NAGASHIMA OHNO & TSUNEMATSU
長島·大野·常松 法律事務所

NO&T Japan Legal Update

No. 3
November, 2015

■DATA PROTECTION & PRIVACY

Amendment to the Act on the Protection of Personal Information

I. Introduction

The Act on the Protection of Personal Information (the "APPI") sits at the center of Japan's data protection regime. In September this year, the Diet approved the first ever significant amendment to the APPI (the "Amendment") since its full introduction in 2005.

The Amendment aims to eliminate the ambiguity of the current regulatory framework and facilitate the proper use of personal data by businesses while strengthening the protection of privacy. It also aims to address global data transfers and harmonize Japan's data protection regime with that of other major jurisdictions.

While the Amendment will likely not be fully implemented until 2017, given the significant extent of the Amendment, companies doing business in Japan are advised to act swiftly to implement updated data protection measures that conform to the strengthened requirements under the amended APPI. Notably, all private businesses in Japan, regardless of their size, will be affected by the Amendment since it will abolish the so-called small business exception applicable to private businesses that have possessed personal data of less than 5,000 individuals in their database in the past six months.

This article summarizes some of the notable changes to the existing regulatory framework as proposed in the Amendment.

II. Revised Scope of Personal Information

Under the current APPI, "personal information" that is subject to the APPI is defined as information related to a living individual which can identify the specific individual by name, date of birth or other description contained in such information. Information that, by itself, is not personally identifiable but may be easily linked to other information and thereby can be used to identify a specific individual is also regarded as "personal information."

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Akemi Suzuki
Partner
T: +81-3- 6889-7225
E: akemi_suzuki@noandt.com

■RISK AND CRISIS MANAGEMENT/ COMPLIANCE

Akihisa Shiozaki
Partner
T: +81-3-6889-7274
E: akihisa_shiozaki@noandt.com

■RISK AND CRISIS MANAGEMENT/ COMPLIANCE

Peter Coney
Senior Foreign Attorney
T: +81-3-6889-7352
E: peter_coney@noandt.com

In an attempt to provide clarity on the definition of "personal information," the Amendment provides that "personal information" should also encompass any signs, code or data (i) that identify physical features of specific individuals, such as fingerprint or face recognition data, or (ii) that are uniquely assigned to each individual by government, providers of goods or services or card issuers, such as a passport number, driving license number or Japanese social security and the recently introduced tax number called "My Number." The scope of such personally identifiable data will be ultimately provided for in the enforcement regulations of the amended APPI, which is yet to be published. At this point, it is widely understood that mobile handset identification data will be excluded from the scope of personal information. On the other hand, it remains unknown whether a mobile phone number, credit card number, email address and customer/user IDs will be included in the scope.

III. Anonymization of Personal Information

In order to provide a framework for Japanese corporations to properly utilize Big Data, the Amendment has introduced the concept of anonymized information.

Anonymized information is generally defined as personal information of a particular individual that has been irreversibly processed in such a manner that the individual is no longer identifiable. Anonymized information may be disclosed to third parties without the consent of the relevant individual if the parties to the disclosure comply with obligations imposed by the Amendment. The techniques and processes required for anonymization will be provided for in the enforcement regulations of the Amendment, the timing of the publication of which remains unknown.

IV. Strengthened Restrictions on Third Party Disclosure

A massive data breach incident in 2014 that reportedly affected over 20 million customers of an educational services company shed a light on the business of mailing list brokers in Japan, leading to a call for tighter regulations on third party disclosure of personal information.

The Amendment requires any business that purchases or acquires personal information held by a third party to investigate how the third party acquired such personal information and keeps records of such investigation. Any party that provides personal information to a third party, on the other hand, will be required to maintain records of such provision. At the time of writing this article, the extent of required investigation and how long the records must be kept remain unknown. It is worth noting that the foregoing requirements will not apply to the disclosure of personal information for the purposes of outsourced processing services or disclosure under a "joint use" structure under the APPI.

In addition, under the current APPI, disclosure under the requisite 'opt-out' mechanism is broadly permitted as an exception to the general prohibition on disclosure of PII to a third party without the individual's consent. The Amendment will prohibit disclosure under the 'opt-out' mechanism of certain sensitive information, such as race, beliefs, social status, health and criminal records. It will also require that disclosure under the 'opt-out' mechanism be notified to and published by the Personal Information Protection Committee (the "Committee") to be established in January 2016, in addition to being notified to or made easily accessible by the subject individuals.

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V. New Restrictions on Cross-border Data Transfers

Under the Amendment, disclosure of personal information subject to the APPI to a third party located outside of Japan will generally be subject to prior consent of the relevant individual to the cross-border transfer. An exception will be applicable to the extent that the third party is located in a foreign country which the Committee considers has the same level of protection of personal information as in Japan, or that the relevant third party has established the same level of protective measures as would have been required under the APPI.

Importantly, the foregoing requirement applies to a transfer of personal information to foreign data processing service providers or foreign affiliates – an important takeaway for multinational companies that have globally centralized systems to manage their employee or customer information.

VI. Comment

The Amendment will be fully implemented no later than September 9, 2017. The implications of the Amendment will not be fully known until its enforcement regulations, the rules of the Committee and relevant administrative guidelines are approved and published. Also, data protection is one area where the best practices in the relevant industries continue to evolve at a fast pace in response to the rapid development of information technology, among other factors. All companies operating in Japan, domestic or foreign, are advised to stay abreast of developments relating to the Amendment and best practices and continuously review and update their measures for protection of personal information.

Recent changes to Japan's whistleblower law regime

I. Introduction

The Olympus accounting scandal (and more recently, the Toshiba accounting irregularities) highlighted various issues in relation to corporate governance in Japan, including questions over whether the country's whistleblower law regime could do more to uncover corporate malfeasance. In particular, concerns were raised as to whether the traditional contact points in company whistleblowing systems are sufficiently independent of company management to ensure the effective functioning of those systems. To address these concerns, Japan recently amended its Companies Act and introduced the Corporate Governance Code to bolster the integrity of the whistleblower law regime.

II. Olympus fraud

The 2011 Olympus accounting fraud saw Englishman Michael Woodford become the most senior corporate figure in history to blow the whistle on his own company. Woodford, who at the time was president and representative director of Olympus, publicly disclosed a $1.5 billion accounting fraud which involved Olympus board members. An investigation into the causes of the fraud concluded that the Olympus whistleblower system (which was established pursuant to the Companies Act) was defective and one reason why the fraud remained undetected for many years. The hotline was connected only to the compliance department. That department was in part controlled by a member of senior management who himself was complicit in the fraud and who prevented efforts to establish a hotline link external to Olympus.

The scandal raised concerns over the effectiveness of whistleblower systems in corporate Japan. However, recent amendments to the Companies Act and the introduction of the Corporate Governance Code are welcome developments responding to such concerns. Before exploring these developments, it is useful to understand other important components of Japan's whistleblower law regime.

III. Whistleblower Protection Act

The most well-known Japanese law concerning whistleblowing is the Whistleblower Protection Act, which came into effect in 2006 and covers both the private and public sector. The focus of the law is the protection of whistleblowers from employer retaliation and the promotion of companies' internal compliance functions. The Act prohibits employers from terminating or penalising employees who make protected internal or external disclosures of wrongdoing. The Act does not, however, protect directors who make such disclosures – as was the case in the Olympus scandal. Further, the Act does not compel companies to establish whistleblower systems. The guidelines for the Act in relation to the private sector nonetheless provide detailed guidance on best practice in establishing hotlines and dealing with disclosures.

IV. Sector-specific laws

At least 10 other less well-known statutes aim to protect whistleblowers in specific industries. An example is the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors Act of 1957 which is designed to protect nuclear industry whistleblowers. It provides for criminal penalties against employers that breach its provisions.

V. Employment case law protections

A body of Japanese employment case law has been developed to protect whistleblowers from employer retaliation. However, Japan's legislators considered that the content and application of this case law were not entirely clear and this concern was a factor behind the introduction of the Whistleblower Protection Act. The case law is nonetheless applied by courts in whistleblower-related employment litigation in the (increasingly) limited circumstances where the Whistleblower Protection Act does not apply.

VI. Companies Act

The Companies Act (and its regulations) require the board of directors of certain larger companies to pass resolutions in relation to the implementation of internal governance controls. Although the establishment of a whistleblower hotline is not mandatory under the Companies Act, the aforementioned requirement strongly encourages such companies at least to consider establishing – if not actually establish – a whistleblower hotline.

Consequently, the vast majority of larger companies have voluntarily established whistleblower hotlines. Before the recent amendments to the Companies Act, such whistleblower hotlines were commonly linked to the company board of directors or compliance department – not the company's statutory auditors or any external entity. Statutory auditors are tasked with the risk monitoring of management and directors.

A concern raised by the Olympus scandal was the fact that most whistleblower hotlines were linked to company boards or internal departments which, by their nature, are not independent of company management. This was perceived to discourage whistleblowing, particularly in relation to alleged wrongdoing involving directors and other senior management. Commentators believe that these concerns were a factor driving the recent Companies Act amendments and the whistleblower component incorporated into the Corporate Governance Code. Indeed, the alleged involvement of senior management in the accounting scandal at Toshiba underlines these concerns.

VII. Amendments to Companies Act

Effective from May 1, 2015, the Companies Act and its regulations have been amended to require, among other things, that the boards of directors of certain larger companies pass resolutions addressing basic principles regarding the following internal governance controls:

(i) a system whereby directors, company accountants and employees can report matters concerning corporate governance directly to the statutory auditors of the company (rather than the board of directors or the compliance department). This does not prohibit existing whistleblower systems that are linked to the board of directors or the compliance function. The effect of the amendment is to ensure that companies consider whether whistleblower systems should be linked to statutory auditors, rather than the board of directors;

(ii) a system whereby those who report corporate governance matters to the statutory auditor shall be protected from detrimental treatment as a result of such reporting. This appears to reflect the Whistleblower Protection Act in that companies are prohibited from terminating or penalising employees who disclose malfeasance; and

(iii) a system whereby the company's governance controls extend to any subsidiaries of the company.

VIII. Corporate Governance Code

Effective from June 1, 2015, the Corporate Governance Code generally reflects the Organisation for Economic Cooperation and Development Principles of Corporate Governance and establishes wide-ranging principles of corporate governance for listed Japanese companies, including principles in relation to whistleblower systems.

Specifically, the Code states that companies should establish a framework for employees to report illegal or inappropriate conduct or other serious concerns without fear of suffering disadvantageous treatment. Further, this framework should allow for a proper assessment and appropriate response to reported issues and the board should be responsible for both establishing and monitoring the enforcement of the framework.

Perhaps most significantly, the Code states that companies should set up a whistleblower point of contact that is independent of management (eg, a panel consisting of outside directors and outside statutory auditors). In providing that listed companies should establish a whistleblower link consisting of outside directors and outside statutory auditors, the Code goes beyond the amended Companies Act (insofar as the Companies Act does not provide that the relevant statutory auditors should be outside auditors).

IX. Comment

None of the aforementioned laws or the Code compel companies to establish whistleblower hotlines. However, the recent emphasis in the amended Companies Act and the Code on the independence of whistleblower hotline recipients suggests that regulators in Japan see whistleblowing as an increasingly important component of corporate governance.

Further, the introduction of the Code will go some way towards shedding light on corporate Japan's attitude to whistleblowing systems. This is because the Code adopts a 'comply or explain' approach, whereby listed companies must publicly disclose the reasons for any non-compliance with the Code's various principles. For most listed companies, the first such disclosures are due at the end of 2015. The disclosures in relation to whistleblowing should shed some light on corporate Japan's attitude to these new post-Olympus developments.

NAGASHIMA OHNO & TSUNEMATSU www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
T: +81-3-6889-7000 F: +81-3-6889-8000