

BEST PRACTICES FOR HANDLING CONFIDENTIAL COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY

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Baker & McKenzie

1. Introduction

On June 19, 2019, the Act for Amendment of the Antimonopoly Act (“**2019 Amendment**”) was enacted. Promulgated on June 26, 2019 and scheduled to come into effect on December 25, 2020, the Amendment introduces a new system for calculating the reduction rate of surcharges (administrative fines) based on the degree of cooperation by the applicant (“**Reduction System**”) into the Japanese leniency program.

Because the new system is expected to increase the need for companies to consult with outside counsels in order to effectively cooperate in investigations by the Japan Fair Trade Commission (JFTC), a new procedure (“**New Procedure**”) will be introduced within the Regulations on Inspection by JFTC (“**Inspection Regulations**”). In the New Procedure, materials containing confidential communications between the company and its attorney that satisfy certain conditions are returned to the company before the case is concluded, without being accessed by the JFTC’s investigator.

The New Procedure is also known as the “Japanese attorney-client privilege”, but the conditions to satisfy its application (e.g., document type and document storage) provided in the guideline published by the JFTC¹ (“**Privilege Guidelines**”) and the privilege conditions of other jurisdictions are unlike in many ways. Special care is required to claim application of the New Procedure to confidential communications in Japan.

This document summarizes the best practices for companies to satisfy the conditions regarding documents and electronic data provided in the Privilege Guidelines.²

¹ “Guideline on treatment of materials containing confidential communications between the company and its attorney” published by JFTC on June 25, 2020. Tentative translation is available for download from the JFTC’s website (<https://www.jftc.go.jp/en/pressreleases/yearly-2020/June/20062602>).

² This document was prepared for the purpose of presenting a general guideline and is not an exhaustive list of all best practices conceivable from the Privilege Guidelines. For further information, please contact the Baker McKenzie Tokyo team at jacp@bakermckenzie.com.

2. Overview of the New Procedure³

(1) Overall flow of the New Procedure

The expected series of events in relation to the New Procedure is as follows:

Seeking legal advice from an Attorney

- The company prepares documents and electronic data to seek legal advice from the Attorney⁴.
- The Attorney prepares documents and electronic data pertaining to the legal advice to the company.
- The company stores documents and electronic data in an appropriate manner.

On-site Inspection / Dawn Raid (Suspected Acts Subject to the Leniency Program)

- The company submits an application form⁵ to the investigator requesting the application of the New Procedure.
- The investigator checks if the conditions for appropriate storage are satisfied.
- The investigator encloses the documents and electronic data that satisfy the conditions for appropriate storage in envelopes, etc. and orders the submission of such envelopes.
- The investigator hands over the documents and electronic data to the determination officer.

Determination Procedure

- The company submits a privilege log⁶ within two weeks (as a general rule) from the submission order (or, in the case of electronic data, from the date of receipt of the copied recording medium).
- The determination officer who is not engaged in the investigation of the case checks if the documents or electronic data are eligible for the New Procedure.

³ The New Procedure is applicable to administrative investigation procedures conducted by JFTC and is not applicable to criminal investigation procedures. However, there is a possibility of an investigation being initiated as a criminal investigation procedure and shifting to an administrative investigation procedure. In order to request the application of this procedure after the transition to administrative investigation procedures, it is advisable to take a photograph of the proper storage conditions at the time of the on-site inspection during the criminal investigation procedure.

⁴ “Attorney” means a person who is an attorney at law under the provisions of the Attorney Act of Japan who performs legal services independently from the company that has committed the Suspected Act Subject to the Leniency Program. In principle, in-house lawyers do not perform legal services independently from the company, and may only be eligible for the New Procedure in exceptional cases where certain requirements are met. Foreign lawyers and *gaikokuho-jimu-bengoshi* are not included.

⁵ The form and the sample of the application form are available for download from the JFTC’s website (<https://www.jftc.go.jp/dk/seido/hanbetsu/mousidesyo-gaiyoubunshyo.html>) (noting that they are only available in Japanese).

⁶ The form and the sample of the privilege log are available for download from the JFTC’s website (<https://www.jftc.go.jp/dk/seido/hanbetsu/mousidesyo-gaiyoubunshyo.html>) (noting that they are only available in Japanese).

Primary Determination Procedure

- The determination officer reviews the application form, confirms submission of the privilege log, and confirms conditions for appropriate storage.
- The determination officer conducts the above review and confirmation within two weeks (as a general rule) from the submission order.

Secondary Determination Procedure

- The determination officer confirms that the content of the documents or electronic data is the Specified Communications and reviews the privilege log.
- The determination officer conducts the above review and confirmation within six weeks (as a general rule) from the date of completion of the first determination procedure.

Result of Determination

- If the documents or electronic data are confirmed as eligible for the New Procedure, they are returned to the company.
- If the documents or electronic data are confirmed as not eligible for the New Procedure, they are handed over to the investigator.

(2) Documents and electronic data eligible for the New Procedure

The New Procedure applies to documents and electronic data that record the contents of confidential communications (“**Specified Communications**”) between a company and an Attorney regarding legal opinions on acts suspected of violating the law⁷ that may be subject to the Japanese leniency program (“**Suspected Acts Subject to the Leniency Program**”).

For example, the following documents and electronic data are eligible for the New Procedure:

- Consultation document from the company to the Attorney
- Response document from the Attorney to the company
- Written report containing a legal opinion based on the internal investigation conducted by the Attorney
- Notes from an internal meeting containing communications between the Attorney regarding the legal opinion in an internal meeting attended by the Attorney

⁷ “An international agreement or an international contract which falls under unreasonable restraint of trade or which contains matters that fall under unreasonable restraint of trade, and relates to the price for goods or services or may affect the price for goods or services by substantially restricting the quantity of goods or services supplied or purchased, the market share or the other party to the transaction” (2019 Amendment Article 7-2(1))

On the other hand, the following documents and electronic data that mainly state facts are not eligible for the New Procedure:

Primary source materials

- Notebooks and pocket diaries of officers and employees
- Notes describing what was discussed in the meeting
- Documents for approving business travel

Fact-finding materials

- Minutes from interviews with officers or employees who may have been involved in Suspected Acts Subject to the Leniency Program
- Results from internal surveys regarding Suspected Acts Subject to the Leniency Program

(3) Appropriate storage

To be eligible for the New Procedure, the documents or electronic data containing Specified Communications must be appropriately stored and satisfy the following conditions:

a. Labeling

There is a label saying that Specified Communication is recorded, on a conspicuous spot, on the document's cover page or the spine, etc. of the folder the documents are filed in (in the case of electronic data, the wording should be within the file name, and in the case of emails, within the subject).

e.g.,

“公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese)
“公取審査規則第 23 条の 2 第 1 項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese)

- * The label must be in Japanese. Labeling with “Privileged” or “Confidential” does not fulfill the conditions.

b. Place of storage

The document or the electronic data is stored or saved in a specific place of storage managed by the company (limited to a place managed by the legal department handling consultation with external counsels or by an officer or employee of such department), and the place where such documents or electronic data are stored or saved is distinguishable by appearance from other places storing documents and electronic data that are not eligible for the New Procedure.

- * Emails are to be managed in designated mail accounts.
- * A bookshelf managed by the legal department labelled as containing materials recording Specified Communications is one example. Although labelling the bookshelf itself is not a requirement, it is

recommended because the label makes it obvious that the storage spaces are appropriately classified.

c. Scope of persons who know the content

The scopes of persons who know the content of the document or the electronic data are limited to those who should have knowledge about it.

(4) Communications of legal opinions on foreign competition law from a foreign-admitted attorney

Documents or electronic data confidentially exchanged between the company and a foreign-admitted attorney, which contain legal opinions on foreign competition law and are exchanged for the purpose of handling the foreign competition law aspect of the case under investigation, are not subject to JFTC's submission order unless they are deemed necessary for the investigation of the case. Documents or electronic data may be deemed necessary for the investigation of the case if they contain primary source materials or fact-finding materials related to the case.

In addition, even if the company applies for the New Procedure for documents or electronic data already shared with a foreign-admitted attorney, the documents or electronic data will not lose eligibility for the New Procedure, provided that measures to maintain the confidentiality of the Specified Communications are taken and that sharing is necessary for the purpose of the well-functioning of the new leniency program.

If a Japanese attorney provides legal advice on the Japanese Antimonopoly Act to the company based on and referring to a legal advice on a foreign competition law from a foreign-admitted attorney, the legal advice quoting the legal advice on foreign competition law by a foreign-admitted attorney may be eligible for the New Procedure as a whole, as long as it is largely considered legal advice on the Japanese Antimonopoly Act.

3. Guidelines on handling materials eligible/not eligible for the New Procedure

As mentioned above, documents and electronic data mainly containing facts are not eligible for the New Procedure. For example, documents and electronic data recording statements made in interviews with officers or employees who are believed to have been involved in Suspected Acts Subject to the Leniency Program are not eligible for the New Procedure, even if prepared by an Attorney.

On the other hand, documents or electronic data containing some facts obtained from interviews with officers or employees and legal opinion evaluating such facts are eligible for the New Procedure if the documents or electronic data are, as a whole, consultation documents or response documents pertaining to legal opinion from an Attorney on Suspected Acts Subject to the Leniency Program.

However, it is not clear as to what extent the legal opinion from an Attorney must be stated in order to be evaluated "as a whole, consultation documents or response documents on legal opinion from an Attorney on Suspected Acts Subject to the Leniency Program". This may create a gray area for documents and electronic data not eligible for the New Procedure.

In addition, since the scope of Suspected Acts Subject to the Leniency Program contains some uncertainty (see Footnote 7), we suggest that companies handle all documents or electronic

data regarding acts that may generally be considered to constitute “cartels” and “bid rigging” as potential materials eligible for the New Procedure when consulting with an Attorney.

When consulting with an Attorney, please take the following points into consideration when preparing documents and electronic data potentially eligible for the New Procedure.

When preparing a document for consultation with an Attorney

- If an internal investigation is conducted before consulting an Attorney, the results should not be documented as an “Investigation Results Report” containing only facts but rather as a consultation document to the Attorney, by including both the facts found in the investigation and the topic of consultation.
- “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第23条の2第1項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) should be indicated on the front page of the consultation document, in the file name of the electronic data, or in the subject of the email, in a conspicuous spot.

4. Guidelines on appropriate storage conditions

As mentioned above, documents and electronic data are eligible for the New Procedure if they contain Specified Communication and are stored appropriately. Please pay attention to the following points after preparing or receiving documents or electronic data potentially eligible for the New Procedure.

(1) In the case of documents in tangible paper form

a. Points on labeling

- Indicate “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第23条の2第1項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) on the front page.
- Indicate “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第23条の2第1項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) on the spine of the folder if the document is bound in a folder.

b. Points on place of storage

- Store in a place managed by the department or officer/employee handling consultation with an Attorney, such as the Legal Department (for example, in the bookshelf managed by the Legal Department).
- Do not store in a place managed by the business division that has committed the Suspected Acts Subject to the Leniency Program.
- Do not store documents that are not eligible for the New Procedure together with the documents subject to application of the New Procedure.

c. Points on disclosure

- If the document is to be shared with a department or officer/employee other than the department or officer/employee handling the consultation with an Attorney such as the Legal Division, limit the scope of disclosure only to those for whom such disclosure is an absolute necessity.

d. Points on preparing the privilege log⁸

Within two weeks from the receipt of submission order, a privilege log pertaining to the application for the New Procedure must be submitted.

The following items need to be included in the privilege log for the documents subject to application of the New Procedure.

- Title of the document
- Date the document was prepared or received
- Name, department, and position of the person who has made the Specified Communications
- Name, department, and position of the person to whom the document was shared
- Place of Storage
- Summary (background of the preparation/receipt of the document)

Given the tight submission deadline, it is advisable to prepare the privilege log in parallel when preparing or receiving a document that may be eligible for the New Procedure.

(2) In the case of electronic data**a. Points on labeling**

- Indicate “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第 23 条の 2 第 1 項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) in the following:
 - the file name of the electronic data
 - the heading of the electronic data
 - the header of each page of the electronic data
 - the name of the folder containing the electronic data
 - the title of the email
 - the file name of the attachment to the email, if the attached file is also subject to application of the New Procedure

⁸ The form and the sample of the privilege log are available for download from the JFTC’s website (<https://www.jftc.go.jp/dk/seido/hanbetsu/mousidesyo-gaiyoubunshyo.html>) (noting that they are only available in Japanese).

- Indicate “PRIVILEGED AND CONFIDENTIAL” in the heading/header of the electronic data and in the title/content of the email to ensure privilege in jurisdictions other than Japan.

b. Points on place of storage

- Store electronic data in a folder managed by the department or officer/employee handling consultation with an Attorney, such as the Legal Department (for example, in the folder managed by the Legal Department).
- Do not save electronic data that are not eligible for the New Procedure together with electronic data subject to application of the New Procedure.
- Set up an email account for dedicated use and communicate with the Attorney using the email account (email handling methods to be explained later).
- Do not use the designated email account for communication with content not eligible for the New Procedure.
- Do not allow officers/employees other than officer/employee handling the consultation with an Attorney such as the Legal Division who have access to electronic data/emails subject to application of the New Procedure to print out and physically possess the electronic data/emails.

c. Points on disclosure

- If access to the folder containing electronic data subject to application of the New Procedure or the designated mail account is to be provided to a department or officer/employee other than the department or officer/employee managing the folder or the designated mail account, limit the scope of access rights only to those for whom access is an absolute necessity.

d. Points on preparing the privilege log⁹

After the order for the recording medium containing the copy of the electronic data subject to application for the New Procedure during the on-site inspection (dawn raid) is issued, within two weeks from the date of receipt of the copied recording medium, a privilege log pertaining to the application for the New Procedure must be submitted.

The following items need to be included in the privilege log for the electronic data subject to application of the New Procedure.

- File name
 - * Subject, in case of emails.
- Date the file was prepared or received
 - * In case of emails, the date on which it was sent or received.
- Name, department, and position of the person who made the Specified Communications

⁹ The form and the sample of the privilege log are available for download from the JFTC’s website (<https://www.jftc.go.jp/dk/seido/hanbetsu/mousidesyo-gaiyoubunsho.html>) (noting that they are only available in Japanese).

- * In case of emails, the name, department, and position of the sender and the recipient.
- Name, department, and position of the person to whom the electronic data was shared
 - * In case of emails, the name, department, and position of the sender, the recipient and anyone else who received the email.
- Place saved
- Summary (background on the preparation/receipt of the electronic data)

Given the tight submission deadline, it is advisable to prepare the privilege log in parallel when preparing or receiving electronic data that may be eligible for the New Procedure.

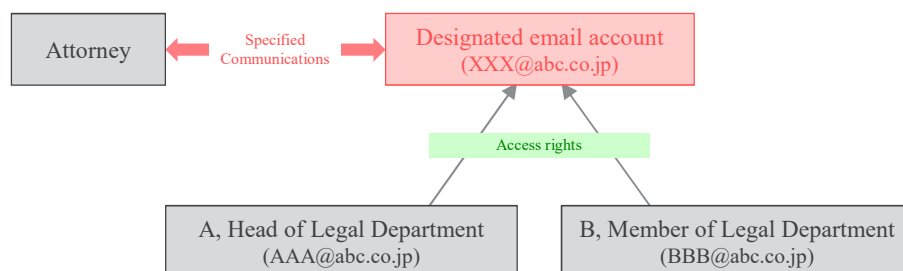
(3) Handling emails

To be eligible for the New Procedure, emails to and from the Attorney must be exchanged through the designated email account.

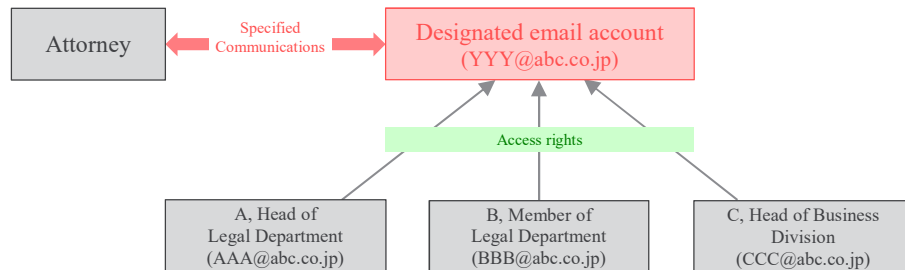
The designated email account is an email account set up for the purpose of communicating with an Attorney, which is separate from the email accounts of individual officers/employees. Such email account may be set up by case or by the scope of access rights (e.g., Legal Department only, Member of Legal Department + Member of Business Division, etc.).

Note that the group address associated with an individual email account (where emails addressed to the group address are sent to the individual email accounts registered under the group address) does not correspond to the “designated email account” described above.

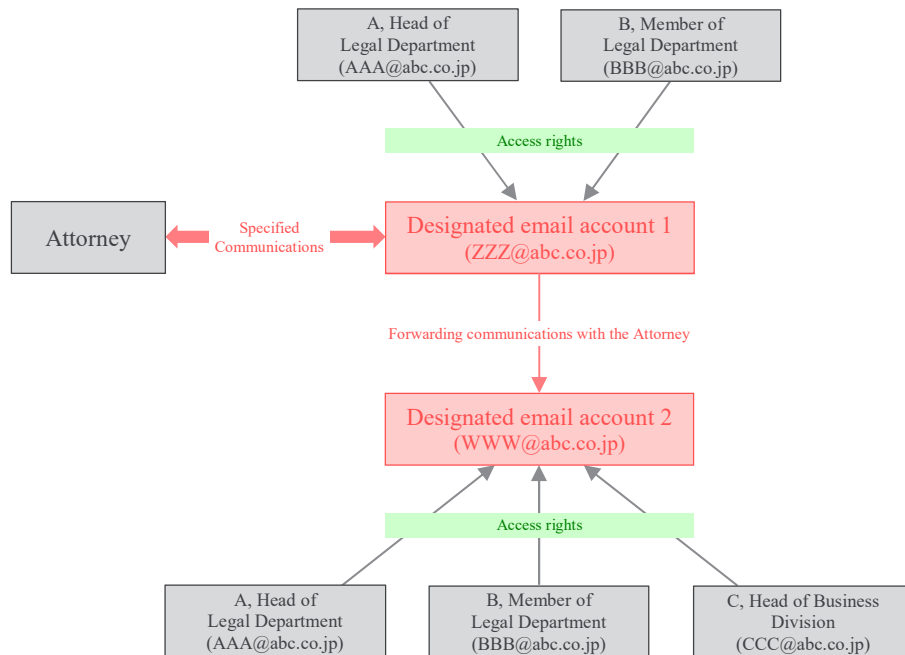
Example 1 (Legal Department only)



Example 2 (Legal Department + Member of Business Division)



Example 3 (Combination of Legal Department only/Legal Department + Member of Business Division)



When handling emails, please pay attention to the following points:

- Do not use the designated email account for communications with contents not eligible for the New Procedure.
- Do not use the designated email account for communications with persons other than the Attorney, such as with persons related to the case within the company.
- Do not forward emails sent to or received by the designated email account to an individual's email address.

(4) Handling of documents/electronic data prepared before the introduction of the New Procedure**a. Documents/electronic data prepared before the introduction of this handling**

There may be situations where documents/electronic data prepared before the introduction of the New Procedure do not satisfy conditions of appropriate storage, despite the possibility of such documents/electronic files being eligible for the New Procedure.

In such situations, it is necessary to ensure the appropriate storage conditions, such as by indicating “Specified Communications” on the front cover of documents.

In the case of emails, since email subjects cannot be changed, the following actions must be taken:

- Making a separate electronic file, for example, by downloading the emails.
- Indicate “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第 23 条の 2 第 1 項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) in the file name of the electronic file.
- Save in an appropriate location

When the JFTC’s investigator orders their submission, the original emails may also be eligible for the New Procedure if the applicant claims that the above measures have been taken.

b. Emails sent and received without using the designated email account in the early stages of consultation

In the early stages of consultation, inquiries to an Attorney potentially eligible for the New Procedure may be sent without an appropriate subject or without using the designated email account due to reasons such as inadequate understanding of this handling.

In such a case, the original emails may be eligible for the New Procedure if, as in the case of a. above, the applicant claims that the following measures have been taken when the JFTC’s investigator orders their submission:

- Made a separate electronic file, for example, by downloading the emails
- Indicated “公取審査規則特定通信” (*Koutorishinsakisoku Tokuteitsuushin*, or “Specified Communications under Inspection Regulations” in Japanese) or “公取審査規則第 23 条の 2 第 1 項該当” (*Koutorishinsakisoku Dai 23 jou no 2 Dai 1 kou Gaitou*, or “Subject to Inspection Regulations Article 23-2 Paragraph 1” in Japanese) in the file name of the electronic file
- Saved the file in an appropriate location

5. Guidelines on communications relating to legal advices on foreign competition law

When dealing with an international cartel, the company must be prepared to respond to authorities in multiple jurisdictions, including Japan.

As mentioned in 2(4) above, with regard to documents or electronic data confidentially exchanged between the company and a foreign-admitted attorney containing legal opinions on foreign competition law, which are exchanged for the purpose of handling the foreign competition law aspect of the case under investigation, such documents or electronic data are not subject to JFTC's submission order, unless they contain primary materials or internal investigation materials that are deemed necessary for the investigation of the case.

In order to request the investigator to prevent a particular document/electronic data from being subjected to the submission order at the time of the on-site inspection (dawn raid), the company must immediately indicate to the investigator that it is "a document/electronic data containing communications of legal opinion by an attorney on foreign competition law". For this purpose, it is desirable to store/save documents/electronic data in a manner that conforms to the conditions of appropriate storage for the application of the New Procedure.

For example, possible approaches may be to store/save such documents/electronic data separately from other documents/electronic data and to exchange emails on legal advices regarding foreign competition law only through a designated email account.

(1) Handling emails

In order to separately save and manage "emails containing communications of legal opinion on foreign competition law" from other emails, it is desirable to exchange emails on legal advices regarding foreign competition law with attorneys only through a designated email account, as described above.

When communicating with attorneys in multiple jurisdictions via email on foreign competition law, we would appreciate it if you could take the following into consideration.

Points on emails regarding foreign competition law

- Set up an email account dedicated to communications regarding legal advices on foreign competition law, different from the designated email account for communications with Japanese attorneys that may be eligible for the New Procedure.
- Do not use the designated email account for communications with Japanese attorneys that may be eligible for the New Procedure for communications on legal advice regarding foreign competition law.¹⁰
- Indicate "PRIVILEGED AND CONFIDENTIAL" in the title/beginning of the email and in the heading/header of the attached file.

¹⁰ Please note that even if a foreign-admitted attorney is copied in the email with a Japanese attorney potentially eligible for the New Procedure, this does not immediately lose the email's eligibility for the New Procedure.