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Recent Developments in Japanese Enforcement of Foreign Bribery Laws

In recent years, Japan has been under increasing scrutiny and pressure from the international community regarding its enforcement of its anti-corruption laws. A signatory to the OECD Anti-Bribery Convention, Japan enacted an amendment to its Unfair Competition Prevention Law (“UCPL”), which came into force on February 15, 1999, to address bribery of foreign public officials. But the OECD Working Group on Bribery in International Transactions has continually criticized Japan for its relatively lax enforcement of anti-corruption. Indeed, while the UCPL is broad in scope and prohibits offering or giving any benefit to a foreign public official, Japan is reported to have prosecuted only four cases of bribery since 1999. In February 2014, the OECD Working Group expressed significant concerns about the lack of foreign bribery enforcement in Japan, noting that numerous allegations involving Japanese companies had been reported in the media, yet did not seem to have been prosecuted. Most recently, in June 2016, a high-level OECD mission met with government representatives and senior officials in Japan to urge them to take additional steps in furtherance of the OECD Anti-Bribery Convention.

Perhaps in response to the OECD’s criticisms, the Ministry of Economy, Trade, and Industry (“METI”) and the Japan Federation of Bar Associations (“JFBA”) have issued guidance in an effort to heighten awareness of anti-bribery issues and highlight the factors that Japanese regulators and foreign regulators will likely scrutinize. This guidance, issued in 2015 and 2016, indicates that anti-corruption is no longer an issue that companies in Japan should take lightly.

I. METI Guidelines Regarding Foreign Bribery

On July 30, 2015, METI revised its Guidelines for the Prevention of Bribery of Foreign Public Officials (“Guidelines”). The Guidelines, which were promulgated in 2004 and previously revised in 2010, had been criticized for being vague and abstract. The revision was published to clarify legal interpretations regarding conducting business internationally, with the purpose of supporting Japanese companies’ expansion overseas.

Although the Guidelines are not legally binding, they provide guidance on how Japanese anti-bribery law should be interpreted. The revision clarified that Japanese companies must reject demands for bribes from foreign public officials even if the bribes are made to avoid unreasonable and discriminatory treatment by those officials. On the other hand, the Guidelines clarified that small congratulatory gifts and travel and entertainment expenses may not be considered bribery if given solely to build a general social relationship or acquaint the official with the company’s products or services, rather than to demand advantageous treatment. Specific examples of acceptable gifts and hospitality include promotional giveaways or commemorative gifts for general distribution, refreshments at business meetings, and seasonal gifts of low value given in accordance with local custom and law.

One focus of the revised Guidelines was to enumerate anti-corruption best practices for Japanese companies conducting business overseas. Japanese companies were encouraged to adopt an internal control system to prevent foreign bribery, taking an approach tailored to the risks in each country and market in which they operated. They were also urged to pay close attention to the internal control systems at foreign subsidiaries, which may have difficulty managing their anti-corruption risks without the parent company’s support. The revised Guidelines also emphasized the importance of conducting review or diligence prior to taking risky operational decisions, such as the



hiring of local agents or consultants, selection of a joint venture partner, acquisition of a company, and participation in public procurement.

II. JFBA Guidance Regarding Anti-Bribery Measures

On July 15, 2016, the JFBA issued new guidance for companies regarding compliance with Japanese and foreign anti-bribery laws, called the Guidance on Prevention of Foreign Bribery (“Guidance”). The JFBA Guidance, which was intended to supplement the METI Guidelines, was published with the purpose of providing practical advice for Japanese companies and legal counsel seeking to implement anti-bribery measures. Its recommendations take into account both Japanese law and foreign bribery laws such as the Foreign Corrupt Practices Act and 2010 U.K. Bribery Act, and are meant to address both bribery of public officials and commercial bribery.

The Guidance echoed many of the messages in the METI Guidelines, including the importance of a comprehensive system of internal controls, monitoring, and training. The Guidance also emphasized the importance of managing third-party relationships by conducting risk-based due diligence and adopting contractual safeguards to mitigate risk. Notably, the Guidance encouraged management at Japanese companies to issue a declaration that they were adopting measures in accordance with the Guidance, with the expectation that this would lead to increased public confidence in the companies.

III. Implications of METI and JFBA Guidance

Companies conducting business in Japan, as well as Japanese companies conducting business overseas, should prepare for increased scrutiny from Japanese regulators in the coming years. When announcing the revision to the Guidelines, METI cited the expansion of Japanese companies to overseas marketing, including the infrastructure sector, as one of the factors that led to the revisions. A recent Japanese prosecution targeted this exact sector, and investigated allegations of bribes paid by Japan Transportation Consultants, Inc. to foreign officials in Vietnam, Indonesia, and Uzbekistan in a bid to gain railway projects. Increased anti-corruption enforcement globally in the life sciences sector may lead to closer attention by Japanese regulators to medical and pharmaceutical companies.

Japan will next be evaluated by the OECD Working Group in March 2019, which may lead to additional enforcement. The OECD Working Group has repeatedly urged Japan to adopt two additional enforcement efforts. The first is amending Japan’s Anti-Organized Crime Law, rendering it impossible for companies and individuals convicted of bribing foreign public officials to keep their illegal proceeds, including by laundering them. The second is to adopt an action plan to organize policy and prosecution resources to be able to proactively detect, investigate, and prosecute cases of foreign bribery involving Japanese companies.

In the face of increased scrutiny, companies with operations or headquarters in Japan are advised to evaluate their internal system of controls to ensure compliance with international anti-corruption compliance standards.