

GOVERNMENT INVESTIGATIONS

Japan



Government Investigations

Consulting editors

John D Buretta

Cravath, Swaine & Moore LLP

Quick reference guide enabling side-by-side comparison of local insights, including into enforcement agencies; forms of liability; requirements and trigger events for investigations; whistle-blower and employee protections; document preservation and production (including data protection, privacy, and legal privilege limitations); investor notification; cooperation with enforcement agencies; resolution of investigations; potential civil and criminal penalties; and recent trends.

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Contributors

Japan



Motonobu Wakabayashi
motonobu.wakabayashi@ohebash.com
Oh-Ebashi LPC & Partners



Kumpei Ohashi
kumpei.ohashi@ohebash.com
Oh-Ebashi LPC & Partners



Yuichi Oda
yuichi.oda@ohebash.com
Oh-Ebashi LPC & Partners



Tatsuki Otawa
tatsuki.otawa@ohebash.com
Oh-Ebashi LPC & Partners

ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The following are the government agencies principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses:

- the police and public prosecutors;
- the National Tax Agency (NTA);
- the Japan Fair Trade Commission (JFTC); and
- the Financial Services Agency (FSA) and the Security and Exchange Surveillance Commission (SESC), which come under the FSA's authority.

Law stated - 12 July 2023

Scope of agency authority

What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The police and public prosecutors have the authority to conduct investigations into any criminal matter, including serious fraud, bribery and money laundering. They often pursue matters that involve both companies and their employees.

The NTA has the authority to conduct investigations concerning income taxes, corporate taxes, local corporate taxes and consumption taxes. It mostly pursues matters relating to business concerns, involving both corporations and individuals, although it can also pursue criminal matters that involve both companies and their employees.

The JFTC has the authority to conduct investigations concerning violations of the Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade . It mostly pursues matters that concern corporations, although it can also pursue criminal matters that involve both companies and their employees.

The FSA has the authority to supervise, among others, banks, insurance companies and financial instruments business operators.

The SESC conducts daily market surveillance; inspections of financial instruments business operators and disclosure statements; investigations of administrative monetary penalties; and criminal investigations relating to securities laws. It mostly pursues matters that concern corporations, although it can also pursue criminal matters that involve both companies and their employees.

Law stated - 12 July 2023

Simultaneous investigations

Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Each government entity has the power to conduct investigations independently of one other; occasionally, they conduct simultaneous investigations and share information on a voluntary basis.

As public prosecutors solely have the power to bring criminal cases before courts, they are often at the centre of an investigation. The police are obligated to send cases to public prosecutors, and the other government entities are required to file accusations with the public prosecutors when criminal prosecutions are to be pursued.

Law stated - 12 July 2023

Civil forums

In what forums can civil charges be brought? In what forums can criminal charges be brought?

Government agencies (eg, the NTA and the FSA) act as administrative law courts and may issue administrative orders, such as orders to impose delinquent taxes, additional taxes or administrative monetary penalties. An appeal against an administrative order may be brought before the civil courts.

Criminal cases may be brought before criminal courts only by public prosecutors.

Law stated - 12 July 2023

Corporate criminal liability

Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

Generally, only a natural person may be held criminally liable; nevertheless, a corporation (judicial person) may also be held criminally liable when there are specific provisions allowing for its punishment, prescribed in the form of a dual liability provision.

A dual liability provision makes a corporation punishable together with the natural person who committed the offence unless the corporation can prove that it was not negligent in appointing or supervising that natural person, such as its officers, directors or employees.

Law stated - 12 July 2023

Bringing charges

Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

According to the Code of Criminal Procedure, public prosecutors may refrain from initiating the prosecution process if doing so would be deemed unnecessary in light of various factors, which may include pervasiveness of wrongdoing or a corporate history of misconduct.

In practice, government agencies have their own internal standards, based on their precedents, for deciding whether to file accusations with public prosecutors. If they determine that criminal prosecution is necessary, they will often work with public prosecutors so that the latter can efficiently make arrests or initiate the prosecution process.

Law stated - 12 July 2023

INITIATION OF AN INVESTIGATION

Investigation requirements

What requirements must be met before a government entity can commence a civil or criminal investigation?

There are no specific requirements that must be met before a government entity may initiate an investigation. A government entity may initiate an investigation at any time it deems necessary, based on the authority granted to it by law.

Law stated - 12 July 2023

Triggering events

What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Government investigations can be triggered by various events, including by the provision of information by concerned parties, self-reporting by violators, whistle-blower complaints, press reports, or findings obtained by regulators through their routine monitoring activities or in collaboration with other regulators.

Some enforcement entities have their own triggering events. For example, the Japan Fair Trade Commission has a leniency programme, which may trigger an investigation.

Law stated - 12 July 2023

Whistle-blowers

What protections are whistle-blowers entitled to?

Whistle-blowers can be protected under the Whistle-Blower Protection Act, which protects whistle-blowers by nullifying any dismissals from employment and prohibiting disadvantageous treatment of whistle-blowers on the grounds of their disclosures and other related matters.

There is no mechanism to reward whistle-blowers.

In 2020, the Whistle-Blower Protection Act was amended to make whistle-blowing even more effective. This amendment came into force on 1 June 2022. With this amendment, existing employees, as well as retirees and executives, are now covered by the Act's protections. In addition, the amendment requires companies operating in Japan to establish necessary internal systems to appropriately deal with whistle-blowers.

Law stated - 12 July 2023

Investigation publicity

At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Typically, enforcement entities do not publicly acknowledge the fact that they are conducting an investigation until they have taken action based on the results of the investigation; however, enforcement entities may effectively acknowledge

the existence of an investigation by not denying press reports about it or even by leaking information about the investigation to the press.

There is no procedure for a business under investigation to request anonymity.

National public officials belonging to government agencies are obligated under article 100 of the National Public Service Act not to divulge secrets that come into their knowledge in the course of the performance of their duties, but this obligation is largely ineffective in helping companies to protect their anonymity.

Unless prohibited by law, companies may express their views on matters under investigation to protect their reputations.

Law stated - 12 July 2023

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

There is generally a covert phase of the investigation, which allows the government entity in charge to gather evidence without any interference from the target business. The length of such a phase depends on the case at issue. In the case of leniency in an anti-monopoly investigation, the government entity usually conducts interviews with the officers or employees of the leniency applicant, and carries out its investigation based on the information provided by the applicant before approaching the target business. Usually, the covert phase in such a case lasts for approximately half a year.

Law stated - 12 July 2023

What investigative techniques are used during the covert phase?

The government entity can request information from the associates of the target business, including its business contacts, and can conduct interviews with employees, ex-employees and officers of the target business and its associates. The entity can also conduct interviews with the informants of the relevant facts and request the banks where the target has its accounts, or that the target uses for its remittances, to voluntarily provide relevant information. The entity can also request the telecommunications companies and internet service providers that the target uses to voluntarily provide log information.

Law stated - 12 July 2023

Investigation notification

After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

The target business should first conduct an internal investigation, including the identification of the items, documents and data provided to or seized by the government entity in the investigation. The target business should also interview its employees or officers who have been interviewed by the entity to confirm what they have told the entity. The target business may ask the entity about the purpose and status of the investigation, although the entity tends not to provide concrete information, especially at the early stage of an investigation.

The target business may request a copy of the seized items, documents or data that are necessary for its business operations, and that the government entity may deem appropriate to be copied. With regard to anti-monopoly investigations by the Japan Fair Trade Commission, the target business has the legal right to request that it be allowed to read or copy, or both, the seized items.

Law stated - 12 July 2023

Evidence and materials

Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

Generally, the target business need not preserve documents, recorded communications or any other materials in connection with a government investigation, except where the relevant laws require the preservation of documents in the ordinary course of business (eg, tax laws require the preservation of account books and tax filing documents); however, it is not advisable to discard relevant documents, recorded communications or other materials after the commencement of an investigation as this may constitute the criminal offences of destruction or suppression of evidence, or obstruction of an investigation.

Law stated - 12 July 2023

Providing evidence

During the course of an investigation, what materials - for example, documents, records, recorded communications - can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

The government entity can require the target business to provide any kind of material that it considers necessary for its investigation. When the target business refuses to provide such required materials, the entity can conduct a compulsory investigation if there is basis in law to conduct such an investigation. In antimonopoly investigations or financial investigations into a security company, the entity may issue an indirect compulsion order that can be enforced if the company refuses to voluntarily submit the requested materials without justifiable reasons. Under an indirect compulsion order, a company that refuses to submit the requested materials without justifiable reasons may be subject to punishment.

The Personal Information Protection Law does not prohibit these requests by government entities if such requests are based on other relevant statutes.

Law stated - 12 July 2023

On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

A target business may oppose the government's demands for materials on the grounds that such demands are irrelevant to the investigation at issue; however, such an opposition does not tend to be effective because the government usually claims very broad relevancy, especially at the early stage of an investigation.

Japan does not have a legal professional privilege, so the advice of legal counsel and in-house attorneys is not deemed privileged. Nevertheless, with regard to criminal investigations, the Code of Criminal Procedure allows legal counsel to

reject the government's demand for materials that counsel is keeping in connection with a case it is handling or has handled for its client.

Law stated - 12 July 2023

Employee testimony

May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

The government may compel the testimony of employees of the target business. For criminal investigations, however, the employee may refuse to provide particular testimony based on the right against self-incrimination, although the prosecutor may compel such testimony under the criminal immunity system, where the employee is given use and derivative use immunity against criminal responsibility based on and related to such testimony.

Law stated - 12 July 2023

Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

If the employees themselves are accused of criminal responsibility and wish to oppose the accusation at issue, it is advisable for such employees to obtain their own legal counsel. This is especially true in criminal cases where the circumstances of the employees tend to be personal and differ from those of the company. On the other hand, if there is no conflict of interest between the employees and the target business, then they may be represented by the same counsel; nevertheless, it is still advisable to carefully check for all possible conflicts – especially in mitigating circumstances, where the interests of employees tend to differ with those of the target business.

Law stated - 12 July 2023

Sharing information

Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Generally, the targets may share information to assist their defence, unless otherwise restricted by the government entity. Still, the targets should be careful in sharing information in case there is a conflict of interest between them. Depending on the circumstances, the investigating authority may consider that there has been or will be destruction or suppression of evidence through such information sharing. In an antimonopoly investigation, a target may not share the fact that it has applied for leniency with the other targets. Japan does not have legal professional privilege (except in the very limited context of antimonopoly investigations); as a result, we generally need not be concerned about the effects of information sharing on privilege.

Law stated - 12 July 2023

Investor notification

At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

Generally, the target must notify investors about the investigation soon after the results of the investigation are revealed to the target; however, if the investigation itself somehow becomes public prior to the conclusion of the investigation, the target needs to consider the early disclosure of such an investigation. The target should only disclose the facts that have been confirmed through the investigation.

Law stated - 12 July 2023

COOPERATION

Notification before investigation

Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

There are certain statutory mechanisms through which a target business can cooperate with an investigation.

A target can notify the government of potential wrongdoing at any time.

Law stated - 12 July 2023

Voluntary disclosure programmes

Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

Government enforcement entities have formal voluntary disclosure programmes primarily under the Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade (AMA), the Financial Instruments and Exchange Act (FIEA) and the Code of Criminal Procedure.

In the case of cartels and bid rigging, companies that apply for leniency are entitled to obtain amnesty or reduced surcharge penalties. The level of benefit that may be availed of varies depending on the timing (pre-investigation or post-investigation), the order of application and the degree of cooperation under the AMA.

In some cases – such as providing false statements in disclosure documents, failing to submit mandatory financial reports or insider trading in the company's own shares – companies that apply for leniency before the investigation commences are entitled to obtain a 50 per cent reduction in surcharge penalties under the FIEA.

For specific offences, including certain types of white-collar crimes, prosecutors are allowed to enter into a particular type of agreement for leniency in exchange for voluntary cooperation under the Code of Criminal Procedure. This plea-bargaining system was introduced by the 2016 amendments to the Code of Criminal Procedure and made effective on 1 June 2018; however, the number of cases where a plea agreement has been entered into is still very low.

Law stated - 12 July 2023

Timing of cooperation

Can a target business commence cooperation at any stage of the investigation?

In general, if a target business wishes to cooperate, it would be advisable for it to initiate cooperation early in the investigation.

Law stated - 12 July 2023

Cooperation requirements

What is a target business generally required to do to fulfil its obligation to cooperate?

A target business will generally be required to produce relevant documentation, report required facts, and make employees available for interviews and (if applicable) examinations.

Law stated - 12 July 2023

Employee requirements

When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

Basically, under the employment contracts, a target business can require its employees to cooperate with government investigations.

When government entities are investigating criminal activities, employees may retain their own legal counsel, especially when there is a conflict of interest with the target business.

It is not uncommon for a target business to pay for its employees' legal fees if their cooperation serves the target's interests. In evaluating a target's cooperation, government entities do not usually view the payment of legal fees negatively.

Law stated - 12 July 2023

Why cooperate?

What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

In an administrative government investigation (which does not lead to a charge being made against an individual), individual employees generally cooperate since this usually serves their interests. On the other hand, various considerations need to be taken into account in a criminal government investigation. Such considerations include, among others, whether to assert the individual employee's innocence, the likelihood that the employee would be arrested, the possibility that the employee could make a plea-bargaining deal and whether the employee received a business order from the employer.

If an individual employee refuses the order of the employer (ie, the target business) to cooperate with a government investigation, the employee can be disciplined by the employer to some extent under the rules of employment; however, such a failure to cooperate will generally not be a cause for dismissal under the Japan's labour laws.

Privileged communications

How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

There is no legal professional privilege under which attorney–client communications may be broadly protected. In an administrative investigation into cartels or bid rigging, certain types of documents and communications between the attorney and the officers and employees of a target business may be protected under AMA-related regulations, but the scope of this protection is quite limited.

In addition, a company or person has the right to refuse the production of certain types of documents in civil proceedings. This right would not be deemed waived as a result of cooperation.

Law stated - 12 July 2023

RESOLUTION**Resolution mechanisms**

What mechanisms are available to resolve a government investigation?

There is no pretrial agreement to defer prosecution in Japan. Under the plea-bargaining system that took effect in 2018, a prosecutor may enter into an agreement with a suspect or defendant (including business entities) with the consent of counsel, under which the prosecutor may agree to drop or reduce criminal charges, or provide favourable treatment if the suspect or defendant cooperates in the investigation against another person or other persons with respect to certain types of crimes. To date, this plea-bargaining system has rarely been used.

As for administrative penalties, the commitment system can be used to resolve matters that involve non-cartel, antimonopoly matters. During an investigation of a violation of the Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade, excluding cartels and bid rigging, the Japan Fair Trade Commission (JFTC) may ask a target company to propose a commitment plan. Upon the JFTC's acceptance thereof, the JFTC will no longer issue any administrative orders provided that the target company complies with the commitment plan.

Law stated - 12 July 2023

Admission of wrongdoing

Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

The Constitution states that no person shall be compelled to testify against themselves, which guarantees the right against self-incrimination in criminal proceedings and, to a certain extent, in administrative proceedings; however, in the case of criminal proceedings, if a natural person in custody keeps exercising the right to remain silent, they are likely to be held in custody for particularly prolonged periods of time. This has been described as problematic hostage justice.

If a target business voluntarily makes an admission of wrongdoing, such an admission can be used against the business in criminal and related proceedings.

Law stated - 12 July 2023

Civil penalties

What civil penalties can be imposed on businesses?

Civil penalties include orders:

- imposing delinquent taxes, additional taxes or administrative monetary penalties;
- to suspend business activities; and
- to rescind business licences.

Law stated - 12 July 2023

Criminal penalties

What criminal penalties can be imposed on businesses?

Corporations and individuals can face monetary fines and confiscations of specific items (or the collection of the equivalent value of such items). Individuals can also face imprisonment concurrently.

Law stated - 12 July 2023

Sentencing regime

What is the applicable sentencing regime for businesses?

There are no published guidelines or standards governing sentencing by the courts, although the courts are bound by precedent to some extent. Each court decides the appropriate sentence at its discretion after considering various factors within the range of penalties stipulated by statute. The court also refers to the recommendation for sentencing submitted by the prosecutor, which is based on an internal database of precedents as well as the internal standards of the public prosecutor's office.

Law stated - 12 July 2023

Future participation

What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

An admission of wrongdoing may result in the imposition of administrative orders or penalties, which may make it difficult for the business entity to conduct normal business, or even to continue business, in the future. On the other hand, if the business entity concurrently agrees to take measures to prevent recurrence of the wrongdoing, this may result in lighter administrative orders or penalties.

Law stated - 12 July 2023

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

A mid- to long-term trend is the growing use of surcharge systems in government investigations. Surcharges are administrative payment orders that impose financial disadvantages on businesses that violate the laws. Although the procedure for imposing a surcharge is not a criminal procedure, the surcharge system is a powerful tool for enforcement agencies to quickly enforce the applicable laws.











Since the introduction of the surcharge system under the Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade in 1977, the same system has been successfully introduced in other legal fields, such as through the Financial Instruments and Exchange Act and the Act against Unjustifiable Premiums and Misleading Representations .

In light of these trends, the introduction of a surcharge system may also be considered for other laws and regulations that need to increase their effectiveness in the future. Taking into account Japan's legal framework, enforcement track record, effectiveness, the actual conditions of domestic and foreign businesses, and international trends, although the introduction of similar surcharge regulations was postponed under recent legal amendments to the personal information protection regulations, it is expected that the introduction of such a system to the regulations will continue to be considered.

It will be necessary to keep an eye on these regulatory trends in the future.

Law stated - 12 July 2023

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