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OECD Escalates its Criticism of Japan for Failures in Combatting Foreign Bribery

Executive Summary

On June 30, 2016, following a two-day high-level mission to Tokyo, Japan to meet with senior government officials and representatives, the Organization for Economic Cooperation and Development (“OECD”) Working Group on Bribery in International Transactions (the “Working Group on Bribery” or “Working Group”) issued a statement admonishing Japan for not doing more to combat bribery by Japanese companies in their foreign business transactions.¹ The recent statement is the latest in a series of efforts by the Working Group since 2002 to apply pressure on Japan to strengthen its anti-bribery legislation and enforcement, and to more robustly implement the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (the “Anti-Bribery Convention” or “Convention”). The OECD’s actions put renewed pressure on Japan and, relatedly, highlight the importance of and need for Japanese companies to be diligent and thorough in addressing foreign bribery risks.

The Anti-Bribery Convention and Japan’s Foreign Bribery Law

The Anti-Bribery Convention establishes legally binding standards requiring signatory countries, including Japan, to criminalize the bribery of foreign public officials in international business, and to enforce the resulting legislation. The Convention establishes an open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have undertaken under the Convention.² This ongoing monitoring function, described by Transparency International as the “gold standard,” is carried out by the OECD Working Group on Bribery, which is comprised of the 34 OECD member countries, plus Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia and South Africa.³ The country monitoring reports contain recommendations formed after rigorous examinations of each country. Japan signed the Anti-Bribery Convention on December 17, 1997, joined

¹ OECD, *Japan Must Make Fighting International Bribery a Priority* (June 30, 2016), available at <http://www.oecd.org/corruption/japan-must-make-fighting-international-bribery-a-priority.htm>.

² OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Dec. 17, 1997), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

³ F. Heiman et al., Transparency Int’l, *Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Oct. 7, 2013), available at https://www.transparency.de/fileadmin/pdfs/Themen/Internationales/2013_ExportingCorruption_OECDProgressReport_EN.pdf.

the Working Group on Bribery, and enacted implementing legislation which became effective on February 15, 1999.

Japan's foreign bribery law, Article 18 of the Unfair Competition Prevention Law ("UCPL"), makes it illegal to "give, offer, or promise any pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official . . . exert upon another foreign official [to so act or refrain from acting] . . . , in order to obtain or retain [an] improper business advantage in the conduct of international business."⁴ The UCPL contains a detailed and broad definition of "foreign public official," which is qualitatively similar to the analogous term in the U.S. Foreign Corrupt Practices Act, as interpreted by courts in the United States.⁵ The UCPL applies to individuals and companies alike. However, unlike in the United States, under Japanese law, criminal liability of a company is based on the principle that the company did not exercise due care in its supervision and selection, among other factors, of an officer or employee to prevent the criminal conduct. The burden rests on the company to establish that it acted with due care by showing that it took proactive and specific steps to prevent wrongdoing, such as by establishing an effective compliance program and robust internal accounting controls. The UCPL applies to Japanese citizens and companies anywhere in the world under the principle of nationality jurisdiction, and it applies to non-Japanese nationals and companies where an act or result of the offense occurs in the territory of Japan under the principle of territorial jurisdiction. Additionally, a director of a Japanese parent company may be held liable for damages caused by a foreign subsidiary's conduct when such conduct results from the director's failure to perform adequate due diligence. Thus, a director who becomes aware of a foreign subsidiary's non-compliance has a duty to fully investigate the conduct, take corrective measures, and enhance internal controls to prevent future misconduct.

The OECD Working Group on Bribery's Monitoring Process

The cornerstone of the Anti-Bribery Convention is the rigorous monitoring process carried out by the Working Group on Bribery. Its purpose is to "monitor and promote the full implementation of [the] Convention," so that companies from all countries abide by the same rules that seek to prevent bribery of foreign public officials.⁶ The Working Group's monitoring activity to date has occurred in three phases, during which two countries review a third country after which the reviewing countries submit a report to the entire Working Group for its review and approval. A Phase 4 review process is currently under development, and is reportedly scheduled to start in 2016. Phase 1 evaluated the adequacy of the country's legislation implementing the Convention. Phase 2 examined the country's enforcement

⁴ Unfair Competition Prevention Law (Act No. 47 of May 19, 1993) art. 18-(1).

⁵ Unfair Competition Prevention Law, art. 18-(2); U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 20 (Nov. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

⁶ OECD, *Country Monitoring Principles for the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/countrymonitoringprinciplesfortheoecdanti-briberyconvention.htm>.

mechanisms and assessed whether the legislation was being applied effectively. Phase 3 focused on the progress made by the country on recommendations presented in Phase 2; enforcement efforts and results; implementation of the 2009 OECD Recommendation for Further Combating Bribery; and issues affecting all countries. The reviewing countries issue a report after each phase, which contain tiered recommendations for improvements, ranging from the compulsory to the merely desirable. The country then typically provides, within a year of the report, an oral response to the Working Group, discussing the steps taken to address the report's recommendations, and a formal written response within two years detailing the progress made in implementing the report's recommendations.⁷ Working Group reports that are critical of the country under review have led countries to dedicate more resources to combat foreign bribery, ramp up investigations and prosecutions, and amend anti-bribery laws. Most notably, the Working Group's review of the UK's implementation of the Convention, including its criticism of the UK's prior, antiquated legislative patchwork, played a significant role in the UK's passage of the Bribery Act in 2010.

Japan's Monitoring History

The Phase 1 report for Japan was issued in May 2002, and an initial Phase 2 report was issued in March 2005.⁸ The Phase 2 report was highly critical of Japan for its insufficient anti-bribery enforcement efforts, and the Working Group ordered Japan to undergo a special, follow on review, called the Phase 2 *bis* review. The Phase 2 *bis* report, issued in June 2006, found that "Japanese law enforcement authorities have still not made adequate efforts to investigate and prosecute foreign bribery cases," and set forth a number of recommendations.⁹ The Phase 3 report, issued in December 2011, again excoriated Japan for its minimal enforcement efforts and provided Japan with a further list of recommendations to address.¹⁰ In a written follow-up report, released publicly in February 2014, Japan detailed the steps it was taking to investigate and prosecute foreign bribery more effectively, including: (i) announcing and stressing the importance of enforcement of anti-bribery laws; (ii) strengthening coordination among law enforcement authorities in Japan; (iii) enhancing the use of requests for mutual legal assistance; (iv) amending regulations so as to expressly include foreign bribery enforcement within the scope of the prosecutors responsible for economic and financial crimes; (v) focusing on reports of suspicious transactions to detect foreign bribery cases; (vi) raising awareness of foreign bribery laws at Japanese companies; and (vii)

⁷ See OECD, *Country Monitoring of the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

⁸ OECD Working Group on Bribery, *Japan: Review of Implementation of the Convention and 1997 Recommendation* (May 21, 2002), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2387870.pdf>; OECD Working Group on Bribery, *Japan: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Mar. 7, 2005), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34554382.pdf>.

⁹ While he served as Deputy Chief of the Fraud Section of the U.S. Department of Justice, Paul, Weiss partner, Mark F. Mendelsohn, served as one of the lead examiners for the United States in conducting the Phase 2 *bis* review of Japan.

¹⁰ OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan* (Dec. 2011), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>.

providing training materials for Japanese overseas missions to detect foreign bribery by Japanese companies.¹¹

Recent OECD Criticism of Japan

Following the on-site visit to Tokyo by a high-level OECD mission on June 29-30, 2016, the Working Group on Bribery reiterated its criticisms of Japan's inadequate efforts to address the bribery of foreign public officials. Drago Kos, Chair of the Working Group on Bribery, said "Japan should be aware that continued failure to fulfill the Working Group's crucial recommendations would not only increase the Group's concerns but – bearing in mind Japan's important role in the world economy – also negatively affect other countries' efforts in the global fight against foreign bribery." Kos added, "Bearing in mind how big the Japanese economy is, for us it is a clear signal that something is wrong," and he noted that it was "only the second time in the history of the Working Group that we have had to resort to this measure,"¹² alluding to the Working Group's extraordinary Phase 2 *bis* review of the UK's implementation of the Convention and the Group's Phase 2 Recommendations, along with the UK's termination of the Al Yamamah case.¹³

The OECD issued a statement highlighting the fact that Japan has prosecuted only four cases of foreign bribery since its implementing legislation came into effect in 1999. It also noted that the Working Group has repeatedly urged Japan to amend its Anti-Organized Crime Law to prohibit companies and individuals convicted of bribing foreign public officials from keeping the proceeds, including by laundering them, as required by the Convention. The Working Group has further recommended that Japan establish an action plan to organize police and prosecution resources to be able to proactively detect, investigate and prosecute cases of foreign bribery by Japanese companies. The criticism from the Working Group echoed a 2015 report by Transparency International, which described Japan as having "little or no enforcement" of the Convention, on par with Russia.¹⁴

Japan responded to the OECD's criticisms, saying "We have been dealing with this actively. We would like to make efforts to pass legislation to back up the treaty in the future." Japan expressed its

¹¹ OECD Working Group on Bribery, *Japan: Follow-Up to the Phase 3 Report & Recommendations* (Feb. 2014), available at <http://www.oecd.org/daf/anti-bribery/JapanP3WrittenFollowUpReportEN.pdf>.

¹² Isabel Reynolds, "Japan Urged to Toughen Punishment for International Bribery," *Bloomberg*, June 30, 2016, available at <http://www.bloomberg.com/news/articles/2016-07-01/on-last-resort-visit-oecd-urges-japan-bribery-crackdown> (last visited July 7, 2016).

¹³ OECD Working Group on Bribery, *United Kingdom: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Oct. 16, 2008), available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/41515077.pdf>.

¹⁴ Reynolds, *supra* note 12.

commitment to the global fight against corruption and explained the latest status of its efforts to implement the recommendations of the Working Group.¹⁵

The OECD's next evaluation of Japan will be in March 2019.

Key Takeaways

The OECD's public and repeated criticisms of Japan regarding its failure to adequately implement anti-bribery efforts create potential reputational and other risks for Japanese companies doing business internationally, and reinforce the need for Japanese companies to be diligent and thorough in addressing foreign bribery risks. Such criticisms by a highly-respected international anti-corruption body likely will create a perception in the minds of non-Japanese regulators—including the U.S. Department of Justice and the U.S. Securities and Exchange Commission—that Japanese companies may not take foreign bribery seriously, and may heighten their interest in, and focus on, Japanese companies in the anti-corruption context. Similarly, U.S. companies and companies from other OECD Convention signatory countries with greater enforcement and a greater focus on anti-corruption compliance may exercise caution in partnering with Japanese companies in connection with international business. Japanese companies would be well served by considering bribery risk mitigation a top priority, including through the effective design and implementation of compliance programs and internal accounting controls, consistent with international standards; the monitoring and due diligence of vendors, consultants and other third-party relationships; and the establishment of rigorous internal processes and procedures to prevent and root out bribery within the company.

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¹⁵ Reynolds, *supra* note 12; OECD, *Japan Must Make Fighting International Bribery a Priority* (June 30, 2016), available at <http://www.oecd.org/corruption/japan-must-make-fighting-international-bribery-a-priority.htm>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

James L. Brochin

212-373-3582

jbrochin@paulweiss.com

David W. Brown

212-373-3504

dbrown@paulweiss.com

Michael E. Gertzman

212-373-3281

mgertzman@paulweiss.com

Mark F. Mendelsohn

202-223-7377

mmendelsohn@paulweiss.com

Alex Young K. Oh

202-223-7334

aoh@paulweiss.com

Kaye N. Yoshino

81-3-3597-8101

kyoshino@paulweiss.com

Tong Yu

81-3-3597-6306

tyu@paulweiss.com

Farrah R. Berse

212-373-3008

fberse@paulweiss.com

Christopher D. Frey

212-373-3966

cfrey@paulweiss.com

Peter Jaffe

202-223-7326

pjaffe@paulweiss.com

Associate Gregg E. Marmaro contributed to this client alert.