WHITE COLLAR CRIME - JAPAN

Are privilege protections coming to Japan?

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Background

The absence of attorney-client privilege protections in Japan means that regulatory investigations must be handled with particular care and consideration. Japanese regulators, such as the Japan Fair Trade Commission (JFTC) and the Japan Financial Services Agency, are empowered to compel the production of or seize materials that would otherwise be protected as privileged (for further details please see "Maintaining privilege in the face of regulatory investigations"). For example, according to media reports, the Japanese Public Prosecutor's Office recently seized the personal computers of certain attorneys retained by a construction company in the context of a criminal cartel investigation.(1) The disclosure of materials that would otherwise be protected by privilege subjects companies to far-reaching and potentially serious repercussions – both in Japan and abroad.

Companies are encouraged to take reasonable steps to mitigate the risks associated with the disclosure of privileged materials to the Japanese regulators, such as the careful management of communications therewith. However, such methods are not a panacea to all of the risks associated with the disclosure of privileged materials, whether by production to, or seizure by, a Japanese regulator.

Situation to date

In lobbying for the amendment of the applicable laws – particularly the Anti-monopoly Act – in order to include privilege-style protections, various industry groups and representative associations in Japan have argued that the absence of such protections unfairly damages the interests of companies active in Japan. Historically, the government has resisted such requests. For example, in 2014 the Advisory Panel on Administrative Investigation Procedures under the Anti-monopoly Act held that:

> *"it is not appropriate to introduce attorney-client privilege at the present stage, because the grounds and scope of the privilege are not clear and it could dispel concerns that the fact-finding ability of the JFTC would be impeded as a result of introducing such privilege."*(2)

Generally – despite acknowledging that the absence of privilege-style protections under the act subjects entities in Japan to certain disadvantages – the government has refused to introduce privilege-style protections out of concern that they could limit the broad investigative powers of the Japanese regulators, including the JFTC, or adversely affect the Japanese regulatory environment.

Recent developments

On April 25 2017 the JFTC Anti-monopoly Study Group, a JFTC advisory board, published its report on the enforcement of the Anti-monopoly Act. On the topic of the introduction of privilege-style protections, the study group, consistent with previous advisory reports, concluded that privilege-

style protections under the act were unnecessary. Notably, the study group concluded that it did not necessarily agree that the absence of privilege-style protections impaired the rights of entities operating in Japan. Further, it expressed concern about introducing privilege-style protections only in the context of the act and not in the context of other relevant legislation, such as the Code of Civil Procedure and the Code of Criminal Procedure.

While the study group agreed to "pay some respect" to the concept of attorney-client privilege, this proposal was thoroughly qualified. For example, the concept of attorney-client privilege would be considered only to the extent that it would not affect the JFTC's investigative powers and provided that measures to prevent spoliations were implemented concurrently.

The study group invited public comments on the report and published the comments received on August 8 2017. A number of key industry groups (eg, the Japan Business Federation and the Japan Association of Corporate Executives) and legal associations (eg, the Japan Bar Association and the American Bar Association Antitrust Division) submitted strong comments in support of the introduction of privilege-style protections in Japan with respect to the application of the Anti-monopoly Act.

Political dispute surrounding amended act

Despite the comments received on the report, it was announced that the JFTC's proposed amendments to the act would introduce only a discretionary surcharge system and no privilege-style protections.

In response, certain legislators – presumably based on the strength of the public comments received on the report – asserted that the act should be amended to include privilege-style protections consistent with the situation in other jurisdictions. These legislators commented that the absence of such privilege-style protections in Japan subjects companies active in Japan to significant litigation risk in foreign jurisdictions. In particular, the legislators noted that in the absence of such protections, companies may be unfairly compelled to produce documents that would otherwise be protected as privileged and outside the scope of ordinary discovery.

On January 10 2018 the JFTC held a press conference to state that it will postpone all amendments to the act to allow more time to consider fully the controversial issue of whether privilege-style protections should be introduced. The JFTC will presumably continue assessing the feasibility of introducing privilege-style protections under the act, but the timing of such amendments is now uncertain.

Potential impact

Regardless of what amendments to the act the JFTC next proposes, the mere fact that this issue has been acknowledged as a material issue by the various stakeholders, including the Japanese Liberal Democratic Party, is a significant development. Even if the introduction of privilege-style protections will not be an issue legislated in the near future, it is possible that, going forward, the JFTC and other Japanese regulators may be more flexible and understanding in considering claims of privilege and requests to maintain protections over certain types of documentation. However, as the criminal cartel investigation referenced above illustrates, Japanese investigative authorities seem to remain relatively unconcerned about claims of privilege. Given the importance of this issue and its potential impact on entities operating in Japan, the ongoing discussions among the various stakeholders will be watched with great interest.

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Endnotes

(1) Under Article 105 of the Code of Criminal Procedure, there is a statutory right of refusal against the seizure of property entrusted to attorneys (including foreign attorneys registered in Japan),

among other professionals. Therefore, this seizure by the Japanese Public Prosecutor's Office was met with great surprise and speculation that the office may have determined that the attorneys in this case had failed to expressly exercise such rights.

(2) Report Issues by the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (Summary), December 24 2014 (English translation).
