putting this Guidance into practice will be useful both to prevent the erosion of corporate value that occurs when the risks associated with bribery eventuate, and to protect local staff from the threat of unreasonable demands for bribes. We suggest that lawyers also use this Guidance to play an active role in giving legal advice in relation to anti-bribery matters.

Moreover, although this Guidance is primarily intended to address the prevention of bribes to foreign public officials, given that there are, among other things, foreign countries with regulations prohibiting bribery in the private sector, it addresses the prevention of acts of bribery in a broad sense, which also encompasses commercial briberies. Accordingly, references in this Guidance to a "*foreign public official*" include civilians and not merely public officials where applicable law prevents a company from making commercial briberies.

Additionally, while this Guidance fundamentally provides strong recommendations as to the practice to be taken to prevent foreign bribery, where a practice is no more than a recommended response the applicability of which depends on the physical, human resources or economic environment, it is marked "*advisable*."

4) Recommendation as to declarations of implementation of this Guidance

In an age where it is acknowledged that bribery risks would have a direct impact on corporate value and the prevention of foreign bribery is regarded as a core strand of corporate social responsibility (CSR), there is strong pressure on companies to make active disclosures to investors and other stakeholders regarding the status of their anti-bribery measures.[x] In that regard, this Guidance encourages Japanese companies to make a declaration – both internally

and externally – of the fact that they are putting into place anti-bribery measures in accordance with this Guidance. Such a declaration of compliance with the Guidance will increase transparency for stakeholders and may lead to increased public confidence in the company. We expect that Japanese companies will consider making declarations of compliance with the Guidance proactively.

---

[i] Article 18(1) of the Unfair Competition Prevention Act provides that "*no person shall confer upon a foreign public official or other similar person a pecuniary or other advantage or solicit or offer the same with a view to causing such public official or other similar person to do or refrain from doing anything in such official capacity or to procure that such official use his status as such to cause another foreign public official or other similar person to do or refrain from doing any act in their official capacity in order to gain an unfair business advantage in relation to an international commercial transaction.*" Breach of Article 18(1) of the Act renders a person liable to imprisonment with hard labour not exceeding 5 years and/or a fine not exceeding JPY5 million, or both (Article 21(2)(vii) of the Act). In the case where a representative of a legal person, an agent, employee or other servant of a legal or natural person breaches Article 18(1) in relation to the affairs of that legal or natural person, the Act provides for a fine not exceeding JPY300 million against the legal person (Article 22(1)(iii).

[ii] In April 2014, the National Police Agency issued a circular to police departments in all prefectures to designate a person in-charge of for anti-bribery measures in order to reinforce the enforcement framework against the offence of bribing a foreign public official.

[iii] Under the FCPA, even if a non-US company is involved in bribery in a third country other than the US, the relevant regulations can be applied to that non-US company should there be circumstances such as, for example, the fact that part of the acts constituting the bribe took place in the US or a conspiracy with a US company (including a non-US company listed at a stock exchange in the US). The US authorities are extremely rigorous in their application of the FCPA to non-US companies, and there is a risk that they will deem acts as minimal as paying a dollar-denominated bribe or sending an email relating to bribery to a US office as offences of bribery partly taking place within the US. Furthermore, where US companies (including foreign companies listed at a stock exchange in the US) are members of a JV or consortium, there is a risk of being deemed to have conspired with such US companies.

[iv] In the event of a breach of the anti-bribery provisions of the FCPA, a company will be subject to a fine of up to USD2 million and an individual will be subject to a fine of up to USD250,000 and imprisonment for up to 5 years. Also, in the event of a breach of the accounting provisions of the FCPA, a company will be subject to a fine of up to USD25 million and an individual will be subject to a fine of up to USD5 million and imprisonment for up to 20 years. Moreover, where either a company or an individual has obtained a pecuniary advantage or inflicted loss exceeding any of the limits for the fines set out above, twice the amount of such benefit or loss is substituted for those upper limits. In the event that a company commits the offence of failing to prevent bribery under section 7 of the UK BA, an unlimited fine may be imposed.

[v] Under the UN Convention against Corruption (although Japan signed this in 2003, it remains to be ratified as the Diet Bill transposing it into domestic law is still under discussion) and the OECD Convention on Combating Bribery of Foreign Public Officials (ratified by Japan in 1998), the prevention of corruption has been made an international imperative. Moreover, in the UN Global Compact, the prevention of corruption is given as one of the 10 principles of corporate social responsibility to be fulfilled by companies. In addition to that, the close relationship between the prevention of corruption and human rights has been internationally discussed for purposes of meeting the responsibility to respect human rights for which the UN Guiding Principles on Business and Human Rights requests companies. Also, page 31 of the 2009 edition of the Guidelines on Corporate Social Responsibility (CSR) issued by the Japan Federation of Bar Associations also raised the prevention of unfair practices abroad, such as bribery, as an issue to be addressed as an aspect of corporate social responsibility.

[vi] UK BA, s. 7(2).

[vii] A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 56.

[viii] METI Guidelines, p. 31.

[ix] For a company to comply with anti-bribery regulations (including the regulations of foreign countries), appropriate measures must be taken, reflecting the situation in which each company finds

itself, including the extent to which it has expanded abroad, the regions involved, the industry, and the nature of the business it conducts. This Guidance is specifically intended to assist such companies in that regard.

[x] In the Non-Financial Reporting Directive adopted by the EU in 2014, so-called 'public-interest entities' (listed companies, financial institutions and so forth) with a headcount in excess of 500 people are required to make disclosures as to their situation in terms of the bribery risks they face, the policies adopted to address them, and the outcome of those policies.

PART 1

IMPLEMENTATION OF ANTI-BRIBERY COMPLIANCE PROGRAM

Article 1. Top management's message and actions

(1) The message to be given by the top management

The top management shall take the lead in sending out a clear message that the corporate group shall never resort to improper practices in the pursuit of profits or sales.

(2) The actions to be taken by the top management

In order to fulfil the preceding paragraph, the top management shall, in respect of the corporate group as a whole and on a continual basis, take the following actions in response to the situation of their bribery risks:

(i) make known internally and externally the efforts of the corporate group in respect of the prevention of bribery by signing a fundamental policy on anti-bribery adopted by the board of directors and making an announcement internally and externally on the fundamental policy;

(ii) communicate to management and employees their position on the prevention of bribery on a continual basis;

(iii) establish a body such as a compliance committee or internal controls committee that is tasked with administering anti-bribery measures, appoint a senior officer as its head, and vest it with adequate powers to fulfil this function;

(iv) decline to approve business activities with high bribery risks;

(v) take rigorous disciplinary actions against any management or employee implicated in a bribery case irrespective of their position; and

(vi) make sufficient budgetary allowances for the body referenced in sub-paragraph (iii) above to implement anti-bribery measures effectively and ensure that sufficient human resources from the legal or compliance department are made available to assist it in its tasks.

Article 2. Risk-based approach

(1) Conducting risk assessments

With the aim of adopting a risk-based approach that focuses human and material resources on business activities that involve a high level of bribery risks, the company shall conduct a risk assessment by:

(i) identifying the countries and regions in which the corporate group is active and its place of operations, and collating and reviewing the materials and information available in relation to the level of corruption in such countries and regions (e.g., Transparency International's Corruption Perceptions Index score);

(ii) identifying the level of bribery risks in light of the amount of contact with foreign public officials and other similar persons in the industry in which the corporate group operates (trading companies, defense, pharmaceuticals, medical devices, natural resources, construction, real estate, logistics and finance are generally high-risk);

(iii) identifying the level of bribery risks by reference to the type of transactions and the scope of operation (government tenders, customs clearances, undertakings requiring licenses or approvals and manufacturing at local production facilities are generally high-risk);

(iv) reviewing the message given by the top management, organizational structure and the status of implementation of and compliance with internal rules in relation to the corporate group's anti-bribery compliance program; and

(v) as regards the method of risk assessment, gathering basic information and conducting hearings, questionnaire surveys and such, to verify the actual situation regarding corruption in foreign business units and places of operations as necessary.

(2) Measures proportionate to the level of bribery risks

The company shall analyze the results of the risk assessment in the previous paragraph, rate the bribery risks in light of the nature of the relevant undertakings and the place of business activities, and determine, among other things, how hospitality and gifts, invitations to foreign public officials and other similar persons, and donations shall be regulated; the subject-matter, frequency and methods of training and monitoring; methods of managing and assessing agents and other third parties; and how to support subsidiaries.

(3) Conducting continual and periodic risk assessments

The risk assessment in paragraph (1) shall be conducted on a continual and periodic basis. Moreover, should an event occur that has a significant impact on the content of the risk assessment, for example, a contingent event of the kind specified in Part 2, consideration shall be given as to whether to re-examine the risk assessment.

Article 3. Establishment of a fundamental policy and internal rules

(1) Establishment of a fundamental policy and internal rues

The company shall establish, as a framework of internal control for the prevention of bribery, a clearly defined fundamental policy that sets out its basic position on anti-bribery matters and internal rules that give effect to it.

(2) The contents of the fundamental policy

The fundamental policy shall set out the top management's message to the effect that improper practices shall not be used in the pursuit of turnover or profit, and make clear to all management and employees of the corporate group that, whether directly or indirectly, bribery to foreign public officials and other similar persons is prohibited.

(3) The content of the internal rules

The internal rules shall, proportionate to the level of bribery risks, contain provisions regarding the following matters:

(i) scope of application of the internal rules (making clear the group companies to which they apply and that management are also subject to them as well as employees);

(ii) unambiguous prohibition on bribery (it is forbidden to give, offer, or promise or approve those acts for any pecuniary or any other form of advantage to foreign public officials and other similar persons, whether directly or indirectly);

(iii) prevention of false accounting (prohibiting accounting treatments and book-keeping that differ from the actual situation, focusing in particular on payments made under false entries [such as bribe payments being recorded as "consulting fees"]);

(iv) disciplinary actions (making clear, referencing, inter alia, employment regulation, that disciplinary actions will be taken in the event of breach of the internal rules [including any rules incorporated by reference therein]);

(v) whistleblowing system (making clear that reports on bribery fall within the scope of the whistleblowing system);

(vi) organizational structure (an organizational structure handling anti-bribery compliance at head office and locally); and

(vii) internal procedures (procedures regarding the engagement of agents and other third parties, hospitality, gifts, invitations to foreign public officials and other similar persons, and donations).

(4) The content of internal procedures

The internal procedures in sub-paragraph (vii) above shall be formulated referencing the matters set out below:

(i) procedures on hospitality, gift-giving and invitations to public officials and other similar persons (if certain hospitality or gifts are permitted, procedures shall be formulated making clear in which circumstances and following which procedures such hospitality and gifts may be authorized, and an upper monetary limit shall be fixed within the permissible range where the local law imposes such upper limit, and an upper monetary limit shall be determined based on the company's risk assessment where no such limit is fixed by local law and such upper limit may only be exceeded with the authorization of the in-charge of compliance);

(ii) donations procedures (laying down procedures for checking matters such as the subject-matter of the charity, the fact that the beneficiary genuinely exists, the characteristics of the beneficiary, the purpose and manner in which the donation is to be provided, and any involvement of any foreign public officials or other similar persons); and

(iii) procedures for engaging third parties (as per Article 5).

(5) The language of the fundamental policy and internal rules

As necessary, the fundamental policy and internal rules shall be translated into English or the local language of the country or region to which they apply.

Article 4. Organizational structure

(1) The need to establish an organizational structure

The anti-bribery compliance program shall put in place an organizational structure at both head office and local establishments, which reflects the scale of business and the bribery risks.

(2) Head office organizational structure

It is advisable to have an organizational structure at the head office whereby:

(i) an internal control committee, compliance committee or other committee specializing in anti-bribery compliance headed by a senior officer other than the president (the "**ABC Committee**") is established, the independence of which from management shall be guaranteed, and which shall report to the board of directors or the audit committee a majority of which shall be external directors; and

(ii) the legal, compliance, accounting, human resources, internal audit and other relevant departments deal with matters on a practical level under the supervision of the ABC Committee.

(3) Organizational structure at overseas local establishments

At overseas local establishments (or, where local establishments are small in scale, the relevant regional headquarter), it is advisable to appoint a local compliance officer who is independent of local management and who will be responsible for handling requests for approval under the internal rules and making reports to the compliance organization at the head office.

(4) Establishing whistleblowing system and helpdesk

A whistleblowing system and helpdesk shall be established enabling, in principle, both Japan-based and local management and employee to make reports or seek advice on an anonymous basis, and proactive efforts shall be made to promote their availability.

Article 5. Managing third parties

(1) The need to manage third parties

The company shall put in place a management system to prevent bribery carried out through agents and other third parties.

(2) Third-party assessment framework

In order to implement the framework in the previous paragraph, the scope of third parties to be managed and the manner in which they are to be managed shall be determined on the basis of the risk assessment conducted in accordance with Article 2, so as to reflect the level of bribery risks in the country or region where the company operates, the transaction amount, and the type of third party (e.g. consultant, agent, distributor, joint venture partner, subcontractor, customs broker, accountant or lawyer).

(3) Methods of managing third parties

For purposes of managing third parties, appropriate methods shall be adopted from those listed below, prior to the execution or renewal of any contract or on a periodic basis, having regard to the level of bribery risks in accordance with the framework provided under the previous paragraph. The person who is invested with the power to authorize any given transaction with a third party in accordance with the relevant bribery risks shall evaluate such risks in accordance with a reasonable evaluation framework, and determine whether to grant such authorization.

(i) Incorporating anti-bribery provisions into the contract with such third party

There shall at the very least be a warranty and declaration and covenant (to the effect that the third party in question has not ever and will refrain from being involved in corruption), and provision for audit rights (the right to conduct an audit in the event that bribery is suspected) and termination rights (the right to terminate without notice in the event that bribery is suspected). Moreover, it shall be mandatory for the contract to contain provisions as to the details of the services and deliverables to be provided, delivery dates and the payee of the contract price (a bank account in a third country shall not be specified without good reason).

(ii) Obtaining a questionnaire and declaration to the effect that they shall refrain from bribery from such third party

This shall set out basic information about the third party (its trading name, the address of its headquarters, contact details, the nature of their business and date of incorporation), its officers and principal shareholders, as well as

any relationships they have with a foreign public official or other similar person (or any relatives of such person); a statement as to whether or not they have been involved in (or suspected of involvement in) corruption in the past; and details of a business reference regarding the above information. Additionally, the third party in question shall be made to give a sworn and signed statement as to the correctness of the above information.

(iii) Conducting due diligence into the third party

Depending on the level of bribery risks, consideration shall be given to steps such as checking that they have no history of corruption offences via a search on Google, etc. (as a simple and low-cost method), or whether to obtain, among other things, an extract of the certificate of incorporation to verify that the third party in fact exists, or, to enhance the compliance system, using a commercial database of foreign public officials and other similar persons. In addition to that, and particularly in relation to high-risk third parties, consideration shall be given to hiring an investigation firm to conduct background checks, as well as sending legal or compliance staff to visit the third party directly to conduct interviews. The results of the due diligence shall be put into an internal database and updated as and when appropriate.

(iv) Requiring a person in charge of the transaction to file an application

The person in charge of any given transaction (the "owner") shall be identified and be required to state in a request for clearance the nature of the services procured and any deliverables, the specific reasons for engaging the particular third party and whether the amount payable is reasonable (on a fair market value basis), attaching the documents in relation to the matters referenced in sub-paragraphs (i) to (iii) above.

Article 6. Training

(1) The need for training

As an indispensable element of internal controls for anti-bribery compliance, the provision of anti-bribery training shall be focused first mainly on the top management and then given to management and employees involved in international transactions.

(2) The content of the training

Such training shall primarily focus on understanding the regulations relevant to the prevention of foreign bribery (laws with extra-territorial application such as the Unfair Competition Prevention Act, the FCPA and the UK BA, and local laws), the fundamental policy and the internal rules. It is advisable to use practical examples, including the bribery risks relevant to the business that may arise and demonstrate practical ways of rebuffing requests for bribes in countries where corruption is rampant.

(3) Training participants, format and frequency

The frequency of training, the participants and the format (classroom-based or web-based training, email updates, etc.) shall be determined in accordance with the outcome of the risk assessment conducted under Article 2. However, such training must be provided not only when the fundamental policy and the internal rules are introduced but on a continual basis, primarily to management and employees involved in international transactions (particularly managers in overseas business units).

(4) Submitting pledges

To enhance the effectiveness of the training, it is advisable to ask the participants to sign a pledge to the effect that they will comply with the fundamental policy and the internal rules once they have undertaken the training.

Article 7. Monitoring and continual improvement

(1) The need for monitoring and continual improvement

The company shall monitor on a periodic basis compliance with the fundamental policy and the internal rules, and make continual improvements thereto.

(2) Monitoring methods

Monitoring shall be conducted following a review by the ABC Committee, using appropriate methods chosen from those set out below and in accordance with the outcome of the risk assessment conducted under Article 2:

(i) on-site audits and interviews at local establishments in high-risk areas by the legal, compliance or internal audit departments (checking, among other things, an unaccounted-for expenditures, opaque commission payments, handling of petty cash and cash generally, counterparty lists, practices in relation to the engagement of agents and other third parties, and receipts submitted with expense claims for hospitality and gifts);

(ii) checking the information provided in applications for clearance submitted pursuant to the internal rules;

(iii) reviewing actual violations;

(iv) looking into the use of, and awareness of, the whistleblowing system and helpdesk; and

(v) conducting walkthrough tests on the ground to check whether adequate internal controls to prevent bribery are in place.

(3) Methods of continual improvement

By way of continual improvement, endeavors shall be made on an ongoing basis to reinforce the internal controls on anti-bribery as set forth in this Guidance, in relation to matters such as the revision of the internal rules, the establishment of the organizational structure, approaches to managing agents and other third parties, and the top management commitment.

Article 8. Facilitation payments

(1) The prohibition on facilitation payments

The company shall make explicit that the payment even of small sums to facilitate the smooth progress of ordinary administrative services ("**facilitation payments**") is prohibited.

(2) Steps designed to eliminate facilitation payments

Where it is found that an overseas local establishment has made a facilitation payment notwithstanding the previous paragraph, it is advisable to deal with such overseas local establishment by taking the following steps (with the head office organizational structure in Article 4 taking the lead):

(i) investigating the circumstances of the facilitation payment;

(ii) giving instructions requiring a record of facilitation payments to be prepared;

(iii) providing practical training to management and employees, which sets out ways of refusing to give facilitation payments; and

(iv) monitoring the status of facilitation payments on a periodic basis, considering preventative measures together with the overseas local establishment and local lawyers, and devising in collaboration with the overseas local establishment ways of eliminating facilitation payments, such as making requests to the local government to improve the situation through collective actions with the local Japanese embassy or consulate, chamber of commerce, Ministry of Foreign Affairs, JICA, JETRO, industry associations or other such bodies.

Article 9. Record-keeping

(1) The need for record-keeping

The company shall keep records primarily to achieve the objectives listed below:

(i) to demonstrate that the company is not engaged in improper practices and has implemented an appropriate anti-bribery compliance program;

(ii) to deter management and employees from making bribes by requiring them to keep records internally;

(iii) to deter foreign public officials and other similar persons from making unreasonable demands for bribes to the company by showing to them that the company is keeping records of payments, such as those to foreign public officials and other similar persons; and

(iv) to enable the company to easily and effectively conduct monitoring (including internal audit).

(2) Record-keeping in the internal controls process

When implementing the anti-bribery compliance program provided for in this Part, the company shall, to the fullest extent possible, keep records of such implementation process.

(3) Maintaining appropriate accounting books and records

The company shall make accounting records in its accounting books in the following manner:

(i) The company shall prepare accounting records such as accounting books that reflect all transactions throughout the corporate group in a manner that is reasonably detailed, accurate and fair. It shall not be permissible to prepare false accounting records to conceal any improper payment such as a bribe or to pay bribes by using cash or deposit that are not recorded in its accounting record or the like.

(ii) Where expenses are made for the purpose of hospitality, making gifts, making invitations to foreign public officials and other similar persons, donations, the engagement of third parties including agents, and the like, the company shall record the amount, payment date and details of the payment in its accounting books in a timely manner and in such a way as to serve the objective set out in sub-paragraph (i).

PART 2

RESPONSE IN AN EMERGENCY SITUATION (CRISIS MANAGEMENT)

Article 10. Definition of 'an emergency situation'

'An emergency situation' refers to a situation where: (1) the company receives an unreasonable demand for a bribe from a foreign public official and other similar persons; or (2) the company has become aware that a bribe has been given, offered or promised to a foreign public official or other similar person (including a situation where it has become aware of such a possibility).

Article 11. Crisis management in the event that the company receives an unreasonable demand for a bribe from a foreign public official or other similar person

(1) Principle of rejecting unreasonable demands

Since it is not uncommon for bribes to be extorted by foreign public officials and other similar persons in countries and regions where corruption is rampant, there is a risk that if a bribe is paid on one occasion, further unreasonable demands will follow and the payment of bribes will go on. Accordingly, the company shall make it its principle to reject unreasonable demands and conduct contingency management. However, such principle shall not apply where there is an imminent danger that the life, body or liberty of any management or employee may be compromised as a result of rejecting a demand for a bribe from a foreign public official or other similar person.

(2) The need for an institutional response

If local staff are left to deal with unreasonable demands for bribes from foreign public officials and other similar persons on their own, this not only increases the risks that such local management and employee will give into the unreasonable demand, but may well also lead to employment and human rights issues involving the local management and employee. Accordingly, in the event that the company receives an unreasonable demand for a bribe from a foreign public official or other similar person,

the company shall conduct crisis management in an institutional manner. In such a case, it is advisable to consult with a lawyer who is familiar with foreign bribery issues at an early stage.

(3) The need for collective actions with external organizations

While it is often difficult for one company on its own to take the appropriate measures to address foreign bribery issues – that is, to reject demands for bribes from foreign public officials and other similar persons even if that means accepting the risk of some form of disadvantage – there are situations where unreasonable demands can be avoided by taking collective action in concert with external organizations. The company therefore should consider consulting with external organizations on a case-by-case basis.

(4) The elements of crisis management

The company shall implement appropriate measures of crisis management to institutionally reject such unreasonable demand from among those listed below where the company receives demands for bribes from foreign public officials and other similar persons:

(i) making an initial on-the-ground response (a clear refusal [excluding, however, situations where there may be an imminent danger to life, body or liberty], swift reporting);

(ii) sharing information to the head office (or the relevant parent company) swiftly;

(iii) depending on the seriousness of the situation, establishing a crisis management response team and consulting with Japanese and local counsel;

(iv) depending on the seriousness of the situation, making timely reports to external directors at the head office (or the relevant parent company) and statutory auditors (including external auditors) and consulting with support services for Japanese business at the local Japanese embassy or consulate, JETRO, the local chambers of commerce, and others; and

(v) in relation to official development assistance, consulting with the fraud and corruption information and consulting service at the Ministry of Foreign Affairs or JICA.

Article 12. Crisis management where the company has become aware that a bribe has been given, offered or promised to a foreign public official or other similar person (including a situation where it has become aware of such a possibility)

(1) The need for crisis management response

Where it has become aware that a bribe has been given, offered or promised to a foreign public official or other similar person, there is a risk, if the company handles the situation badly, that it will escalate to the point where corporate value is damaged severely. To preserve corporate value, therefore, the company shall implement an appropriate crisis management.

(2) The need to act swiftly

Since a crisis management response may be able to prevent a crisis from increasing in scale by addressing it at an early stage, the company shall implement crisis management (crisis management) once it becomes aware that a bribe has been given, offered or promised to a foreign public official or other similar person. In such a case, it is advisable to consult with a lawyer who is familiar with foreign bribery issues at an early stage. Furthermore, if a risk exists that enforcement action will be taken in relation to the matter in a foreign country and the confidentiality of attorney-client communication is recognized in the country, it is advisable to consider ensuring confidentiality of attorney-client communications (in common law jurisdictions, this includes attorney-client privilege).

(3) The elements of crisis management

Once it has become aware that a bribe has been given, offered or promised to a foreign public official or other similar person (including where it has become aware of such a possibility), the company shall implement appropriate measures of crisis management from among those listed below:

(i) an on-the-ground response to prevent bribes from being further given or promised (as per Article 11(4));

(ii) steps necessary with a view to the preservation of evidence, including material that may be prejudicial to the company;

(iii) procedures for designating the officers responsible for handling the incident and establishing an investigation team and so forth;

(iv) putting in writing the powers of the officers responsible for handling the incident and the investigation team (it is necessary for specialists experienced in investigations to be added to the investigation team and for the investigation team and the officers handling the incident to be composed of people who are independent and not subject to influence from the people implicated in it);

(v) communicating the findings of the investigation (including interim progress) to the head office (or to the relevant parent company) in a swift and timely manner;

(vi) depending on the seriousness of the incident, timely reports to external directors at the head office (or the relevant parent company) and statutory auditors (including external auditors);

(vii) where the findings of the investigation are that the likelihood of bribery is high, considering whether to make reports or admissions to law enforcement agencies, and, in relation to official development assistance, to consult with the fraud and corruption information and consultation service at the Ministry of Foreign Affairs or JICA; and

(viii) ascertaining the causes of the incident based on the facts found in the investigation, taking disciplinary actions against those involved, and adopting measures to prevent any recurrence.

Article 13. Crisis management framework

(1) The need to put in place a framework for crisis management at ordinary times

In order to implement a timely crisis management as provided by Articles 11 and 12, the company shall decide on the initial steps to be taken on the ground, lines of communication, the composition of the crisis management team, and other aspects of the crisis management framework in advance of any such incidents.

(2) The need to put in place a framework for crisis management throughout the corporate group

The crisis management framework set out in the preceding paragraph shall be treated as one part of the implementation of a system that will ensure the appropriateness of the group's business and operation. Where overseas local establishments, subsidiaries and so forth do not have adequate structures in place to deal with such situation, the head office (or the relevant parent company) shall ensure appropriate measures as a group by being proactively involved.

Article 14. Record-keeping

Where crisis management is conducted in accordance with this Part, from the perspective of ensuring the performance by the directors, etc. of their fiduciary duties, the company shall consider keeping a record of the steps taken in accordance with the lawyers' instructions.

PART 3

SUBSIDIARY MANAGEMENT AND MERGER & ACQUISITION

Article 15. Parents' assistance to subsidiaries in relation to their anti-bribery compliance programs

(1) The need to implement anti-bribery compliance program throughout the corporate group

In order to implement an anti-bribery compliance program that maintains a certain standard throughout the corporate group, the parent company shall provide each of their subsidiaries with the support necessary in light of their bribery risk.

(2) The scope of application of this Guidance

Each Article of this Guidance is expected to be used by companies to implement an anti-bribery compliance program for their corporate group.

Article 16. Merger & acquisition

(1) The need for anti-bribery due diligence in mergers and acquisitions

In mergers and acquisitions, the company shall conduct anti-bribery due diligence before or after the mergers and acquisitions (" **Anti-Bribery DD**") to the extent appropriate in light of the bribery risks to prevent the risks of inheriting foreign bribery problems from the target company and the continuation of bribery practices in business activities after the mergers and acquisitions.

(2) The elements of Anti-Bribery DD

When conducting the Anti-Bribery DD in the preceding paragraph, it is advisable to take the following steps:

(i) *Prior to the execution of the agreement for the acquisition*

Before the acquisition, Anti-Bribery DD shall be conducted with particular emphasis on the following matters:

(a) conducting an assessment of the bribery risks at the stage of planning the acquisition in light of the countries and industries in which the target company operates, and its business structure;

(b) planning the Anti-Bribery DD at an early stage (and at the same time as the legal and financial due diligences for purposes of the

acquisition) to allocate human and material resources in accordance with the level of risks;

(c) ensuring that the matters to be covered in the Anti-Bribery DD include: (i) whether the target company has put in place the anti-bribery compliance program prescribed in this Guidance; (ii) the level of compliance awareness of the top management and key management and employees; (iii) the extent to which its business activities depend on agents and other third parties; (iv) payments to bank accounts in countries other than those where third parties operate; (v) the amount, frequency and form of hospitality, gifts, invitations or donations and such; (vi) the management of cash accounts and any facilitation payments; (vii) the amounts spent on the acquisition of licenses and approvals and customs clearances; (viii) the employment of relatives of government officials; (ix) the status of the whistleblowing system; (x) the criminal records, antecedents and history of regulatory sanctions of the target company and its management; and (xi) the existence of accounting systems adequate to prevent bribery; and

(d) ensuring that the steps taken to carry out the Anti-Bribery DD include due diligence on the documents supplied, interviews, walkthrough tests on site to verify whether adequate internal controls are in place to prevent bribery, and background checks, engaging law firms, accounting firms, forensics companies and investigations companies as necessary.

(ii) *On execution of the agreement for the acquisition*

Particular focus should be given to the following matters at the time of executing the agreement for the acquisition:

(a) where the Anti-Bribery DD has uncovered a bribery issue of such a nature that the purposes of the acquisition can be nonetheless achieved, the agreement for the acquisition company shall include covenant clauses that require the seller to ensure that the target

company will, among other things, discipline the management and employees involved, conduct additional investigations and reports in relation to the matters uncovered, provide a written pledge from its top management taking a firm line on anti-bribery matters, and consider and implement practicable measures to prevent any recurrence;

(b) where Anti-Bribery DD has uncovered a bribery issue so serious that the purpose of the acquisition cannot be achieved, the company shall either abandon the acquisition plan or devise an alternative acquisition plan that does not include the part of the business with the high level of bribery risks; and

(c) the agreement for the acquisition shall include a representation and warranty from the seller that there is no bribery issue in relation to the acquired business.

(iii) *Post-acquisition measures*

Particular attention shall be given to the following matters post-acquisition:

(a) where, due to insider trading regulations or a lack of cooperation from the seller, it was not possible to obtain sufficient information in pre-acquisition Anti-Bribery DD, the company shall conduct adequate Anti-Bribery DD focusing on the areas with high bribery risks within a certain period immediately after the closing of the acquisition;

(b) as regards any bribery issues uncovered post-acquisition, the company shall take appropriate steps to keep bribery risks arising out of the acquisition to a minimum, such as considering whether to make a report to the authorities, disciplining the personnel involved and introducing measures to prevent any recurrence, as well as enforcing any warranty or representation clauses in the agreement for the acquisition; and

(c) post-acquisition, the company shall promptly apply its own anti-bribery internal controls, including the fundamental policy and internal rules and conduct monitoring of the acquired business.

PART 4

MISCELLANEOUS

Article 17. Disclosure of information

(1) Disclosure of information at ordinary times

When the company perceives that its bribery risks would have a serious impact on its corporate value, it is advisable for it to disclose information regarding the nature of the bribery risks the company is facing and the state of implementation of the anti-bribery compliance program put into place to address them, in disclosure documents such as timely disclosures, business reports, securities filings, corporate governance reports and corporate social responsibility reports.

(2) Disclosure of information when bribery has come to light

When an issue with bribery that will have a serious impact on its corporate value has come to light, the company shall set out the nature of that issue in disclosure documents such as timely disclosures, business reports, securities filings, corporate governance reports and corporate social responsibility reports.

Article 18. Declaration of implementation of this Guidance

(1) Recommendation to make a declaration of implementation of this Guidance

Where the company intends to implement an anti-bribery compliance program by reference to the METI Guidelines and this Guidance, it may make a declaration to that effect internally and externally through the information disclosure under Article 17,

the fundamental policy under Article 3, and so forth. The following text is an example of such a declaration.

"*This company is striving to implement anti-bribery measures by reference to the Ministry of Economy, Trade and Industry's Guidelines on the Prevention of the Bribery of Foreign Public Officials and the Japan Federation of Bar Associations' Guidance on Prevention of Foreign Bribery.*"

(2) Effect of the declaration of implementation of this Guidance

The declaration of implementation under the previous paragraph does not impose any legal duty on the company that makes it. Nonetheless, it is advisable for the company to utilize this Guidance to strengthen anti-bribery measures by making management and employees aware of it to the extent possible. Moreover, it is advisable for the company to strive as far as possible to publicize its progress in implementing this Guidance for purposes of enhancing public confidence in the company.