

## Client Alert

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## Draft Guidelines Released on Amendment to the Antimonopoly Act (Japan): Reduction System for Cooperation and Attorney-Client Privilege

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### Introduction

The "Act for Amendment of the Antimonopoly Act ("Amendment") was enacted on June 19, 2019, promulgated on June 26, and, with the exception of some provisions already in force, will come into effect within one year and six months from the date of its promulgation.

Under the former leniency program, immunity / administrative fine (surcharge) reductions were granted to companies that applied for leniency and met certain requirements. The program was often criticized both for giving companies an insufficient incentive to cooperate with Japan Fair Trade Commission ("JFTC") investigations and for being inadequate to discourage them from interfering with such investigations. To address these concerns, the Amendment introduced a "Reduction System for Cooperation in Investigations" ("Reduction System"). Under this new system, a company can be eligible for a surcharge reduction based on the extent of its contribution to an investigation (i.e., how helpful the company is in proving the existence of a cartel / bid rigging and/or the other facts of a case).

In addition, the JFTC is introducing a type of attorney-client privilege to its Rules on Investigations in order to facilitate the new leniency program. This attorney-client privilege limits the access of JFTC investigators to documents containing confidential communications between a company and its attorney(s) that satisfy certain requirements.

On April 2, 2020, the JFTC published draft rules regarding the new leniency program ("Draft New Leniency Program Rules"). The JFTC simultaneously issued a draft operational policy for the Reduction System ("Draft Cooperation Guidelines") and draft guidelines for the handling of materials containing confidential communications between companies and their attorneys ("Draft Privilege Guidelines") and announced on the same date that it would be collecting public comments until May 15.

### Draft New Leniency Program Rules and Draft Cooperation Guidelines

#### (1) Overview

To be eligible for the Reduction System, a company needs to file an application for consultation with the JFTC within 10 days from the date on which it receives notice from the JFTC regarding the submission of reports and materials based on the leniency application (Notice under Article 7-4, Paragraph 5 of the Antimonopoly Act ("Paragraph 5 Notice")). Since an application for consultation can only be submitted by a company that has



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received Paragraph 5 Notice, the Draft Cooperation Guidelines provide that a company needs to submit sufficient materials and reports at the time the leniency application is filed.

In the consultation, the applicant explains the contents of materials it intends to report or submit under the Reduction System. The JFTC then assesses the extent to which the applicant would contribute to the investigation based on the explanation, suggests a reduction rate range and asks for the applicant's consent. As part of its cooperation, the applicant is required to respond to additional JFTC requests. Upon reaching an agreement, the applicant submits the agreed reports and/or materials.



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The JFTC will use the following criteria to assess the extent of an applicant's contribution:

- (i) the degree of specificity and detail of the report and/or materials;
- (ii) whether the report and/or materials include all relevant information that would contribute to the investigation; and
- (iii) whether the contents of the report and/or materials are supported by documents submitted by the company.

Based on these three factors, the JFTC will determine whether the extent of the applicant's contribution to the investigation is low, medium or high and assign a reduction rate in accordance with the following tables.

[Reduction rates under the new leniency program]

	Order of application	Reduction rate corresponding to the order of application	Reduction rate corresponding to the extent of the contribution to the investigation
Before the investigation starts	First	Immunity	Up to an additional 40%
	Second	20%	
	Third to fifth	10%	
	Sixth and thereafter	5%	
After the investigation starts	Up to three companies	10%	Up to an additional 20%
	Others	5%	



[Reduction rates corresponding to the extent of the contribution to the investigation]

Before the investigation starts	After the investigation starts	Extent of contribution to the investigation
40%	20%	High (Satisfies all three factors)
20%	10%	Medium (Satisfies two of the three factors)
10%	5%	Low (Satisfies one of the three factors)

The Draft Cooperation Guidelines list the following as information that contributes to an investigation and gives specific examples of each.

- a) Goods or services targeted in the violation
- b) Manner of the violation
- c) Participants in the violation
- d) Timing of the violation
- e) Status of implementation of the violation
- f) Other matters related to the violation
- g) Amount of the basis for calculating the surcharge
- h) Surcharge calculation rate

In addition, the Draft New Leniency Program Rules now allow leniency applications to be filed by email rather than fax.

## (2) Discussion

To be eligible for a surcharge reduction under the Reduction System, an applicant needs to submit a report that contributes to the investigation in addition to the reports and materials required to apply for the leniency program in the first place. The applicant also needs to respond to additional JFTC requests. Receiving the maximum reduction requires a company to carefully prepare and review not only the contents of the report to be submitted with its leniency application but also those of the report to be submitted under the Reduction System.



The JFTC has not disclosed how it will assess the contribution evaluation criteria listed above and thus it remains unclear how the JFTC will assess the extent of a company's cooperation. Close attention will need to be paid to the JFTC's decisions and positions in future cases.

Moreover, although the ceiling on the number of applicants for leniency has been abolished, the 20-day deadline to apply from the start of an investigation remains. Companies will likely be compelled to make strategic decisions more quickly than before.

## Draft Privilege Guidelines

### (1) Overview

As mentioned above, attorney-client privilege is intended to facilitate the new leniency program. Privilege is limited to confidential communications between a company and its attorney(s) containing legal advice related to suspected acts constituting unreasonable restraint of trade (i.e., cartel participation and bid rigging ("Specified Communications")).

Documents containing Specified Communications prepared or obtained by a company or its attorney(s) on or after the date of the Specified Communications (including the first in a series of Specified Communications) that are stored appropriately will be considered privileged.

More specifically, written inquiries from a company to its attorney, written responses from the attorney to the company, written reports containing legal opinions based on an internal investigation conducted by the attorney and transcripts of exchanges related to legal opinions at internal meetings attended by the attorney are included. On the other hand, documents which mainly contain facts (e.g., the results of internal investigations conducted by the company and records of interviews conducted by the attorney) are not included.

Documents for which privilege is asserted must also be stored appropriately in accordance with the following conditions:

- a) documents must be appropriately labeled (e.g., by bearing an indication such as "Specified Communications under the JFTC Investigation Rules");
- b) documents must be stored in a suitable location; and
- c) the scope of the persons who know the contents of the documents must be appropriately limited.

Electronic data such as emails are also subject to privilege. However, email must be managed in specific mail accounts in order to be subject to privilege.

A separate JFTC "Determination Officer" (i.e., not the investigator) will review the contents of documents claimed to be privileged and confirm whether they are in fact privileged and whether they contain anything to suggest that the company intends to interfere with the investigation.

Communications with foreign attorneys concerning foreign competition law are, in principle, not subject to JFTC submission orders unless such communications are deemed necessary to an investigation as primary or fact-finding materials.



## (2) Discussion

Documents mainly containing facts (e.g., primary or fact-finding materials) are excluded from privilege. For this reason, records from an attorney's interview with a company's employee may not be subject to privilege even if they are prepared by an attorney. The scope of privilege may be narrower in Japan than in other jurisdictions, making caution necessary.

Most of the appropriate document storage conditions relate to format. As any suspicion of an unreasonable restraint on trade requires an immediate response, a certain level of care should be exercised in connection with document storage (including email storage) at all times. In addition, it is important that officers and employees who may handle documents subject to privilege be appropriately trained.

Although, as mentioned above, communications with foreign attorneys concerning foreign competition law are in principle not subject to JFTC submission orders, the treatment of such communications remains unclear. At the very least, companies are advised to store these communications and other documents appropriately so that they can immediately be asserted to be "communications with foreign lawyers concerning foreign competition law" at the time of any on-site inspection, in a manner similar to the handling of documents subject to privilege. In cases involving international cartel investigations, a uniform strategy must be employed with regard to competition authorities in multiple jurisdictions. In these cases, legal advice from Japanese attorneys may be intermingled in documents with advice from attorneys in other jurisdictions. As such, documents subject to privilege as legal advice from a Japanese attorney and documents not subject to submission orders as communications with foreign attorneys concerning foreign competition law need to be stored separately.

## Conclusion

While some details of the new leniency program's Reduction System and the Draft Privilege Guidelines have been published, ambiguities remain concerning specific practical details. We expect the JFTC to flesh these areas out after its rules and guidelines are finalized based on public comment and through its actual handling of cases under the new rules and guidelines. The substantial anticipated effect of the Amendment and the initial confusion it is expected to cause mean that companies will need to closely monitor the JFTC's future actions and take necessary measures in response.