Financial crime in Japan: overview
Masato Suzuki Shu Kakuno and Hiroshi lida, Iwata Godo

FRAUD
Regulatory provisions and authorities

1. What are the main regulatory provisions and legislation relevant to corporate fraud?

The main regulatory provisions and legislation relevant to corporate fraud include the following:

• Penal Code (PC). This contains many provisions on corporate fraud, including fraud, misappropriation and theft as basic categories of crime related to corporate fraud.

• Companies Act (CA). This contains provisions on special breaches of trust (as a specific category of crime related to corporate fraud) committed by corporate directors and other applicable company members.

• Financial Instruments and Exchange Act (FIEA). This includes provisions on the requirements for proper disclosure of corporate affairs and the prohibition of misconduct in relation to securities transactions, special provisions under civil law concerning the breaches of these rules, and provisions on administrative dispositions and criminal punishment.

• Act on the Punishment of Organised Crime and the Control of Criminal Proceeds (APOCCCP). The APOCCCP contains provisions on special categories of organised crimes and has provisions in relation to the concealment, receipt and confiscation of the proceeds of a crime. Since 2017, a revision to the APOCCCP applies, and the applicable sanctions can be imposed on organised crime groups at the time at which a crime is planned and prepared (conspiracy).

Administrative regulations are enforced through the control of the licensing, registration and notification of financial institutions, depending on the type of business. Financial institutions may often be required to establish certain systems (including control and compliance systems).

Civil regulations are, in principle, enforced through the filing of claims by the aggrieved party based on torts.

Best practice regulations/guidelines dealing with corporate fraud are yet to be issued.

Offences

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

The specific offences relevant to corporate fraud are as follows:

• Fraud (Article 246, Penal Code (PC)). Fraud involves defrauding another person and causing such other person to deliver property. Many types of fraudulent acts are qualified as crimes. Attempts are also punishable.

• Theft Article 235, PC). Theft consists of stealing the property of another person. Withdrawing monies from ATMs using an illegally-obtained cash card is a crime. Attempts are also punishable.

• General breach of trust and special breach of trust (Article 247, PC). This type of crime is committed by an individual who is in charge of the affairs of another, for the purpose of promoting his/her own interest or inflicting damage on another person, in breach of his/her duties and that inflicts a damage on the property of another person. Some forms of misconduct by officers and employees of financial institutions may constitute a breach of trust. When committed by directors (or applicable persons), such conduct may fall within the category of "special breach of trust" (Article 960, Companies Act (CA)). Attempts are also punishable.

• Misappropriation (embezzlement in the course of business activities) (Article 253, PC). This entails the embezzlement by one person of the property of another in the course of business. Certain forms of misconduct by officers and employees of financial institutions may constitute such a crime.

• Misconduct in relation to securities transactions (Articles 157, 158, 159 and 197, Financial Instruments and Exchange Act). Misconduct in relation to securities transactions includes the use of illegal means that can include conduct such as making false statements on important matters, the spreading of rumours and the use of fraudulent means or other similar acts in relation to securities transactions. Such conduct is prohibited and subject to punishment. Corporations can also be punished for this crime. Attempts are not punishable.

All of the crimes listed above require intention. Therefore, to secure the conviction of a corporation or an individual, the public prosecutor must prove both the occurrence of the criminal act and the sufficient criminal intent beyond reasonable doubt.

Enforcement

3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities

There are two main relevant types of authorities:

• Authorities with powers over criminal cases.

• Authorities with powers in relation to the regulations under administrative law.

Those with authority over criminal cases are the police and the Public Prosecutors’ Office. They usually have the power to conduct compulsory investigations, but often make enquiries or interview suspects on a voluntary basis.

Those with authority in relation the regulations under administrative law are divided into ministries and agencies. In general, corporate fraud is regulated by the Japanese financial authorities. These have regulatory power over financial institutions
(such as banks, insurance companies and so on). The financial authorities generally investigate financial institutions on a voluntary basis for the purpose of requiring financial institutions to improve their business procedures in accordance with administrative guidance.

Non-compliance with the regulations may give rise to punishment or administrative sanctions (which can include the cancellation of business licences and imposition of surcharges (kachokin). Surcharges are distinguished from fines (including administrative fines) in Japan, as fines relate only to criminal punishment. The punishment of criminal offences committed outside Japan is expressly specified in the laws (however, the extra-territorial application of administrative powers is generally not specified).

For more information on the prosecuting authority see box: The regulatory authorities.

**Prosecution powers**

Public prosecutors only have the authority to prosecute (Article 247, Code of Criminal Procedure (CCP)). In most cases, public prosecutors ultimately decide to prosecute criminal cases based on the results of a police investigation. However, public prosecutors may proceed with investigations independently from the police if the administrative authorities recognise the existence of a crime in connection with the relevant laws and regulations of their jurisdiction, such authorities must file a complaint in relation to the crime to the police or to the Public Prosecutors' Office.

**Powers of interview**

In criminal cases, the police or the public prosecutors have the power to arrest and interrogate a suspect upon a warrant issued by a court. They can also interview the suspect on a voluntary basis (Article 198, CCP).

The administrative authorities usually have the power to force financial institutions under their control to submit a report. Failure to comply with this reporting obligation usually constitutes a crime. Moreover, the administrative authorities often interview and monitor the financial institutions on a voluntary basis.

**Powers of search/to compel disclosure**

In principle, in criminal cases, the police or the public prosecutors have the power to conduct necessary searches (including obtaining evidence) or inspections upon a warrant issued by a court (Article 218, CCP) and to search or inspect a third party.

The administrative authorities usually have the power to conduct on-site inspections at financial institutions under their control. Any avoidance or prevention/blocking of such an on-site inspection usually constitutes a crime. Moreover, the administrative authorities often request financial institutions to submit information to them on a voluntary basis.

**Powers to obtain evidence**

For the relevant powers, see above, Powers of search/to compel disclosure.

In criminal cases, the police or the public prosecutors may obtain evidence located abroad with the co-operation of other countries in accordance with international assistance arrangements.

If the evidence is located abroad, the administrative authorities will request the relevant Japanese corporation or Japan branch office to submit such evidence, or may seek to collect such evidence with the co-operation of the foreign countries’ competent agencies in accordance with an applicable mutual legal assistance treaty (if any) or on a voluntary basis.

In addition, following a recent revision to the CCP, new provisions (effective June 2018 at the latest) permit plea bargaining (limited to cases involving the crime of another person) and allow the public prosecutors to grant immunity from prosecution to a witness, based on the decision of a court.

**Power of arrest**

For the relevant powers, see above, Powers of interview.

Detention may be allowed if requested by the public prosecutors following arrest and if deemed necessary by a court. An appeal may be filed against detention (Article 429, CCP). The period of arrest is up to 72 hours and the period of detention is up to 20 days. There is no right to bail before indictment.

**Court orders or injunctions**

A court confirms certain requirements for the request of warrant or detention made by the public prosecutors or the police for arrest or search (including the existence of a crime, connection with a crime and necessity of physical restraint), and rules whether there are grounds for an appeal against detention or seizure of evidence.

An injunction may be filed in advance with a court against the exercise of powers by the administrative authorities (Article 37-4, Administrative Case Litigation Act). However, an injunction can only be filed when the administrative disposition against which the injunction is sought clearly violates the laws and regulations. Accordingly, an injunction is unlikely to be granted in cases of corporate fraud.

4. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

In criminal cases, the public prosecutor decides whether to prosecute by taking into consideration the possibility of proving the criminal offender’s guilt, the extent of damage, finishing of settlement (although a (high) possibility of settlement is not enough) and so on (Article 248, Code of Criminal Procedure). In Japan, there is no jury system for indictment (for corporate fraud and for other crimes).

Administrative dispositions (such as the cancellation of a financial institution’s business licences) are made by the administrative authorities. The requirements for disposition are abstract and allow for some degree of discretion. However, the amount of surcharge is automatically calculated in accordance with the applicable laws and regulations.

5. What are the sanctions for participating in corporate fraud?

**Civil/administrative proceedings or sanctions**

Administrative sanctions (such as the cancellation of a business licence, business suspension and/or business improvement order) are mainly imposed on the overall financial institution. However, surcharges are imposed on the offenders who carried out the misconduct (which can include a company). Non-compliance with these sanctions is generally subject to further punishment.

Generally, in accordance with the Administrative Procedure Act, notification and hearings are made before the administrative disposition is decided, subject to certain exceptions in the relevant law. The relevant procedures for corporate fraud in relation to financial transactions are governed by the Financial Instruments and Exchange Act (FIEA).

Administrative sanctions (with the exception of surcharges) are imposed by and are subject (to a certain degree) to the discretion of the relevant authorities. The financial regulatory authorities will decide the details of administrative sanctions by judging whether they can trust the financial institution to improve on a voluntary basis, or whether they should closely monitor the financial institutions for a period of time to ensure business improvement, or whether it is appropriate for financial institutions to continue to do
business. In doing so, the regulatory authorities will take into consideration the:

- Seriousness or viciousness of the acts involved.
- Adequacy of the business management system.
- Operational management system applicable to the act.
- Existence of any mitigating circumstances.

**Criminal proceedings**

**Right to bail.** The accused may be bailed out after indictment. However, right to bail is only allowed in limited cases. In many cases, the accused is bailed out subject to court discretion (Articles 89 and 90, Code of Criminal Procedure).

**Penalties.** Criminal punishment is imposed on individuals who participate in corporate fraud. However, the applicable legal entity may also be subject to punishment if the relevant statute includes express provisions to that effect and some penalties are also imposed on the applicable natural persons. It is a requirement that related natural persons are punished at the same time.

Criminal punishment generally means imprisonment, but the following penalties are available under the Penal Code (PC):

- **Fraud:** imprisonment with labour for up to ten years.
- **Theft:** imprisonment with labour for up to ten years, or a fine of up to JPY500,000.
- **General breach of trust:** imprisonment with labour for up to five years, or a fine of up to JPY500,000.
- **Aggravated breach of trust:** imprisonment with labour for up to ten years, or a fine of up to JPY10 million, or both.
- **Misappropriation in the course of business activities (embezzlement):** imprisonment with labour for up to ten years.
- **Violation of Article 197 of the FIEA (unfair transaction and market manipulation):** imprisonment with labour for up to ten years, or a fine of up to JPY10 million, or both.
- **Violation of Article 197-2 of the FIEA (insider trading):** imprisonment with labour for up to five years or a fine of up to JPY5 million, or both.

The gravity of punishment is determined by a court, taking into account the circumstances of the accused (including the malicious nature of the motives and acts, and the seriousness of the consequences).

As an additional penalty, the proceeds of a crime may be confiscated or collected (Articles 19-1 and 19-2, P.Q. For aggravated crimes, the basis for confiscating and collecting the object is wider in scope (Act on the Punishment of Organised Crime and the Control of Criminal Proceeds).

**Civil suits**

A person who has sustained damages arising from corporate fraud can file a civil action for damages under tort against the persons who committed the corporate fraud.

For fraudulent acts, torts in violation of accountability or the principle of suitability will be recognised.

In addition, the FIEA contains special provisions on the amount of damages that must be paid by persons who make false statements in security registration statements.

In principle, US-style class actions are not available in Japan. However, certain consumer organisations certified by the Prime Minister (the Secretary-General of the Consumer Affairs Agency) of Japan are permitted to file actions against business operators to request injunctions to end violations of the Consumer Contract Act committed by the business operators against a large number of unspecified individuals. Furthermore, organisations that are specifically certified among these consumer organisations recently became able to file actions for the “confirmation of common obligations” and are now authorised to take judicial action to ascertain the rights of such consumers. However, this does not permit these consumer organisations to represent consumers without their individual consent.

In Japan, punitive damages are not permitted.

**Safeguards**

6. **Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?**

In criminal cases, the suspects and the accused have:

- The right to remain silent (Articles 198 and 311, Code of Criminal Procedure (CCP)).
- The right of confidential communication with the defence attorney (Article 39, CCP).

These rights are based on the Constitution. However, client-attorney privilege is not recognised under Japanese law.

Unlawfully obtained evidence may be eliminated by a court taking into account the gravity of illegality, the necessity to prevent violation of procedures and to solve the relevant matter.

Appeals against the detention or seizure of evidence can be filed with a court (Article 429, CCP).

Client-attorney privilege is not available throughout examinations conducted by the administrative authorities. In addition, the administrative authorities do not permit counsel to be present at such examinations. Financial institutions can file an action to revoke the administrative dispositions made by the financial authorities with a court. However, in practice, few actions are brought except in relation to tax matters. The administrative authorities do not have the power to obtain evidence by force. Therefore, it is generally considered that the exclusion of unlawfully obtained evidence would not really matter.

**BRIBERY AND CORRUPTION**

**Regulatory provisions and authorities**

7. **What are the main regulatory provisions and legislation relevant to bribery and corruption?**

The main regulatory provisions relevant to bribery and corruption are as follows:

- Article 198 of the Penal Code (PC) prohibits the bribery of Japanese public officials.
- Article 18 of the Unfair Competition Prevention Law (UCPL) prohibits the bribery of foreign public officials.
- Articles 967 and 968 of the Companies Act (CA) prohibit the bribery of a director to cause the director to violate his fiduciary duties to the company or to shareholders.

The Ministry of Economy, Trade and Industry (METI) published best practice guidelines entitled Guidelines to Prevent Bribery of Foreign Public Officials (METI Guidelines). This was revised in September 2017.

**Domestic bribery cases**

There are many criminal cases involving domestic bribery. The most famous domestic bribery case with a cross-border element is the Lockheed Corporation case. In 1972, Kakuei Tanaka, the Japanese Prime Minister at the time, allegedly accepted JPY500
million in bribes from Lockheed through the Marubeni Corporation, a sales agent of Lockheed, promising to influence All Nippon Airways Co to get them to purchase Lockheed's TriStar. Tanaka was arrested in 1976 and found guilty by the Tokyo District Court in 1983. He was sentenced to four years' imprisonment and ordered to pay JPY500,000. He appealed to the Tokyo High Court and then to the Supreme Court, but died in 1993 before a decision was rendered.

In a more recent case, the Securities Exchange and Surveillance Committee of Japan (SESC) began an intensive inspection of registered financial instruments and exchange business operators and so on (FIEBOs) conducting discretionary investment management business in relation to the provision of gifts and entertainment by the FIEBOs to pension funds. The SESC took administrative action against Deutsche Securities because it had provided officers of three employee pension funds with substantial benefits through gifts and entertainment relating to its discretionary investment management business, which falls within the definition of providing a special profit to clients. In this context, a former Deutsche Securities salesman and a former executive of the welfare pension fund of Mitsui Group (a deemed public official) were sentenced for bribery by the Tokyo District Court in 2014. The salesman was convicted of bribery because he had provided the executive with excessive entertainment, such as meals at restaurants, visits to nightclubs and games of golf, for about JPY0.87 million against the purchase of investment products, and the executive was convicted for accepting the bribes. Although Mitsui's fund was privately owned, the officers and employees of the welfare pension fund were deemed to be (quasi-)public officials and were subject to the bribery provisions of the PC based on the Pension Insurance Act. The salesman was sentenced to ten months in prison, suspended for three years, and the executive was sentenced to one year and six months in prison, suspended for three years.

Foreign bribery cases
Since Japan first incorporated the crime of foreign bribery into the UCPL in 1998, there have been only four foreign bribery cases:

- The first, the Kyudenko case, occurred in March 2007, and concerned the act of offering an improper advantage to public officials of the Republic of the Philippines. Two Japanese employees of a Kyudenko subsidiary in the Philippines provided a set of golf clubs and other gifts (worth about JPY800,000) to certain executive officers of the National Bureau of Investigation of the Philippines (NBI) on their visit to Japan, with the intention to conclude an NBI project contract. Both employees were fined JPY500,000 and JPY200,000 respectively.

- The second, the PCI case for which the Tokyo District Court rendered decisions in January and March 2009, concerned the offering of improper advantage to a Vietnamese public official. Four employees of Pacific Consultants International (PCI) gave money on two occasions, of about US$600,000 and US$220,000 each, to an executive officer for placing an order with PCI for a consulting project in relation to road construction and other infrastructure projects in Vietnam. The four employees were punished by imprisonment from one and a half years to two and a half years, and PCI was subjected to a fine of JPY70 million. This is the first case where an entity was punished pursuant to the dual punishment provisions of the UCPL.

- The third, the Futaba case concerned the offering of an improper advantage to a public official of the People's Republic of China. A former senior executive of Futaba Industrial Co (Futaba), a major car parts maker, was guilty of foreign bribery under the UCPL by paying a local government official of the Guangdong province around HK$30,000 and offering a women's handbag as a gift in December 2007 to persuade the authorities to overlook some irregularities at the plant of a subsidiary of Futaba and not to report it to the relevant state agency. The former senior executive was punished with a fine of JPY500,000. The fourth, the JTC case, for which the Tokyo District Court issued a decision on 4 February 2015, involved the railway consulting firm Japan Transportation Consultants (JTC) and three former executives, which had paid bribes to foreign public officials in several countries.

- The former executives paid around JPY70 million between December 2009 and February 2014 to several officials of Vietnam Railways, a Vietnamese public corporation, in Vietnam, to win consulting contracts with favourable conditions related to a railway construction project in Hanoi, which was funded by the Japan International Cooperation Agency (JICA) through Japan's Official Development Assistance (ODA). For a similar purpose, they paid a total of around IDR1.53 billion and JPY5 million between October 2010 and December 2013 to several Indonesian governmental officials in connection with railway projects in Indonesia, and also paid around US$580,000 between August 2012 and July 2013 to several officials of Uzbekistan's public railway corporation in connection with a railway project in Uzbekistan, all of which were funded by JICA through ODA.

- The former executives were punished by imprisonment of two and three years suspended for three and four years respectively, and JTC was fined JPY90 million.

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


Japan became a party to this Convention in 1998.

Article 10 of the Convention provides that the bribery of a foreign public official will be deemed an extraditable offense under criminal extradition treaties.

Offences

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

Foreign public officials

The Unfair Competition Prevention Law (UCPL) prohibits the payment of bribes to foreign public officials. Article 18(1) of the UCPL provides that “no person shall give, offer or promise to give any money or other benefits, to a foreign public official, for the purpose of having the foreign public official act or refrain from acting in a particular way in relation to his/her duties, or having the foreign public official use his/her position to influence another foreign public official to act or refrain from acting in a particular way in relation to that official’s duties, in order to obtain illicit gains in business with regard to international commercial transactions”.

“Foreign public official” means any of the following persons, including not only persons in central government, but also in local governments or certain public entities:

- A person who engages in public services for a foreign state or local government.
- A person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest.
- A person who engages in the affairs of an enterprise of which the majority of voting shares or equity interests is directly owned.

global.practicallaw.com/financialcrime-guide
by the foreign, state, or local government, or of which the majority of officers is appointed or designated by the foreign state, or local foreign government, and to which special rights and interests are granted by the foreign state or local government for performance of its business, or a person specified by cabinet order as an equivalent person.

- A person who engages in public services for an international organisation (that is, an international organisation constituted by governments or intergovernmental international organisations).

- A person who, under the authority of a foreign, state or local government or an international organisation, engages in affairs that have been delegated by such an organisation.

"International business" means economic activity beyond national borders. An act is considered to be "international" if either:

- An international relationship exists between the parties to the commercial transaction (for example, where a Japanese trading company bribes the public official of a foreign country to win an ODA bridge construction project in the country, and the intent to commit the offence is required).

- An international relationship exists for the business activity in question (for example, where a Japanese-affiliated construction company in a foreign country bribes a public official of the country in Japan with the intention of winning an order for repair works for the embassy of the country in Tokyo).

**Domestic public officials**
The Penal Code (PC) prohibits both paying a bribe to public officials and receiving a bribe from public officials.

The PC generally prohibits a public official from accepting, soliciting or promising to accept a bribe in connection with his or her duties. It also prohibits a person from giving, offering or promising to give a bribe to a public official.

"Public officials" are defined as "national or local government officials, members of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations".

There are two types of national government officials:

- **Regular officials.** Regular public officials are typically those who work at government offices.

- **Special officials.** These officials are high-level officials such as the Prime Minister, ministers and judges.

Similarly, local public officials include regular and special officials. Employees of state-owned or state-controlled entities, such as the Bank of Japan, national universities, and Japan Tobacco, are usually deemed to be public officials and are subject to the bribery provisions of the PC or similar provisions under special laws.

The intent to commit the offence (awareness of the domestic public bribe) is required.

**Private commercial bribery**

No general Japanese law prohibits commercial bribery among private persons. However, bribery of board members of companies is a crime under the Companies Act (CA). Directors or statutory auditors are prohibited from accepting, soliciting or promising to accept property benefits in connection with their duties, and those who have provided or offered or promised to give such benefits will be punished. The CA also makes the bribery or the provision or request of benefits in relation to the exercise of shareholder rights a crime.

Specific laws may also regulate the provision of advantages or benefits between private parties. For example, the Financial Instruments and Exchange Act (FIEA) generally prohibits financial instruments and exchange business operators (FIEBOs) such as securities companies, banks and so on from providing property benefits to clients to make up for losses in securities or derivative transactions.

The Cabinet Office Ordinance on Financial Instruments and Exchange Business Etc restricts FIEBOs and their officers or employees from providing a special advantage to clients. The Ordinance also restricts the staff of registered credit rating agencies (CRAs) from receiving, demanding or accepting an offer of money or goods that exceeds JPY3,000 per case from their clients in general.

No criminal punishment is applicable to those acts. However, FIEBOs or CRAs may be subject to administrative action by the relevant regulatory authority.

**Defences**

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

**Indirect bribery**
The payment of a bribe to a Japanese government official or a foreign government official through third party agents is punishable under the Penal Code (PC).

**Domestic bribery**
The PC does not provide any *de minimis* exceptions for payments of nominal sums or for facilitation and "grease" payments.

There is no definition of a "bribe" in the PC. However, it is generally interpreted as an advantage given to a public official to influence the performance of his/her duties. It is not limited to monetary or property benefits, but includes the satisfaction of a demand or desire of the official. Gifts, travel, meals, entertainment or free lease of property, are generally viewed as an advantage.

It should be noted that gifts, gratuities and so on within the scope of social courtesy are not deemed to be "bribes". However, the criteria for what is "within the scope of social courtesy" are unclear.

**Foreign bribery**
The Unfair Competition Prevention Law (UCPL) does not provide for any *de minimis* exceptions for payments of nominal sums or for facilitation and grease payments.

There is no provision in the UCPL that clearly allows small facilitation payments and the bribery of foreign public officials in Japan will not be exempted from punishment just because the bribe is a small facilitation payment. In addition, the METI Guidelines do not include any reference to "small facilitation payments". Therefore, there is no clear safe harbour rule for small facilitation payments under the UCPL or the METI Guidelines and provided the prerequisite "in order to obtain illicit gains in business with regard to international commercial transactions" is fulfilled in specific cases, it will constitute the offence of bribery of foreign public officials under the UCPL, regardless of whether it is a small facilitation payment or not.

Furthermore, the following acts are less likely to be regarded as a bribe:

- The provision of promotional products for general distribution (such as calendars and souvenirs that are widely distributed).

- The provision of sweets and drinks at business meetings.

- The use of company cars when foreign officials visit the company for business purposes when such use is needed due to transportation conditions.

- The provision of inexpensive seasonal gifts according to local custom.
• The provision of travel and meal expenses when inspection of factory and laboratory facilities is needed and where their display is not enough to gain understanding of a company’s products, services and quality.

11. Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?

The Penal Code generally provides for the liability of co-principals, abettors, or accessories to the crime, which are all applicable to both domestic and foreign bribery. If spouses or agents fall within the concept of co-principals, abettors, or accessories to the crime, they will be liable. Such interpretation also applies to violations of the Unfair Competition Prevention Law’s prohibition regarding foreign bribery (see Question 10, Foreign bribery).

Enforcement

12. Which authorities have the powers of prosecution, investigation and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

The relevant enforcement authorities in cases of bribery and corruption are the police and the public prosecutor.

The police and the Public Prosecutor’s Office have the same investigatory, enforcement and prosecutorial powers in cases of bribery and corruption (see Question 3).

For more information on the prosecuting authority see box: The regulatory authorities.

13. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See Question 4.

Convictions and sanctions

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

Civil/administrative proceedings or penalties

If a director or officer of a company participates in bribery and corruption in the course of its business, the company may be subject to civil liability against the related third party and administrative sanctions from the relevant regulatory authority.

Criminal proceedings or penalties

Right to bail See Question 5, Criminal proceedings: Right to bail.

Penalties. The following penalties can be imposed for bribery and corruption:

• Domestic bribery. Under the Penal Code (PC), a public official who accepts, solicits or promises to accept a bribe in connection with his or her duties is generally punished by imprisonment for no more than five years, and a person who gives, offers or promises to give a bribe to a public official will be punished by imprisonment for a period of no more than three years or a fine of no more than JPY2.5 million. Acts such as accepting a bribe before assumption of office or after resignation, passing a bribe to another person, or for exercising undue influence, are also subject to criminal punishment. Criminal penalties vary depending on the type of bribe. The bribery provisions of the PC do not apply to legal entities.

• Foreign bribery. A person who violates the foreign bribery provisions under the Unfair Competition Prevention Law (UCPL) will be subject to imprisonment of up to five years or a fine of up to JPY5 million, or both. If an individual who violates the UCPL’s foreign bribery provision is an employee, agent, officer or director of a company, and the bribe is made in connection with the company’s business, the company is subject to a fine of up to JPY300 million.

• Commercial bribery. The sanctions for commercial bribery will depend on the form the bribery takes, for example:
  - when directors or statutory auditors accept, solicit or promise to accept property benefits in connection with their duties, they will be punished by imprisonment for no more than five years or a fine of not more than JPY5 million; and
  - directors or statutory auditors that provide, offer or promise to give profits will be punished by imprisonment for not more than three years or a fine of not more than JPY3 million.

The Companies Act also makes bribery or the provision or request of benefits in relation to the exercise of shareholder rights a crime. Punishment for the above crimes does not apply to legal entities.

Safeguards

15. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

See Question 6. In general, plea bargaining and leniency policy for bribery are not available in Japan.

Tax treatment

16. 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?

According to Japanese law, bribes made to public officials or foreign public officials constituting the crime of bribery are expressly stated not to be eligible as a deductible expense under the Corporation Tax Act (Paragraph 5, Article 59) and the Income Tax Act (Paragraph 5, Article 49).

INSIDER DEALING AND MARKET ABUSE

17. What are the main regulatory provisions and legislation relevant to insider dealing and market abuse?

Main regulatory provisions

The Financial Instruments and Exchange Act (FIEA) prohibits insider trading under Articles 166 and 167 and unfair trading under Article 157, spreading rumours, using fraudulent means and committing assault or intimidation under Article 158, and market manipulation under Article 159 (collectively referred to as “market abuse”).

Regulatory authorities and guidelines

The regulatory and supervisory authorities relevant to insider trading and market abuse are the:
• Financial Services Agency of Japan (FSA). The FSA is responsible for ensuring the stability of the financial system, protecting investors and carrying out surveillance over securities transactions.

• Securities and Exchange Surveillance Commission (SESC). The SESC is entrusted by the FSA with daily market surveillance, inspections of financial instruments firms, inspections of disclosure documents and related activities.

Both the FSA and the SESC periodically issue and update guidelines relating to the FIEA. In addition, there are several self-regulatory organisations, such as the Japan Exchange Regulation (JPX), the Japan Securities Dealers Association (JSDA), and the Japan Investment Advisers Association (JIAA), which also publish self-regulatory guidelines for the prevention of insider trading.

**Offences**

**18. What are the specific offences that can be used to prosecute insider dealing and market abuse?**

**Insider trading**

The following are insider trading offences under the Financial Instruments and Exchange Act (FIEA):

• **Insider trading by corporate insider (Article 166, FIEA).** Any person listed below (Corporate Insider) who has come to know a material fact pertaining to the business or other matters of a listed company (Material Fact) and makes a sale, purchase or other transfer for value or acceptance of such transfer for value of shares of the listed company before the Material Fact is publicised, has violated the insider trading laws, as set out in the FIEA:
  - an officer, agent, employee or other worker (Officer) of the listed company (including its parent company and subsidiaries) who has come to know a Material Fact in the course of his/her duty;
  - a shareholder entitled to the right to inspect accounting books of the listed company who has come to know a Material Fact in the course of such an inspection;
  - a person with statutory authority over a listed company who has come to know a Material Fact in the course of the exercise of such authority (for example, a public officer with the statutory authority to grant permissions, initiate investigations or inspections);
  - a person that has concluded, or who is in the process of a negotiation to conclude, a contract with the listed company who has come to know a Material Fact in the course of the conclusion, negotiation, or performance of the contract;
  - an Officer of a juridical person listed in the second or fourth items above, who has come to know a Material Fact in the course of his/her duty;
  - a person that has, within one year, ceased to be a person listed in the first to fifth items above;
  - a person who has received information on a Material Fact, from a person listed in the first to sixth items above;
  - an Officer of a juridical person who has received, from a person listed in the seventh item above, belonging to the same juridical person, information on a Material Fact in the course of his/her duty.

Material Facts include, among others:

- a decision by the organ of the listed company which is responsible for making decisions on the execution of the operations of the listed company to carry out certain important matters;
- the occurrence of certain important facts in the listed company;
- the existence of a significant difference with the latest publicised forecasts of sales, current profits, net income, or other accounting item of the listed company;
- any other important matters which would have a significant influence on investors’ decisions.

The decisions, occurrences, and difference in settlement of account information which are similar to the above with respect to the subsidiaries of the listed company area also included in the Material Facts.

• **Insider trading by a person in connection with a tender offer (Article 167, FIEA).** The same punishment for insider trading by corporate insider (see above) will be imposed against a person who has come to know a fact concerning the launch or suspension of a:
  - tender offer; or
  - purchase of more than 5% of the shares of a listed company (collectively, a Tender Offer), who has the same relationship with the tender offerer or the purchaser as prescribed in the eight points listed above.

• **Prohibition of acts of communicating information and acts of advising transactions (Article 167-2, FIEA).** A person listed in the eight points above in relation to insider trading by corporate insider (see above) who has come to know a Material Fact must not inform another person of such Material Fact and must not advise another person to sell or purchase stock of the subject listed company, for the purpose of letting such other person make profits or avoid losses, before such Material Fact is publicised. If such other person proceeds to conduct insider trading based upon the information or advice mentioned above, the person who informed such Material Fact or provided such advice will be subject to punishment.

Insider trading offences are not a strict liability offence in terms of criminal penalty. Criminal intent by the person who committed the insider trading offence must therefore be established. An attempt to commit the relevant insider trading is not punishable. The insider trading action can be brought against both individuals and corporate bodies.

**Market abuse**

In relation to market abuse, the FIEA prohibits the following (Article 157, FIEA):

• The use of wrongful means, schemes, or techniques with regard to the sale, purchase, or other transaction of securities and so on.

• The acquisition of money or other property by misrepresenting important matters or omitting important matters necessary for avoiding misunderstanding with regard to the sale, purchase, or other transaction of securities and so on.

• The use of false quotations in order to induce the sale, purchase, or other transaction pertaining to securities and so on.

In addition, the spreading of rumours, use of fraudulent means, assault, or intimidation for the purpose of carrying out the sale, purchase, or other transaction of securities, or causing a fluctuation of quotations on securities are prohibited (Article 158, FIEA).

The FIEA also prohibits market manipulation. The following are the main acts prohibited as market manipulation (Article 159, FIEA):

• Conducting a series of trades that mislead other investors into thinking that trading of a certain listed security is active, with
the purpose of creating an environment in which other investors want to trade in said security (intention to solicit). Also, conducting a series of trades to influence the market price of the security for the same purpose.

- Making trades without intending to effect a transfer of rights (wash sales), or conspiring with others on certain trades (collusive trading) with the purpose of misleading other investors regarding the overall trading environment, such as leading them to believe that trading is active.

Defences

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

Safe harbours

Certain transactions that are considered to not undermine the fairness and credibility of a securities market are exempt from the insider trading regulations under the Financial Instruments and Exchange Act (Articles 166(6) and 167(5)). These include:

- Over-the-counter or negotiated transactions conducted between specific persons who possess unpublished material information pertaining to a listed company.
- The acquisition of share certificates by the exercise of a share option.
- Transactions based on contracts or plans made before becoming aware of material information.

Reduction of fines

For the offence of insider trading relating to the acquisition of treasury shares by a listed company, if the company voluntarily reports the offense to the Securities and Exchange Surveillance Commission (SESC), the SESC and the Financial Services Agency and so on will initiate an investigation into the offence, the amount of fine to be paid will be reduced by half (Article 185-7(14), FIEA). No other reduction of fines can be applied to insider trading offences.

Enforcement

20. Which authorities have the powers of prosecution, investigation and enforcement in cases of insider dealing and market abuse? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

The Securities and Exchange Surveillance Commission (SESC) aims to ensure the fairness and transparency of markets and to protect investors, and has the power to investigate insider trading and market abuse cases.

Investigations and procedures for administrative monetary penalty (fines)

The SESC can conduct voluntary investigations when considering the imposition of fines on those suspected of market abuse or insider trading. These investigations include:

- Requesting to appear and questioning a person concerned with the case or a witness, interviews with traders and/or listed companies, requesting to submit books and documents and so on.
- On-site inspections and inspecting books and documents and so on (Article 177, Financial Instruments and Exchange Act (FIEA)). Investigations are conducted on a voluntary basis. However, failure to comply with investigations will result in those suspected of market abuse or insider trading being subject to (Article 205-3(iii) and 205(iv), FIEA):
  - punishment by a fine of no more than JPY200,000; and
  - punishment by imprisonment for not more than six months and/or a fine of not more than JPY500,000.

If the SESC finds a violation as a result of an investigation, it will make a recommendation to the Prime Minister and the Commissioner of the Financial Services Agency (FSA) to issue an order to pay an administrative monetary penalty.

After receiving a recommendation from the SESC, the FSA will commence an administrative trial procedure by trial examiners. Upon receiving the decision of the trial examiners, the Commissioner of the FSA will decide whether to order the payment of an administrative monetary penalty.

Investigations of, and procedures for, criminal cases

The SESC also has authority to conduct compulsory investigations of serious breaches of applicable laws (such as insider trading and market abuse). The SESC may question a suspect or witness in a criminal case and inspect items or property in the possession of a suspect or witness on voluntary basis (Article 270, FIEA). The SESC can search a company's business premises and the residence of a suspect/witness in order to seize relevant documents under a search warrant issued by a judge (Articles 211 to 220, FIEA). Based on the result of investigations, the SESC can file criminal charges with the Public Prosecutor's Office against suspects.

Powers to obtain evidence abroad

The FSA has signed the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding (MMoU) and strengthened its co-operation with overseas authorities. In fact, by collaborating with foreign authorities through bilateral/multilateral information-sharing frameworks including the IOSCO MMoU, the SESC has made recommendations to issue orders to pay administrative monetary penalties and filed criminal charges.

For more information on the prosecuting authority see box: The regulatory authorities.

21. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

The Securities and Exchange Surveillance Commission (SESC) has the authority to make recommendations regarding administrative monetary penalties in order for the Financial Services Agency (FSA) to make a decision on whether to press charges. Based on the recommendation from the SESC, the FSA will decide whether to order the payment of an administrative monetary penalty (fine) (see Question 20, Investigations and procedures for administrative monetary penalty (fines)).

The SESC has the authority to make the decision for filing criminal charges with the public prosecutor's office against suspects (fine) (see Question 20, Investigations of, and procedures for, criminal cases).

In general, cases recognised to be significant and which involve malicious intention can be subject to criminal investigations and charges rather than administrative monetary penalties, though there are no clear and specific rules or guidelines regarding the SESC's decision-making process.

global.practicallaw.com/financialcrime-guide
## Congrowions and sanctions

### 22. What are the sanctions for participating in insider trading and market abuse?

Administrative penalties and criminal sanctions can be imposed in insider trading cases and market abuse cases.

**Civil/administrative proceedings or penalties**

For insider trading or market abuse (except unfair trading under Article 157 of the Financial Instruments and Exchange Act (FIEA)), the Financial Services Agency (FSA) can impose monetary penalties (fines) (Articles 173, 174, 175 and 175-2, FIEA). The company can also be subject to other administrative guidance or sanctions.

The amount of administrative monetary penalty to be paid is determined by applying the calculation of the formula set out in Article 175 of the FIEA. The FSA has no discretion in relation to the determination of the fine and cannot make any upward or downward adjustment to the amount to be paid.

If a person who is found guilty of insider trading has been subject to an administrative penalty payment order within the five years preceding the trade date, the administrative monetary penalty is multiplied by 1.5 (Article 185-7(15), FIEA).

The names of persons who have committed violations of the FIEA, including insider trading and market abuse, may be published (Article 192-2, FIEA).

**Criminal proceedings**

**Right to bail.** See Question 5, Criminal proceedings: Right to bail.

**Penalties.** The following penalties are applicable:

- **Insider trading.** A person who commits insider trading can be punished by imprisonment for up to five years and/or a fine of up to JPY5 million (Article 197-2(13), (14) and (15), FIEA). The property gained through insider trading will be confiscated and any shortfall amount will be collected from the offender (Article 198-2, FIEA). If the violation is committed by its representative, agent or employee, a company can be punished by a fine of up to JPY500 million (Article 207(3)(iii), FIEA).

- **Market abuse.** A person who commits market abuse can be punished by imprisonment for up to ten years and/or a fine of up to JPY10 million (Article 197(1v), FIEA). A person who commits market abuse and sells or purchases securities at prices that are the result of market abuse with the intent of making economic gains can be punished by up to ten years’ imprisonment and a fine of up to JPY30 million (Article 197(2), FIEA). The property gained through market abuse will be confiscated and any shortfall amount collected from the offender (Article 198-2, FIEA). If the violation is committed by its representative, agent or employee, a company can be punished by a fine of up to JPY700 million (Article 207(1)(i), FIEA).

**Civil suits**

A person who commits market manipulation can be held liable to pay 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 resulting from the market manipulation (Article 160(1), FIEA).

An aggrieved party can claim damages based on tort (Article 709, Civil Code) or for restitution for unjust enrichment (Articles 703 or 704, Civil Code).

### Safeguards

#### 23. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

**Safeguards regarding the conduct of investigation**

Japanese law does not provide any measures to safeguard the conduct of investigations. For voluntary investigations carried out by the regulatory authorities, non-compliance with the investigation may be subject to punishment (see Question 20).

**Process of appeal**

Any action for the rescission of the payment order for an administrative monetary penalty issued by the Commissioner of the Financial Services Agency (FSA) must be filed within 30 days from the date on which the order comes into effect (Article 185-18, Financial Instruments and Exchange Act). In June 2013, the FSA ordered a financial consultant to pay an administrative monetary penalty on the grounds that she had committed insider trading using non-public information for a public offering. The consultant denied it and brought an action for the revocation of such order. The judgment of the Tokyo High Court upheld the decision and became final in July 2017.

**Money laundering, terrorist financing and financial/trade sanctions**

#### 24. What is the main legislation and regulatory provisions relevant to money laundering, terrorist financing and/or breach of financial/trade sanctions?

**Money laundering**

The following laws prohibit or restrict money laundering:

- Act on the Punishment of Organised Crime and the Control of Criminal Proceeds.
- Act on Prevention of Transfer of Criminal Proceeds (APTCP).
- Foreign Exchange and Foreign Trade Act (FEFTA).
- The Japan Financial Intelligence Centre (JAFIC) is the relevant financial intelligence unit (FIU) under the Financial Action Task Force on Money Laundering (FATF) regime. The JAFIC is established within the National Police Agency (NPA). The JAFIC collects and analyses information in relation to the money laundering matters.

**Terrorist financing**

The following acts set out matters in relation to combating the financing of the terrorism (collectively known as the CFT regulations).

- FFTA.
- Act on Special Measures concerning the Freezing of Terrorist Assets (ASMFAT), implemented by Japan in accordance with UN Security Council Resolution 1267.

The JAFIC is relevant financial intelligence unit (FIU) under the FATF scheme. The JAFIC also collects and analyses information in relation to the terrorist financing matters.

[global.practicallaw.com/financialcrime-guide](http://global.practicallaw.com/financialcrime-guide)
Furthermore, the Ministry of Finance (MOF) also in charge of the CFT regulations. The MOF has the authority to supervise, monitor and inspect suspicious cross-border financings of terrorism under the FEFTA.

Financial/trade sanctions
The MOF and the Ministry of Economy, Trade and Industry have the authority to impose financial/trade sanctions under the FEFTA.

Offences

25. What are the specific offences that can be used to prosecute money laundering, terrorist financing and breach of financial/trade sanctions?

Money laundering
The Act on the Punishment of Organised Crime and the Control of Criminal Proceeds prohibits the following conduct in connection with money laundering:

- 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. A person who violates the provision is subject to imprisonment for up to five years or a fine of up to JPY3 million, or both.
- Accepting the proceeds of a crime. A person who violates the provision is subject to imprisonment for up to three years or a fine of up to JPY1 million, or both.
- As part of activities of terrorist groups or other organised crime groups, any of the two or more persons who have planned to carry out the relevant criminal act by an organisation arranges funds or goods, inspects the relevant places beforehand, or conducts acts to prepare for carrying out the planned crimes in accordance with the plan. A person who violates the provision will be subject to imprisonment with or without labour for up to five years.

Passing-off as another person in order to receive, transfer, or solicit a transfer of deposits or savings is punishable under the Act on Prevention of Transfer of Criminal Proceeds.

Terrorist financing
The Terrorist Financing Suppression Act prohibits the following conduct in connection with terrorist financing:

- Financial support or attempts to support with intention to facilitate terrorism.
- Raising funds or attempts to raise funds to be used for terrorism by solicitation, request or other means.

The Act on Special Measures concerning the Freezing of Terrorist Assets also prohibits conduct such as money lending, gifting certain assets, or making a purchase of certain assets with designated international terrorists without the permission of the Public Safety Commission.

Financial/trade sanctions
The Ministry of Finance and Ministry of Economy, Trade and Industry have the authority to impose sanctions in relation to financing and trade under the Foreign Exchange and Foreign Trade Act.

Defences

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

Money laundering
The Act on the Punishment of Organised Crime and the Control of Criminal Proceeds prescribes certain defences in relation to money laundering (accepting criminal proceeds). These are where either:

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

Terrorist financing
In relation to terrorist financing, authorisation (such as having approval or a licence from the Ministry of Finance (MOF)) constitutes a defence under the Foreign Exchange and Foreign Trade Act (FEFTA).

In relation to certain transactions with designated international terrorists, permission from the Public Safety Commission constitutes a defence under the Act on Special Measures concerning the Freezing of Terrorist Assets.

Financial/trade sanctions
In relation to the terrorist financing, authorisation (such as having approval or a licence from the MOF or the Ministry of Economy, Trade and Industry) constitutes a defence under the FEFTA.

Enforcement

27. Which authorities have the powers of prosecution, investigation and enforcement in cases of money laundering? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

 Authorities

Money laundering. The police and the public prosecutors are responsible for criminal enforcement in relation to money laundering. The Japan Financial Intelligence Centre (JAFIC) collects and analyses information in relation to money laundering matters. In addition, the public prosecutor has the authority to apply to the court prior to the trial in order to freeze certain property related to money laundering in accordance with the Act on the Punishment of Organised Crime and the Control of Criminal Proceeds (APOCCCP).

Terrorist financing. The police and the public prosecutors are responsible for criminal enforcement in relation to terrorist financing.

The Ministry of Finance is responsible for administrative enforcement in relation to terrorist financing. In addition, the public prosecutor has the authority to apply to the court prior to the trial to in order to freeze certain property related to terrorist financing in accordance with the APOCCCP.

The Public Safety Commission has the authority to make permission for certain transactions with designated international terrorists under the Act on Special Measures concerning the Freezing of Terrorist Assets.

For more information on the prosecuting authorities see box: The regulatory authorities.

global.practicallaw.com/financialcrime-guide
28. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See Question 4.

Convictions and sanctions

29. What are the sanctions for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?

Money laundering

Right to bail. See Question 5, Criminal proceedings: Right to bail.

Penalties. See Questions 5, Criminal proceedings: Penalties and Question 14, Criminal proceedings or penalties: Penalties.

Terrorist financing

Right to bail. See Question 5, Criminal proceedings: Right to bail.

Penalties. See Questions 5, Criminal proceedings: Penalties and Question 14, Criminal proceedings or penalties: Penalties.

Financial/trade sanctions

Right to bail. See Question 5, Criminal proceedings: Right to bail.

Penalties. See Questions 5, Criminal proceedings: Penalties and Question 14, Criminal proceedings or penalties: Penalties.

Safeguards

30. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

See Question 6.

FINANCIAL RECORD KEEPING

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

According to the Companies ACT (CA) and its implementing regulations, joint stock companies and membership companies (of the limited liability company type) must prepare accurate accounting books in a timely manner (Articles 432 and 615, CA), and joint stock companies must publish their balance sheets and, where applicable, their profit and loss accounts (Article 440, CA).

According to the Financial Instruments and Exchange Act (FIEA) and its implementing regulations, a person who conducts a public offering of securities must prepare financial and accounting documentation in accordance with the rules on terms, format, and preparation methods applicable to financial statements (Article193, FIEA). These documents must be submitted to the FSA as part of its securities registration statement at the time of the public offering and continuous periodic reports (annual securities reports and for listed companies, quarterly securities reports) must also be drawn up and disclosed to the public.

32. What are the penalties for failure to keep or disclose accurate financial records?

Companies Act

According to the Companies Act (CA) and its implementing regulations, when a director (or applicable person) of a company fails to prepare accounting books or record balance sheets, he/she will be subject to punishment by an administrative monetary penalty($aryo of no more than JPY1 million (Article 976, CA). In addition, when the director (or applicable person), in soliciting subscribers for shares of the company, produces documents concerning such solicitation that contain false statements about important matters, he/she may be subject to imprisonment with labour for no more than five years, or a fine of no more than JPY5 million, or both (Article 964, CA).

Financial Instruments and Exchange Act

According to the Financial Instruments and Exchange Act (FIEA), failure to submit any required financial statement or report will be subject to a penalty, depending on the type of document. For example, a person who conducts a public offering before a securities registration statement has been accepted or fails to submit an annual securities report by the prescribed time will be subject to imprisonment with labour for no more than five years, or a fine of no more than JPY5 million, or both (Article 197-2, FIEA). Also, a person who has made false statements about important matters regarding those documents will be subject to imprisonment with labour for no more than ten years, or a fine of no more than JPY10 million, or both (Article 197, FIEA).

In addition, if the above-mentioned violation of provisions of the FIEA is committed by an officer or employee of a corporation, the corporation will also be subject to a fine (for a violation of Article 197: a fine of not more than JPY700 million; for a violation of Article 197-2: a fine of no more than JPY500 million) (Article 207, FIEA). Furthermore, if such violation is committed, it will be separately subject to an order by the Financial Services Agency to pay a surcharge of a prescribed amount, depending on the type of violation (Articles 172 to 172-4, FIEA).
33. Are the financial record keeping rules used to prosecute white-collar crimes?

Making false statements about important matters in financial statements will be subject to criminal penalties (see Question 32). Therefore, a violation of the financial record keeping rules is used to prosecute white-collar crimes.

DUE DILIGENCE

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

A financial institution is required to keep the prescribed confirmation about its counterparty to a transaction (Act on Prevention of Transfer of Criminal Proceeds). In addition, in relation to financial institutions, guidelines issued by the supervisory government authorities express viewpoints on how to avoid having relations with anti-social forces (organised crime organisations) and provide guidance on:

- Information gathering.
- Setting up and updating databases.
- Information sharing among group companies.
- The utilisation of information provided by industrial groups.

With regard to companies other than financial institutions, the Ministry of Justice has issued the Guidelines on How Companies May Prevent Damage from Anti-Social Forces and recommends the "creation of databases integrating information on anti-social forces". However, there is nothing noteworthy here beyond general due diligence requirements and procedures. It seems that each company should form its judgement on a case-by-case basis in relation to gathering:

- Public information (media information, information released by administrative bodies, commercial registration information and so on).
- Information from industrial groups.
- Information from credit information and rating service providers.

CORPORATE LIABILITY

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

In Japan, a corporate body can only be subject to criminal liability if special (express) provisions exist. Generally, a corporate body can be punished by a fine only after it has been proved that its officer or employee has committed a specific crime in connection with the business of that corporate body.

CARTELS

36. Are cartels prohibited in your jurisdiction? How are cartel offences defined? Under what circumstances can a corporate body be subject to criminal liability for cartel offences?

Cartels are prohibited as an “unreasonable restraint of trade”, which is defined as “business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade” (Article 2(2), AMA).

Authority and sanctions

Administrative sanctions. The Japan Fair Trade Commission (JFTC) is the government agency responsible for enforcing the AMA and can conduct primary investigations and impose cease-and-desist orders and administrative fines (surcharge payment orders). The JFTC imposes administrative fines, which are generally 10% (but 2% and 3% for wholesale and retail activities respectively) of the affected turnover over three years on a corporation that is a party to a cartel. Any appeal suit pertaining to cease-and-desist orders and surcharge payment orders will be subject to the exclusive jurisdiction of the Tokyo District Court.

Criminal sanctions. In addition to administrative sanctions, firms and individuals can face criminal exposure for cartel violations. The filing by the JFTC of a criminal accusation to the Prosecutor General is the exclusive means by which a criminal prosecution can be brought against firms and individuals for cartel violation of the AMA (Article 96 (1), AMA). If the JFTC determines that a case is particularly egregious and has a significant effect on people's lives, or that the administrative remedies are not sufficient, it may file a criminal accusation with the Prosecutor General, which may result in a fine of up to JPY500 million for firms, or imprisonment of up to five years and a fine of up to JPY5 million for individuals.

In a recent case, although the AMA does not state whether it applies to acts committed overseas, Japan's Supreme Court ruled on 12 December 2017 that the JFTC could impose administrative surcharges on firms that join cartels established overseas if the cartels could impair free competition on the Japanese market.

This was the court's first decision approving the application of the AMA to cartels created abroad. 11 foreign companies, including Samsung SDI's subsidiary (Samsung SDI (Malaysia)), had agreed to set the minimum price of cathode ray tubes for televisions to be sold to local subsidiaries of Japanese companies. In 2010, the JFTC decided that these companies had formed a price cartel and ordered Samsung SDI (Malaysia) to pay a surcharge of about JPY1.37 billion (about US$14.8 million at the time).

See Cartel Leniency Q&A: Japan.

IMMUNITY AND LENIENCY

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

The Anti-monopoly Act (AMA) provides for a leniency programme (Article 7-2, AMA). The leniency programme covers administrative surcharges that could be imposed as a result of an unreasonable restraint of trade, while criminal penalties are not covered by the leniency programme.

The leniency programme is as follows:

- The first applicant that files an application before the Japan Fair Trade Commission (JFTC) begins an investigation: full immunity.
- The second applicant that files an application before the JFTC begins an investigation: 50% reduction in administrative surcharges.

Main statutory provisions relating to cartels

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade, commonly known as the Anti-monopoly Act (AMA),

global.practicallaw.com/financialcrime-guide
• The third applicant up to the fifth applicant that files before the JFTC begins an investigation: 30% reduction in administrative surcharges.
• Other applicants (up to five applicants in total and up to three applicants that file applications within 20 days after the JFTC begins its investigation): 30% reduction in administrative surcharges.

CROSS-BORDER CO-OPERATION

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

Obtaining evidence
Evidence for criminal cases in Japan can be obtained from foreign countries based on a treaty or agreement regarding mutual legal assistance in criminal matters with Japan (such as an agreement with the US, South Korea, China, Hong Kong, the EU, and Russia). For foreign countries that have not entered into a treaty or agreement, co-operation is conducted through diplomatic channels based on the principle of reciprocity.

Seizing assets
Assets derived from criminal activity can be seized in a foreign jurisdiction based on treaties or agreements and through diplomatic channels (see above, Obtaining evidence).

Sharing information
If the Japanese authorities (including the Japan Fair Trade Commission (JFTC)) suspect a violation of Japan's anti-corruption laws, the JFTC and the public prosecutor’s office can request that foreign authorities conduct an investigation and arrest the suspect through diplomatic channels in accordance with a mutual legal assistance treaty (if any) or on a voluntary basis. For an actual or suspected violation of financial regulations, the Japan Securities and Exchange Surveillance Commission co-operates closely with foreign securities regulators, such as the US Securities and Exchange Commission and the Monetary Authority of Singapore.

39. In what circumstances will domestic criminal courts assert extra-territorial jurisdiction?

In general, Japanese laws and regulations do not apply to the activities of foreign companies outside of Japan, as their territorial scope should be limited to Japan.

However, the Penal Code (PC) provides that its provisions will apply to a person (either a Japanese national or non-Japanese national) who commits certain categories of serious crimes outside Japan (for example, counterfeiting of currency, official documents and securities and the unauthorised creation of payment cards with an electromagnetic record and so on) (Article 2, PC).

40. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory? Are there statutes aimed at blocking the assertion of foreign jurisdictions within their territory?

There is no statute that is clearly and explicitly intended to block the assertion of foreign jurisdictions within the territory of Japan.

WHISTLEBLOWING

41. Are whistleblowers given statutory protection?

The Whistleblower Protection Act provides that a legal entity is not authorised to dismiss or give any disadvantageous treatment to a worker on the basis of his/her whistleblowing where both:
• The worker's whistleblowing is made to a prescribed reporting destination about a Reportable Fact (that is, any prescribed criminal act or act subject to an administrative disposition) that has occurred, or is about to occur, in a business operator's organisation the said worker works for.
• The worker's whistleblowing meets the prescribed requirements (for example, the absence of malicious or wrongful purpose, or in case of whistleblowing to an administrative body, the existence of reasonable grounds sufficient to believe the occurrence of the Reportable Fact).

Whether or not these requirements are met generally distinguishes a whistleblower from a leaker.

REFORM, TRENDS AND DEVELOPMENTS

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

There are no significant impending developments in the field of business crime. Some parts of the media have reported that the Consumer Affairs Agency are considering amending the Whistleblower Protection Act.

MARKET PRACTICE

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

There is no systematic market practice in combating corruption and corporate crime. However, in general, most, if not all, listed companies in Japan have established or strengthened their internal control systems and compliance procedures by, for example:
• Rolling out in-house education and training courses.
• Strengthening internal audit rules.
• Increasing audit frequency.
• Setting up credible whistleblowing systems and hotlines.
THE REGULATORY AUTHORITIES

Public Prosecutor’s Office
W www.kensatsu.go.jp/link/index_english.htm
Status: The Public Prosecutor’s Office is a governmental organisation.
Principal responsibilities: The Public Prosecutor’s Office has principal responsibility for investigating criminal matters, together with the police, and deciding to prosecute.

National Police Agency
W www.npa.go.jp/english/index.html
Status: The national police agency is a governmental organisation.
Principal responsibilities: The national police agency has principal responsibility for investigating of criminal matter.

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 legal affairs which include civil, criminal and other matters.

Financial Services Agency (FSA)/Securities and Exchange Surveillance Commission (SESC)
W www.fsa.go.jp/SESC/english/index.htm (SESC)
Status: The FSA and the SESC are governmental organisations.
Principal responsibilities: The FSA has principal responsibility for ensuring the stability of the financial system, protecting investors and carrying out surveillance over securities transactions. The SESC has principal responsibility for daily market surveillance, inspections of financial instruments firms, inspections of disclosure documents and related activities.

Ministry of Economy, Trade and Industry (METI)
W www.meti.go.jp/english/index.html
Status: The METI is part of the government.
Principal responsibilities: The METI has supervisory responsibility for matters regulated by the UCPA,

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.

Japan Fair Trade Commission (JFTC)
W www.jftc.go.jp/en/
Status: The JFTC is a governmental organisation.
Principal responsibilities: The JFTC enforces the Anti-Monopoly Act and can conduct primary investigations and impose cease-and-desist orders and administrative fines (surcharge payment orders).

Japan Exchange Regulation (JPX)
W www.jpex.co.jp/english/corporate/jpx-profile/jpxr/
Status: The JPX is a private organisation.
Principal responsibilities: The TSE has issued self-regulatory 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 self-regulatory guidelines on the prevention of insider trading.
Japan Investment Advisers Association (JIAA)

Website: www.jiaa.or.jp/index_e.html

Status: The JIAA is an industry body.

Principal responsibilities: The JIAA has issued self-regulatory guidelines on the prevention of insider trading.
ONLINE RESOURCES

Japanese Law Translation Database System
W www.japaneselawtranslation.go.jp/?re=02
Description. This website was launched by the Ministry of Justice in 2009. Please note that, according to the website, all of the translations contained in this Japanese Law Translation Database System are unofficial.

Guidelines to Prevent Bribery of Foreign Public Officials
Description. This is the official information for the Guidelines to Prevent Bribery of Foreign Public Officials (METI Guidelines, revised on 30 July 2015).

FSA Laws and Regulations
Description. These are tentative translations of the FSA laws and regulations, prepared by the FSA.

Japan Fair Trade Commission (JFTC) Legislation and Guidelines
Description. There are some English translations of the Legislation & Guidelines, prepared by the JFTC. Only Japanese version is authentic.

Japan Securities Dealers Association (JSDA) Rules
Description. These are tentative translations of JSDA's rules for non-Japanese readers' reference.

JPX Rules
W www.jpex.co.jp/english/rules-participants/rules/regulations/index.html
Description. This translation may be used for reference purposes only.
Masato Suzuki, Partner

Iwata Godo
T +81 3 3214 6247
F +81 3 3214 6209
E msuzuki@iwatagodo.com
W www.iwatagodo.com/english/


Areas of practice. Financial and securities regulation; commercial litigation; compliance; regulatory investigations, anti-corruption and anti-money laundering.

Non-professional qualifications. LLB, University of Tokyo, Faculty of Law; LLM, University of Pennsylvania Law School.

Recent transactions
- Assisted financial institutions in relation to an on-site inspection by the Financial Services Agency and the local finance bureau.
- Represented financial institutions in relation to the termination of transactions with Anti-social Forces (organised crime groups).
- Assisted many financial institutions for the establishment of internal systems related to Anti-Money Laundering/Combating the Financing of Terrorism.
- Represented institutional investors in relation to market manipulation trading against the Securities and Exchange and Surveillance Committee and public prosecutors.
- Represented the Japanese subsidiary of a multinational corporation in litigation involving allegations of fraudulent transactions against its employees.


Professional associations/memberships. Member of the Association of the Law of Finance and Japan Association of Private Law.

Publications
- Legal Study of Interest Rate Swap Transactions subject to Negative Interest Rates - Whether the Exemption from the Obligation to Pay Interest Qualifies as the Provision of a Special Interest, etc (Weekly Financial Affairs No 3170, 13 June 2016) (Japanese).
- Practical Business in accordance with FATCA (Foreign Account Tax Compliance Act) (Chuo Keizai, September 2012) (Japanese).

Shu Kakuno, Associate

Iwata Godo
T +81 3 3214 6233
F +81 3 3214 6209
E shu.kakuno@iwatagodo.com
W www.iwatagodo.com/english/


Areas of practice. Corporate & commercial transactions; M&A.

Non-professional qualifications. LLB, University of Tokyo, 2006; JD, University of Tokyo, School of Law; 2008; LLM, Queen Mary, University of London, 2017.


global.practicallaw.com/financialcrime-guide
Hiroshi Iida, Associate

Iwata Godo
T +81 3 3214 7049
F +81 3 3214 6209
E Hiroshi.iida@iwatagodo.com
W www.iwatagodo.com/english/

Professional qualifications. Japan, Attorney-at-law

Areas of practice. Structured finance; banking; financial regulations and litigation.

Non-professional qualifications. LLB, University of Tokyo, Faculty of Law; LLM, University of Tokyo Graduate Schools for Law and Politics, JD, University of Tokyo School of Law


Publications

- Commentary on Amendment of Cabinet Office Ordinance Related to the Insurance Business Act Amended in 2014 (Limited to the Provisions to be Enforced within Two Years) (NBL Vol 1079 (1 August 2016) – 1081 (1 September 2016)) (Japanese).