

DEEMED PUBLIC OFFICIALS: A POTENTIAL RISK FOR US COMPANIES IN JAPAN

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Japan is one of the lower-risk countries for US companies in terms of compliance issues involving bribery and corruption. Transparency International's

2013 *Corruption Perceptions Index* places Japan 18th out of 177 countries, on a par with the United States (19). This is a much higher position than other Asian countries, including South Korea (46) and China (80).

However, in addition to considering potential exposure to the United States' Foreign Corrupt Practices Act and the United Kingdom's Bribery Act 2010, there are a number of unique local issues of which US companies should be aware.

Last year, a Japanese subsidiary of a major international bank was investigated in connection with entertaining executives of commercial pension funds. An employee and a pension fund manager were arrested on suspicion of giving and accepting bribes.

The bank has already dismissed the employees involved and cooperated with the investigation. It also has received administrative guidance to improve its compliance, rather than submit to more severe sanctions.

This case reveals two potential blind spots for foreign firms operating in Japan: *minashi koumuin* (deemed public officials), and the appropriate range for *settai* (entertainment).

Deemed public officials are officers and employees of entities that are not government owned but serve public functions. This concept is somewhat analogous to state-owned enterprises,

but rather than being government-owned/controlled entities that participate in commercial activities, these are commercial entities that play quasi-government roles.

Some of the better-known examples are companies that, having been government-owned, later became privatized. They include Japan Post Service Co., Ltd., the Japan Railways Group, Japan Tobacco Inc., the Nippon Telegraph and Telephone Corporation, as well as various highway and infrastructure authorities.

The statutes that authorized the establishment of these companies stipulate that their officers and employees are "deemed to be an employee engaged in public service" for the purposes of the Penal Code of Japan.

Officers and employees of public universities, hospitals, and research labs are also treated as deemed public officials. A particular area of concern for companies that have interactions with such organizations—such as those in the pharmaceutical industry—is inviting doctors and academics to conferences and paying for their travel expenses, or giving research grants, which could be viewed as bribes in some circumstances.

One group that may seem odd at first glance is driving instructors, who also fall into this category because they administer road tests for drivers' licenses. The same is true for all organizations that administer exams for other types of licenses and permits.

Pension fund managers are designated by the Employees' Pension

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Insurance Act as deemed public officials, even if the pension fund is privately owned and the pensions are for employees of private companies. That is because maintaining pensions is a government-mandated function.

Thus, would giving a gift to a deemed public official or taking such a person out to lunch or dinner automatically be a crime? Japan's bribery law prohibits the giving and receiving of bribes to public officials (and, by extension, to deemed public officials) "in connection with his or her duties."

While it probably would be difficult to prove the true motivation of the person giving the gift, the law doesn't specify that the bribe has to be "solely" or "primarily" in connection with the official's duties.

A separate issue is the appropriate amount for gifts and entertainment, even when they are legal and perfectly appropriate.

Gift giving is an integral part of Japanese social interaction, and in some circumstances, not giving a gift could be considered rude. The same is true of entertaining.

But what is the appropriate amount that should be spent, if at all? In a country like Japan, where a dinner can easily exceed \$150 per person, US standards may not be directly applicable.

In the Pension Funds Case, the Financial Services Agency disclosed that the benefits given included frequent entertainment events (about 40 times over a two-year period to one fund) and some overseas trips. The amount and nature of the benefits may have struck the investigators as being more than necessary for simply maintaining a social relationship.

Commercial bribery cases are rarely, if ever, prosecuted in Japan. However,

it is possible for an executive to be accused of violating his or her fiduciary duty by making a corporate decision based on a bribe.

Many Japanese companies—even if not subject to the deemed public official laws—have instituted policies against accepting expensive gifts or entertainment.

No clear standards exist on what is appropriate, and it will depend on various factors, such as the nature of the relationship, the business, and the gift or entertainment. However, not having a specific standard doesn't mean anything is permissible.

Although Japan may seem like a relatively easy place to maintain anti-bribery compliance, it is essential to be aware of unique local issues that could end up having significant consequences. •

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